

1 THE COURT: Let's get the jury.

2 (Jury present)

3 THE COURT: I'm very sorry for the delay. I was
4 responsible for some of it.

5 I'm not going to allow cross-examination at this
6 point. You all should know that two of the programmers did
7 testify to a 60- to 90-day period. How that was translated
8 by Dr. Warren-Boulton, it seems to me, it's going to be a
9 subject for jury argument. The facts are the facts.
10 Frankly, I don't think -- I've concluded that it's not a
11 proper subject of cross-examination with Professor Hubbard.
12 So two of the programmers did say in their testimony 60 to
13 90 days as opposed to 60, and that may or may not have been
14 translated by Dr. Warren-Boulton in a different way. That's
15 something for you all to decide.

16 Go ahead. Excuse me.

17 MR. TASKIER: Thank you, Your Honor.

18 BY MR. TASKIER:

19 Q So, Dr. Hubbard, for purposes of your report and
20 opinion, you assumed liability in this case?

21 A Yes, sir, as a damages witness I did just that.

22 Q You assumed that Microsoft engaged in anticompetitive
23 conduct, correct?

24 A I assumed liability, so yes.

25 Q You assumed that de-documenting the namespace

1 extensions was an anticompetitive act?

2 A Yes.

3 Q And you assumed that the act delayed the release of
4 PerfectOffice for Windows 95 and reduced the functionality
5 of the product that Corel eventually released, correct?

6 A If I'm understanding your question, I assume the
7 anticompetitive behavior -- I'm not sure if I quite
8 connected to the rest of your question. Maybe you should
9 ask me again.

10 Q Let me try it again.

11 You assumed that the anticompetitive act of
12 de-documenting the namespace extensions delayed the release
13 of PerfectOffice for Windows 95, correct?

14 A If I'm understanding your question, yes.

15 Q And that the anticompetitive action causing the delay
16 also reduced the functionality of the product that was
17 ultimately released by Corel in May of 1996?

18 A Again, if I'm understanding your question, yes.

19 Q Given those assumptions, you then calculated your
20 damages?

21 A Yes, sir.

22 Q You found negative damages resulting in zero damages?

23 A Yes, essentially zero.

24 Q So even assuming that liability, your right down the
25 middle call as an expert is that there are zero dollars

1 attributed to damages?

2 A Absolutely, for all the reasons I explained to the
3 Court today.

4 Q And in large part that is because, as you found, as you
5 wrote in your report, PerfectOffice was not well positioned
6 to succeed on the Windows 95 platform even if it had been
7 released at an earlier date or with some additional
8 features, correct?

9 A Are you asking me something?

10 Q I'm quoting your report to you and saying that's one of
11 the reasons why you think there are no damages?

12 A The damages calculations that I did are economic and
13 statistical. The commentary to which you refer in the
14 report is there and I certainly agree with it, but it's more
15 corroborative.

16 Q Doesn't your view of the overpayment drive your
17 damages?

18 A Yes.

19 Q And your view of the overpayment is because, your view
20 that you claim the market adopts, was that WordPerfect and
21 Quattro Pro were not successful products, were in decline,
22 and were not worth what Novell paid for them?

23 A I believe both of those things, but the answer to your
24 question is no. I don't have a view, I have a calculation.
25 The calculation that I made is not dependent on what you

1 just said. I happen to believe that's the way the industry
2 evolved, I explained that, but that is in no sense a view.

3 Q It's your opinion, you have articulated your opinion
4 repeatedly, that these products were in decline and that
5 they could not succeed in the future, correct?

6 A I have said more or less that my point is that that is
7 not where the calculation comes from. The calculation comes
8 from actual data.

9 Q Actual data, meaning the drop in the market price, the
10 valuation of the market when they announced the purchase?

11 A Yes, sir. I recall the decisions of millions of
12 investors' actual data.

13 Q Right. It's an interpretation by you of that data as
14 to what drove those decisions, correct?

15 A Yes, but unrelated to the questions you asked. The
16 narrow answer to your question just now was yes.

17 Q It is an interpretation of that data to say that they
18 did it for these particular reasons?

19 A No, sir, that's not accurate. It is the case that I
20 made a calculation and made an interpretation. I also
21 believe everything else you just said, but I do not need
22 that to make the calculation that I made.

23 Q I think your testimony is clear that you do.

24 Now you estimated --

25 MR. JARDINE: Move to strike that comment.

1 THE COURT: I'll strike that.

2 BY MR. TASKIER:

3 Q When you compared value of the assets that it announced
4 it would buy to the value of the assets that it sold, that's
5 the same approach that Dr. Warren-Boulton took, correct,
6 generally?

7 A Generally, but that's like saying that flying at 30,000
8 feet, the Empire State Building and my house look about the
9 same. They are not that close, but yes.

10 Q You took the 155 million and he took 155 million as the
11 purchase price, correct?

12 A No, 1.55 billion.

13 Q You are absolutely right.

14 A What's the order of magnitude.

15 Q Those are big numbers, 1.55 billion.

16 You took 1.55 billion and he took 1.55 billion,
17 correct?

18 A Yes, correct.

19 Q And that purchase price was compared to 146 million
20 that was the selling price to Corel, correct?

21 A Yes.

22 Q And you and he did both of those things?

23 A Yes.

24 Q You made different adjustments in between?

25 A Yes.

1 Q Now in economics the value of an asset, an actual
2 market transaction or an event is the gold standard,
3 correct?

4 A It depends on what question you are asking me. Yes, a
5 market price is a gold standard. The value in a
6 transaction, as I described to you, is the entire literature
7 on overpayment of corporate acquisitions. So I don't know
8 that I follow what you're saying.

9 Q Do you recall in your deposition being asked about just
10 that and you saying that this is the market, the gold
11 standard in economics is an actual transaction, actual
12 event, and the market did this for me?

13 A I think I am referring to the -- it's off now, but the
14 stock price decline and the market reaction, yes, I think
15 that's the gold standard.

16 Q Let's pull that up. It's page 214, lines 8 through 11,
17 in your deposition. I think you're referring, sir, to the
18 purchase price. Lines 6 through 11.

19 213 -- corroboration on 212 at the bottom, lines 23 and
20 24. Look at 212, 23, did you do any analysis to attempt to
21 corroborate your evaluation of the WordPerfect assets? And
22 then you talk about the WordPerfect assets, the value for
23 those, then you say valuation. Then you say on 213, line 8,
24 keep in mind, I'm not doing a, quote, valuation the way you
25 would have in investment banking. I'm saying the market

1 votes. It's the market's values, it's not mine. That's
2 what the market said, then we can argue GroupWise. It's the
3 market that did the valuation, not me.

4 Then you were asked, did you do any analysis to
5 corroborate whether that was realistic. Your and
6 Dr. Warren-Boulton come out with two strikingly different
7 estimates what the market value of those assets are,
8 correct? You said, he's actually got a huge range, but,
9 yes, we still differ. Dr. Warren-Boulton performed a number
10 of analyses to try to corroborate his numbers which were at
11 least in the ballpark. Actually he didn't. Many of the
12 ones he said are mischaracterized versions of me, and some
13 others are. I'm sure we'll get to that.

14 Then you were asked, did you do anything to try and
15 corroborate that your estimate is in the ballpark. You
16 said, I had data. This is the market. The gold standard in
17 economics is an actual transaction, actual event, and the
18 market did this for me. I didn't need to.

19 Does that refresh your recollection?

20 A I think that's exactly what we talked about this
21 morning. Probably if you continue the text, you will see
22 the other assumptions that I had to make to do that. So
23 what I'm describing is essentially that table I put up. We
24 had an actual transaction, and that's your 1.55, an event,
25 the market did the pricing, and then I had to make an

1 assumption, but I can't see the rest, but I would assume
2 it's the rest of what I've described this morning. I think
3 it's pretty much exactly what I said here this morning.

4 Q All right. So you opine in your report that the assets
5 in Novell's hands were only worth \$207 million, correct?

6 A Not quite. Remember when I told the jury this morning
7 I had more work to do, that would be true of a collection of
8 assets in March 1994, but that wouldn't be the answer to
9 your question, but more or less.

10 Q That's because in your opinion WordPerfect and Quattro
11 Pro were not worth very much and were worth less when they
12 were owned by Novell?

13 A That is my conclusion, yes.

14 Q And because it is your opinion that they were failing
15 products which were then mismanaged by Novell?

16 A I also believed that the products had significant
17 issues, and there were management challenges at Novell that
18 commentary is not necessary for any of the calculations that
19 I did.

20 Q When I look at your estimated overpayment, it's about
21 87 percent overpayment compared to 1.348 million to 1.55
22 billion, is about an 87-percent overpayment; is that
23 correct?

24 A I will accept that math. The math I showed was
25 relative to the abnormal return, but that sounds about

1 right.

2 Q And that works out to about seven and a half times?

3 A I'm sorry. Seven and a half times what?

4 Q Seven and a half times what the actual price was.

5 A That sounds about right.

6 Q So to make it more concrete, if Novell was buying a
7 house that was really only worth \$100,000, your conclusion
8 here is that they paid \$750,000 for it, correct?

9 A A house is perhaps a bad analogy given what the U.S.
10 economy went through since 2007. But, yes, there is
11 significant overpayment in a lot of corporate transactions,
12 particularly, frankly, in the tech sector. But, yes, it is
13 my view that the overpayment was that size, if that's your
14 question.

15 Q All right. That is.

16 Let's come back the overpayment in a minute. I want to
17 talk to you about your opinion that WordPerfect was not a
18 successful product on Windows. In your report you said it
19 wasn't a successful product on Windows, and I would like to
20 put up for you a chart that they used previously.

21 MR. TASKIER: Demonstrative Exhibit 18,
22 Mr. Goldberg.

23 BY MR. TASKIER:

24 Q This is based on the same IDC data you relied on in
25 your report. In yellow it shows the DOS sales for

1 WordPerfect word processors, and in blue it shows
2 WordPerfect 16-bit sets. And we can see that they increased
3 in 1991, 1992 and 1993. At their peak in 1994, they were
4 comparable to the peak in WordPerfect's DOS sales in 1990
5 and 1991. But you believe that even though these sales
6 match the sales of WordPerfect in DOS and show a transition
7 to Windows, WordPerfect was still unsuccessful on Windows?

8 A What you are showing the court is half of two tables
9 that I talked about this morning. If you look at market
10 shares, you see quite a different result. And all the
11 growth in the future, Mr. Taskier, is coming from Windows.
12 So it's hardly the picture of health. And there's certainly
13 documents in this proceeding that indicate that the
14 conversion from DOS to Windows at WordPerfect, that users
15 from DOS to Windows was quite a bit under what WordPerfect
16 had hoped and anticipated.

17 Q You are focusing on shares. I'm focusing here on
18 revenue, correct?

19 A Yes. I'm explaining to you why it's so misleading in a
20 market where all the growth is about to happen in what
21 you've shaded blue. I think it would be instructive for the
22 jury to focus on shares. I presented both to them this
23 morning. We can talk about both again now or whatever you
24 want.

25 Q Let's look at shares, then. Let's turn to a chart that

1 Microsoft's counsel used in his opening statement --
2 Mr. Goldberg -- that shows WordPerfect 16-bit Windows market
3 share was over 20 percent every year from 1991 to 1992 to
4 1993, and then it dips below in 1994, correct?

5 A I see that. My own numbers this morning -- I don't
6 know what this slide is, but I did present a slide to the
7 jury showing decline in market shares.

8 Q This is Microsoft's slide, it was used in the opening,
9 and it shows that in 1992 there was a 30-percent share of
10 the market, and that slowly went down. Of course, we all
11 know what happened at the end when there wasn't any Windows
12 for 95 product.

