

1 THE COURT: Let's get the jury.

2 There's another question.

3 THE CLERK: Do you want me to go get it?

4 THE COURT: Yeah. But basically it is whether
5 Professor Murphy has ever testified for Microsoft before. I
6 assume that that's something that Mister -- which is going to
7 be covered.

8 MR. TASKIER: Yes, we will.

9 THE COURT: Let's get the jury. The question is
10 from Number 6.

11 I knew Mr. Taskier was going to cover this one,
12 anyway.

13 The question specifically is: Has the witness been
14 an expert witness for Microsoft before? He mentioned he used
15 material he had studied previously, so it sounded like he had.
16 Juror number 6.

17 MR. TULCHIN: We'll bring that up.

18 (Whereupon, the jury returned to the court
19 proceedings.)

20 THE COURT: Mr. Tulchin.

21 MR. TULCHIN: Thank you, Your Honor.

22 Q. BY MR. TULCHIN: Professor Murphy, before we get to
23 the second theory, have you testified in any case for
24 Microsoft before?

25 A. Yes, I have. I've testified in I believe three

1 other matters in court for Microsoft. I believe that's
2 correct.

3 Q. Does that include cases where there's been
4 depositions; is that right?

5 A. I've been deposed in some additional cases to
6 those. So probably 20 -- I'd say between, you know, five to
7 10, maybe eight or nine is probably a good number, something
8 like that.

9 Q. Okay.

10 A. Don't hold me to that exact number, but it's in
11 that range.

12 Q. Let's go to the second theory. Could you remind
13 the jury just briefly what this second theory is?

14 A. The second theory is the middleware theory, and
15 basically the theory that because Corel software exposed APIs.

16 Q. You mean Novell.

17 A. I'm sorry. Novell's software exposed APIs. That
18 would give an opportunity for software developers, ISVs to
19 write to those APIs as opposed to the APIs Windows. And then
20 there's a series of things that need to happen to cause that
21 to allow that to affect operating system competition. I think
22 we prepared some slides on that.

23 Q. Let's look first at slide Number 312. And this is
24 a question and answer that were put to Professor Noll on
25 November 14th when he was sitting in the same chair you're in

1 now, Professor Murphy. What's the relevance of this, and why
2 did you want to show this to the jury?

3 A. Well, this is a discussion that I believe you asked
4 the question of Professor Noll, exactly this question about
5 APIs. So the question was:

6 So if a middleware product runs on Windows and
7 an application is written to the middleware APIs,
8 would the application be able to run on a Windows
9 operating system without necessarily being written
10 to the Windows APIs?

11 So this is the issue whether it should have an
12 application written just to those APIs. And Professor Noll
13 says:

14 Yes. That's the whole point of middleware --
15 I'm sorry -- the whole point of middleware is to
16 free the software vendor, the applications
17 developer, from using any particular operating
18 systems set of APIs. Essentially what's happening
19 is that the applications vendor is letting the
20 middleware provider perform the function of
21 accessing the operating system and just using the
22 applications programming interfaces of the
23 middleware product itself as a way to gain access
24 to all operating systems.

25 So what he's saying here is if you were to write

1 just to the APIs of middleware and not to the operating
2 systems and that same middleware existed on another operating
3 system because you're not using the operating systems APIs
4 that same program should in principal run, not to the original
5 operating system, but on that other operating system that has
6 those same APIs because it has the same middleware. That then
7 creates more applications available for those other operating
8 systems.

9 So the key question is, would a sufficient number
10 of software developers chose -- have chosen to write for those
11 APIs that there would have been a sufficient number of
12 applications developed would then run also on other operating
13 systems? Now there's a number of things that go into that,
14 and that's what we're going to talk about next.

15 Q. Let's look at that Slide 313, Professor Murphy.
16 And you say there were three requirements for this theory to
17 work, if I could shorthand it that way.

18 A. Yes.

19 Q. Is that fair?

20 A. There were three basic requirements you need.
21 Number 1, you need that the middleware be cross-platform,
22 because even if the application --

23 THE COURT: I think this is a point that -- it
24 cites at the bottom the source of Dr. Noll's testimony and
25 findings of fact. My understanding is that Dr. Noll might not

1 have subscribed to all of these three; is that correct?

2 Particularly the third.

3 MR. TULCHIN: Your Honor, he clearly said 1 and 2.

4 THE COURT: But there's some dispute --

5 MR. TULCHIN: There may be some argument as to
6 whether he put Number 3 this way.

7 MR. JOHNSON: I would say lot more than argument,
8 Your Honor.

9 THE COURT: But in any event, the testimony speaks
10 for itself.

11 MR. TULCHIN: It speaks for itself.

12 THE WITNESS: I'm not going to try to misrepresent
13 what Dr. Noll said. Think he definitely agreed with Number 1
14 and Number 2. I think those are pretty standard, and anybody
15 who talks about this issue basically talks about Number 1 and
16 Number 2. And I think there's some differences in Number 3
17 with Dr. Noll. I think there's not differences with the
18 findings. The findings basically say what I say here until
19 Number 3. But, you know --

20 THE COURT: I just brought that up. You mentioned
21 that the sources, Dr. Noll's testimony and the findings, and
22 as to 3 you're relying upon the findings.

23 MR. TULCHIN: Correct, Your Honor. And we're going
24 to get to that in just a moment.

25 THE WITNESS: Professor Novell would have a

1 Number 3 that would be somewhat different than my Number 3, is
2 the accurate and fair way to say it.

3 Q. BY MR. TULCHIN: Okay. Let me just see if I can
4 phrase in sort of an anecdotal way what these three
5 requirements are. If there's a piece of middleware that's
6 running on top of Windows, for Professor Noll's theory to work
7 in this example, that piece of middleware, let's just say it's
8 a piece of software running on top of Windows, must also work
9 on other platforms, maybe OS/2 or Linux or some other
10 operating system platform, that's the first criteria; right?

11 A. Yes. And if it's going to enhance competition,
12 it's going to have to run on some other platform in the
13 relevant market, some other operating system that's in the X86
14 marketplace.

15 Q. And that same piece of middleware must be available
16 on all or nearly all PCs; correct?

17 A. Yeah. And it's not just that same piece of
18 middleware in a sense that it's a piece of software that has
19 the same name or even performs the same end users functions,
20 it's going to have to expose the same set of APIs, so that
21 program written to those APIs will actually run when it moves
22 over that other platform if you're going to make it truly
23 cross-platform.

24 Q. Okay. Let's talk about now this third criteria,
25 and let's look at the findings of fact that you've cited as

1 your source for the third criteria. Let's look first at
2 finding of fact 28. This is our Slide 314. This comes from
3 the case in the District of Columbia, Professor?

4 A. Yes, it does.

5 Q. And can you tell the jury how this finding relates
6 to your third criteria, I won't repeat it, the third criteria
7 for the middleware theory?

8 A. Okay. So first of all, it's talking about
9 middleware in the second sentence. It just says:

10 Such software is often called middleware
11 because it relies on the interfaces provided by
12 the underlying operating system while simultaneously
13 exposing its own APIs to developers.

14 So the key feature here is that in order for this
15 story to work the developers have to write to the middleware's
16 APIs rather than write to the operating system's APIs. So --
17 and what it's saying, remember this is as of 1999, it says:

18 Currently no middleware product exposes enough
19 APIs to allow independent software vendors, ISVs,
20 profitably to write full-featured personal
21 productivity applications that rely solely on
22 those APIs.

23 And the basic idea that they're getting at is that
24 it's not enough to just have some APIs. You have to have a
25 rich enough set that somebody who wants to write a program

1 that's going to make people want to use that platform and
2 write the kind of program he wants to write. And that's what
3 you need. You need to have a sufficiently rich capability
4 from an economic point of view. You have to be able to
5 support a sufficiently rich set of applications that people
6 actually are going to want to then use that operating system
7 or use those applications and, therefore, be willing to go to
8 an operating system that supports that middleware product.

9 Q. So let's look at the next source that you have for
10 your third criteria. And we're going to go through each of
11 the three. But this was finding of fact 32. And you have a
12 section of it in the middle of the finding highlighted. Can
13 you tell the jury what's going on here, please?

14 A. Right. So the prior finding said that as of 1999
15 that there had yet to be a middleware product that had a
16 sufficient number of APIs. This one talks a little bit more
17 forward looking. It says:

18 As the Court find above, however, it remains
19 to be seen whether server or middleware based
20 development will flourish at all. Even if such
21 development were already flourishing, it would
22 still be several years before the application
23 barrier eroded enough to clear the way for the
24 relatively rapid emergence of a viable alternative
25 to incumbent Intel-compatible PC operating

1 systems.

2 Basically they're saying even as of 1999 it is not
3 even clear, not only that there wasn't one then, but whether
4 one would merge in the future.

5 Q. Okay. And I just want to show you one more finding
6 of fact that you asked us to prepare a slide about in this
7 connection. This is Slide 316, finding number 77. And again,
8 what's going on here, Professor?

9 A. Again, there's a couple of things. Again, it's
10 talking about two particular middleware technologies, Sun's
11 Java and Netscape. And it's comment is the one that's
12 highlighted is:

13 Nevertheless, these middleware technologies
14 have a long way to go before they might imperil
15 the applications barrier to entry.

16 It goes on to say:

17 Windows 98 exposes nearly 150,000 APIs whereas
18 the combined APIs of Navigator and the Java class
19 libraries together representing the greatest hope
20 of proponents of middleware total less than 1,000.

21 So they're just drawing a contrast between the set
22 of APIs available on the native operating system, in this case
23 Windows, and what would be available by these middleware
24 products.

25 Q. All right. Professor, let's go back to your

1 Slide 313, which is entitled, there are three requirements.
2 And what I'd like to do, if I could, is to go through each of
3 the three. Before we do, maybe as a way of heralding what's
4 coming, can you tell the jury whether from an economic point
5 of view according to your analysis any of the three
6 requirements have been met?

7 A. Well, I think certainly at the time, let's go
8 through them one at a time. In a sense of being a middleware
9 product that exposed the same set of APIs on different
10 operating system platforms, Novell's product at the time did
11 not have those APIs exposed on the other competing operating
12 systems. They were at the time running on Windows only. So
13 they don't satisfy Number 1. There's discussion that they
14 were thinking about it, that they had plans to maybe in the
15 future or in the future develop those. But at the time they
16 certainly were not running on multiple platforms.

17 Q. Okay. So we're going to get to criteria Number 1.
18 But what you're saying is Novell's product at the time were
19 not cross-platformed in the way Professor Noll requires.

20 A. In the way that middleware theory would require,
21 because the middleware theory is about exposing the same APIs
22 set on different platforms, not saying a word processor that
23 runs on two different platforms. It's about can ISVs write to
24 multiple platforms by writing once to the APIs set in the
25 middleware.

1 THE COURT: Excuse me. I think I know the answer
2 to this. But just to be clear. You're talking about the
3 application APIs, not the underlying operating system APIs.

4 THE WITNESS: Correct. The applications -- the
5 middleware APIs have to be on multiple platforms.

6 THE COURT: So the idea is they run on different
7 operating systems, but they can expose their own APIs.

8 THE WITNESS: Exactly. It's like a translation
9 layer. It sits on top of the operating system and exposes its
10 own APIs, so that's what you can write to. But in order to be
11 effective translation here, it really has to allow you to
12 write something that can relatively easily be run on different
13 platforms.

14 THE COURT: Excuse me, Mr. Tulchin.

15 Q. BY MR. TULCHIN: And for the theory to work,
16 Professor Noll's theory to work, all three of these criteria
17 must be met; correct?

18 A. Yeah. Really -- Number 1 is important if it's
19 going to have any affect on OS competition, because even if
20 you've got a lot of people to write for your middleware, if it
21 only ran on Windows it wouldn't do anything to encourage
22 people to leave Windows. In fact, if anything, it would
23 encourage people to stay on Windows because that's what's
24 available.

25 So Number 1 you will need. Cross-platform has to

1 be there if you're going to have the potential leave to have
2 some affect on competition.

3 Q. All right. Let's just start, then, with criteria
4 Number 1, the first requirement. Did you look at any of the
5 testimony in this case in connection with your analysis of
6 whether or not Quattro Pro, WordPerfect and PerfectOffice were
7 cross-platformed at the time?

8 A. They were not -- the PerfectOffice suite and those
9 applications in particular were not cross-platformed in the
10 sense that they exposed the same set of APIs on different
11 operating system platforms.

12 Q. Well, let's look at your Slide 317. This is an
13 excerpt from the testimony of Robert Frankenberg,
14 Bob Frankenberg, the former CEO with Novell. And how does
15 this bear on what you were just saying, Professor?

16 A. I think he was asked directly about this question.
17 It says, the question, the beginning question is:

18 Now, yesterday on direct, you spoke a little
19 bit about certain applications being
20 cross-platformed. Do you recall that?

21 Answer. I do, yes.

22 Question. PerfectOffice 3.0 -- which
23 contains some of the software we just talked
24 about -- was released in December of 1994;
25 correct?

1 The answer is correct.

2 And was that written for Windows 3.1
3 platform; right?

4 Answer. Yes, it was.

5 Question. There was no version of
6 PerfectOffice that was released by Novell that was
7 written for any other platform; is that right?

8 Answer. No, not at that time. The intent
9 was to start with that. It was not released at
10 that time.

11 And then it goes on and says:

12 Okay. I think I have you. But let me ask you
13 more generally. From the time that Novell
14 acquired WordPerfect in June of 1994 until the
15 time Novell sold WordPerfect to Corel in 1996,
16 Novell never released a version of PerfectOffice
17 that was written for any other platform except
18 Windows 3.1?

19 Answer. That is true.

20 So that I think makes the point that at the time
21 those software products were not cross-platformed.

22 Q. And let's look at 318. This is an excerpt from the
23 testimony of Mr. Gibb on October 26. And again, this is on
24 the same subject matter, sir?