13 You don't dispute that there was a 20-percent or
14 30-percent share in this period of time, do you?

15 A Subject to check, no. I would have to look at my own
16 data, but that's clearly what this chart shows.

17 Q So it's true that when Novell bought WordPerfect in
18 1994, that it would have known that WordPerfect had not
19 released a Windows word processor until 1991, and that the
20 first releases on Windows were not as good as the subsequent
21 ones?

22 A I'm sorry. The first releases by WordPerfect --

23 Q By WordPerfect on Windows was not as good as the
24 subsequent ones.

25 A Yes, I agree with that.

1 Q As a matter of economics, that knowledge should have
2 been factored into the purchase price?

3 A Any knowledge known at that time should have been
4 factored into the purchase price, yes.

5 Q I would like to show you what's been marked as
6 Plaintiff's Exhibit 378, which is an internal Microsoft
7 document titled WordPerfect for Windows 6.0, competitive
8 product analysis.

9 Let's turn to the first page of the analysis which
10 states, and it's on the overview, this document is designed
11 to give the reader a comprehensive look at WordPerfect for
12 Windows 6.0 and how it compares to Word for Windows 6.0.

13 If we take a look at the next paragraph, the second
14 sentence reads, the industry generally lauded WordPerfect's
15 robust and feature-filled Windows word processor, as it
16 seemed like WordPerfect finally created an application that
17 exploited the Windows platform.

18 Did I read that correctly?

19 A That's what it says on the page, yes.

20 Q Let's go to the next paragraph, WordPerfect's
21 processing sales still rival those of Word. In the past
22 year, WordPerfect for Windows unit shipments increased by
23 60 percent while Word's increased only by six percent. The
24 point is, WordPerfect's success up to now shows it is making
25 inroads in the Windows market and not just by converting

1 their DOS installed base.

2 MR. JARDINE: Your Honor, I will object to the
3 question on the ground that he hasn't established whether
4 this witness, who is an economic expert, has seen this
5 document and whether it's qualitative.

6 THE COURT: I understand. I'm going to allow it.

7 Go ahead.

8 BY MR. TASKIER:

9 Q Let's move down to page 21 of the document, come to the
10 heading document and file management.

11 MR. TASKIER: Mr. Goldberg, is there a reason I
12 can't see anything on this screen?

13 My eyesight is not as good as it used to be. I
14 apologize.

15 MR. JARDINE: Which exhibit are we looking at
16 here?

17 MR. TASKIER: Still looking at the same exhibit,
18 Mr. Jardine. Page 21 of 378.

19 So much better.

20 THE COURT: The technical expert is putting in the
21 plug. Your technical expert just plugged it in.

22 MR. TASKIER: That's usually the first step,
23 right?

24 THE COURT: That's the only way I can get a
25 computer to work is by pulling it out and putting it back

1 in.

2 MR. TASKIER: Running on Windows, right, Your
3 Honor?

4 THE COURT: My lips are sealed.

5 A JUROR: Strike that.

6 BY MR. TASKIER:

7 Q This is a document and file management, two standouts
8 here: QuickFinder and the ability to create a directory
9 from the open file dialog box. Users love them both. Then
10 it says, the speed of QuickFinder's indexed searches rival
11 those of stand-alone packages. For example, a search of 337
12 files, 24 megabytes of data, takes about a second using
13 QuickFinder. The same search without an index, what Word's
14 find file does, takes about two minutes.

15 Last sentence of the page reads --

16 MR. JARDINE: Your Honor, I object if he's just
17 reading a document.

18 THE COURT: I think that's right.

19 MR. TASKIER: I'm about to ask him a question,
20 Your Honor.

21 THE COURT: Go ahead, ask the question, then I'll
22 sustain the objection.

23 What you're doing is fine, but it's really in the
24 way of argument. You really are not asking him questions
25 and his opinions. He said what he thought was the declining

1 product and that supported his view about the figures. He's
2 testified about the figures. Clearly there is evidence in
3 the record that, you know, you can rely upon to show that
4 WordPerfect and PerfectOffice made inroads on Windows
5 suites. That's fair, but don't do it through this witness.

6 MR. TASKIER: Well, the witness --

7 BY MR. TASKIER:

8 Q Dr. Hubbard, you have made conclusions about the
9 success of WordPerfect on Windows and the success of
10 WordPerfect --

11 THE COURT: That's right, you can certainly argue
12 that conclusion is wrong when you argue to the jury.

13 BY MR. TASKIER:

14 Q And when you came to your conclusions, sir, you didn't
15 mention this competitive analysis in your report, did you?

16 A I did not. I talked about data on the performance of
17 the stand-alone market in suites. I also presented
18 information on timing and product reviews. But I'm
19 principally here to talk about the data and the numbers.

20 Q That was actually a yes or no question, so let's try it
21 again. You didn't mention this in your report, did you?

22 Yes or no.

23 A No, it wouldn't have been relevant for me.

24 THE COURT: Did you just turn a yes into a no?

25 MR. TASKIER: I said yes or no. I will try to

1 talk into the microphone.

2 BY MR. TASKIER:

3 Q This document is not on the list of materials you
4 considered in forming your opinions, correct?

5 A That's correct.

6 Q If it's not on the list, you didn't consider it and it
7 wasn't part of your expert opinion, correct?

8 A I think that follows, certainly.

9 Q Just checking.

10 Now in discussing WordPerfect's alleged lack of success
11 on Windows, your report did quote some product reviews for
12 WordPerfect 6.0. You are aware that in response to
13 complaints about WordPerfect for Windows 6.0, WordPerfect
14 issued an updated and corrected version of WordPerfect for
15 Windows 6.0A, correct?

16 A I believe that's the case, yes.

17 Q And WordPerfect 6.0A was released just a half year
18 after Windows -- WordPerfect for Windows 6.0, correct?

19 A I'm not sure on the timing, but I take that subject to
20 check.

21 Q Your report doesn't discuss how WordPerfect for Windows
22 6.0A was received?

23 A No, sir, I don't believe I do.

24 Q You only mentioned WordPerfect 6.0?

25 A That's correct.

1 Q And your report also doesn't mention any reviews for
2 WordPerfect for Windows 6.1, which was a further advance and
3 which was well received; isn't that right?

4 A I don't recall those reviews, no.

5 Q And WordPerfect for Windows 6.1 was the version of what
6 was included in PerfectOffice 3.0, correct?

7 A I believe that's the case, yes.

8 Q And your report is silent about the quality of the
9 WordPerfect for Windows 6.1 product?

10 A I don't recall discussing it, no.

11 Q Let's talk about some of the reviews you didn't
12 discuss. Are you familiar with the PC Computing Magazine?

13 MR. JARDINE: Your Honor, we object to this. He
14 didn't testify about reviews on direct. It doesn't --

15 THE COURT: I think it's fair to establish what he
16 did not consider, but it's not fair to establish it by
17 showing what the review was. I think you can -- if you just
18 want to do it generally, or if you want to do it
19 specifically, either way, but you can't use the witness as a
20 medium to put up documents he didn't consider. But you can
21 establish that he did not consider them.

22 MR. TASKIER: All right, Your Honor. I guess that
23 will shorten some of the exhibits we're going to use.

24 THE COURT: Good.

25 MR. TASKIER: However we get there.

1 THE COURT: It is always a pleasure to hear from
2 you.

3 MR. TASKIER: Even if I'm reading findings of
4 fact?

5 BY MR. TASKIER:

6 Q So were you aware, sir, that PC Computing Magazine
7 awarded WordPerfect 6.0 the most valuable player award for
8 word processors in 1993?

9 A I don't recall that, no.

10 Q And were you aware that PC Computing Magazine awarded
11 WordPerfect 6.0A the most valuable player award for word
12 processors for 1994?

13 A I don't recall that. I used PC Magazine for the
14 reasons I described in the report. So you could read lots
15 of things from PC Computing Magazine and my answer would be
16 the same.

17 Q And Quattro Pro 6.0 was also listed as an MVP finalist
18 with the best database features and integration in the
19 PC Computing Magazine, correct?

20 A I don't know.

21 Q And you did not consider PC Computing Magazine as a
22 subject for your report, it's not listed?

23 A I did not.

24 Q Now do you recall that WordPerfect 6.1 was well
25 received for Windows?

1 MR. JARDINE: Your Honor, if we're going to go
2 through the list, I think he can ask if he considered any of
3 these reviews. He's testified as an economic expert.

4 THE COURT: I think he's already testified that he
5 didn't consider 6.1 anyways.

6 THE WITNESS: Yes, sir.

7 BY MR. TASKIER:

8 Q Were you aware, sir, that the Windows Magazine gave
9 straight A's to 6.1?

10 A No, I'm not.

11 Q Now in your report you said that WordPerfect
12 Corporation did not develop successful suite products,
13 correct?

14 A I believe I said something to the effect that they had
15 a difficulty making the migration to suites, yes.

16 Q I think even the heading -- look at page 14.

17 A This is of my report?

18 Q Of your report, the one I gave you.

19 The heading there says WPC did not develop a successful
20 suite product; is that correct?

21 A Yes.

22 Q So isn't it true that one of the reasons that was given
23 for the Novell/WordPerfect merger was to develop a suite
24 product with enhanced product integration and a rich set of
25 application functionality for a common user interface?

1 A Yes, that was part of what Novell management had hoped
2 to accomplish.

3 Q And after the merger, they did release PerfectOffice
4 3.0, which was highly regarded as a suite?

5 A On reviews, yes.

6 Q Now in your report, Exhibit 8 -- let's turn to Exhibit
7 8.

8 MR. TASKIER: Can you bring up Exhibit 8 for the
9 jury.

10 THE WITNESS: Did you say eight?

11 BY MR. TASKIER:

12 Q Exhibit 8 of your report, sir.

13 A Okay.

14 Q This exhibit lists PC Magazine awards that you talked
15 about for office suites at the very top.

16 MR. TASKIER: No, that's your resume.

17 BY MR. TASKIER:

18 Q We'll try and go through -- you and I both have that,
19 correct?

20 A No, you can ask me.

21 Q There it is. It says, PC Magazine awards, 1994
22 editors' choice, technical excellence, readers' choice,
23 winner Microsoft. 1995, same thing, correct?

24 A Yes.

25 Q You used this as evidence to support your view that

1 WordPerfect did not develop a successful suite project,
2 correct?

3 A I used this as part of the corroborative evidence of
4 the story that was happening in the industry and to this
5 firm. You realize this does not precisely inform my damages
6 calculation.

7 Q Well, I'm just asking about your view that WordPerfect
8 didn't develop a successful suite, and this informed your
9 view?

10 A Yes. PC Magazine was the number one publication, and I
11 used that.

12 Q These reviews come from the December 1994 and July 1995
13 issues, correct?

14 A It's cut off at the bottom. I can check -- yes, it
15 appears so.

16 Q And PerfectOffice 3.0, WordPerfect's successful suite,
17 was released in December of 1994, correct?

18 A I would have to go back and check, but that sounds
19 about right.

20 Q And now on your report at paragraph 47, let's turn back
21 to that, you say on page 20, Exhibit 8 shows in 1994 and
22 1995, Microsoft Office won technical excellence and the
23 readers' choice awards from PC Magazine. These awards
24 indicate that well before the introduction of Windows 95 in
25 1995, Microsoft offered suites of tightly-integrated

1 software products that were well regarded on the Windows
2 platform, whereas the Borland Office suite featuring
3 WordPerfect for Windows was not?

4 Did I read that correctly?

5 A Yes.

6 Q It wasn't Borland Office that was in the market after
7 the summer of 1994, it was PerfectOffice 3, wasn't it?

8 A I really don't recall, sir.

9 Q So are you aware that Mr. Gates, when he was here,
10 testified that InfoWorld was one of the most important
11 reviews at the time?

12 A I'm aware that he said that. And Mr. Gates is
13 obviously somebody with immense knowledge of this area.

14 Q Are you aware that InfoWorld in April '95 summarized
15 its review of PerfectOffice, it says, PerfectOffice is a
16 terrific assortment of programs that offers more integration
17 then we've seen so far in many high end office suites?

18 A I think that answer follows the many answers I've
19 given, that I considered what I considered the number one
20 magazine for circulation. I did not consider these others,
21 irrespective of Mr. Gates.

22 Q Actually you did consider InfoWorld, according to your
23 report, but you never mentioned it in your report. You
24 listed it as something you considered, but you didn't
25 mention it?

1 A But I specifically say, as you recall, in the report
2 that I used PC Magazine for the reviews and I explained why.

3 Q But this was InfoWorld that you considered, which gave
4 a very positive review of PerfectOffice that you didn't
5 mention?

6 A I did not mention lots of reviews in either direction.
7 I focused on PC Magazine.

8 Q Which had two reviews that were -- that showed that
9 Microsoft won before PerfectOffice came out?

10 A In that table --

11 THE COURT: One was in '94?

12 MR. TASKIER: The one before it came out and the
13 one before it was reviewed.

14 THE COURT: We all know '95 was a chaotic year for
15 applications because of Windows 95.

16 BY MR. TASKIER:

17 Q Isn't it true that the only time your report actually
18 discusses PerfectOffice 3.0 review talks about
19 PerfectOffice's presentation software and not about
20 WordPerfect or Quattro Pro?

21 A I really don't recall.

22 Q Let's look at paragraph 46, the paragraph, when Novell
23 introduced PerfectOffice 3.0 in December 1994, a reviewer of
24 its presentations for Windows noted that several years ago,
25 on and on. It doesn't talk about WordPerfect or Quattro

1 Pro, correct?

2 A Not in that sentence, no.

3 Q Or in that paragraph?

4 A Quattro Pro is talked about earlier in the paragraph,
5 yes.

6 Q Not in relation to --

7 A I'm sorry. Was that a comment, a question, a mumble?

8 Q I was about to make a comment and turned it into a
9 question, and I decided it's not worth debating at this
10 time.

11 THE COURT: He struck himself.

12 BY MR. TASKIER:

13 Q So let's turn to that. In paragraph 53 of your report,
14 sir, you talk about the installed base of users of the
15 WordPerfect Corporation, Borland, and Novell office
16 productivity applications was shrinking, while Microsoft's
17 was growing strongly?

18 A Yes.

19 Q Did I read that correctly?

20 A You did.

21 Q That was your view?

22 A It's the data, yes.

23 Q So let's look at some of the data on installed base. I
24 have a report -- an IDC report that's been marked as
25 Plaintiff's Exhibit 599.

1 MR. TASKIER: Can you bring that up, please,
2 PX599. Go to table 13 on page 26.

3 BY MR. TASKIER:

4 Q Now the three products -- this shows total
5 IBM-compatible word processing shipments and installed base
6 for 1993 and 1994, correct?

7 A Yes.

8 Q And the source at the bottom says International Data
9 Corporation, 1995, correct?

10 A Yes.

11 Q It shows the top ranking is Microsoft Word for Windows?

12 A Uh-huh. (Affirmative)

13 Q And it shows on the far right 1993 installed base of
14 6.9 million users, roughly, correct?

15 A Uh-huh. (Affirmative)

16 Q And below that it shows WordPerfect for Windows with
17 4.7 million users, correct?

18 A Yes.

19 Q Below that it shows WordPerfect for DOS with 7.7 users;
20 is that right?

21 A Yes.

22 Q Now if we go to the 1994 installed base on the far left
23 set of numbers, it shows that WordPerfect for Windows grew
24 from 4.7 million in installed base to 7 million in installed
25 base, correct?

1 A I see that.

2 Q And so it was not shrinking, it was growing in 1994,
3 correct?

4 A I see that, and we've talked about the difference
5 between shares and numbers before. But, of course, Word for
6 Windows is growing much more, which is what the paragraph
7 says.

8 Q Numbers. Before it was dollars. This is not dollars.
9 This is users. This is shares. Isn't that right,
10 Dr. Hubbard?

11 A This is -- well, you can get a share out of it. The
12 number you pointed to me was an installed base.

13 Q Number of people using it, they're shares. The share
14 is derived from that, it's not dollars?

15 A You can get a share from it, yes.

16 Q Pretty directly?

17 A I think it's called arithmetic.

18 Q There you go. So we can see that there's a large
19 installed base of WordPerfect for DOS, which is right below
20 that, which is 7.684. That's roughly the same as 1993,
21 correct?

22 A Yes.

23 Q If we add the installed base of WordPerfect for Windows
24 and WordPerfect for DOS, that's 7 million plus 7.7 million,
25 that's 14.7 million; is that correct?

1 A Something like that.

2 Q And if we look at the Word for Windows above, that's
3 13.6 million?

4 A Uh-huh. (Affirmative)

5 Q Then below that on number six, it says, Microsoft Word
6 for DOS, that's 1.4 million. I want to do this fairly. DOS
7 and Windows together. So 1.4 and 13.6 is 15, right?

8 A I see that.

9 Q WordPerfect's share for both WordPerfect for Windows
10 and DOS is 14.7 million, correct?

11 A Something like that.

12 Q So they are very roughly the same, 14.7 million versus
13 15 million?

14 A Not a terribly interesting concept because you are
15 adding across DOS and Windows, and we all know what happens
16 forward looking. I testified about this this morning. We
17 can revisit that.

18 Q We're talking about installed base, right? So this is
19 the installed base of people using WordPerfect versus the
20 installed base of people using Windows, correct?

21 A Yes, and I spoke about that this morning.

22 Q Now in your report at paragraph eight, one of the
23 things you say, WordPerfect, and later Novell, was therefore
24 unable to build a significant installed base of users of its
25 office productivity applications on the Windows platform.

1 By contrast, Microsoft did develop a substantial installed
2 base on the Windows platform. Importantly, the success of
3 WordPerfect in the stand-alone segment of the market on the
4 DOS platform did not translate to success in the suite
5 segment of the market on the Windows platform.

6 That's your view, right?

7 A Yes.

8 Q You agree, however, that WordPerfect for Windows
9 installed base in 1994 was more than half of the Word for
10 Windows installed base at that time, correct?

11 A You're comparing Windows to Windows?

12 Q Just Windows.

13 A Yes.

14 Q So that shouldn't be a surprise because we saw before
15 that WordPerfect for Windows had a 25- to 30-percent market
16 share on Windows from the Microsoft opening slide, the one
17 that showed the graph?

18 A Yes.

19 Q For that period of time in the early 1990's, correct?

20 A Yes, I remember that from that slide.

21 Q So your statement that WordPerfect lacked a significant
22 installed base on Windows ignores the base of loyal
23 WordPerfect users on DOS, which was roughly equal in size to
24 the WordPerfect for Windows installed base, doesn't it?

25 A You're going to have to unpack that question because I

1 think you just asked me a couple.

2 Q Let me try it again. All right.

3 So you are focusing on the installed base for Windows
4 for WordPerfect, you are not focusing on the roughly
5 equivalent same size base of WordPerfect's loyal users on
6 DOS, correct?

7 A I'm focusing on the car market, not the car plus buggy
8 market, yes.

9 Q You are saying that one is a buggy and the other is a
10 car, they do the exact same thing, but one is a buggy?

11 A I'm afraid the marketplace had a different judgment
12 about that than your question, but --

13 Q No. No. You are calling DOS a buggy, when it did word
14 processing pretty effectively, and you're calling Windows a
15 car, and you're drawing that analogy, correct?

16 A I am because we know the marketplace moved and moved
17 dramatically away from DOS toward Windows.

18 Q The marketplace didn't talk about cars and buggies, did
19 it, sir?

20 THE COURT: The marketplace spoke for itself.

21 THE WITNESS: The marketplace moved --

22 THE COURT: We understand.

23 THE WITNESS: If you don't like car and buggy, DOS
24 went away and Windows is here.

25

1 BY MR. TASKIER:

2 Q WordPerfect for DOS was the number one word processor
3 on DOS, correct? There is no question.

4 A I believe that's the case, yes.

5 Q Let's look at Exhibit 412 in your book, page 2.

6 Now Mr. Frankenberg addressed some of this in his
7 testimony in court. And let me direct your attention to a
8 paragraph where it says, a majority of customers today, a
9 majority of customers today have not chosen to adopt either
10 one of today's leading suites. According to the
11 January 1994 Computerworld Software Suites Study, 74 percent
12 of users have not yet adopted a suite standard.

13 Now that suggests, doesn't it, that almost
14 three-quarters of the potential market for suites had not
15 yet had a suite chosen by those consumers, correct?

16 A That suggests that one marketing survey in one memo
17 says that. I can't read from that any kind of industry
18 corroboration.

19 Q It's data, isn't it?

20 A Data is one marketing study.

21 Q You didn't consider this marketing study, did you?

22 A I did not, no.

23 Q Let's look at the next paragraph, it says,
24 traditionally, the word processor, more than any other
25 application, has played the largest role in influencing the

1 purchasing decision of a potential suite buyer, and then it
2 cites IDC Summer Software Survey in 1993. As the leading
3 vendor of word processing software, WordPerfect has direct
4 access to the largest user base of potential suite customers
5 in the industry. As part of the greater Novell, the world's
6 leading network software provider, WordPerfect is able to
7 access a vast networking user base to determine what
8 customers really want in suite solutions.

9 Now Mr. Frankenberg testified about this document as
10 saying that it was a great opportunity for WordPerfect to
11 convert those customers who hadn't yet chosen a suite to
12 purchase WordPerfect's suite. Do you recall that?

13 MR. JARDINE: Objection, Your Honor. Is he asking
14 if he knows Mr. Frankenberg's testimony or this document,
15 which is a Novell document?

16 THE COURT: I think it was Mr. Frankenberg's
17 testimony, and I think the witness is starting to say he
18 probably did not. The witness can answer the question.

19 THE WITNESS: I had not read that portion of
20 Mr. Frankenberg's testimony, but it wouldn't surprise me
21 that WordPerfect, and later Novell, would be very optimistic
22 about its own ability to do lots of things. It wouldn't
23 strike me as a surprise.

24 BY MR. TASKIER:

25 Q It would certainly not surprise you that that was

1 Mr. Frankenberg's plan for WordPerfect -- for PerfectOffice
2 for Windows 95, correct?

3 A May well have been Mr. Frankenberg's plan. I just look
4 at the actual data.

5 Q You looked at the actually what, sir?

6 A The actual data where we know what happened to the
7 market shares in suites.

8 Q Right, because there was no WordPerfect for Windows 95.
9 The data shows zero share for WordPerfect and Novell because
10 there was no product, correct?

11 A The WordPerfect assets had not done -- they had a
12 slightly rising share of suites, but just at a very small
13 level.

14 Q Because they didn't have -- it's true, sir, that they
15 didn't have a PerfectOffice for Windows 95, and that's not
16 included in your calculations, is it?