25 A. Yes. And I'll just go to his final answer, which

1 is:

2 Answer. I think we only did it for, you know,
3 Microsoft platform. We did for -- well, I guess
4 we had -- we had a DOS offering. But suite, the
5 entire thing we were doing was really based on
6 Windows 3.1 and Windows 95.

7 So that is really -- he's confirming what
8 Mr. Frankenberg said, which is, in fact, at the time they were
9 not cross-platformed and, therefore, at the time could not
10 have served this middleware role.

11 Q. And, of course, it takes some time even if Novell
12 started in '95 or '96 to make PerfectOffice for some other
13 platform, let's say for Linux, it takes some period of time
14 for the software developers to write the code to run on that
15 other platform; correct?

16 A. Yes. That's been the testimony in this case. I'm
17 not a software engineer, but my understanding is it does take
18 time. And, in fact, as Mr. Peterson mentioned today, and they
19 talked about when they started developing and then when they
20 ultimately released their product. Obviously developing a
21 product takes time.

22 Q. Now, I know you're not the technical expert in this
23 case, Professor. But do you have any understanding as to
24 whether or not the NameSpace extension APIs were available on
25 some other platform, such as OS2 or Linux or some other

1 operating system?

2 A. No, they were not. They were -- Microsoft had
3 developed those for the Windows platform. So those NameSpace
4 extensions were not, as I understand it, available on other
5 platforms.

6 Q. So let's go back to your Slide 313, your three
7 requirements. And we've been talking about criteria Number 1.
8 That for this middleware theory to work for some software like
9 WordPerfect or PerfectOffice to pose as a threat to
10 Microsoft's position in the PC operating system market, the
11 market where Windows competed, the first criteria is that
12 PerfectOffice or WordPerfect would have to be
13 cross-platformed; right?

14 A. That's correct.

15 Q. And in your analysis, were they at the time?

16 A. Well, certainly at the time they were not.

17 Q. And if the NameSpace extension APIs had been used
18 by Novell to write WordPerfect or PerfectOffice for the
19 Windows platform, would that make those products more likely
20 to be cross-platformed or less?

21 A. It certainly wouldn't contribute them to be more
22 cross-platformed to the extent it allowed -- those were
23 features that were available in Windows but not elsewhere.

24 Q. Now, let's go to the second criteria. And
25 Professor Noll said that for middleware to pose a threat, the

1 middleware software must be available on all or nearly all
2 PCs. Do you recall that?

3 A. Yes.

4 Q. Now, in your analysis, was PerfectOffice or
5 WordPerfect or Quattro Pro sufficiently popular at the
6 relevant time to be available on all or nearly all PCs?

7 MR. TASKIER: Your Honor, there's a lot of leading
8 going on.

9 THE COURT: It is. But it's okay. Go ahead. You
10 can answer. Just try not to lead. There's always a delicate
11 balance of directing attention and leading.

12 THE WITNESS: Okay. Yeah. If you look at the same
13 evidence we looked at before, which is go back and look at the
14 fraction of even Windows PCs that had either WordPerfect's
15 software containing these features or Quattro Pro's software
16 or the PerfectOffice, you'll see that there was a very small
17 fraction of Windows PCs had.

18 And this is really important, actually, because the
19 idea -- and it really relates -- 2 is closely linked up to
20 Number 3, because the whole idea of middleware is you're
21 trying to get ISVs to say, I'm not going to write to the
22 operating system. I'm going to write to the middleware. Now,
23 why would they want to do that? Well, the primary reason is
24 that gave them access to more customers.

25 So if I was in a marketplace where there were

1 20 different operating systems that each of which had five or
2 10 -- you know, between, you know, less than 10 percent of the
3 market, then it would be a tough choice because if there was a
4 piece of middleware that ran on all 20 operating systems, I
5 could write to that and reach all of the operating systems.
6 The alternative would be to write individual program, each of
7 which would be reaching less than 10 percent of the customers.

8 But that's not the situation we have here in the
9 X86 marketplace.

10 Q. What is this X86? I'm sorry. What's that?

11 A. The Intel-Compatible X86 PC operating marketplace.
12 It would be nice if you had a shortcut for that, wouldn't it,
13 as many times as that's come up in this trial?

14 The basic idea here is Windows was 90-plus percent
15 of that marketplace. So just by writing to Windows you could
16 reach 90 percent of the customers right off the bat. If you
17 had a piece of middleware that was on 10 percent of those PCs,
18 you're talking reaching only 10 percent of the customers I
19 could reach on Windows. Very little incentive for somebody to
20 say, I'm going to write to the middleware rather than write
21 directly to Windows, you know, because it's not a good
22 tradeoff.

23 Secondly, because middleware adds another layer to
24 the process, in general it's not as easy to write as good of
25 an application or as fast or as successful of an application

1 right into the middleware rather than writing directly to the
2 operating system. And because of that, you're saying, I'm
3 going to get less functionality typically and reach a smaller
4 number of people? That's not going to be attractive.

5 So the only way middleware is going to be
6 successful is if it can be on a very large number of machines,
7 particularly almost all of the Windows machines and also
8 mostly of the machines on the other platforms and the other
9 operating systems that would then have the potential at least
10 if it provided a good enough operating system -- good enough
11 environment for ISVs to evolve and to start attracting
12 developers away from Windows.

13 So this being available on nearly all PCs is really
14 important. You don't really get to Number 3 if you can't be
15 on lots of PCs.

16 Q. And in connection with this Number 2 criteria, and
17 these were Professor Noll's words, right? Available on all or
18 nearly all the PCS; correct?

19 A. I don't know if that's the precise words, but
20 certainly that concept he has said and certainly just about
21 anybody who has talked about these.

22 Q. Well, I can find them in the transcript if you want
23 to see them again. The pages we've referenced. But let's
24 just go on.

25 I want to show you the same slides that we looked

1 at earlier, very briefly. We won't spend a lot of time with
2 it. And this is in connection with this second criteria. Can
3 we look at Slide 307? And this is WordPerfect in the relevant
4 period.

5 A. Yes. Let's take '94, which is the year before
6 we're talking about, the Windows 95 coming out. WordPerfect
7 word processor in this case, and this is in terms of sales, is
8 out there on 20-something percent of PCs. And, you know, you
9 might say isn't it the installed base that matters, the number
10 that are out there? But in this case, the middleware software
11 is going to be available on the new versions, so it's really
12 the sales data that's really the thing we need to look at.

13 So we're talking less than -- we're talking
14 somewhere in the 20 percent range in '94 and even a lower
15 number if you get to the early part of '95. But
16 20-something percent of the people who have office
17 productivity applications, which is even an even smaller
18 fraction of people who have Windows, it's not making it very
19 attractive as middleware platform.

20 Q. So just hypothetically, let's say you looked at
21 install base and WordPerfect share was 50 percent, was half,
22 would that meet the criteria of being available on all or
23 nearly all PCs?

24 A. No; because in that case you'd be giving up almost
25 half the customers on Windows by writing to middleware rather

1 than writing directly to the operating system.

2 Q. And then let's look --

3 A. And an ISV would not find that very attractive.

4 Q. Let's look at 309. There is spreadsheets, the
5 market share for Quattro Pro was even lower; correct?

6 A. Yeah. It was lower, so everything we just said
7 about WordPerfect would, of course, hold even stronger if we
8 were to focus on the spreadsheet.

9 Q. And then let's look at the suite market. This is
10 your Side 311, office suites written for the Windows platform.
11 PerfectOffice share is way below 10 percent in all the
12 relevant years; correct?

13 A. That's correct. So again, that would mean an ISV
14 who would choose to write his application to APIs distributed
15 with PerfectOffice suite would be limiting his market
16 enormously instead of being able to reach all of those people,
17 100 percent of the people by writing to Windows, he would be
18 able to reach a small fraction of those people by writing to
19 the APIs set of -- that was distributed with PerfectOffice.
20 That's not even mentioning the fact that the functionality
21 provided by those APIs was smaller much less than the
22 functionality provided by Windows. So you'd be suffering both
23 in terms of what you had to work with and how many people you
24 could reach.

25 From an ISV's point of view, that's just not going

1 to be economically attractive. That's really what undermines
2 the theory.

3 Q. Well, let's look at the third requirement, and
4 we'll go back. You've testified a little bit about this
5 already. But in your analysis in the work you did prior to
6 today, Professor, did you find any middleware that exposed
7 enough APIs, and let's extend the period past '96, let's say
8 in the period from 1994 to 1999, was there ever any middleware
9 that met this requirement of exposing enough APIs to allow
10 ISVs profitably to write full feature, personal productivity
11 applications that rely sole on the APIs of the middleware?

12 A. There certainly weren't any that I identified.
13 There weren't any that had been identified by the testimony
14 that I've seen. And the findings of fact that we cited
15 earlier pointed out that no such middleware existed as of 1999
16 and even questioned whether such middleware would exist in the
17 years after that.

18 Q. Well, let's look at finding 28, just again, Slide
19 314. Is this the sentence you were just referring to?

20 A. Yes. This is one of them. It says:

21 Currently -- and this is as of 1999 -- no
22 middleware product exposes enough APIs to allow
23 independent software vendors, ISVs, in quotes,
24 profitably to write full-featured personal
25 productivity applications that rely solely on

1 those APIs.

2 And this is really the step that you need. If the
3 middleware theory is going to work, if the middleware theory
4 is going to breakdown the application barrier entry, you need
5 to have ISVs willing to write these types of applications to
6 those pieces of middleware. And according to the findings,
7 according to the evidence that I've seen, such middleware did
8 not exist as of 1999.

9 Q. And then finding 32, Slide 315, you showed us this
10 briefly before, but it says even if this middleware investment
11 were already flourishing it would be several years before the
12 barrier could be eroded enough. Do you see that?

13 A. Yes. I mean, that just makes the point that if
14 there was going to be an effect, it would even take time
15 beyond that.

16 But I still think the most important part was that
17 even the other middleware products didn't have the features
18 necessary to perform this middleware, to satisfy
19 Professor Noll's middleware theory that allowed people to
20 write the kind of applications that would be effective at
21 breaking down the application barrier to entry and allowing or
22 generating greater competition or affecting even competition
23 in the X86 PC operating system marketplace.

24 Q. All right. We've been calling that the PC
25 operating market, just to make it a little easier. Okay?

1 A. I'm willing to go with that.

2 Q. Let's go back to Slide 313 just for a minute.

3 Again, these are the three requirements from Professor Noll's
4 theory, so you understand --

5 MR. TASKIER: Objection, Your Honor.

6 THE COURT: Sustained. Sustained. When you say
7 theory, you mean middleware theory. You don't mean --

8 MR. TULCHIN: Correct. This is the middleware
9 theory.

10 THE COURT: But the third requirement he did not
11 testify to that way.

12 Q. BY MR. TULCHIN: Professor, I just want you to tell
13 the jury the following. Assume with me for a second that
14 PerfectOffice and WordPerfect were cross-platformed at the
15 time, that they met the first requirement, and just assume
16 with me for a second that they were available on 100 percent
17 of PCs or something very close to that, nearly all. As you
18 understand the middleware theory, how it all, could
19 WordPerfect or PerfectOffice break down the applications
20 barrier to entry and threaten Windows' position in the
21 operating system market under Item 3?

22 A. Well, there certainly has been no evidence that
23 they would be sufficiently popular to attract ISVs, to attract
24 developers to write even under those conditions. First off,
25 partly owing just to the fact that writing to Windows was very

1 attractive. You reach 90-plus percent of anybody you could
2 reach in that PC operating system marketplace simply by
3 writing to Windows. And if you wrote to Windows you had
4 access to all that functionality that Windows supported. If
5 you wrote to these, you would have far fewer set of APIs. And
6 the evidence that's been presented in this case is that there
7 were not any applications written to these -- any applications
8 certainly of this nature that were written to these APIs.

9 Q. And why did it have to be --

10 A. It is a long distance from essentially no
11 applications being written to having enough applications being
12 written that would break down the applications barrier to
13 entry.

14 Q. And my question, Professor, is, why did they have
15 to be of that nature, full-featured productivity applications,
16 in order to pose a threat to Windows, in order to be able to
17 break down the barrier?

18 A. There's two important parts there. One is they
19 have to be sufficiently attractive to attract ISVs. It's not
20 about what ISVs could do, it's about what they would do. It's
21 not like if you held a gun to their head could they do
22 something. It's really would they have the incentive to do
23 that? Would they find it profitable? If you go back to this
24 thing, we talk about profitably. You go back to the findings
25 of fact. You talk about profitably. It has to be in their

1 interest to write these. And that's really where the rub
2 really comes in, that they really wouldn't have the interest
3 to write to these applications.

4 Now, the question, why would they need to be
5 full-featured? Well, again, this goes back to what's going to
6 make an operating system attractive. You don't move to an
7 operating system because you want to do one thing or two
8 things. You go to an operating system because you want to do
9 a lot of the things that you want to do with your PC. Because
10 you're going to switch that operating system, it's going to
11 have to support all the different things you want to do
12 including all those things that you spend lots of time with
13 like full-featured productivity applications.

14 Q. With respect to the middleware theory of -- what is
15 your opinion as to whether requirement 1 and requirement 2 and
16 requirement 3 have been met given the facts and data in this
17 case?

18 A. I don't see how the software issue in this case
19 meets those three criteria.

20 Q. Any of the three?

21 A. It doesn't appear to meet Number 1 because most of
22 it, in fact, none of it was cross-platformed at the time. I
23 know that they talk about plans to make it cross-platformed,
24 but at the time it certainly wasn't cross-platformed. Given
25 the numbers we saw before, even but for any effect of the

1 NameSpace extensions, it wasn't going to be available on a
2 sufficient number of PCs, partly because even productivity
3 applications weren't put on the majority of PCs at the time,
4 let alone the fact that this particular software package would
5 have had a relatively small share of PCs. So Number 2
6 wouldn't have been satisfied.

7 And Number 3, I think even according to the
8 testimony of Novell's experts in this case, that those pieces
9 of software that Novell middleware didn't expose enough APIs
10 to attract developer interest. So to me my reading of the
11 economic situation is that this middleware theory would not be
12 tenable. It just can't really work. It's not going to work
13 in this case.