17 A They didn't have --

18 THE COURT: Until 1996.

19 BY MR. TASKIER:

20 Q Until May of 1996, they didn't have it, correct?

21 A I'm sorry. Now what are you asking, on May '96 or on
22 the suite market shares?

23 MR. JARDINE: Your Honor, could we clarify. He
24 asked two questions. Is he asking whether they had a suite
25 product or a suite product for Windows 95? I think it got

1 asked both ways.

2 THE COURT: That's right.

3 MR. TASKIER: I appreciate that. Let's try it
4 again.

5 BY MR. TASKIER:

6 Q Your projections of suite market share do not account
7 for the fact that there was no PerfectOffice for Windows 95
8 available. So there is no market share for WordPerfect for
9 those suites?

10 A Let's be clear. When I was talking about data, I was
11 talking about data, not my calculations, so I was talking
12 about the other WordPerfect suites. I certainly agree with
13 what you just said.

14 Q So until 1995 when Windows 95 came out in August, the
15 only suite product that WordPerfect had was PerfectOffice
16 3.0, correct?

17 A Yes, it had a suite product, just not for Windows 95.

18 Q It didn't have one for Windows 95 when Windows 95 was
19 issued or thereafter until May of 1996?

20 A Yes.

21 MR. JARDINE: Objection, I think that -- well, so
22 the record is clear, 3.0 did run on Windows 95.

23 THE COURT: But nothing specifically designed for
24 Windows 95.

25 MR. TASKIER: Right, that's what I'm thinking,

1 Your Honor.

2 BY MR. TASKIER:

3 Q I would like to turn, sir, to 219, WordPerfect
4 operating income.

5 You testified about -- there we go. So this is the
6 chart you used earlier, correct?

7 A Yes, sir.

8 Q Fiscal year for WordPerfect was calendar year, correct?

9 A Yes.

10 Q So you are counting 1989, 1990, 1991, 1992, 1993 and
11 1994, correct?

12 A Yes, sir.

13 Q And the source of this is Novell's Form S-4A?

14 A Yes.

15 Q Which was filed with the Securities and Exchange
16 Commission, correct?

17 A Yes, sir.

18 Q Now let's turn to S-4A, which is in your book.

19 MR. JARDINE: Is that an exhibit?

20 MR. TASKIER: DX379.

21 THE WITNESS: Okay.

22 BY MR. TASKIER:

23 Q Just out of the box, I want to turn you to the first
24 page where it says filed on June 23, 1994, correct?

25 A Yes.

1 Q So that's a 1994 filing, middle of 1994 for 1993,
2 correct?

3 A Yes.

4 Q Let's turn back to 219.

5 You have fiscal year 1994 numbers down there, don't
6 you?

7 A Yes.

8 Q At almost nothing, right?

9 A Yes.

10 Q This report doesn't report fiscal year 1994 numbers,
11 does it?

12 A I would have to go back and check what's in here and
13 what's projected.

14 Q Let's turn to page F4.

15 A Where is page F4, sir?

16 Q It's at the back.

17 A Mine are numbered consecutively.

18 Q Let's just look at it on the screen. That will help
19 you.

20 It only lists 1993, 1992 and 1991 data, correct?

21 A Yes.

22 Q So 1994 data is at best imputed or projected?

23 MR. JARDINE: Your Honor, he needs to show him the
24 particular page, because the next page does show a half year
25 of 1994.

1 THE WITNESS: I'm still not in the report where
2 you are on the screen.

3 THE COURT: Show Mr. Taskier.

4 BY MR. TASKIER:

5 Q So on the next page, Mr. Jardine correctly points out
6 that there is some cash flows ending April 30th, 1994.

7 That's not a full year in 1994, is it, sir?

8 A Sir, I still don't have F4. If you could show me
9 where -- I see it.

10 THE COURT: I think we can accept the
11 representation. Apparently there are figures on one page
12 through April of 1994?

13 MR. TASKIER: Correct.

14 THE COURT: Is that right, Mr. Jardine?

15 MR. JARDINE: That's fine. I think Professor
16 Hubbard would like to see it. It's page 191 in the upper
17 left-hand corner.

18 THE WITNESS: Page 191. Okay.

19 BY MR. TASKIER:

20 Q So in 219 where you have FY 1994, that's a projected
21 number for the full year, correct?

22 A Yes.

23 Q You don't have data for the full year?

24 A Not at the time of the S-4A.

25 Q Let's look back at the S-4, and F4 shows -- page 105,

1 F4 shows consolidated statement of income, and it shows net
2 sales, it shows cost of sales. Then it shows expenses,
3 selling and marketing. Then it goes down to the bottom and
4 it shows net income, correct?

5 A Yes.

6 Q Now we went through this with Dr. Warren-Boulton.
7 Actually, and I know you're not surprised to hear this, 219
8 was used with Dr. Warren-Boulton's cross-examination.
9 Dr. Warren-Boulton testified that 219, even though it was
10 corrected for certain one-time expenses, does not correct
11 for the very large costs of sales that were part of
12 WordPerfect's system. In other words, he testified that
13 WordPerfect had a salesforce that sold directly and that it
14 was subsequently -- that one of the reasons for the purchase
15 was that Novell hoped to use its vendor salesforce and
16 reduce the costs of the direct salesforce from WordPerfect.

17 Do you remember that?

18 A I remember that testimony, but it's somewhat curious
19 because, first of all, why on earth would you make that
20 correction and, second, as a point of fact, Novell has
21 rising marketing costs over this period as a company.

22 Q That's exactly right, because those are marketing costs
23 that are attributable to the bloated salesforce that
24 Mr. Frankenberg reduced; isn't that correct?

25 THE COURT: I think you better -- I see an

1 objection, and I think that's for the jury to determine
2 whether it was bloated or not.

3 MR. TASKIER: Sorry, Your Honor. I was quoting --

4 THE COURT: I understand, but we know what that
5 issue is. Whether that was a good decision or not or what
6 effect it had is something the jury has to determine.

7 BY MR. TASKIER:

8 Q So you testified that, in 219, this descending trend of
9 operating income was a bad sign for WordPerfect, correct?

10 A Certainly it wasn't a sign of health in operating
11 income, yes.

12 Q Dr. Warren-Boulton testified that if you corrected it
13 for the sales and operating -- sales and marketing expenses,
14 it would show a different picture. So we've done a
15 different slide.

16 A That's wholly inappropriate just as a matter of
17 economics, but --

18 Q Let's show you the corrected slide that we've prepared,
19 which adds in the selling and marketing costs. That shows a
20 very different picture about the potential health of
21 WordPerfect, doesn't it?

22 A It shows a different picture still if you doubled the
23 last two bars, but it's completely inappropriate to do, as a
24 matter of economics, to be adding these things back. This
25 is just silly.

1 Q So Dr. Warren-Boulton is doing silly talk, he's
2 egregious, he's made astonishing errors, he has no merit
3 whatsoever --

4 A I didn't say he has no merit whatsoever.

5 Q His presentations are highly misleading, he's made a
6 breath taking error. You're pretty harsh, aren't you, sir?

7 MR. JARDINE: Your Honor, is that a question?

8 THE COURT: I think the question is you are very
9 harsh, aren't you.

10 THE WITNESS: I am a tough grader, yes.

11 BY MR. TASKIER:

12 Q Economists can differ, can't they?

13 A They can differ over reasonable things, yes, but not
14 over econ 101.

15 Q Not what you think is econ 101.

16 A I wrote an econ 101 book. I have a very strong notion
17 of what I think econ 101 is.

18 Q Now in paragraph 129 of your report you wrote, it is
19 evident that Novell did not even plan to offer 32-bit office
20 productivity applications as soon as Windows 95 was
21 launched.

22 Turn to paragraph 129. See where I am, sir?

23 A Yes.

24 Q Is that an opinion of yours?

25 A Based on the citations that I have there, yes. Again,

1 this isn't essential for the work I talked about this
2 morning, but, yes, it is my view based on those citations.

3 Q Then you relied on internal documents by Novell in
4 reaching that determination, correct?

5 A Yes, sir.

6 Q And you said in your deposition that you adopted what
7 you find to be persuasive evidence, correct, of those
8 internal documents?

9 A I don't recall, but I would hope I would adopt
10 persuasive evidence if I saw it, yes.

11 MR. JARDINE: Your Honor, I'm sorry to keep
12 objecting, but there is a difference between his report and
13 what he testified to in court. There's lots of his report
14 that he didn't testify to, and I'm not sure that it's proper
15 cross-examination to question him on things he didn't
16 testify about today.

17 THE COURT: I don't know either.

18 Go ahead.

19 BY MR. TASKIER:

20 Q So if there is additional evidence that you didn't
21 consider, that the jury has heard, it's fair for them to
22 make a determination based on that; isn't that right?

23 A It's fair for the jury to make a determination on
24 anything it wants in this proceeding.

25 Q So you also say in this paragraph, Novell -- if I can

1 find it. I'm sorry. It's not on the marked version.
2 Novell could have reallocated its resources in order to
3 release 32-bit office productivity applications, but instead
4 chose to focus on 16-bit applications, thinking that the
5 demand for 16-bit products would remain strong.

6 Do you see that?

7 A Yes, I do, and there was testimony in this proceeding
8 to the same effect as well. But, yes, I see that.

9 Q There is testimony in this proceeding to that effect?

10 A That's my recollection, yes.

11 Q Well, are you referring to Mr. Gibb's testimony about
12 the 32-bit code?

13 A I really don't recall. This is not central to what I
14 testified to this morning.

15 Q All right. Let's look at Mr. Gibb's, if we can.

16 THE COURT: No. No. No. No. Now I do
17 understand the issue and I sustain the objection that was
18 lodged before.

19 MR. TASKIER: All right.

20 BY MR. TASKIER:

21 Q All right. Let's look at paragraph 129, and it says --
22 on that same page, you say, it is evident that Novell did
23 not even plan to offer 32-bit office productivity
24 applications as soon as Windows 95 was launched, correct?

25 A Yes, sir, again, based on the reading of those

1 documents.

2 Q And your footnote for that is at 190, and it refers to
3 a document?

4 A Yes.

5 Q And it only lists one document for that, correct?

6 A In that footnote, yes.

7 Q But your sentence said Novell documents indicate,
8 correct?

9 A Yes. I think I was referring basically to this entire
10 discussion.

11 Q This one document is DX4.

12 A Is there something you want me to look for?

13 MR. TASKIER: Bring up DX4.

14 BY MR. TASKIER:

15 Q It's in your book, sir.

16 A If it's on the screen, I'll look.

17 Q Let's turn to page 5, to the business applications
18 where it says Chicago. It says, there are very few
19 resources on Chicago at this time. Even though we are
20 phasing out WordPerfect for VMS, all resources need to be
21 applied to Chicago, or Tapestry. We do not want to be
22 significantly behind Microsoft, if at all, in releasing a
23 Chicago suite.

24 So did I read that correctly?

25 A It would appear so, sure.

1 Q So when you say it's evident that Novell did not even
2 plan to offer 32-bit office productivity applications as
3 soon as Windows 95 was launched, that's not consistent with
4 we do not want to --

5 THE COURT: Approach the bench.

6 (Side-bar conference held at bench off the
7 record.)

8 THE COURT: Again, the record should reflect that
9 that exchange was not on the record because I misunderstood
10 the court reporter. If anybody wants to put it on the
11 record, we'll do it afterwards, after the jury.

12 BY MR. TASKIER:

13 Q So my question, sir, was that's your statement in your
14 report that it is evident that Novell did not even plan to
15 offer 32-bit office productivity applications as soon as
16 Windows 95 was launched, is, in fact, inconsistent with the
17 statement we do not want to be insignificantly behind
18 Microsoft, if at all, in releasing a Chicago suite?