14 Q. Let's go back to Slide 303. This was the one we
15 looked at earlier, and after putting up the two opinions, you
16 said there were additional problems. And I want to talk for a
17 moment about the first of the two additional problems on
18 Slide 303.

19 You testified earlier, sir, about the fact that if
20 the NameSpace extension APIs had been available, if support
21 hadn't been withdrawn for them, the PerfectOffice in
22 WordPerfect products would have made Windows more desirable.
23 Do you remember that testimony?

24 A. Yeah. I mean, it would have to some extent
25 enhanced the functionality that people had available on

1 Windows. People would have had --

2 MR. TASKIER: Your Honor, can we have a side bar?

3 THE COURT: Sure.

4 (Whereupon, the following proceedings were
5 held at the bench:)

6 MR. TASKIER: I've read his report several times,
7 at least. I don't recall this in his report. I don't recall
8 this in his deposition. I think this is all new.

9 MR. TULCHIN: Your Honor, we've been through this,
10 and there was no objection to it the first time around.

11 THE COURT: You've -- it seems to me that's the
12 official ground. We've been through it.

13 MR. TULCHIN: Yeah. We've been through it. But I
14 have just a few questions so he can show the testimony on
15 which he's relying for this Number 1.

16 THE COURT: Okay. It's not been objected to so
17 far.

18 MR. TULCHIN: It hasn't.

19 THE COURT: It's part of the case. It's clearly
20 become part of the case as the case develops, so I understand.
21 It's overruled. And we've been through it.

22 (Whereupon, the following proceedings were
23 held in open court:)

24 Q. BY MR. TULCHIN: Professor Murphy, in connection
25 with point Number 1, did you ask us to prepare some slides?

1 A. Yes, I did.

2 Q. Let's look at Slide 320. And I think you talked
3 about Mr. Frankenberg earlier. Is this in part what you were
4 relying on for your testimony, that if Novell had been able to
5 use the NameSpace extensions the way they wanted, the product
6 would have been even more desirable?

7 A. Yes. I mean, actually this is something I
8 discussed in my expert report, as well. I mean, so this was
9 not the first time this came up. This was in my expert
10 report. But Mr. Frankenberg made the same point at trial
11 where he said, especially for those who use WordPerfect
12 products, they would be able to use Windows 95, and they
13 wouldn't otherwise have been able to do that if they wanted to
14 continue to use WordPerfect.

15 That's what he says. I think the truth of the
16 matter is they could continue to use older versions of
17 WordPerfect did continue to run on Windows 95. But I think
18 what he's referring to is the new versions would potentially
19 have been available earlier according to Novell's theory. And
20 the question is:

21 If anything that would increase the sales of
22 Windows 95; correct?

23 And the answer is. Yes.

24 Question. Having a good PerfectOffice
25 product out there would make Windows 95 even more

1 popular than it turned out to be; true?

2 Answer. True.

3 Question. If PerfectOffice had been
4 released in 1995 by Novell and had been successful
5 and had gained a reasonably good share of the
6 market, how, if at all, would that have affected
7 sales of Windows?

8 Presumably it would have increased sales
9 of Windows. That's the answer.

10 Question. And would that have made
11 Windows 95's market share even higher than what it
12 turned out to be; correct?

13 Answer. Yes.

14 Q. And then there's one more slide on this subject,
15 this is from Professor Noll. 321. And this was
16 Professor Noll testifying on November 15. And I asked him, I
17 just read to him the same testimony from Mr. Frankenberg that
18 you just read to us, Professor Murphy. And I said:

19 You have no basis for disagreeing with
20 Mr. Frankenberg, the former CEO, do you, sir?

21 And here's his answer. I completely
22 agree. I see no reason to disagree with it.

23 Now, how does this testimony from Mr. Frankenberg
24 and Professor Noll affect your analysis of the theories that
25 Professor Noll offered for how WordPerfect or PerfectOffice if

1 they had come out a little earlier might have affected
2 competition in the PC operating system market?

3 A. Well, this points out that they very well could
4 have worked in the opposite direction of his theories, that
5 they actually could have made Windows more popular. So if
6 think had, in fact, it very well could have gone in the
7 opposite direction, making Windows even more popular, and
8 making people less willing to move to other operating systems.
9 So it could have had the reverse effect for precisely this
10 reason.

11 Q. Now, Professor Murphy, I think earlier in your
12 testimony you referred to a first mover advantage or first
13 in-advantage. Do you remember that?

14 A. I don't recall that precise sentence, but I
15 certainly have talked about that numerous times. The basic
16 idea is if you're the first one in the marketplace people get
17 to know your product, get accustomed to your product, as in
18 any market that will give you an advantage.

19 Q. And how did that connection with suites, with
20 Microsoft Office and competitors?

21 A. I think it operated a couple times. One, Microsoft
22 was the early developer for Windows in general, which gave
23 them a head start; secondly, Microsoft was the first to really
24 move in the direction of suites as a concept and popularize
25 suites, that gave it another kind of early mover advantage.

1 Those two things together are part of what led to Microsoft's
2 success.

3 Q. And have you prepared a chart in a different
4 market, different products entirely that depicts what you're
5 referring to when you talk about a first mover advantage?

6 A. Yes. I think I did. I prepared one from the MP3
7 player marketplace. That is the personal music players, I
8 guess is the best way to talk about it.

9 Q. Could we put up Slide 324.

10 And what is this about, Professor Murphy?

11 MR. TASKIER: Your Honor, the same objection I had
12 before.

13 THE COURT: This was not in the report or --

14 MR. TULCHIN: It is. It's certainly my
15 recollection.

16 MR. TASKIER: The portable media players?

17 THE WITNESS: No. The first mover advantage was
18 discussed, I do believe.

19 THE COURT: But not the chart.

20 THE WITNESS: But not the chart, no.

21 THE COURT: Put the chart down. Just talk about
22 it.

23 MR. TULCHIN: Okay.

24 Q. BY MR. TULCHIN: In connection with -- what did you
25 call it? The personal music devices?

1 A. I don't know. This is -- who wants another
2 tortured market definition? It's the things you carry in the
3 pocket that you listen to music on, those are the kind of
4 things we're talking about. Let's not be over technical.

5 Q. Who was first to that market?

6 A. Well, the first -- you know, when you say first in
7 the market, it's always a little tough. But the first
8 successful one was Apple with its iPod. They really kind of
9 popularized the -- that product.

10 Q. And at a subsequent date, did Microsoft come out
11 with a product that competed with the Apple iPod?

12 A. They came out with a product, I believe it's called
13 the Zune player.

14 Q. Would you spell that for the court reporters?

15 A. I think it's just Z-U-N-E. But it never was
16 sufficiently popular enough that I learned how to spell it.
17 But it wasn't very successful.

18 Q. And in connection with your work in this case, did
19 you compare the Apple market shares and the Zune market share
20 and in effect match them to what had happened in the suite
21 market?

22 MR. TASKIER: Your Honor, again --

23 THE COURT: They can do it. You know, I'm glad
24 they can make use of this. Obviously it sticks in their craw
25 that they relate to market. So if they want to make use of it

1 in this case, let them go ahead.

2 THE WITNESS: Basically what you see is the same
3 thing. They were in early. They were successful, and they
4 continued to be successful. And, you know, that was a
5 combination of being in early and also continuing to provide
6 the kind of products that people wanted. And that's a tough
7 combination to beat. If you're incumbent and you continue to
8 meet people's needs, that makes a tough combination to beat.
9 But I think Mr. Peterson talked about that same thing today.

10 Q. BY MR. TULCHIN: Professor Murphy, just a few more
11 questions on direct. In your opinion was it ever the case
12 that WordPerfect or Quattro Pro or PerfectOffice or the
13 combination of all three threatened to diminish, erode or
14 destroy the applications barrier to entry?

15 A. No, for the reasons I said before. Neither of
16 those theories works once you look at the actual conditions of
17 the marketplace. On top of that you have these additional
18 problems I pointed out.

19 Q. And in your opinion did WordPerfect or Quattro Pro
20 or PerfectOffice either alone or in combination and even if
21 combined with App Ware and/or OpenDoc, did they ever threaten
22 in any way to diminish or erode or destroy the applications
23 barrier to entry?

24 A. No; because those same problems would affect that
25 broader set of products.

1 Q. Would your opinion change in any way if you
2 combined the effects of the Microsoft conduct to which
3 reference is made in the findings of fact that you looked at
4 with any of these products, Novell products? Would any of
5 that have had the ability to threaten or erode or diminish
6 Windows market share during the relevant period?

7 A. I guess the way I would put it, it wouldn't change
8 my conclusion about the Novell products effects. That is, had
9 Novell's products come out earlier because they didn't -- they
10 weren't delayed, that conclusion wouldn't be affected by
11 considering what happened in those other cases --

12 MR. TULCHIN: Nothing further, Your Honor.

13 THE WITNESS: -- regarding Novell's products.

14 MR. TULCHIN: Thank you, Professor.

15 THE COURT: Mr. Taskier?

16 MR. JOHNSON: Your Honor, just wondering, we
17 apparently have all day tomorrow with Professor Murphy.

18 THE COURT: Well, then we can send the jury home.
19 That's good. Let's get started.

20 MR. JOHNSON: Maybe we can send them home and get
21 started tomorrow.

22 THE COURT: No, not now.

23 You all can stay until 2 o'clock, can't you?

24 We'll stay till 2:00. By information, we may be
25 able to send you home early tomorrow. We'll let you know.

CROSS-EXAMINATION

1
2 BY MR. TASKIER:

3 Q. Good to see you, Dr. Murphy.

4 A. Good to see you, as well.

5 Q. It's been a couple years, hasn't it?

6 A. Yes, it has. Over two, I think.

7 Q. It was October of 2009. The courtroom has sort of
8 switched, but you were in the witness seat in
9 ZN Mariners vs. Heaton, an antitrust monopolization case?

10 A. I recall.

11 Q. And you were the defense witness there, too;
12 correct?

13 A. That's correct.

14 Q. And you in that case opined that there was no
15 monopoly, and there was no anti-competitive activity that --

16 MR. TULCHIN: Objection on relevance grounds, Your
17 Honor.

18 THE COURT: That I'll allow. Nothing else.

19 THE WITNESS: That's correct.

20 Q. BY MR. TASKIER: You appear very frequently for
21 defendants in these cases, don't you, sir?

22 A. Yes, I have.

23 Q. And at the time of your deposition in this case
24 it's true that you've never served as a testifying expert for
25 a plaintiff in a private antitrust monopolization case?

1 MR. TULCHIN: Same objection.

2 THE COURT: Overruled.

3 THE WITNESS: I believe that's correct. I've done
4 some consulting work, but I've not testified for plaintiffs.

5 Q. BY MR. TASKIER: Now, as of the time of your
6 deposition in 2009, and I don't have any more recent, your
7 resume listed about 60 different times in the prior four years
8 where you'd been deposed, issued a report or testified at a
9 trial; isn't that right?

10 A. Yeah. I mean, all of the 60 is kind of double
11 counted because many of those cases I'd issue one or more
12 reports, and you're deposed and maybe testify. So....

13 Q. That's something in the order of 15 times of
14 testimony or report or rebuttal report or deposition in the
15 course of each of those four years?

16 A. Yeah. Probably a little more than that, actually.
17 Yeah. That wouldn't be out of range.

18 Q. And in 2009, as you said before, you were a
19 principal with Chicago Partners; correct?

20 A. That's correct. I was a principal of
21 Chicago Partners, which is essentially where I still work
22 today. We were just bought by somebody else.

23 Q. And Navigant is a consulting firm; correct?

24 A. Navigant is a consulting firm.

25 Q. And it was a consulting firm, it was a spinoff of

1 the old Arthur Anderson Consulting?

2 A. You know, I believe that to be correct, but my
3 Navigant history lesson is not up to date.

4 Q. Now, the time period of 2000 and 2009, Microsoft
5 was one of Chicago Partners top 10 clients, wasn't it?

6 A. I would believe that would be true, yes.

7 Q. And you testified at your deposition that your
8 hourly rate then was \$890 an hour?

9 A. I believe that's correct.

10 Q. So you've gotten a raise?

11 A. Yeah. I've gotten a raise since then.

12 Q. You still have (unintelligible) by \$100.

13 MR. TULCHIN: Move to strike the comment.

14 THE COURT: It's struck.

15 Q. BY MR. TASKIER: At the time of your deposition,
16 you said you personally received about 80 percent of that fee?

17 A. Yeah. I think it's currently -- I think that's
18 right. I think I still get 80.

19 Q. So you personally receive about 80 percent now of
20 \$980?

21 A. That would be correct.

22 Q. So that's like \$784?

23 A. I haven't done the math, but it sounds about right.

24 Q. All right. Now, you also testified that you
25 receive about 5 percent of the fees that are generated by

1 Chicago Partners staff who work for you on this matter, on
2 these matters; right?

3 A. Well, that would be a subset of the staff. I think
4 we discussed that at the deposition. There are a number of
5 people who work on it for whom I wouldn't have received fees.
6 It depends on who's doing the work, I guess. But for those
7 people who I do receive the fees, it typically would be in the
8 range of 5 percent.

9 Q. And that's over since approximately 2000; correct?

10 A. No. Actually mostly in the earlier years I didn't
11 get any fees on people who worked there.

12 Q. But Chicago Partners did receive fees from
13 Microsoft; correct?

14 A. They did, but I didn't.

15 Q. Is it fair to say that Chicago Partners has
16 received and now Navigant has received millions of dollars
17 over the last 10 or 12 years?

18 MR. TULCHIN: Objection on relevance grounds.

19 THE COURT: Overruled.

20 THE WITNESS: Yeah. I think we've done work for
21 Microsoft totalling a million dollars, yes.

22 Q. BY MR. TASKIER: And you have personally, as you
23 said before, have done quite a bit of work in the past decade
24 for Microsoft?