19 A You know, I would have to go back and reread this
20 entire thing. But just reading this for exegesis, for what
21 it's worth, I don't find these inconsistent.

22 Q Now do you have an understanding of how namespace
23 extensions are important in this case?

24 A Only at a very general level. I'm not a software
25 engineer or technical expert. For my purposes I've assumed

1 the problem.

2 Q So you do or you don't?

3 A At the level you probably want to ask me about it, no,
4 I'm not an engineer.

5 Q You didn't know when you were asked in your deposition
6 either, correct?

7 A I probably had the same basic understanding, but not a
8 very deep one.

9 Q Correct, you said not really.

10 A So I think we're saying the same thing.

11 Q Okay. That's fair enough.

12 Now in your opinion, you believe that Novell would not
13 have released 32-bit applications earlier than November of
14 1995, correct?

15 A Yes.

16 Q We've been through at least that document where you
17 cited support for that conclusion, but didn't go through too
18 many more. Let me ask you, do you know when the alleged
19 anticompetitive conduct first occurred in this case?

20 A I really don't, no.

21 Q You don't know when the namespace extensions were
22 de-documented?

23 A I don't really recall, no. For my purposes, I'm simply
24 assuming it had the effect over my period, so I don't really
25 know.

1 Q So you considered materials that talk about timelines
2 and planning without knowing whether they were the product
3 of the anticompetitive conduct?

4 MR. JARDINE: Objection, Your Honor. He didn't
5 testify about such documents, and it's argumentative.

6 THE COURT: Overruled. Overruled.

7 Go ahead.

8 THE WITNESS: Nothing in what I presented this
9 morning hinged on anything, and, frankly, this entire line
10 of questioning, but certainly in the question you just
11 asked.

12 BY MR. TASKIER:

13 Q So the answer to that is yes, you didn't?

14 A I don't recall, no.

15 Q Now the jury has -- can we turn back to paragraph 129
16 in your report. There's another comment you raised, I think
17 you talked about it today too, it says, quote, a 1995 Novell
18 e-mail explains that an initial October 1995 target for
19 PerfectOffice on Windows 95 was pushed back to December 1995
20 because of Quattro Pro localization delays?

21 THE COURT: I think this really does go beyond his
22 testimony at trial. I will allow some examination from the
23 report, but this really is not anywhere close to what he
24 testified to.

25 MR. TASKIER: I believe he did mention Quattro Pro

1 in his direct testimony.

2 THE COURT: He did mention Quattro Pro.

3 THE WITNESS: Right. I mentioned Quattro Pro, but
4 not for localization delays.

5 Can you tell me in the paragraph where you are?

6 THE COURT REPORTER: Can you start your answer
7 over.

8 THE WITNESS: In my testimony this morning, I
9 mentioned Quattro Pro, but not localization delays,
10 something to the effect.

11 But, in any event, could you tell me where in the
12 paragraph you are.

13 BY MR. TASKIER:

14 Q I said the second to last sentence, sir. Do you see
15 that now?

16 A Yes.

17 Q Now do you know whether or not it is possible that
18 Novell could have avoided these localization delays if the
19 namespace extensions had not been de-documented and still
20 been able to produce a 32-bit suite for Windows 95 in
21 September 1995?

22 MR. JARDINE: Objection.

23 THE COURT: Sustained. This is so far afield from
24 the direct. It's all a question for argument. Different
25 experts have testified -- excuse me, different witnesses

1 have testified about this, and we're not going to use this
2 witness to talk about Windows.

3 MR. TASKIER: May I be heard, Your Honor?

4 THE COURT: Yes.

5 (Side-bar conference held)

6 MR. TASKIER: Your Honor, in the trial, as you are
7 aware, there's a significant issue about delays and whether
8 that's been engendered by Quattro Pro localization problems,
9 and that is --

10 THE COURT: Localization problems until December
11 and then leaving Oracle thereafter.

12 MR. TASKIER: There is an issue in this case that
13 has been raised which we as the plaintiff need to address
14 because, as Your Honor has repeatedly said, that ends the
15 case. This witness has testified about those delays and
16 whether or not they would have had an effect.

17 THE COURT: What did he say?

18 MR. TASKIER: In his deposition he testified about
19 this delay. He said -- we asked same questions. I just
20 asked him just now on cross-examination, Your Honor, do you
21 know whether or not Novell could have avoided those
22 localization delays to still produce a 32-bit suite with
23 Windows 95 in September '95. His answer was it's entirely
24 possible.

25 THE COURT: But he doesn't know. He doesn't know.

1 MR. JARDINE: He didn't testify about it today in
2 any way.

3 THE COURT: This is for the jury to determine.
4 It's for the jury to determine, frankly. One thing, you had
5 one witness testify that the whole international issue was
6 just fine to be out first, the marketing guy said no way
7 possible because they had clients like Siemens who needed it
8 all in the same language. A very complex factual issue
9 which the jury is going to have to determine. This witness
10 has nothing to add. He hasn't heard the testimony.

11 (Side-bar conference concluded.)

12 BY MR. TASKIER:

13 Q Let's talk about overpayment, Dr. Hubbard. I think we
14 can clarify the difference between you and
15 Dr. Warren-Boulton.

16 MR. TASKIER: Mr. Goldberg, can you pull up
17 Exhibit 14 of Dr. Hubbard's report. Just the top part is
18 all we need.

19 BY MR. TASKIER:

20 Q This is the calculation of overpayment section of your
21 report?

22 A Yes.

23 Q It shows how you calculated the overpayment?

24 A Yes.

25 Q And let's walk through it for just a second. Focusing

1 on the top left side of the table, it shows that Novell's
2 stock price fell from 23.75 to \$20 to \$19 on March 22nd and
3 23rd, 1994, correct?

4 A Yes.

5 Q If we look down a bit, we can see on October 30th and
6 31st, 1995, Novell's stock price rose from \$14.88 to \$16.50,
7 correct?

8 A Yes.

9 Q Let's work from left to right. You go from changes in
10 the stock price to how much Novell's total stock market
11 value went up or down in column five, correct?

12 A Yes.

13 Q And Novell's market value fell \$1.712 billion over that
14 March 22, 1992 time period, correct?

15 A Unadjusted, yes.

16 Q These are the current numbers?

17 A Yes.

18 Q Columns six and seven relate to adjustments made to
19 account for any movement in the stock market overall or for
20 stock repurchase, correct?

21 A Well, stock repurchase isn't an issue here. But, yes,
22 there's an event study. It's one I calculated. I
23 calculated abnormal return.

24 Q Then you add up -- let's go over to eight, and you add
25 up the adjusted \$1.778 billion plus the \$431 million in

1 column eight to get to your -- actually you subtract to get
2 to your overpayment?

3 A Yes.

4 Q Now let's go back to the far left corner, far left
5 side, and there are only four days there, correct?

6 A Right.

7 Q March 22, 23, and October 30 and 31, correct?

8 A Yes.

9 Q Now Warren-Boulton studied 12 days, the jury recalls,
10 not four, correct?

11 A I don't remember how many, but it was a significant
12 number and I explained the problems with the others.

13 Q Let's look at the demonstrative from
14 Dr. Warren-Boulton's testimony.

15 MR. TASKIER: Bring that up. Novell's stock price
16 change relative to S&P 500.

17 BY MR. TASKIER:

18 Q So we'll see he has three different sets of days,
19 correct, of four days each?

20 A Yes.

21 Q And you left out March of 19th and 20th, which I think
22 are small declines, March 18th and March 21st, small
23 declines, correct?

24 A The characterization of left out, they didn't belong.
25 If you want to ask me a question of how to do an event

1 study, I can tell you. But I didn't use them and I
2 explained why. But left out means that this benchmark is
3 correct, and I already explained that it's not.

4 Q So you disagree about the benchmark, and you disagree
5 about the dates, correct?

6 A Yes, and I'm happy to explain why on any of them.

7 Q I'm happy to ask you. So you did not include the
8 January 1996 dates at all, correct?

9 A Right, for the econ and statistics 101 problems that I
10 mentioned this morning.

11 Q We understand how he's failing at econ 101.

12 October 27th, this increase you left out as well, you
13 excluded from your calculation, correct?

14 A Absolutely.

15 Q Now all of these days are not equal. Most of the
16 difference for your overpayment calculation versus
17 Dr. Warren-Boulton focuses on October 27th and then the four
18 January dates, correct?

19 A By and large, yes. I mean that's where the bulk of the
20 error is, and I can explain why. There are two different
21 mistakes he's made in those two, but yes.

22 Q October 27th was a Friday, correct?

23 A I believe so, yes.

24 Q And the stock price rose from \$13.75 to \$14.85 on that
25 day, correct?

1 A Something like that.

2 Q Now Novell had about 370 million shares outstanding,
3 according to your Exhibit 14, right? So the stock market
4 value rose more than \$400 million on October 27th, correct?

5 A Yes.

6 Q That's about \$1.25 a share times 375 million shares?

7 A Something like that, sure.

8 Q Now in your report, page 28, footnote 104, you explain
9 the reason you didn't utilize October 27th, you say, news
10 reports indicate that the planned divestiture was announced
11 during trading hours on October 30th, 1995. I'll skip those
12 cites. While Novell's share price appreciated on
13 October 27, as well, the trading day prior to October 30,
14 1995, there is no evidence that news of the planned
15 divestiture had leaked onto the market. Instead, the
16 increase in Novell's share price on October 27th, 1995 can
17 be attributed to the following announcements, all day on
18 that day. One, Novell and AT&T reached an agreement to
19 integrate AT&T's dial-up Internet service with Novell's
20 PerfectOffice Suite. Two, Novell announced that Hewlett
21 Packard would support Novell's Tuxedo open transaction
22 processing system. Three, Novell announced it had five
23 million licensed GroupWise users worldwide. And, four,
24 Novell began shipping ManageWise 2.0, end quote.

25 Did I read that correctly?

1 A Yes, sir, you did.

2 Q Let's take it in parts. You agree that if news of the
3 planned divestiture had leaked on to the market on
4 October 27, it would be correct to include that market
5 effect in your analysis?

6 A Not necessarily given the conflating events, but you
7 would certainly look at it. There are reasons to believe in
8 the data it did not. I can tell you why if you would like
9 to ask me.

10 Q Let me ask my questions first.

11 You say there was no evidence of the news that the
12 planned divestiture had leaked into the market, correct?

13 A Yes.

14 Q But you understand that that would be insider trading,
15 and that insider trading is a crime, correct?

16 THE COURT: Unless you're a member of Congress
17 perhaps.

18 THE WITNESS: No, sir, there are a couple of
19 things that could have happened. One is a general leakage,
20 in which case what you would see are news stories and a big
21 spike in volume. If you look at volume data on
22 October 27th, you would see really, really small volume.
23 October 30th, huge volume. You're right, the other thing
24 would be insider trading, and I've seen nothing in this
25 record and certainly nothing from Dr. Warren-Boulton to

1 suggest that happened. You can't pick dates because they
2 suit you. You have to have a reason. I'm saying there was
3 no reason in the record.

4 BY MR. TASKIER:

5 Q Right. And you are saying that the trading day before
6 the announcement that they intended to sell, which had
7 roughly the equivalent effect on the market price, was
8 something you shouldn't consider?

9 A I think not. You had no information about leakage. If
10 you study the volume data, we can talk about the tick data
11 by time of day, if you would like, you will see nothing on
12 October 27th or on the couple of days before of any volume
13 information that would indicate any generalized leakage.

14 If you would like to say there's insider trading, I
15 suppose you could say that, but I have seen nothing in this
16 record to suggest it's true.

17 Q I'm not going to say that there is insider trading
18 because we don't have evidence of it and, in fact, criminals
19 tend not to publicize they are breaking the law, correct?

20 A That's true, but you are the one that needs the date,
21 so you would have to point to something like that.

22 Q So that's -- let's consider PX611, which is in your
23 binder. These are notes from a meeting of Novell's board of
24 directors on October 27th?

25 A I have 610. Where is -- I see 610. Then it skips in

1 mine to 613.

2 Q Neither do I. Obviously a typo in my script.

3 THE COURT: We have another half hour. Are you
4 prepared to do that now or do it overnight?

5 MR. TASKIER: I'm sure I can find it overnight,
6 Your Honor. I'm surprised I don't have it right here.

7 He says it is 611, and it is there. We both
8 missed it, Dr. Hubbard.

9 THE WITNESS: Maybe you can guide me because I
10 don't have it, at least in chronological order.

11 MR. TASKIER: This will help us. Old technology.

12 BY MR. TASKIER:

13 Q Right after DX2 and DX192.

14 A I see. Got it.

15 Q Good. All right. So these are board meeting notes
16 from October 27, 1995, correct?

17 A That's what it says at the top of the page, yes.

18 Q And in the second paragraph, it's -- and the first
19 paragraph says, Mr. Frankenberg explained the purpose of the
20 meeting to give the board an update of work being done in
21 preparation for the sale of the business applications
22 division.

23 So he's noting on the second paragraph, he reported
24 that John Thompson of IBM was contacted Monday evening and
25 was asked to consider purchasing the division.

1 So Mr. Thompson of IBM knew about the plans of sale,
2 correct?

3 A It would appear so.

4 Q And it says, Duff also talked to Computer Associates.
5 They said they were not interested. Duff also talked to Dan
6 Ailers of Apple and asked if he had an interest in a
7 management position with a new applications company.

8 At the bottom of the page, the last paragraph says, Jim
9 reported that he has been in contact with Morgan Stanley.
10 They gave us the first tier of companies including Noorda,
11 IBM, and Computer Associates. They have a second tier of a
12 dozen or so we will look at if nothing comes of Noorda and
13 IBM.

14 And down in the middle of the page, it says, Mary
15 reported that Computer Reseller News plans to announce in
16 their Tuesday release that Novell is selling the division.

17 Do you see that, sir?

18 A I see it, sure.

19 Q Doesn't that suggest to you, sir, that at least IBM,
20 this fellow Ailers from Apple, Computer Associates and
21 Computer Reseller News, as well as Morgan Stanley, the
22 investment bankers, all had advance knowledge of the plan to
23 sell?

24 A I don't expect -- I don't agree with your inference,
25 Mr. Taskier. I sit on four large corporate boards. I've

1 participated in dozens of acquisitions. And in each case
2 there are bankers, lawyers, a variety of hangers on in the
3 room, and I'm not aware of any leakage of any of those,
4 including quite significant transactions. You may be aware
5 that the way the SEC started to look at this is the way I
6 describe, which is looking at volume. If you check the
7 data, you will find absolutely nothing. So I simply can't
8 accept your inference.

9 Q You are assuming that there was no insider trading of
10 any kind, there was no leakage --

11 THE COURT: It's against the law to engage in
12 insider trading. And absent evidence -- if you've got
13 somebody -- absent the SEC looked at it, if you've got some
14 kind of evidence that any of those people engaged in insider
15 trading, present it. Otherwise move on.

16 MR. TASKIER: On insider trading, Your Honor?

17 THE COURT: No. I am not going to accept the
18 premise that professionals break the law and people who are
19 sworn to secrecy. I just am not going to accept it. If
20 you've got evidence of it -- of course it happens. We all
21 know it does. That's not -- I'm not going to allow that
22 kind of rank speculation.

23 BY MR. TASKIER:

24 Q The price, however, Dr. Hubbard, of the stock, the
25 stock price increased on the 27th, the trading day before,

1 after there was discussion privately of a potential
2 intention to sell?

3 A The price certainly went up. I pointed out there were
4 other conflating events as well.

5 Q Now these other conflating events, are they four news
6 articles that you referred to?

7 A Yes.

8 Q Now these articles were discussed in your deposition at
9 length, correct?

10 A At great length.

11 Q So I would like to, if you would let me, avoid going
12 through them at great length again, and if you would admit,
13 sir, that three of the four news events that you cited as
14 having an effect were, in fact, not news events, but were
15 republications of prior news articles?

16 A I think that's true for some of them. I think we also
17 talked about the fact that the mid '90s is not today. Lots
18 of things got faxed around and sat in fax machines. It's
19 not the world of instant communication today, but I
20 certainly take your point.

21 Q So three of the four would not have, in your view, if
22 they were just republications of the news, have an effect on
23 the stock price, correct?

24 A Not necessarily. It depends on how widely they had
25 been disseminated.

1 Q And the fourth news article is PX612 in your book.

2 MR. TASKIER: Can you bring that up, Mr. Goldberg,
3 PX612.

4 THE WITNESS: That too appears to be out of
5 chronological -- there it is. It's ahead of 05, yep.

6 BY MR. TASKIER:

7 Q So that's about AT&T and Novell reaching an agreement
8 to support dial-up Internet service in PerfectOffice,
9 correct?

10 A Yes.

11 Q And that means that the two companies' deal means that
12 Novell's users will be able to access the Internet from
13 their personal computers at the touch of a button once
14 AT&T's WorldNet service is commercially available in early
15 1996?

16 A Yes.

17 Q This is about adding a button to PerfectOffice?

18 A Well, that's one way to put it. It's about allowing
19 that access, but yeah.

20 Q The dial-up Internet by AT&T WorldNet service which was
21 not in effect?

22 A Which was coming, yes.

23 Q That would only be valued by the set of people who used
24 PerfectOffice and who also subscribed to AT&T's WorldNet
25 service, correct?

1 A Not clear. It could signal other future deals with
2 AT&T, it's absolutely not clear.

3 Q AT&T WorldNet service was not yet commercially
4 available?

5 A It was imminent.

6 Q As you discussed in direct testimony, you believe that
7 PerfectOffice, WordPerfect and Quattro Pro are only worth
8 about \$100 million in early 1996, correct?

9 A Something in the hundreds, yeah, in that range.

10 Q So do you think it's plausible that Novell's market
11 value appreciated by \$400 million in late October of 1995 in
12 response to having a dial-up button to a program that you
13 believe is only worth about \$100 million?

14 A I pointed out there are four events on this day. It's
15 not for me to say any one, but it's actually for you to do
16 that, but that's --

17 Q I thought we just established that three of the events
18 were not news and shouldn't be considered as news?

19 A I told you why I don't agree with the second part of
20 what you said, given the technology at the time.

21 Q I'm not so sure I understand why that follows.

22 A We don't know how quickly those events were actually
23 disseminated in the marketplace. Things sit around in fax
24 machines at that time. My point is there are four things
25 that happened. You can't do an event study unless you can

1 actually identify something central to your theory, and you
2 have not.

3 Q Isn't it a tentative market response, though, that
4 markets respond instantaneously to information that's given?

5 A When it's out there.

6 Q Some of this was out there quite a bit beforehand,
7 wasn't it?

8 A It certainly had been published in some small areas a
9 couple of days before.

10 Q We'll go through all these documents, sir.

11 So one was the October 27th Telecomworldwire was
12 September 18th. That wasn't a couple days before, was it,
13 sir?

14 A Nope.

15 Q And Novell hits GroupWise milestone target. That was
16 October 17th. That wasn't a couple days before, was it,
17 sir?

18 A Nope.

19 Q And the Salt Lake Tribune article which you cited was
20 October 23rd. That was more than a couple days, too?

21 A Right around that, yes.

22 Q So this issue, this October 27th issue was a
23 \$400 million difference between your calculation and
24 Dr. Warren-Boulton's calculation, correct?

25 A Yes.

1 Q He accepts that it happened, that it applied, that it's
2 400 million. You don't accept it and you discount it,
3 correct?

4 A Discount?

5 Q You add it into your overpayment?

6 A Yes, because he established no principal reason to
7 include the data. It's actually for him to do.

8 Q That's your view?

9 A That's what an event study is. It's not my view.

10 Q Let's turn to the January 1996 event. You excluded the
11 four days that he used from January and February 1996,
12 correct?

13 A Yes. Part of the disagreement is about the length of
14 event windows, but the real issue is whether the January
15 event passes either an economic or a statistical threshold,
16 and it passes neither.

17 Q And your report said that it isn't statistically
18 significant, correct?

19 A Yes, that would be the statistics part.

20 Q And his purchase sale damage adjustment was about a
21 billion dollars, correct?

22 A It's 970 something, yes, in that range.

23 Q And your report in this case says that by excluding the
24 days of this announcement of January, that would lower his
25 damages estimate by about 25 percent, correct?

1 A Yes.

2 Q So that 25 percent of \$1 billion is \$250 million,
3 correct?

4 A Something like that.

5 Q So you would agree that \$250 million is a meaningful
6 amount of money?

7 A It's an extremely meaningful amount of money.

8 Q And excluding it from Dr. Warren-Boulton's damages
9 analysis would make a meaningful difference in the size of
10 calculated damages, \$250 million?

11 A Yes, but Dr. Warren-Boulton had no principled reason of
12 economics or statistics to include it. The arithmetic is
13 different, yes, but he has no principled reason to include
14 it.

15 Q His testimony, sir, was that the market went up when
16 the announcement there was an intent to sell in October but
17 there was no purchaser identified, correct?

18 A Yes.

19 Q So it was an offer to sell, correct?

20 A Yes.

21 Q So the market went up recognizing that Novell is going
22 to rid itself of this underperforming asset, correct?

23 A Your word that it's underperforming, but yes.

24 Q I thought that you had said so too?

25 A I definitely said so. I'm surprised you did.

1 Q When you are saying that it's not statistically
2 significant, I'm not so sure I understand what that means,
3 because when the market hears that there actually is a real
4 buyer in January, the market reacts and the price goes up,
5 so you write that off because it's not statistically
6 significant even though it clearly has a market reaction?

7 A Call me old fashioned, Mr. Taskier, as the market moves
8 up and down, the question in events studies is can you
9 adjust the event. There had already been an announcement.
10 Second, is it statistically different from zero. The jury,
11 it's important to know what this is about, it means can you
12 reject the hypothesis that that event is zero. If somebody
13 says to you something is not statistically significant, they
14 mean you can't reject the hypothesis that that was just a
15 random draw of zero.

16 Q Let me sum up quickly because we have one minute --

17 THE COURT: You can take as much time as you need.
18 I hope the end is near. 2:15 is when the jury --

19 MR. TASKIER: Okay. I'm happy to go to 2:15.

20 Just leave that up there, Mr. Goldberg.

21 BY MR. TASKIER:

22 Q January 31st was the day that Novell literally actually
23 agreed with a willing purchaser to sell the business,
24 correct?

25 A Yes, correct.

1 Q And it would be meaningful to the market --
2 statistically significant to the market that instead of just
3 trying to find a buyer on that date, Novell actually had
4 one; isn't that right?

5 A Except it wasn't statistically significant to the
6 market. Neither Dr. Warren-Boulton nor I believe that. He
7 simply would like to count on it. There was no
8 statistically significant reaction.

9 Q You are saying because you calculated ups and downs for
10 other moments?

11 A You cannot reject the hypothesis in that event study
12 that you were looking at a zero. You can't just pick and
13 chose when you apply models and when you don't. I'm sorry.

14 Q He's not picking and choosing, is he, sir? He's
15 choosing January 31st, which is the day that they announced
16 they literally have some buyer, Corel, the market goes up
17 that day?