25 A. Yes, I have. I have done a fair amount of work for

1 Microsoft.

2 Q. So you were retained I think initially as an expert
3 in the remedies phase of Microsoft in the case in Washington,
4 DC, the State of New York vs. Microsoft Corporation. That was
5 your first appearance in the Microsoft -- as a Microsoft
6 expert?

7 A. I think that was my first appearance as an expert
8 anywhere. But, yes, I think that was it.

9 Q. And you submitted a report in that case?

10 A. Yes, I did.

11 Q. And you gave direct expert testimony that was
12 submitted to the Court in that case?

13 A. I think, yeah. It was written testimony. There
14 was not direct testimony in that case.

15 Q. And there were depositions, of course, as well?

16 A. There were depositions, yes.

17 Q. And trial examination.

18 A. Cross-examination at trial. But the testimony --
19 the direct testimony was written as opposed to what we just
20 did here, which was direct.

21 Q. And isn't it a fact that you were retained also
22 subsequent to that as an expert for Microsoft in
23 Sun Microsystems vs. Microsoft.

24 A. Yes, I was.

25 Q. And you submitted a report in that case?

1 A. Yes, I did.

2 Q. And you testified in this case?

3 A. Yes, I did.

4 THE COURT: By deposition, I think. I think.

5 MR. TASKIER: I think that's -- I think there's
6 trial testimony.

7 MR. JOHNSON: How did you know that, Your Honor?

8 THE COURT: I think it was trial. It might have
9 been something else.

10 MR. TASKIER: I have it was trial testimony in --

11 THE COURT: It might have been something short of
12 trial.

13 Q. BY MR. TASKIER: Now, putting aside conduct that
14 had already been found in the Washington, DC, case to be
15 anticompetitive by Microsoft; right? The Washington, DC, case
16 clearly found that there were anticompetitive conduct by
17 Microsoft; correct?

18 MR. TULCHIN: Objection, Your Honor.

19 THE COURT: Sustained. Sustained.

20 MR. TULCHIN: Thank you.

21 Q. BY MR. TASKIER: Isn't it true that in that case,
22 on Microsystems, it was your expert opinion that Microsoft did
23 not commit any anticompetitive conduct?

24 MR. TULCHIN: Same objection, Your Honor.

25 THE COURT: In which case?

1 MR. TASKIER: We're talking about Sun Microsystems,
2 Your Honor.

3 THE WITNESS: I'd have to go back and check, but it
4 was a preliminary injunction.

5 THE COURT: I'm going to sustain that. We're not
6 going to litigate other cases here. You can ask him about if
7 he testified in other cases, but we're not going to relitigate
8 other cases.

9 MR. TASKIER: Your Honor, I'm only going to elicit
10 the fact that he gave the testimony that there was no
11 anticompetitive conduct in any of these cases.

12 MR. TULCHIN: That's --

13 THE COURT: And that's fine. I'm glad you want to
14 elicit that, but I'm going to sustain the objection.

15 MR. TASKIER: I'm sorry. I didn't hear the last
16 part.

17 THE COURT: The objection is sustained.

18 Q. BY MR. TASKIER: Isn't it a fact that you were
19 retained as an expert for Microsoft in the California class
20 action of coordinated proceedings of Microsoft cases?

21 A. Yes, I was.

22 Q. And you submitted a report in that case?

23 A. Yes, I did.

24 Q. And you were deposed in that case?

25 A. Yes, I was.

1 Q. And you were retained by Microsoft as an expert in
2 the Maryland multidistrict litigation, in re: Microsoft
3 antitrust litigation?

4 A. Yeah. I mean, those two cases are basically the
5 same case. They're just in different places.

6 Q. And you submitted reports and were deposed in that
7 action, as well?

8 A. Very similar to the California report for the
9 reason I just stated.

10 Q. And in the Arizona class action, you were an
11 expert, as well?

12 MR. TULCHIN: Same objection, Your Honor.

13 THE COURT: He was retained in the Arizona case.
14 He just asked where he was retained.

15 Q. BY MR. TASKIER: You were retained in the Arizona
16 case, as well?

17 A. Yes, I was. And as I just testified it's not
18 surprising because it's basically the same report in Arizona
19 that was filed in California and others.

20 Q. And you were retained in the Minnesota class
21 action?

22 A. Yes.

23 Q. And you were retained in the Iowa class action?

24 A. Yes.

25 Q. And you were retained in the Mississippi class

1 action?

2 A. Yes.

3 MR. TULCHIN: To the extent that counsel is
4 implying that these were cases brought by those states, Your
5 Honor, I think we should correct that.

6 THE COURT: They're class actions brought in these
7 states class actions by consumers, I assume. Is that right?

8 MR. TASKIER: That's correct, Your Honor.

9 Q. BY MR. TASKIER: And you were retained by Microsoft
10 in the California case of Go Computer vs. Microsoft; correct?

11 A. Yes, I was.

12 Q. And all of these cases related at least in part to
13 Microsoft's conduct regarding Microsoft Windows; correct?

14 A. Yes. I believe all of those cases had something at
15 least to do with Windows, yes.

16 Q. And all of the cases, like the case between Sun and
17 Microsoft and Go Computer and Microsoft, all of those cases
18 came after the case against Microsoft in Washington, DC in
19 2002?

20 MR. TULCHIN: Objection, Your Honor.

21 THE COURT: I'm going to sustain. You're here to
22 try the Novell case, not any of the other cases. And that's
23 why we're here, and that's the only reason you're here. So
24 sustained and move on.

25 Q. BY MR. TASKIER: And it's, of course, true that

1 you've worked with Microsoft's lawyers over all these years
2 with these cases?

3 A. Yes. I've worked -- I generally don't work by
4 myself, so yes, I did work with Microsoft's lawyers.

5 Q. And in each of those cases was Microsoft
6 represented by the same law firm?

7 A. I don't know.

8 Q. Was --

9 A. Well, at least -- probably, but I can't say for
10 sure.

11 Q. Was that Sullivan and Cromwell?

12 MR. TULCHIN: Objection to all of this, Your Honor.

13 THE COURT: Sustained.

14 THE WITNESS: Actually, I don't believe --

15 Q. BY MR. TASKIER: Now, you didn't write your entire
16 report yourself, you had your staff help; correct?

17 A. Absolutely.

18 Q. And apart from your staff, did anyone else write
19 your report in any manner?

20 A. No. We received comments from attorneys working on
21 the case, but it was our work, and me and my staff put the
22 report together.

23 Q. And you retained --

24 Your Honor, may I ask about other cases for
25 Microsoft, or is that --

1 THE COURT: I think you've probably covered the
2 waterfront, but if you want to ask him if he was retained in
3 other cases for Microsoft, that's fine.

4 MR. TASKIER: Thank you.

5 Q. BY MR. TASKIER: You were retained as an expert by
6 Microsoft in Detail Holdings --

7 THE COURT: Say, were you retained otherwise. I
8 think there comes a point where there's a 403 problem. So
9 have you been retained by Microsoft in other cases?

10 THE WITNESS: Yes, I have.

11 Q. BY MR. TASKIER: Now, let me show you an article
12 you wrote. Do we have a copy of that? 2001.

13 With the Court's indulgence, Your Honor.

14 MR. TULCHIN: We certainly object to the use of
15 this article, Your Honor. Pure hearsay. And I think I know
16 what the purpose is. I haven't heard any questions yet, but
17 in anticipation I just want wanted to mention that.

18 THE COURT: Okay. Let's hear a question, and then
19 I'll rule.

20 Q. BY MR. TASKIER: You mentioned writing articles as
21 part of your credentials today, sir. Is this Plaintiff's
22 Exhibit 618 an article that you wrote with a faculty colleague
23 and authored an article entitled, Rethinking Antitrust that
24 was published in the Wall Street Journal on February 26, 2001?

25 A. Yes. This is an article -- this is a newspaper

1 article that we wrote. When I spoke earlier about articles,
2 actually just to clarify, these are not the kind of articles I
3 was talking about. I was talking about the articles I've
4 written in chapters I'd written in academic journals. That's
5 not that I don't write these.

6 Gary and I, in fact, frequently write. Typically
7 Wall Street Journal is the number one place. Actually, they
8 asked us to write something just the other day. We get
9 requests from the Wall Street Journal to write for them
10 regularly. Gary and I write together quite a bit.

11 Q. And it's a significant place to be published, isn't
12 it, sir?

13 A. Yeah. I think it's a good way -- it's not what we
14 do, you know, as our academic life, which is, you know,
15 basically in other places. But, yeah, I think it's -- the
16 Wall Street Journal is a good place to -- you know, when you
17 have something to say or want to comment on a topic, it's a
18 good place to write.

19 Q. Well, this particular article, sir, was published
20 on the very day that US Court of Appeals --

21 MR. TULCHIN: Objection, Your Honor. I know where
22 he's going with this, and it's subverting the Court's ruling
23 before trial on this very subject.

24 MR. TASKIER: No, it isn't, Your Honor.

25 THE COURT: Just based on what I've heard already,

1 the objection is sustained.

2 MR. TASKIER: I'm sorry, Your Honor? I couldn't
3 hear.

4 THE COURT: Based on what I've heard already, the
5 objection is sustained.

6 MR. TASKIER: Can I be heard on a side bar, Your
7 Honor, on this?

8 THE COURT: No, you can't. Ask him about his
9 opinions on this case. You're here on one case and one case
10 only to the extent that I have allowed findings of fact on
11 another. Each case turns on its own facts.

12 Q. BY MR. TASKIER: Dr. Murphy, I'd like to confirm
13 some of the areas in which I presume you agree with
14 Professor Noll. You I believe accepted in this case pursuant
15 to the findings of fact that the relevant market is the
16 licensing of all Intel-compatible PC systems worldwide.

17 A. Yes, I did.

18 Q. And that is from the findings of fact in the case
19 in Washington, DC, that is binding here.

20 A. I believe that's where it was from, yes.

21 Q. And you also accepted the findings I believe that,
22 quote, Microsoft enjoys so much power in the market for
23 anticompetitive system that if it wished to exercise its power
24 solely in terms of price, it could charge a price for Windows
25 substantially above that which could be charged in the

1 competitive market in order to do so for a significant period
2 of time without losing an unacceptable amount of business to
3 competitors. In other words, Microsoft enjoys monopoly power
4 in the relevant market.

5 A. I did. That's from the findings. And possession
6 of monopoly power, as I said earlier today, it's something I
7 accepted for purposes of this case.

8 Q. And you're familiar and accept the findings which
9 the jury has heard with respect to Microsoft's conduct against
10 Netscape, Navigator and Sun's Java, as well.

11 A. Yes. I mean, that's what's on the table in this
12 case.

13 Q. Now, you submitted your direct testimony in the
14 remedies phase to the Court in Washington, DC.

15 MR. TULCHIN: Objection, Your Honor.

16 THE COURT: So far I'll allow it. I'm not sure how
17 much more. Go ahead.

18 MR. TASKIER: Your Honor, there are opinions that
19 he's rendered in this case that merit --

20 THE COURT: I've overruled the objection.

21 MR. TASKIER: Thank you.

22 Q. BY MR. TASKIER: Let me show you a copy of your
23 direct testimony in that case, Dr. Murphy. This is the copy
24 of your direct testimony, sir?

25 A. I believe it is. It's from nine and a half years

1 ago, so I can't say I remember every word, but....

2 Q. I'm not going to ask you about every word.

3 Let me address -- ask you to look at Paragraph 20.

4 Let me ask you to look at Paragraph 20.

5 A. Okay.

6 Q. And in that, you state, in carrying out --

7 MR. TULCHIN: Objection, Your Honor. This is not
8 in evidence.

9 THE COURT: Approach the bench. Let's see it.

10 (Whereupon, the following proceedings were
11 had at the bench:)

12 THE COURT: So what are you going to ask?

13 MR. TASKIER: Your Honor, this entire report is
14 filled with prior statements under oath by this witness that
15 are inconsistent with his testimony here today.

16 THE COURT: No. No. I'm sorry. Paragraph 20, I
17 don't what it's got to do with anything.

18 MR. TASKIER: Paragraph 20, I wish to elicit from
19 him that he applied in carrying out this analysis, I've
20 accepted as accurate the Court of Appeals decision in the
21 District Court findings of fact both as a general matter and
22 in so far as these findings relate to the determinations
23 upheld on appeal. And he applies -- that he applies those.
24 And that his analysis as he --

25 THE COURT: So what? I mean, I can understand you

1 want to try another case instead of this one. But you're
2 trying this one.

3 MR. TASKIER: No, Your Honor, I'm not trying to try
4 another case. May I finish?

5 MR. TULCHIN: If I may interject this, Your Honor.
6 What this is about in part by talking about the remedy phase,
7 Mr. Taskier has quite deliberately violated the Court's
8 instructions about how we were going to treat collateral
9 estoppel. We weren't going to communicate that this was the
10 case brought by the Department of Justice. We were going to
11 call this a case in the District of Columbia. The remedies
12 phase which he's referred to several times now is an effort to
13 communicate to at least those jurors who remember the DOJ case
14 exactly what this was. And we went through this --

15 THE COURT: No. I understand.

16 MR. TASKIER: I think it's absolutely untrue, Your
17 Honor. I never said the Department of Justice.

18 THE COURT: Well, I don't see -- so what? I see
19 nothing in Paragraph 20 that is inconsistent with anything
20 said here. It's very fact specific to this case.

21 MR. TASKIER: Well, I understand, Your Honor. But
22 what he's saying in this case repeatedly that there's never a
23 high enough level of anticompetitive conduct or effect that's
24 going to have an affect on the operating system market. And
25 he's repeatedly made that assertion in this case.

1 THE COURT: Well, he accepted findings. I have to
2 analyze all these findings, and the answer is no. I don't
3 think -- what I understood him testify was generally what he
4 said was absolutely tailored to this case.

5 MR. TASKIER: And, Your Honor, my point here is
6 that in this case where the Court of Appeals --

7 THE COURT: The Fourth Circuit?

8 MR. TASKIER: No, the DC Circuit -- rejected his
9 testimony quite clearly on all of the points that are exactly
10 the same kinds of analysis that he's applying here.

11 THE COURT: Well, fortunately I don't sit on the
12 DC, Columbia Court of Appeals. I'm sitting here in a case
13 Novell vs. Microsoft. And the objection is sustained.

14 MR. TULCHIN: Thank you, Your Honor.

15 MR. TASKIER: I can't address any of this?

16 THE COURT: No, you can't address it.

17 MR. TASKIER: All right. Thank you.

18 THE COURT: And I'm going to lose my temper soon,
19 and I'm going to say out in front of the jury, I understand
20 why you want to try other cases instead of this case if you
21 don't cut it out. So let's go.

22 (Whereupon, the following proceedings were
23 held in open court:)

24 Q. BY MR. TASKIER: Now, sir, you testified on direct,
25 as I understand that you assumed that Microsoft

1 de-documentation of the NameSpace extension APIs was
2 anticompetitive; correct?

3 A. Yes. I think what -- and I tried to talk about
4 this a little more in the subsequent. What we were talking
5 about there is we assumed that this causal delay, and we
6 didn't assume that there was an offsetting justification for
7 doing this. This had the effect of causing a delay without
8 any other -- for purposes of our analysis. That's what we
9 assumed.

10 Q. And you assumed that the delay would have affected
11 WordPerfect's success in coming out with a PerfectOffice for
12 Windows 95?

13 A. Yes. And we presumed it had an effect, and then we
14 tried to look at, well, what effect would that have on the
15 competition?

16 Q. Now --

17 Your Honor, can I have five minutes?

18 THE COURT: No. You can for personal reasons, but
19 not for --

20 MR. TASKIER: Personal reasons.

21 THE COURT: Of course. We'll take a short recess.

22 (Recess.)

23 THE COURT: No, it's no problem at all.

24 MR. TASKIER: It's never happened before. I'm
25 trying to get something in.

1 THE COURT: No. Please. I had no idea. I would
2 have stopped at 1 o'clock.

3 MR. TASKIER: I thought I would be fine.

4 (Whereupon, the jury returned to the court
5 proceedings.)

6 THE COURT: I'm really sorry. Mr. Taskier doesn't
7 feel well, and if I had known that, I would have -- and we'll
8 stop for the day. I was hoping to go until 2:00 or 2:15 so we
9 could let you out early tomorrow. So obviously that's fine.
10 And I'm very, very sorry. So we'll stop for today and pick up
11 at 8:00 tomorrow. I'm very sorry.

12 MR. TASKIER: I appreciate that.

13 THE COURT: Do you want to start later?

14 MR. TASKIER: No. I think I should be fine.

15 THE COURT: I apologize to you, and we'll get
16 started at 8 o'clock tomorrow.

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

18 MR. TASKIER: I just didn't want to faint in front
19 of the jury.

20 THE COURT: I thought you had to go to the men's
21 room. The second time if you want to -- you're welcome to
22 stay or go. I just feel terrible.

23 MR. TASKIER: Thank you, Your Honor. Your Honor,
24 excuse me. I think I'm going to go back to the hotel.

25 THE COURT: Of course, if he wants to be, he can be

1 excused.

2 MR. TASKIER: Thank you, your Honor.

3 THE COURT: Before we get to this, I've got a note,
4 which is very troublesome. It's from one of the jurors. I
5 need to say that some of the jury is talking about the case.
6 They are not letting Microsoft finish their sides and in my
7 opinion making judgment already. I am honestly scared for
8 deliberation because of it. I would like to keep anonymous.
9 But can you, please, give a lecture or comment to them.

10 I guess tomorrow I'll tell them wait until you hear
11 all the case. Before they make up any minds, they shouldn't
12 talk about the case before then.

13 MR. TULCHIN: Your Honor, can you tell us what
14 juror that's from?

15 THE COURT: They didn't sign. I think with some
16 cross-examination I could figure it out. But I don't want to
17 cross-examine the person and question or examine.

18 Okay. Let's start with -- let me get my
19 instructions. I'm sorry. I tried to print out again at
20 lunch, my lunch -- and there's no change from what I have
21 yesterday. But I gather from Mr. Holley's notes, that you
22 have I was going to try to type out the sentence I want to
23 add, but I think you already got it from the transcript.

24 MR. HOLLEY: That's right, Your Honor. And I tried
25 to handwrite it into the -- I hope I got it accurate.

1 THE COURT: That's fine. It's basically the same
2 thing.

3 Okay. Let me hear from Mr. Johnson or whoever.

4 MR. JOHNSON: Actually, Mr. Schmidtlein is going to
5 take that.

6 THE COURT: Mr. Schmidtlein.

7 MR. JOHNSON: He is going to do jury instructions.

8 MR. SCHMIDTLEIN: Thank you, Your Honor. I think
9 again from my colleagues who are appellate lawyers, I'm always
10 told for belt-and-suspenders purposes, every time people stand
11 up and talk about jury instructions, we have to tell or at
12 least say we made our initial submissions. Our comments we're
13 making here are in the spirit of trying to work, but we're
14 preserving all of our rights and everything else.

15 THE COURT: You don't have to say that, because I
16 can understand.

17 MR. SCHMIDTLEIN: Okay. Now, you've got our
18 submissions. You know, we're very appreciative of the fact
19 that you've given us an opportunity to be part of this sort of
20 Internet process. We tried to in the submission that I think
21 we handed up this morning similar to what we did the other day
22 was to try to redline with some suggestions, and we presented
23 a short brief, tried to at least highlight kind of the
24 substantive, some of the substantive issues. Some of the
25 things were not, you know, terribly substantive. It was

1 really minor tweaks.

2 THE COURT: Theresa, can you lend me a pen?

3 THE CLERK: Yes.

4 THE COURT: Thank you.

5 Go ahead.

6 MR. SCHMIDTLEIN: And I'm happy to go through some
7 of those. I suspect you've got some thoughts and ideas. I
8 guess I will say on the deception point that you made this
9 morning that we were able to pull the transcript and then try
10 to get down what you had offered. I guess the only initial
11 reaction I have to that is I think the language, if I've got
12 it right from the transcript, was:

13 When a monopolist had engaged in deceptive
14 conduct that has a purpose and effect of
15 preventing a competitor from developing a product
16 that would enhance competition by threatening a
17 monopolist's monopoly power.

18 Did I get that right?

19 THE COURT: That's right. And I was going to add,
20 actually what Mr. Holley added, a relevant market.

21 MR. SCHMIDTLEIN: Which I think is fine. The only
22 immediate reaction we had to that was the word preventing has
23 a purpose and effect of preventing a competitor from
24 developing. I think that might be a bit strong. I'm not sure
25 that the act has to be a complete prevention. And so again,

1 not having --

2 THE COURT: What do you suggest?

3 MR. SCHMIDTLEIN: Hindering. I don't think that a
4 complete --

5 THE COURT: Obviously Mr. Holley objects to it. If
6 I change prohibiting to hindering -- or preventing to
7 hindering.

8 MR. HOLLEY: I guess, Your Honor, in the realm of
9 things I don't like it makes it worse. But because it does
10 seem to me that, and I don't want to reargue the point.
11 But --

12 THE COURT: Let me tell you why I'm putting it in
13 at all. I mean, I certainly get the point and agree that a
14 tort of committing a bad act of deceit, an action of deceit is
15 not sufficient for an antitrust claim. But we got here in
16 part because of my original decision and we got here in part
17 from my reading of Novell's response to the Rule 50 motion.
18 And I started thinking -- I mean, the problem that I have, and
19 I still don't know how it comes out, but I really am of the
20 view there is no duty to cooperate imposed by antitrust law
21 itself absent certain things happen. And I think I need to
22 know -- I would like to know from the jury whether they find
23 these things happened.

24 And it seems to me that in this case, and again
25 focusing upon the facts of this case, that if the jury were to

1 find -- everything else they have to find, as well. But if
2 they were to find that the withdrawal of the documentation for
3 the NameSpace extension APIs, if the way it developed was that
4 back in July of '94 or by August of '94, and I think there's
5 testimony to that effect that Mr. Giles or somebody had
6 already written the APIs, and it's certainly subject to
7 question. But if that had happened, and maybe my recollection
8 is wrong. Isn't the testimony of Mr. Giles or somebody?

9 MR. HOLLEY: Yes, Your Honor. The testimony makes
10 no sense in light of all the subsequent testimony --

11 THE COURT: I'm not going there.

12 MR. JOHNSON: Your Honor, it was 80 percent done by
13 October.

14 THE COURT: Yeah. That if, in fact, that had
15 occurred so that Novell was ready to proceed, then in October
16 they're withdrawn. And the effect of that conduct, it's not
17 simply deceit, but deceit affected competition by -- because,
18 you know, recognizing I'm not subscribing the other theory,
19 but under Novell's theory that everything happened, and
20 WordPerfect was destroyed preventing it from becoming a very
21 popular alternative application drawing people to another
22 operating system or preventing it from being exploited, I mean
23 that in a technical sense, being used as middleware, then it
24 would seem to me that deceit does implicate antitrust
25 concerns; correct?

1 MR. HOLLEY: Well, I would say no, Your Honor, for
2 the following reason. Conduct cannot be anticompetitive under
3 controlling 10th Circuit case law, particularly Telex, if the
4 conduct is consistent with ordinary business practice in the
5 industry. The evidence, I think with the sole exception of
6 Mr. Harral who seems to say that changes can only be made in
7 response to bug reports externally, all the other testimony
8 including from Mr. Frankenberg is to the contrary.

9 THE COURT: But if I'm right -- I don't -- I'm not
10 sure I read it that way. I'm not sure that Mr. LeFevre said
11 among other things. But if that's right, you're entitled to
12 motions of judgment in the matter of law. That goes to the
13 issue of which -- is a fair point. I'm not, you know -- but
14 if, in fact, the position I am going to take is, and I could
15 be right or wrong, that's not the issue, and I'll have to
16 reconsider it if the jury returns a verdict against you, that
17 if I adopt the view which I fully intend to do, despite the
18 testimony, which you can say in favor of you, despite the
19 language in the beta about not committed to the future, but
20 if, in fact, that is understood in the industry in the context
21 it's going to be withdrawn for reasons that come up during the
22 course of the beta process, you don't agree with that, and
23 that's fine. But if you -- but if I let it go to the jury,
24 which I intend to do, that seems to me to be a different issue
25 than the one I discussed before.

1 MR. HOLLEY: Well, fair enough, Your Honor. But
2 even -- there is no case, there literally is no case, and we
3 looked high and low, and I'm sure Williams and Connolly and
4 Dickstein looked high and low. There is not a single decided
5 case under Section 2 of the Sherman Act in which one
6 competitor is saying something misleading to another
7 competitor that's been the basis of a Section 2 liability.
8 And the reason why is competitors say things to one another
9 all the time, like, hey I might increase my prices next week.
10 Talk about head fakes. Or, I'm going to release a new
11 product, or, I'm going to do all sorts of things. That is not
12 a basis for Section 2 liability.

13 THE COURT: I agree with you absent a competitive
14 issue. But, I mean, the reason -- I mean, I understand what
15 you have to say, and it makes a lot of sense in terms of the
16 case itself. But it's very fact specific. The fact of the
17 matter is, focusing upon the withdrawal of the APIs of the
18 documentation for the NameSpace extension APIs in this context
19 under Novell's theory does -- it's not just saying, we're
20 going to come out with another product, we're going to do
21 this, it is related to the fact that because of the original
22 announcement and then the original -- excuse me -- and then
23 the withdrawal, and the fact that in the interim according to
24 Novell and according to this testimony has used the APIs which
25 were exposed. It seems -- and they can't use them anymore,

1 and as a result under their theory it's -- the product is
2 destroyed. It seems to me it does implicate competition.

3 MR. HOLLEY: Well, Your Honor, I obviously don't
4 want to argue the facts because that will be next week. But
5 it isn't true that the documentation was withdrawn, and it
6 isn't true that they were unable to use them. But let's
7 assume for --

8 THE COURT: That's a whole different issue.

9 MR. HOLLEY: Well, assume for present purposes that
10 what you said is correct, I still think that the issue for the
11 jury is not whether Microsoft lied to Novell, but whether, in
12 fact, the conduct was anticompetitive under the test that Your
13 Honor has set forth correctly in the instructions. The test
14 is, is it consistent with competition on the merits? Was the
15 decision at all beneficial to users? Is there a but for
16 explanation for the conduct other than its adverse impact on
17 competitors?

18 If the jury finds that those things three things
19 are true, it doesn't matter whether they decide that Microsoft
20 said something to Novell that was untrue. That's an entirely
21 sort of orthogonal inquiry. The inquiry is, is it
22 anticompetitive as that term is defined under Section 2?

23 And I think deceit is irrelevant to that question,
24 and that's why you don't find any cases other than cases of
25 three, I think there are three that exist in the world about

1 deceit. And they are cases in which systematic lies were told
2 not to competitors, but to distributors, retailers, end user
3 customers that was impossible for the other competitor to
4 neutralize. In those circumstances, courts have said, that
5 kind of systematic pattern of lying, not to your competitors
6 but to other people, could give rise to Section 2 liability.

7 THE COURT: What kind of lies were told?

8 MR. HOLLEY: Okay. So here are the cases. There
9 are three of them. One was Northwest Airlines running ads in
10 the Minneapolis Tribune saying that charter flights crash more
11 often than scheduled airline flights. The second case was a
12 drug company sending a letter to every registered pharmacist
13 in the United States saying, if you prescribe the generic
14 version of our patented drug, you could kill people. And the
15 third one was a case in which one Bar review company ran
16 around law school campuses putting up posters on the wall
17 saying, you should know that the people who own our competitor
18 have been fined by the SEC for securities fraud.

19 Those are the cases that exist. Literally those
20 are the only three decided cases. So this is a rare thing to
21 be talking about deception as a Section 2 violation because it
22 really is a tort claim.