18 A The market goes up that day, but there is no
19 statistically significant market reaction. You can't do
20 that.

21 Q That's a \$250 million difference right there, and
22 that's a \$400 million difference in October, correct,
23 between your view and Dr. Warren-Boulton's view?

24 A Something like that. I mean I gave those numbers this
25 morning.

1 Q You also took issue with Dr. Warren-Boulton's
2 comparable multiples analysis, correct?

3 A Not here this morning, but I did in my report.

4 Q You said they were irrelevant in your report, correct?

5 A I didn't say the idea of comparables is irrelevant. He
6 failed in execution both in the selection of the sample and
7 how he did the multiples if that's what you mean.

8 MR. JARDINE: I'm going to object again. That
9 examination goes to testimony and a report that was not
10 given today.

11 THE COURT: Overruled. I thought it was part of
12 Dr. Warren-Boulton's testimony.

13 MR. TASKIER: I'm sorry, Your Honor. I didn't
14 hear that.

15 THE COURT: Overruled.

16 BY MR. TASKIER:

17 Q In your report you criticized -- you can that that
18 down, Mr. Goldberg -- that rather than apply multiples based
19 on historic earnings to Novell's forecasted earnings,
20 Dr. Warren-Boulton should have applied them to Novell's
21 historical earnings, correct?

22 A Coming from memory here, that's my recollection that he
23 mixed and matched concepts of trailing and forward looking.

24 Q You corrected that alleged error of
25 Dr. Warren-Boulton's and you create your own values of

1 WordPerfect using comparable companies, correct?

2 A Yes and no. Yes, I corrected that mistake, but, no, I
3 didn't fundamentally correct his mistake because I kept on
4 his playing field of the same comparable firms which were
5 inappropriate. But, yes, I did that calculation, if that's
6 your question.

7 Q And in discussing how to appropriately perform
8 evaluation analysis, your report cites and relies upon a
9 book titled Valuation, Measuring and Managing the Value of
10 Companies, correct?

11 A I believe so, yes.

12 Q And in the footnote 180 of your report, you cite to
13 pages 366 and 375 of that report?

14 A I'm sorry. Which paragraph are we on now?

15 Q Footnote 180.

16 A Footnote 180 from Tim Koller's book, okay.

17 Q You cite to pages 366 and 375 and 376, correct?

18 A That's what it says there, yes.

19 Q Now can you turn to Plaintiff's Exhibit 613. And let's
20 go to page 369, which is in between 366 and 375, correct?

21 A I believe I can accept that.

22 Q So over here it says, based on the principles of
23 valuation and on empirical evidence, we recommend building
24 multiples based on forecasted profits, not on historical
25 profits. If you must use historical data, make sure to use

1 the most recent data possible and eliminate any one-time
2 events. Correct?

3 A I would agree with that.

4 Q But in your corrected valuations, you reported that
5 WordPerfect for its earnings were \$27 million, correct?

6 A I'm sorry. Where are you now?

7 Q All right. So we're looking at 614, Exhibit 614, the
8 backup table from your report. This is from your report,
9 correct?

10 A Looks to a backup table, yes.

11 Q It says here that EBITDA is \$27 million, correct?

12 A Yes.

13 Q That's historical EBITDA, correct?

14 A Yes.

15 Q In your median multiple using that \$27 million values
16 WordPerfect at about \$499.4 million, correct?

17 A Yes.

18 Q Dr. Warren-Boulton valued WordPerfect and Quattro Pro
19 at \$1.017 billion, right?

20 A It's over a billion. Something like that.

21 Q Just about twice what you have there?

22 A Yeah.

23 Q There is a note one at the bottom here which says that
24 you used Novell's S-4 SEC filing to determine what
25 WordPerfect's earnings were, correct?

1 A Yes.

2 Q We have that in Exhibit DX379, which is in your packet.

3 A Did you say DX?

4 Q DX379.

5 A Okay.

6 Q I would like you to turn to page 74.

7 A Okay.

8 Q Let's look at the third full paragraph, in
9 September 1993.

10 MR. TASKIER: Page 74. That says 65.

11 THE WITNESS: Okay. Now you've lost me. Look for
12 74 on the bottom instead of the top?

13 BY MR. TASKIER:

14 Q Seventy-four on the bottom. I'm sorry.

15 A Yep.

16 Q And the third full paragraph, it says, in
17 September 1993?

18 A Uh-huh. (Affirmative)

19 Q It says, in September 1993, WordPerfect management
20 adopted plans to restructure and streamline WordPerfect's
21 operations and, as a result, recorded a nonrecurring
22 restructuring expense of \$33 million in the third quarter of
23 1993.

24 A Okay.

25 Q Let's move down to the last three sentences.

1 Management believes that the plan has enabled WordPerfect to
2 significantly improve its operational efficiencies and
3 estimates that these efficiencies will save WordPerfect
4 approximately \$30 million in annual operating costs.
5 WordPerfect management does not believe that the
6 restructuring plan will have a material adverse effect on
7 future revenues. Correct?

8 A That's certainly their belief, yes.

9 Q So we now have a plan that's going to save \$30 million
10 in costs without a material impact on future revenues,
11 correct?

12 A Certainly a plan to do this, sure.

13 Q They are taking a restructuring expense of \$33 million,
14 correct?

15 A Prior to that, yes.

16 Q Great. So in calculating WordPerfect's earnings in
17 your analysis, isn't it true that you didn't exclude this
18 \$33 million of nonrecurring expense so that WordPerfect's
19 earnings are actually much lower than they otherwise would
20 have been?

21 A I really don't recall. I mean the methods that I
22 focused on related to EBIT and EBITDA, and all of this, as
23 you know, is second order to the point that he picked the
24 wrong comps. This whole discussion was just about
25 correcting multiples.

1 Q That's not an answer to the question, sir. The
2 question is you put \$27 million as EBITDA and you multiplied
3 that to get 499 million?

4 A Yes.

5 Q If you added in the nonrecurring expense, it would have
6 been \$60 million. If you doubled that, you would have had
7 roughly a billion dollars, which is what Dr. Warren-Boulton
8 has, isn't that correct?

9 A I would have to go back and look at this. It's by no
10 means clear to me what the timing is of this restructuring
11 expense you have.

12 Q Now you have said that Dr. Warren-Boulton's valuations
13 were irrelevant?

14 MR. TASKIER: You can take that down.

15 THE WITNESS: I've said the way he approached
16 designing comparables didn't shed any light. Irrelevant
17 sounds okay too.

18 BY MR. TASKIER:

19 Q Now you also said that his independent valuation of
20 WordPerfect on the Lotus bid, which is independent of all
21 the stock market stuff, right, was irrelevant?

22 A I think I explained why this morning, and I could do so
23 again if you wish.

24 Q Now we've heard -- the jury has heard
25 Dr. Warren-Boulton, we've heard you, and clearly we have two

1 economists who are disagreeing quite vehemently over what
2 goes in and what goes out of the over calculations, correct?

3 A I think that's fair to say.

4 Q It's clearly possible for you to use the same
5 techniques, yet make choices that lead to very different
6 conclusions about the value of financial markets, correct?

7 A We clearly got different answers. I claim this isn't
8 about choices, it's about reasonable application of methods.
9 Choices is like choosing a parameter that reasonable people
10 could disagree on. I do not think that's what's going on.

11 Q You think he's unreasonable?

12 A I think he's unreasonable.

13 Q He disagrees with that, correct?

14 A I assume so.

15 Q So there is a disagreement.

16 So you said it was irrelevant to look at the value that
17 a potential buyer, such as Lotus, placed on the assets,
18 correct?

19 A I think I described this morning that we don't have a
20 consummated bid. That bid, whatever it would have been,
21 would have valued the assets in Lotus's hands, not in
22 Novell's. And, third, we never had the chance for the
23 market to opine on that bid. So, yes, for all three of
24 those reasons, I don't find it germane.

25 Q Well, for all three of those reasons, you can't have

1 two consummated bids at the same time, can you? In the real
2 world, one happens and you can't have the other, correct?

3 A You can't imagine the stock market reaction to
4 competing bids. There was never a real bid from Lotus.
5 There was never a bid. There is no evidence of that.

6 Q You didn't answer my question. You can't have two
7 simultaneous consummated bids with market reaction to both
8 of them at the same time, right?

9 A What I mean is actual bona fide bids in the marketplace
10 that the market can react to. You may -- in fact, you
11 frequently see that. You don't see that here.

12 Q You don't think there is any evidence that there was a
13 bid?

14 A Not what I would call a bid. There is evidence that
15 there was some discussion, but I don't see the evidence of a
16 bid. In any event, it would be the value in Lotus's hands,
17 not Novell's.

18 Q Okay. We get that.

19 Let's turn to Exhibit PX418, please. This is a Novell
20 internal document reviewing potential transactions -- excuse
21 me, a WordPerfect internal document reviewing the potential
22 transactions with Novell and Lotus, and offer terms that it
23 sets forth in the first paragraph, A, are from Novell. And
24 then the second paragraph, it says, B, Lotus, and let's look
25 at number one. It states, offer of \$1.2 billion based upon

1 a \$70 share price, equates to 26.5 percent of the combined
2 company. At market price, \$77.75, on date of offer the
3 market value of the offer was \$1.34 billion.

4 Do you see that, sir?

5 A I see what it says, yes.

6 Q So isn't that evidence that Lotus had made an offer
7 worth \$1.34 billion to WordPerfect?

8 A Nothing on -- my experience on boards, nothing on this
9 page would indicate other than some kind of discussion is
10 going on. I wouldn't view this as a bid. In any event,
11 from an economist's perspective, it's a bid for something
12 that Lotus is going to --

13 Q You don't view it as a bid? You don't view it as
14 something that WordPerfect should have taken seriously?

15 A I didn't say that.

16 THE COURT: That's a different question.

17 THE WITNESS: I did not say that. I said as a
18 board member, I see these sorts of documents all the time.
19 There are all kinds of potential transactions, people coming
20 around, bankers shopping things, lot of things happen. This
21 would not be what I would call a bid. But I can read the
22 words on the page.

23 BY MR. TASKIER:

24 Q Because it's extraneous evidence to your target
25 analysis, correct, sir?

1 A I don't think it's extraneous, I just don't find it
2 terribly informative because the value of the assets to
3 Lotus is almost surely not the same as the value to Novell.
4 We wouldn't know whether Lotus had overpaid in any event
5 anyway despite Dr. Warren-Boulton's assertion that by
6 construction they can't.

7 Q I understand your reasoning. But this is, nonetheless,
8 evidence that there were discussions with Lotus with respect
9 to a sale of the WordPerfect to Lotus for \$1.34 billion,
10 correct?

11 A I can only see what this piece of paper says. There
12 may have been some discussion, but that's all I know. I am
13 not on the board.

14 Q That piece of paper says that; isn't that right?

15 A That's what this piece of paper says, yes.

16 Q That's a WordPerfect internal document assessing those
17 two bids, correct?

18 A I don't know in what context this document was
19 produced.

20 Q You don't know?

21 A It's just an internal document.

22 THE COURT: We better stop. It's 2:15.

23 MR. TASKIER: Thank you, Your Honor.

24 THE COURT: See you all at eight o'clock in the
25 morning. I'll stay here with counsel for just a second.

1 (Jury excused)

2 THE COURT: I don't have either of Dickstein
3 Shapiro's or Sullivan Cromwell's letter in front of me, but
4 I would propose tomorrow to answer the jury question pretty
5 much as outlined. I think it was Mr. Tulchin's letter. The
6 one -- the only substantive difference that I know is that I
7 think Dickstein Shapiro's and probably Mr. Johnson wants me
8 to simply say in regard to the delay in filing suit, that
9 Novell was in its rights. I think Mr. Tulchin says that
10 counsel may argue about the date that the suit was filed in
11 closing argument. I can think of two relevant reasons for
12 that, so I would tend to add number one. If it's allegedly
13 the first time that Novell knows about this alleged
14 problem -- excuse me, that Microsoft knows about the alleged
15 problem, then unrelated to delay in filing suit, that's
16 relevant. I mean I think it's saying nobody ever told us
17 about this back then and we didn't know there was a problem.