23 MR. SCHMIDTLEIN: Your honor, can we add --

24 THE COURT: But again -- but again, why doesn't it
25 implicate the antitrust laws? If somebody tells a

1 competitor -- and this is all in the context of the duty to
2 cooperate.

3 MR. SCHMIDTLEIN: Right.

4 THE COURT: Don't forget that. This is in the
5 exception.

6 MR. SCHMIDTLEIN: Right.

7 THE COURT: Generally you don't have a duty. But
8 why if you have gone out and you've told somebody, you can use
9 this product --

10 MR. SCHMIDTLEIN: You should use it.

11 THE COURT: -- and you evangelize, and you should
12 use it.

13 MR. HOLLEY: Christy Sports, Your Honor. There's a
14 lease which says, and it's in place for 10 years, the lease
15 says, you know, you have to get our permission to run your ski
16 rental business halfway up the mountain. There's a course of
17 dealing over 10 years in which the owner of the property lets
18 this person run their ski rental business, and in year 10 they
19 say, you know, we changed our minds. You're way out of luck.
20 Shut down.

21 THE COURT: But you don't have any -- but you don't
22 have any alleged reliance upon the misrepresentation to
23 prevent you from developing a product which is going to be
24 competitive.

25 MR. HOLLEY: Well, Your Honor, the person built

1 their entire ski rental business on the failure to enforce the
2 restricted covenant in the lease. Maybe there aren't
3 overstatements, but there certainly are a course of dealing
4 where the lessee believed that they had a right to build their
5 business on the failure to enforce the covenant.

6 The 10th Circuit holds, just to show you how narrow
7 the exception to the Colby doctrine is under Aspen Skiing, the
8 10th Circuit held that was a temporary relationship and that
9 the lessor had the right in its business judgment to change
10 its mind and to enforce the covenant and to put that company
11 out of business.

12 Now, that is so far more extreme than what we have
13 here because Novell was not terminated. Microsoft continued
14 to help Novell build a product that ran on Windows 95. Novell
15 could have used the Windows 95 common file open dialog. They
16 could have used the iShellFolder interface and the common
17 controls in Windows to build a product that came out on time.

18 THE COURT: Well, maybe they didn't have to do it
19 because the product that they had for Windows -- previous
20 version of Windows already had on, so it wasn't a step
21 backwards, anyway. That's a whole other one.

22 MR. HOLLEY: There's that one. And there's
23 additional problem that the folks in Scotts Valley in
24 California were nowhere near done with the other critical path
25 product. But I'm leaving that aside.

1 THE COURT: I'm going to include it, and I'll
2 use -- I'm not sure -- why is it prevent and not hinder?

3 MR. HOLLEY: Well, Your Honor --

4 THE COURT: No. No. No. I'm asking Mr.
5 Schmidlein why is it preventing and not hindering.

6 MR. SCHMIDTLEIN: Well, because I don't think the
7 standard is, the deception would -- I mean, physically
8 prevent, I mean, we could release some piece of junk. It's
9 not like they went and blew up the whole company. I don't
10 think that has -- that's the standard. I mean, I don't think
11 it has to be actually physically prevented us from being able
12 to release any software product.

13 THE COURT: But your whole theory is it was this
14 particular software that you needed in order to survive.

15 MR. SCHMIDTLEIN: Right. Right. But I think if
16 you say the deception literally prevented us, I think that
17 takes out the timing element and we were delayed, it didn't
18 prevent us from ever releasing it. That's why I think
19 hindering is a more accurate.

20 THE COURT: Okay. I'm going to include it, and
21 I'll try to think about whether it should be prevent or
22 hinder.

23 MR. HOLLEY: Your Honor, I just point out that
24 hinder is a word that would permit almost any trivial
25 imposition upon someone to become actionable.

1 THE COURT: That's why I think prevent is better.

2 MR. HOLLEY: Yes, Your Honor.

3 THE COURT: But I really do think this is tied very
4 much to the facts of this case. As I understand the theory
5 is, look, you all did this, and we couldn't -- we couldn't
6 take the third option. We were prevented from taking the
7 third option, and the third option is what we needed, at least
8 that's what the program Mr. Gibb thought, in order to not take
9 a step backwards.

10 Okay. Next one Mr. Schmidtlein.

11 MR. SCHMIDTLEIN: Well, as I said, as we sort of
12 laid out in our brief, there's a handful of sort of big
13 picture issues that we've made suggestions on. You know, the
14 language from your prior decision, the Fourth Circuit prior
15 decision, about the behavior taken as a whole was
16 anticompetitive. We made that, we've made that suggestion.
17 You made I think reference earlier today to the debate about
18 the middleware definition. We think --

19 THE COURT: Yeah. I intend to just say middleware
20 and leave it at that.

21 MR. HOLLEY: Your Honor --

22 MR. SCHMIDTLEIN: That's our --

23 THE COURT: Of course, you can be heard on all of
24 this.

25 MR. HOLLEY: I don't know whether you want to do it

1 back and forth, or you want to hear me later. But I'd be
2 happy to do it later, Your Honor.

3 THE COURT: Why don't I hear it all and then you.

4 MR. HOLLEY: Fair enough, Your Honor. Thanks.

5 MR. SCHMIDTLEIN: So we're I won't spend any time
6 right now on middleware.

7 I know on Monday, I think Monday, the submission we
8 made on Monday, I know you began this discussion with
9 Mr. Martin back in Baltimore about the burdens about no
10 legitimate justification and sort of the back and forth.

11 THE COURT: It seems to me that's very theoretical.
12 They have articulated. I mean, actually one of my law clerks
13 said something about that, and I looked back, and I said, they
14 had whether you buy or not, so you've got the burden anyway.
15 They have articulated a legitimate business reason. You may
16 think it's phoney, but it seems to me the language about
17 burden shifting, everybody is in agreement if they articulate
18 a legitimate reason, then you still have a burden.

19 MR. SCHMIDTLEIN: I think it's a non-pretexual
20 business justification, which I think puts on them -- it's not
21 that they can just throw out any ostensible justification.

22 THE COURT: They have raised a perfectly legitimate
23 business reason, as far as I'm concerned. If I have to make
24 that judgment, they have -- whatever you may say, looking at
25 the evidence, they were worried about robustness, and that's

1 why it was withdrawn.

2 MR. SCHMIDTLEIN: Well, we think there's obviously
3 a factual dispute on that.

4 THE COURT: Obviously there's a factual dispute,
5 and that's why I'm letting it go to the jury. All I'm saying
6 is that in terms of to the extent I have to make a legal
7 decision on whether they have articulated a legitimate
8 business justification in order to allocate burdens of proof,
9 I think that clearly it is legitimate and it's a factual issue
10 for the jury. Otherwise, I wouldn't include it at all. I
11 wouldn't even submit the question.

12 Okay. But if that's what the difference is. I
13 mean, I certainly think there's a factual issue, which the
14 jury should decide. I also clearly think that they have
15 articulated a legitimate business reason for their actions to
16 allow it to go to the jury. And one way or the other you have
17 the burden of proof. Maybe, in fact, if the burden is simply
18 like whether they're right or wrong, it simply has to be
19 non-pretextuous, I don't think you want me to instruct on
20 that.

21 MR. SCHMIDTLEIN: I'm sorry. Say that again.

22 THE COURT: I think that would be a lesser burden
23 they would have. I would impose upon you the burden of
24 proofing that as completely phoney as opposed to whether it's
25 right, and I don't think you want that instruction.

1 MR. SCHMIDTLEIN: I think they have to prove that
2 it wasn't completely phoney.

3 THE COURT: It wasn't completely phoney. I mean,
4 in fact, finally somebody, it was Mr. Belfiore, I've never
5 thought that there was a contradiction between what's said in
6 Mr. Gates memo saying this is a fine piece of work and the
7 fact that robustness was a concern. Somebody can misuse it.
8 And Mr. Belfiore finally said it the way I understood, it was
9 an elegant nice fine piece of work in terms of writing the
10 API.

11 So the bottom line is I think that clearly they
12 have articulated. You may have reason, and I don't quite now
13 how this is going to play out, but you think I'll discover
14 within a month that would solve the problem. But I'll wait to
15 hear the excellent argument of excellent counsel on that one.

16 MR. SCHMIDTLEIN: Okay.

17 THE COURT: I assume there will be responses that
18 test all kinds of things, but that's -- okay. Next one.

19 MR. SCHMIDTLEIN: The last -- I think the last sort
20 of big picture issue the -- you had added inserted in several
21 places where you made references to nominal damages, and we
22 obviously, you know -- we obviously have an objection to that.
23 And think that that's --

24 THE COURT: Fine.

25 MR. SCHMIDTLEIN: -- sort of leading the jury in

1 that direction.

2 I took a quick look at Mr. Holley's markup that he
3 handed us I guess a little while ago. In terms of the first
4 page of what -- of his handwritten notes --

5 THE COURT: Would somebody.

6 THE CLERK: I have a copy.

7 THE COURT: I'd like to know how Mr. Taskier, he
8 doesn't look very well. Is somebody being in touch with him?

9 MR. JOHNSON: Yeah. We had somebody go back to the
10 hotel with him, Your Honor. And he was white and sweating.

11 THE COURT: He didn't look good. So if you hear
12 anything, let me know.

13 MR. JOHNSON: We will, your Honor.

14 MR. SCHMIDTLEIN: I think Mr. Holley has added some
15 additional language in the, I guess the first bubble there at
16 the top. It's imperative that the jury be told that they
17 cannot find that Microsoft --

18 THE COURT REPORTERS: I'm sorry.

19 MR. SCHMIDTLEIN: I'm sorry. It says -- but he
20 says, but if the Court decides to include the sentence
21 Microsoft --

22 THE COURT: Well, actually let's talk about his
23 Mr. Tulchin's letter at first because I frankly find it rather
24 persuasive. I think maybe I was right the first time not to
25 include this, because there's a whole different legal standard

1 there, and I was trying to round it out. But it seems to me
2 what you should really argue is the findings of fact which
3 I've read in, rather than -- and this seems to me to insert
4 what I have declined to do thus far, which is the legal
5 standard, which in the case have decided under the
6 (unintelligible) test, and it applies the reasonable capable
7 of standard, which I don't think is appropriate in this case.
8 It seems to me, I'd been inclined to exclude the sentence
9 altogether.

10 MR. SCHMIDTLEIN: Well, the notion that somehow
11 Microsoft came through that case without a finding that it was
12 anticompetitive --

13 THE COURT: And they've been read into evidence.
14 There were factual findings made which are relevant which I've
15 allowed to be read in. And I got myself to this, and I really
16 thought it was right until I read Mr. Tulchin's letter.

17 MR. SCHMIDTLEIN: Right. We may want to put
18 something in writing in response. We just got this this
19 morning.

20 THE COURT: Let's not discuss Mr. Holley's
21 alternative language until we decide whether the sentence is
22 going to go in at all. So if you want to submit something in
23 response, that's fine.

24 MR. SCHMIDTLEIN: Okay. I think -- I haven't had a
25 chance to confer with all of my team here on all of

1 Mr. Holley's other -- a lot of it looks like it's words, but I
2 don't think we're going to have a problem with.

3 THE COURT: He did pick up the one typo that I made
4 about the omission about withdrawal support for the
5 documentation on page -- I think it's word smart.

6 Okay. Mr. Holley?

7 MR. HOLLEY: Thank you, Your Honor. I won't repeat
8 the points in Mr. Tulchin's letter. We obviously agree with
9 you.

10 THE COURT: Am I right that -- maybe I'm right.
11 When I read it, I think Mr. Tulchin said, oh, the government
12 can do this. It's fine in an injunction case. I would have
13 thought that would have given you some concern.

14 MR. HOLLEY: Well, I'm hoping to never be in
15 Microsoft five, Your Honor, so maybe Google should worry about
16 it more than Microsoft.

17 But we do stand by what we said in the letter. And
18 I think the fact of the matter is that because it was all
19 talking about nascent threats to competition, there was no
20 finding that Microsoft's position in the operating system
21 would have changed.

22 THE COURT: I think that's right. I think they're
23 facts from which -- with appropriate testimony one could
24 perhaps build. But I don't think there was such a finding.

25 MR. HOLLEY: Now, Your Honor, most of the changes

1 that are in my printing I hope were noncontroversial, and I
2 just was trying to clarify things.

3 I would like to comment on the deception point.
4 Just I would encourage Your Honor to take one more look at the
5 letter we sent on the 5th of December. I don't propose to
6 repeat the points in that letter. But I just --

7 THE COURT: I'll take another look.

8 MR. HOLLEY: But I just ask Your Honor to take one
9 more look at it.

10 I also think on Page 4 in the sentence that begins,
11 in order to prevail Novell must prove that the anticompetitive
12 conduct it alleges was engaged in by Microsoft, in fact,
13 caused the harm Novell claims it suffered, I think that's the
14 first half of Your Honor's test from the summary judgment
15 motion decision. But I think it's important to add the second
16 half of the test there which --

17 THE COURT: But that's -- maybe I'm cheating. But
18 that's what I'm trying to reserve for decision by asking
19 questions 4 and 5.

20 MR. HOLLEY: Your Honor, with respect I have to
21 disagree with that. I think that there's one question about
22 what the appropriate causation standard is, but I think that's
23 different than saying that not only do they have to show that
24 WordPerfect Quattro Pro and PerfectOffice were injured, but
25 that that conduct also injured competition in the PC operating

1 system market, or otherwise we lose the nexus between the
2 conduct directed to Novell's office productivity applications
3 and the conduct which allegedly harmed competition in the
4 relevant market. I really do believe, Your Honor, I just ask
5 you to think about that.

6 THE COURT: Well, I have. And what I'm trying to
7 do is -- I've told you before, I happen to agree with you.
8 But that is not -- what I'm trying to do is prevent another
9 eight weeks of trial. And recognize I'm telling you I'm
10 agreeing with you, just so we don't argue about the principle.

11 MR. HOLLEY: Right.

12 THE COURT: But it seems to me that, without -- if
13 I instruct that, that clearly is an issue which divides you
14 and which may result in reversal on appeal and then an
15 eight-week retrial. What I'm trying to do is structure this
16 is such a way a to find out what the jury says without me
17 instructing them on that. If the jury answers question 4 no,
18 you win.

19 MR. HOLLEY: Agreed, Your Honor. And I'd like to
20 address the two formulations in a moment. But I think that
21 what we wouldn't know unless the jury was instructed the way
22 that Microsoft believed is appropriate, we wouldn't know
23 whether the jury believed anything more than that whatever
24 Microsoft did hurt Novell's Office productivity applications.
25 And I think that falls far short of making the showing that

1 Your Honor properly required them to make in your summary
2 judgment decision where you said they have to show that, and
3 then they have to show harm to competition in the PC operating
4 systems market. If they only showed the first, then we're
5 back in claims 2 through 5, which the Court properly dismissed
6 and which the Fourth Circuit affirmed your dismissal, wherein,
7 harm in the market for word processors and spreadsheets, we've
8 got to link the harm between, the harm to their applications
9 and the harm to competition in the relevant market.

10 And that's what I was hoping to achieve, Your
11 Honor, by the addition of the sentence on Page 4. I really do
12 think it's important not to ask them to find whether
13 competition was harmed in some free floating sentence.

14 As Your Honor has pointed out, this is a strange
15 Section 2 claim. Normally you're talking about harm to
16 competition in the market where the products competed. And
17 I'm not going to belabor this point.

18 But this is confusing to lawyers, and it's got to
19 be confusing to these 12 lay people who have been paying very
20 close attention and trying very hard to understand. And I
21 think we owe it to them to explain to them what this case is
22 really about.

23 MR. SCHMIDTLEIN: Your Honor, I think --

24 THE COURT: In other words, I'm not -- this
25 probably does not address your concern. But suppose I revise

1 question 3 to the verdict form?

2 MR. HOLLEY: Yes, Your Honor. I, of course, can't
3 lay my fingers on it.

4 Okay. I have it, Your Honor.

5 THE COURT: Suppose I added there, engaged in --

6 MR. HOLLEY: Your Honor, I don't mean to interrupt
7 your train of thought. I actually think that 3 and 4 in the
8 verdict form work fine. I just fear that the instruction on
9 Page 4 talks about the question raised in question 3 but
10 ignores the question raised in question 4. That's my only
11 point, Your Honor.

12 I think the verdict form works. I mean, I'll make
13 this -- obviously it goes without saying that we're having
14 this conversation in the context of trying to work
15 cooperatively to get something. I obviously repeat the same
16 reservation that Mr. Schmidtlein repeated.

17 But I think that the verdict form actually
18 logically tracks and makes sense. My only point was that I
19 fear that the instruction in the first full paragraph of
20 Page 4 only talks about the issue that the jury is asked to
21 answer in question 3 on the verdict form and does not add the
22 second question that Your Honor is asking the jury in
23 question 4 of the verdict form.

24 THE COURT: Well, what I was trying to do was to
25 sidestep two issues that I think divide you. And, A, there is

1 the standard to -- that should be imposed, should be applied
2 in determining harm to competition in the PC operating system
3 market. And that clearly divides you all. One is
4 contributing significantly, the other is reasonably capable of
5 contributing. That's one issue.

6 MR. HOLLEY: Yes, Your Honor.

7 THE COURT: And your proposal keeps that alive. I
8 mean, you're -- I understand -- and I understand that is
9 still -- that's still enables the record to be clear.

10 MR. HOLLEY: Yes, Your Honor. My only -- if we're
11 going to jump to that, my only suggestion is, I fear that if
12 you ask a jury those two questions in sequence, they might
13 think that they're being given some sort of --

14 THE COURT: No. I understand. So you want me to
15 add the language.

16 MR. HOLLEY: Yes.

17 THE COURT: Which seems to be sensible.

18 MR. HOLLEY: Thank you, Your Honor.

19 THE COURT: I'm thinking out loud. I think there's
20 something else which divides you all, which Mr. Martin, he
21 argued two points. Number one, had the wrong standard;
22 secondly, that this really is a Clayton 4 issue and not a
23 Section 2 issue and this whole concept of same conduct that
24 this proposed instruction is simply wrong because I don't have
25 to prove that. And I was trying to sidestep that by the way I

1 did.

2 So your proposed instruction does make it clear on
3 the record on the standard to be applied. It makes me make a
4 decision which is subject to appellate review on the same
5 conduct question. And I was trying to avoid the latter.

6 MR. HOLLEY: I understand that, Your Honor. But I
7 with all respect, I do think that given the Court's summary
8 judgment decision and the way that the case has been tried, it
9 really is important to draw the nexus between the injury to
10 their Office productivity applications and harm to competition
11 in the PC operating system market.

12 Mr. Martin isn't here to raise his side of the
13 argument. But I would say that in 99.9 percent of antitrust
14 cases where the normal rule where the Fourth Circuit decided
15 to depart from here applies, this issue never comes up because
16 the plaintiff is either a consumer or competitor in the market
17 in which trade was restrained, so you never have to link up
18 how injury to the plaintiff affects injury to the market,
19 because by definition they're in the market. And if you hurt
20 them, you hurt competition in the market.

21 Here we have this very strange beast which we have
22 to live with because the Court of Appeals in Richmond let it
23 happen. But we have a strange situation where the harm
24 occurred to products in market A, and the anticompetitive
25 effect occurs in market B. And in that situation, I think you

1 really have to say that it's incumbent upon the plaintiff to
2 prove how the harm in market A affects market B. It is not
3 just a factual issue. It really is a legal issue, Your Honor.

4 MR. SCHMIDTLEIN: Your Honor, I don't think in --
5 earlier in your instructions, I mean, there are even with our
6 suggested modifications which take out some things, the jury
7 is reminded in a number of different places about the harm to
8 competition has to be harm in the PC operating system market.
9 So the notion that somehow they're going to miss. And after
10 Mr. Tulchin has done his closing, and we've heard over and
11 over here today, they're not going to miss that somehow
12 there's this issue about the PC operating system market versus
13 applications.

14 But I do think as we've discussed before, this is a
15 Clayton 4 Section 2, you know, issue here, that I think
16 legally they're wrong. So we don't think the notion that
17 somehow the jury is going to be confused or they're going to
18 somehow miss out on the relevant market here is I think wrong.

19 MR. HOLLEY: Your Honor, I'm not talking about
20 relevant market definition. To be frank, Your Honor, I would
21 rather that the Court take out the paragraph that says, in
22 order to prevail and rely on other parts of these instructions
23 than to do what I fear is happening here, which is to instruct
24 the jury in this particular paragraph that all Novell needs to
25 do is prove that the anticompetitive conduct it alleges was

1 engaged in. And Microsoft, in fact, caused the damage Novell
2 claims it suffered. I appreciate that that's -- I'm sure the
3 Court --

4 THE COURT: No. No. That's a fair point. That's
5 a fair point. I tried to preserve the part that was agreed
6 upon, and I think your point is well taken, at least I
7 understand your point.

8 MR. HOLLEY: Thank you, your Honor. I won't --

9 THE COURT: Give me -- bear with me a couple
10 minutes.

11 MR. HOLLEY: Yes, Your Honor.

12 (Time lapse.)

13 THE COURT: I'm not even going to play with the
14 concept, but maybe I just have to bite the bullet on this.
15 Mr. Holley, is there some way -- and I have to work on this, I
16 don't want to waste everybody's time, on Page 5.

17 MR. HOLLEY: Yes, Your Honor.

18 THE COURT: When I talk about asking questions 4
19 and 5 because of uncertainties, suppose I said there,
20 Microsoft takes the position in order to prevail Novell must
21 prove both that, and then include your instruction?

22 MR. HOLLEY: I think I could live with that.

23 THE COURT: And Novell on the other hand takes the
24 position that it need prove only that, and then the first
25 thing.

1 MR. HOLLEY: Well, Your Honor, I think even under
2 Mr. Martin's formulation, which I do not agree, I don't think
3 he would even go that far. I think that Novell agrees, I
4 think -- I mean, I've never quite understood the distinction
5 they're seeking to draw between Clayton 4 and Sherman 2 in
6 this context. But I don't think it's Novell's position that
7 Novell has no obligation to show harm to competition in the PC
8 operating system market. I've never heard -- I've never heard
9 anyone on the Novell side say that. So I don't think it would
10 be accurate to say that Novell contends that.

11 THE COURT: Well, I think that's a point well
12 taken. But I would add, Novell on the other hand takes the
13 position that -- the slightly different position that needs to
14 prove that it suffered damage and that Microsoft's conduct as
15 a whole -- I'm just -- injured competition in the PC operating
16 market.

17 MR. HOLLEY: Your Honor --

18 MR. SCHMIDTLEIN: Taking into account that weakened
19 state of the market and those things.

20 MR. HOLLEY: But the problem of this as a whole
21 thing, is it comes from a series of cases about monopoly
22 broth, you know, the City of Mishawaka, the American Electric
23 Power, all those sorts of cases, which say that when a
24 plaintiff alleges that an antitrust defendant engaged in five,
25 six, seven, eight acts, it isn't fair or appropriate to say,

1 we're going to look at act Number 1 separately from act
2 Number 2 from act Number 3.

3 What I don't want to do here, and I don't think it
4 would be fair, is to backdoor the piggybacking concept by
5 using the phrase, as a whole. As I understand it, Novell has
6 now formally dropped any claim about print processing and the
7 logo program. So if we have one act, that this whole case is
8 sitting on one act. And so as a whole is a very strange
9 concept. And what I think that Novell is seeking to do is
10 exactly what the Court said it wasn't allowed to do, say that
11 they can establish liability under Section 2 based on things
12 that Microsoft did to other companies.

13 Your Honor I think said that your view was that
14 that conduct was relevant to intent only under 404(b), but it
15 was not to be used as primary evidence on which Novell could
16 predicate its case. So when you say as a whole, in a case
17 that involves one anticompetitive act at a minimum you're
18 creating confusion. And I think you may be creating an
19 invitation for the jury to rely on things done to other
20 companies in deciding whether Microsoft is liable in this
21 case.

22 THE COURT: It certainly is admissible under 404,
23 but I'm not -- and if I said it's only under 404, that's what
24 I said.

25 But why under their view, which I'm not sure I

1 subscribe to, and I'm just trying to avoid the retrial, under
2 their view why can't you take into account what is in evidence
3 which is the actions taken against Sun and Netscape in
4 determining whether competition in the operating system market
5 occurred?

6 MR. HOLLEY: If they were --

7 THE COURT: Whether it was harmed.

8 MR. HOLLEY: Yeah, I understand, Your Honor. And
9 if Novell was the attorney general of the United States, the
10 answer to that question would be one way. And given that
11 they're a private party seeking treble damages, the answer is
12 different. The reason why they can't is because it isn't
13 conduct that affected them, unless they can show, which they
14 utterly failed to prove, that conduct directed at Netscape or
15 Sun somehow exasperated or made worse what Microsoft did to
16 them.

17 But what the evidence shows is that one set of
18 conduct is on this axis, and the other set of conduct is on
19 this axis. And there hasn't been one word of testimony that I
20 recall hearing where anyone explained how what was done to
21 Netscape and Sun had any bearing, you know, on what was done
22 to WordPerfect. So you have sort of two groups of conduct
23 that don't have any connection with one another.

24 THE COURT: Let me just -- because I'm not sure I
25 understand the effect of the licensing agreement. What about

1 the licensing agreement with Netscape?

2 MR. HOLLEY: So the licensing agreement with
3 Netscape, all that could possibly say is that WordPerfect was
4 a distribution vehicle for Netscape, and maybe somehow that
5 doing what Microsoft did to WordPerfect, to delay for a few
6 months the release of their product, made them a less
7 effective distribution vehicle, although I don't know why
8 because there's no evidence that says that PerfectOffice for
9 Windows 95 was a more effective distribution vehicle than
10 PerfectOffice 3, which already existed.

11 THE COURT: Because it was selling.

12 MR. HOLLEY: I'm sorry, Your Honor?

13 THE COURT: Because it was selling. It was being
14 sold.

15 MR. HOLLEY: Well, that assumed, you know, that's
16 like the old cartoon in the New Yorker where the guy's doing
17 all the calculations on the blackboard, and he says, a miracle
18 ensued.

19 I mean, what was going to happen that was going to
20 vault them into very high sales? I mean, there's no evidence
21 of that, Your Honor. They didn't put on any evidence from
22 which anyone could conclude that somehow magically their sales
23 were going to go way up.

24 So the distribution thing seems to me to be a
25 complete red herring. There is no evidence that what

1 Microsoft did to Netscape and Sun made any worse the decision
2 to withdraw support for the NameSpace extension APIs. And
3 absent that, Your Honor, I don't see why it's relevant, other
4 than on intent, which I don't agree with, but I understand
5 that Your Honor doesn't agree with us on that.

6 THE COURT: Anything else, Mr. Schmidtlein? I need
7 to think this through.

8 MR. SCHMIDTLEIN: You've got our position. We
9 think you and the Fourth Circuit had it right in terms of the
10 weakened state, I'll try to get the language right here.

11 Microsoft's behavior taken as a whole was
12 anticompetitive, taking into account the weakened state of
13 other applications and ISVs. That's what the Fourth Circuit
14 said. That's what you said. That's what we should be putting
15 before the jury.

16 MR. HOLLEY: Your Honor, that cannot be a slogan.
17 I know that that is what the Court said, and I know that
18 that's what the Fourth Circuit said. But it was incumbent
19 upon Novell to prove how the weakened state of competition
20 affected what Microsoft did to WordPerfect, Quattro Pro and
21 PerfectOffice. And there was a complete failure of proof on
22 that point at trial. There is no evidence that what Microsoft
23 did to Netscape Navigator and Sun's Java had anything to do
24 with the impact of the withdrawal of support for the NameSpace
25 extension APIs on Novell. No one even suggested such a

1 connection, Your Honor.