18 There also seems to me, since we've gotten into
19 the alleged missing document issue, it may be relevant to
20 the missing document. So it would seem to me I should add
21 that counsel may argue something about the delay, but that
22 is something -- but they should not be concerned about the
23 delay itself in filing suit because Novell was in its right
24 in filing a suit when it did.

25 I think that's the only difference. I think,

1 otherwise, there is no bill of sale. I say on the last two,
2 look, counsel, the evidence is in about
3 internationalization. That would be argued as counsel sees
4 fit. But the only difference that I can think of is
5 Mr. Tulchin I think did add something. I don't have the
6 letter in front of me, but there could be argument about
7 when the suit was filed bearing upon the issues which will
8 be argued by counsel. It seems to me there are reasons that
9 that can be legitimately argued provided that I now say that
10 Novell was clearly within its right when it filed suit.

11 MR. JOHNSON: Your Honor, I hope we're not
12 slipping backwards into an argument that we were late with
13 this suit because it was obviously within our perfect right
14 to do so.

15 THE COURT: I honestly don't know. If what they
16 say it was the first time they learned about the problem,
17 then it's relevant to the fact that they didn't even know,
18 allegedly, that the withdrawal was a problem until the suit
19 was filed. That is relevant.

20 MR. JOHNSON: Well, Your Honor, obviously there
21 were lots of discussions prior to filing that suit.

22 THE COURT: There were settlement discussions.

23 MR. JOHNSON: There were, in fact, Your Honor,
24 three extensions of the tolling in order to consider those
25 issues. So to say that they didn't learn about it until the

1 filing of the suit would be a misstatement.

2 THE COURT: That's a fair point. In fact, they
3 saw a copy of the complaint before that.

4 MR. JOHNSON: Exactly, Your Honor, that's my
5 point.

6 THE COURT: That's a perfectly fair point.

7 MR. JOHNSON: Okay. One thing I wanted to briefly
8 mention, Your Honor, and Mr. Tulchin can address it, they
9 have identified no witnesses for Thursday. And I just
10 wondered what the plan was.

11 MR. TULCHIN: We've asked them by letter who, if
12 anyone, they were calling on rebuttal, and we haven't had a
13 response. But our plan for Thursday is -- we're a little
14 behind because I didn't know some of these crosses would be
15 as long as they are, but we have two witnesses we've
16 identified for tomorrow once Dr. Hubbard is finished. One
17 I'm quite sure will be on and off, they know who it is,
18 during the day. And the second will be called tomorrow, but
19 undoubtedly won't finish until Thursday.

20 THE COURT: When is Dr. Bennett going to testify?

21 MR. TULCHIN: Yes, Professor Bennett will be
22 Monday.

23 MR. JOHNSON: Okay, Your Honor. I didn't want to
24 obviously waste any time on Thursday.

25 THE COURT: We'll leave early on Thursday.

1 MR. TULCHIN: I wonder, Your Honor, in the same
2 spirit if we could have some information about rebuttal.

3 MR. JOHNSON: We don't know yet, Your Honor.
4 We're exploring that right now.

5 THE COURT: When you know, let them know.

6 MR. JOHNSON: Will do.

7 MR. TULCHIN: Your Honor, we filed something this
8 afternoon -- or maybe this morning, it was the middle of the
9 day, on the subject of Novell's proposed charge and verdict
10 form. I hope it's helpful to the Court.

11 THE COURT: I'm sure it will be. What I have here
12 is the next build, which it takes into account what you all
13 have written. There are a couple of changes. I haven't had
14 a chance, but I did send it back to my office. As I told
15 Mr. Schmidtlein the last time I saw him, he would understand
16 this, it turned out to be the fact that although my office
17 agreed with him, I was going to listen to them on the edges,
18 but I probably made up my mind about it subject to hearing
19 from you about the basic structure, but I've got a couple of
20 things I want to add.

21 If you all could leave one person behind, I can
22 give copies to take back to the Hotel Monaco or Little or
23 big America, whatever that is. And I have been giving you
24 all five copies each. Do you want more, do you want less?

25 MR. JOHNSON: Five is fine.

1 MR. TULCHIN: Five is fine.

2 THE COURT: So I'm going to go upstairs and change
3 and just add a couple of things. I will give these to you.
4 This takes into account -- it obviously can't take into
5 account what was just handed to me. Just let me -- if
6 you've got a couple of minutes, let me just tell you what to
7 look for.

8 I have changed the format, but not significantly,
9 and I sort of just -- it's more like general instructions,
10 but it does lead to special -- it doesn't have a general
11 verdict form. Again, the specific questions -- and
12 essentially, as you all will see, I have bought Microsoft's
13 questions. It seems to me they are better.

14 I'm still trying to keep it simple. I have put
15 the causation question first because it seems to me that if
16 the jury looks at that, it could be a shorter deliberation
17 for them. Maybe not. It's entirely up to them. I was
18 concerned about having a third and focusing, even though I
19 put in language -- don't worry, Novell had a fair point for
20 me to put it out there wasn't fair. So I put it first, it
21 is fair, because it's a logical thing for them to look at
22 first.

23 Some of Microsoft's you will see I have excluded
24 and, frankly, I did it on the principle, which I'm certainly
25 prepared to hear about. It seemed to me that Microsoft

1 wanted me to put in the instructions some of the things
2 which Mr. Tulchin can say far more ably than I in closing
3 arguments. They were a bit argumentative. I do think it's
4 worthwhile to spell out a little bit the specifics of
5 Novell's claims so the jury can understand it. In terms of
6 the other things, I think I can just leave it up to you all.

7 I have included questions four and five, and this
8 is where I really do think -- and I will hear from you all.
9 Four basically is do you find that the withdrawal of the
10 APIs significantly -- contributed significantly to the
11 maintenance of the monopoly. That essentially adopts
12 Microsoft's position in two respects. Number one, the
13 standard is significantly contributed rather than reasonably
14 capable, or whatever it is. Secondly, it implies the same
15 conduct, the conduct caused maintenance of the monopoly in
16 the operating system market. I have included that, but
17 telling you -- but then I also included five, essentially I
18 think the same question, except I used the reasonably
19 capable of. I've got to think right now whether I want to
20 put in -- yeah, reasonably capable of affecting the
21 operating system market.

22 I think I want to give those two alternatively
23 because I think that's a fair difference. Frankly, I agree
24 with Microsoft. I don't see how you can have an effect.
25 Number one, it does have to be the same conduct because the

1 whole nexus of the case is right, but that's a distinction.
2 I would hate to rule that way and be wrong and have the case
3 turn on that. So it seems to me we ought to segregate it
4 out, what I tell the jury is, look, you don't have to answer
5 four yes to get to damages if you answer three yes. That's
6 enough.

7 The purpose of distinguishing it out, and I tell
8 the jury, look, there's slightly different legal standards,
9 in my judgment there are certain uncertainties in the
10 antitrust law, I would just like them to answer those
11 questions to clarify the record and perhaps prevent a
12 retrial. So that's the way it's written and the reason it's
13 written is because I would rather not make a decision on
14 something which I think the jury can answer independently,
15 which I don't think will affect its verdict.

16 If I rule, then I would rule in Microsoft's way.
17 So if the answer comes back no -- three yes, but four no, I
18 might grant a judgment notwithstanding a verdict. The issue
19 would be joined. I just want to prevent you all from having
20 to retry it, so that's the reason it's there.

21 So just read it that way. If you think I'm wrong,
22 let me know. I'm perfectly prepared to bite the bullet,
23 but, you know, this litigation has been expensive enough.
24 On certain specifics, I know you all will have objections
25 to. The ones that I know will be objected to is that I have

1 put in the additional sentence I proposed last week about
2 the binding effect of the government case. Mr. Holley
3 didn't seem to be happy with that. So it's in there. Tell
4 me tomorrow why it shouldn't be there.

5 In terms of damages, I have, again, not included
6 Microsoft's proposed instructions about the assumptions of
7 experts and things of that nature. It seems to me the
8 general instructions about not being speculative are
9 sufficient to handle that. I really don't think it's
10 necessary. Again, I will hear from Microsoft, if they
11 really want them in. Again, it's sort of in the nature I
12 don't think we need it.

13 I've put in some of Novell's language in these
14 proposed instructions. From Novell's point of view, I'm
15 sure not enough. Microsoft should be alerted, for example,
16 in the duty to cooperate, I have added a sentence. I have
17 not included -- I just remember because Novell will object
18 to this, I have not included language about short-term loss
19 or a long-term gain in anticompetitive because I remain of
20 the view, although it has understandably become a part of
21 the antitrust doctrine, it gets there by a factual
22 inference, which in 99 percent of the cases can be drawn
23 that if somebody doesn't take a profit on one end, it's
24 because of long-term gain.

25 Microsoft -- I could be wrong about this, if

1 Microsoft's antitrust people think that it should be, I will
2 put it there. It seems to me that the factual inference
3 which forms a basis for perfectly sound antitrust doctrine
4 does not apply where, in fact, you can't draw that factual
5 inference.

6 Since at least it's intimated by some of
7 plaintiff's evidence that what Microsoft really had in mind
8 was going to make money on the office end either in 1995 or
9 at least by being able to use some of these fancy things in
10 1996, I don't see how you can fairly draw the inference that
11 Microsoft was intending to take any short-term loss at all.
12 That, in fact, it may have been doing it for other
13 illegitimate reasons, but that is not the claim asserted in
14 this case and can't be the claim asserted in this case
15 because it was attempting to monopolize the applications
16 markets.

17 My own view is if you look at the evidence fairly,
18 you simply can't draw from the evidence the factual
19 inference that Microsoft intended to take any short-term
20 loss at all because maybe if it had any intent, it was going
21 to lose money on the operating system side and put it up on
22 the applications side.

23 I understand fully the antitrust doctrine. We
24 talked about this last week. It is certainly a principle of
25 antitrust law, which I don't quarrel with, if somebody is

1 going to take a short-term loss, that may be a hallmark for
2 evidence of anticompetitive intent in the long term. That
3 seems to me that's based upon a factual inference that you
4 can't draw in this case.

5 But, again, I'm just alerting you. It's not
6 there. This is a long winded discussion for the fact that
7 Novell is going to object to that, but it's not there.

8 MR. JOHNSON: We'll leave somebody here, Your
9 Honor, to pick that up.

10 THE COURT: It should be ready in 15 minutes.
11 Actually, if they could come up to the fourth floor.

12 THE CLERK: I will bring them up.

13 MR. TULCHIN: Thank you, Your Honor. See you
14 tomorrow.

15 MR. JOHNSON: Thank you, Your Honor.

16 THE COURT: Tomorrow if you all really just want
17 to persuade me that the whole approach is wrong, I will be
18 open to this, but I obviously have bought -- I've kept the
19 same format, just adopted Microsoft's questions.

20 MR. HOLLEY: Understood, Your Honor.

21 (Whereupon, the trial was continued to Wednesday,
22 December 7, 2011 at 8:00 a.m.)

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