2 So the weakened state of competition doesn't
3 matter, because there's no causal link between the two. So
4 it's one thing to say you can look at some things Microsoft
5 did to other companies in determining whether Microsoft
6 intended to harm a similar punitive middleware threat. I
7 understand the Court's view on that. I understand the logic
8 of that. I don't agree with it, but I understand it. I do
9 not understand how things done to other companies that are
10 entirely disconnected from the allegedly anticompetitive act
11 in this case should be considered in determining whether
12 Microsoft violated the antitrust laws in this case.

13 THE COURT: So basically you want me to bite the
14 bullet and say, without saying what the standard is, whether
15 significantly -- you'd like me to bite the bullet.

16 MR. HOLLEY: I would.

17 THE COURT: But you're prepared for me not to do
18 that and to leave that standard open. But you want me to
19 basically say it's got to be the same conduct -- that the
20 conduct directed -- the withdrawal -- now we know what it
21 is -- the withdrawal of name sake harmed competition in the
22 operating system.

23 MR. HOLLEY: Yes, Your Honor. I think that is what
24 the jury must be told, because otherwise, we have sort of two
25 cases --

1 THE COURT: And if I'm wrong, it's got to be -- and
2 the 10th Circuit disagrees, if I give that instruction the
3 case has to be retried, unless the jury answers question 1 no.
4 But it's not going to do it.

5 MR. HOLLEY: Well, I'm afraid to say that if the
6 jury came back in Novell's favor and you didn't tell the jury
7 that, then we would be facing a retrial.

8 THE COURT: Unless I can figure out some way to
9 preserve the without -- getting a jury finding on the issue in
10 a fair way.

11 MR. HOLLEY: Your Honor, it's an interesting
12 question. I must say that we have thought about it this. I
13 understand Your Honor's desire to get feedback from the jury
14 that would allow the Court of Appeals to make decisions that
15 would not result in this whole operation happening again. But
16 I don't see how one can do that with the fundamental question
17 of what is the basis for imposing liability in the case. I
18 just don't see how you can fail to instruct the jury what the
19 elements of the claim are. You know, I can try to be more
20 creative. But I don't understand that. I think you have
21 to --

22 THE COURT: Okay. I'll understand. And I'll think
23 about it. I'll either bite the bullet or try to find some
24 other way to do it.

25 MR. HOLLEY: Thank you, Your Honor. And just very

1 briefly, Your Honor. There are points in Novell's --

2 THE COURT: There was something else that you were
3 going to address, and I forgot what it was.

4 MR. HOLLEY: Yes, there is, Your Honor. I do not
5 agree with the notion that the jury can be told that
6 middleware is anything that literally sits in the middle,
7 which I think is what Novell is suggesting. The findings of
8 fact that Professor Murphy went through on the stand today
9 could not be more clear. Novell asked that they have a
10 binding effect. The Court granted that request. And as a
11 consequence --

12 THE COURT: That's an interesting question. It's
13 binding upon you all. I'm not sure -- it's binding in the
14 sense that they introduce it, so they can't step away from it.
15 But I'm not sure technically it's binding upon Novell.

16 MR. HOLLEY: Well --

17 THE COURT: As a practical matter.

18 MR. HOLLEY: Well, I think if you look at the
19 collateral estoppel cases, Your Honor, they say that the facts
20 are binding on both parties.

21 THE COURT: Okay.

22 MR. HOLLEY: And they really -- in all fairness,
23 they ought to be binding on the party that sought collateral
24 estoppel effect. But in any event, it really is, it's not a
25 sensible analysis to say that because the DC Circuit and

1 Judge Jackson noted that what they defined as middleware
2 didn't yet exist, that couldn't be what they meant middleware
3 was. I think it's patently obvious if you look at 28, 32, 39
4 and other findings of fact to which the Court has given
5 collateral estoppel effect that middleware has to be a lot
6 more than any random layer of software that exposes a few
7 APIs. And it's not -- this isn't --

8 THE COURT: Why should I weigh in on this in the
9 instructions?

10 MR. HOLLEY: Because, Your Honor, the jury needs to
11 understand that we're not just having a debate about some
12 terminology in the ether. The only way that Novell can show
13 that under this theory -- there's the moat theory, which has
14 its own issue. But the only way that Novell can show under
15 the cross-platform middleware theory that the delay in the
16 release of PerfectOffice had any impact on competition in the
17 PC operating system market is to show not only that if it had
18 the product come out earlier it would have been substantially
19 more popular, but that the product itself had some capability
20 of functioning as a middleware platform. And this is not a
21 concept that most lay people understand.

22 It is the theory of the government case that Novell
23 brought this case predicated on, and they shouldn't be allowed
24 to walk away from it now. The theory of the government case
25 was in a piece of middleware could be cross-platformed

1 ubiquitous in the sense that it was available on all or almost
2 all PCs and it had realistic capability of functioning as an
3 alternative to Windows as a platform for developing
4 application software. If it doesn't have those
5 characteristics, then it can't have any impact. By
6 definition, it can't have any impact on competition in the
7 PC operating system market.

8 THE COURT: What's the alternative definition
9 for --

10 MR. SCHMIDTLEIN: The notion that a piece of
11 middleware has to run, I think their prong is sort of
12 full-fledged, you know, general purpose applications is
13 ridiculous. If that's -- if that's the theory, Java and
14 Netscape don't meet that theory, and they would have thrown
15 the case out.

16 They love to borrow the portion of that case that
17 talked about relevant market where they were in there saying,
18 oh, Java and Netscape are replacements for the operating
19 system. It's the same. And the government came back and
20 said, whoa, whoa, whoa. They're not -- they don't expose that
21 much functionality. They can't literally replace the
22 operating system such that they're in the same relevant
23 market.

24 So the Court said, yes, you're right. They can't
25 literally replace the operating system. But they can serve as

1 a middleware layer that if cross-platformed could reduce the
2 applications barrier to entry and therefore impact competition
3 in the anticompetitive market. It doesn't mean that you have
4 to be able to run everything that could be run on Windows for
5 it to have an impact on competition in the operating system
6 market. If that was the case, they would have thrown the
7 government case out.

8 THE COURT: I'm not going to try to --

9 MR. HOLLEY: Your Honor --

10 THE COURT: If it doesn't do that, how does it
11 threaten the monopoly?

12 MR. SCHMIDTLEIN: It doesn't have to -- you don't
13 have to be able to run --

14 THE COURT: I mean, I understand the government
15 case to be essentially that, frankly, applying a lesser
16 standard, that what happened was, and maybe I'm wrong, but
17 Microsoft defended on the basis that, look, all of these
18 competitors, these are competitors. And the Court found and
19 the government alleged, no, they're not competitors, but they
20 certainly some day could be competitors. And you're sort of
21 caught in the worst of all worlds. We're going to use against
22 you the fact, your evidence that they're potential competitors
23 because there's plenty of evidence that you adopted business
24 practices that went after these people, and not
25 inappropriately in my judgment. The Court said, you can't do

1 that as a matter of injunctive relief. We are not going to
2 allow that.

3 But I don't see how the whole theory works unless
4 middleware eventually can be a substitute for the operating
5 system which means a loss of APIs.

6 MR. SCHMIDTLEIN: Well, in the case -- I think you
7 heard testimony of the PerfectFit partners and that for
8 WordPerfect particularly on the enterprise space, I mean, the
9 custom solutions and the custom applications that were being
10 built by both third-party ISVs and inhouse, I mean, if I'm a
11 big company and I'm looking to buy a word processing suite,
12 I'm not looking to buy multiple word processors or multiple
13 spreadsheets, I'll buy a suite. And if that suite exposes
14 APIs, and there's all sorts of -- the type of applications my
15 employees need, not games, not, you know, entertainment. I
16 don't even know what other personal productivity applications
17 they're talking about. But the custom solutions that, for
18 example, companies would use, that's the type of stuff there
19 is testimony in this record was being written -- PerfectOffice
20 had been written historically to WordPerfect. And that's
21 exactly -- those are not -- those may not meet the definition
22 of a general purpose application, per se. Those are
23 customized solutions. But if you're an IT person making a
24 business, that's what you care about. Those are the
25 solutions, not whether Microsoft Office can run solely on top

1 of WordPerfect.

2 So I think absolutely it meets. It meets the
3 definition. And Your Honor is absolutely right that for you
4 to jump in and to make a decision in this regard, I mean, you
5 might as well grant judgment on that claim. You know, the
6 testimony in the record is it wasn't a full-fledged operating
7 system right now. And for you to jump in and make that
8 decision I think is essentially taking it away from the jury.

9 MR. HOLLEY: Your Honor, Microsoft stands by the
10 argument that it made at the close of Novell's case, which is,
11 yes, the Court could grant judgment as a matter of law right
12 now based on nothing but the findings of fact that Novell
13 sought collateral estoppel in Fact 4. Those findings
14 completely undermine both the franchise applications theory
15 and the cross-platform middleware theory.

16 And it is wrong to say that these trivial
17 applications that did nothing but automate the functionality
18 of word processors and spreadsheets are the sorts of
19 applications that could allow a middleware platform to
20 threaten Windows. That makes no sense. The only thing that
21 could threaten Windows as Your Honor just observed five
22 minutes ago is a middleware platform that served as an
23 alternative to Windows as a development platform not for
24 macros and verbal applications used by dental practices, but
25 by full-featured applications. And not just a couple of them,

1 as Professor Murphy observed today, but thousands of them,
2 because it is the 70,000 Windows applications that gave rise
3 to the applications barrier to entry. You cannot predicate a
4 case as Novell did by relying on the applications barrier to
5 entry theory and then selectively pick the pieces of that
6 theory that you like. The theory says that it is the sheer
7 number of Windows applications that give rise to the barrier.
8 That's what the government case is all about, and that's what
9 the findings of fact say.

10 So it's just simply -- I know the evidence came in,
11 but the evidence is meaningless. All that evidence is about
12 is some applications that say, I want to send out a reminder
13 about dental cleaning appointments, and I'm going to use the
14 database piece of my Office suite to automatically interact
15 with the word processor part of my Office suite to send out
16 those reminders.

17 That really trivializes what the government meant
18 when it talked about middleware. Middleware has to be a
19 plausible alternative to Windows. There is no evidence. In
20 fact, Mr. Alepin testified, their expert testified that he
21 could not identify a single serious application, a
22 full-featured application that ran on any of the things that
23 Novell says is middleware.

24 So it isn't like the concept of middleware is some
25 debate, you know, some scholastic debate. It's founded in the

1 findings of facts --

2 THE COURT: Okay. I understand. Actually one
3 thing that occurred to me listening to the professor today --
4 what's his name?

5 MR. TULCHIN: Murphy, Your Honor.

6 THE COURT: Murphy. And another the problem with
7 the theory is that if you wrote to the application, you'd have
8 to buy both the operating system and the application. I mean,
9 that would be another reason that you wouldn't, developer
10 wouldn't want to do it, because consumers wouldn't want to pay
11 the -- if you write directly to the operating system, for
12 somebody and I certainly know people with home computers who
13 don't have words processors. Why would somebody write a music
14 program to a word processor which requires a consumer to buy
15 both the word processor and operating system.

16 MR. HOLLEY: It's a fair point, Your Honor. And
17 then there's the added problem that Professor Murphy pointed
18 out, which was --

19 THE COURT: Was it -- he said it was at trial. It
20 wasn't at trial.

21 MR. TULCHIN: Your Honor, it was an evidentiary
22 hearing.

23 THE COURT: It was an injunction hearing in which
24 you put some product in your product and the Fourth Circuit
25 said no.

1 MR. HOLLEY: Well, that's correct, Your Honor. We
2 don't need to go into all the details of that.

3 THE COURT: Okay. I understand. Let me hear from
4 Mr. Johnson. The poor guy. Do you want to be heard? You
5 don't have to. You feel strongly.

6 MR. JOHNSON: Very briefly, Your Honor.

7 THE COURT: Mr. Schmidlein did a good job, but you
8 care about this.

9 MR. JOHNSON: The notion that in order to prevail
10 we have to destroy Windows is just ridiculous. What we're
11 talking about, what we're talking about is reducing
12 applications barrier to entry. What we're talking about --
13 and I talked to you about this on the Rule 50 motion. We're
14 talking about getting the players on the field. We're not
15 talking about winning the game.

16 THE COURT: But you've got to be on the right
17 field.

18 MR. JOHNSON: Of course we do. And the evidence is
19 legion in this case that we were on the field. One of those
20 fields was the middleware field. And I noticed in
21 Dr. Murphy's testimony today APP Ware got suddenly slipped in
22 at the end. And you know from this case that the evidence is
23 legion that AppWare was, in fact, aimed towards providing all
24 the services applications would need so that they didn't have
25 to write to Windows. And it's not our people saying it, it's

1 Microsoft's people.

2 Now, there may be a factual dispute about where we
3 might have ended up had we been allowed to survive. And, in
4 fact, in the government case, there was a dispute about where
5 things might have ended up if Microsoft had not killed Sun and
6 Netscape. But the fact of the matter is both of those
7 products and our product had the potential to reduce the
8 applications barrier to entry. It's not about beating
9 Windows, replacing Windows or destroying the applications
10 barrier to entry. It's simple enough in terms of competition,
11 and Professor Noll spoke about this. It is enough so that
12 Microsoft has to either reduce their price or not sell as
13 much.

14 That's what we're talking about here. We're
15 talking about creating a field where other players are there.
16 What Microsoft did was to make sure that all the potential
17 players were dead, and they were successful in that. In fact,
18 you saw it, you saw it on Dr. Murphy's very first screen shot,
19 which is that Microsoft Windows went from 80-some percent of
20 the market in 1994 to 90-whatever-it-was, it was so close to
21 the top 100 percent that you couldn't even tell if there was
22 anything left, by the conduct that it undertook during this
23 period of time to eliminate competition in the operating
24 system market. And we were part of that potential that would
25 have allowed new players on the field. So --

1 THE COURT: Tell me factually if your products
2 were -- let's forget the ubiquity and the cross-platform. If
3 they did not expose sufficient APIs for full service use
4 basically --

5 MR. JOHNSON: Yes.

6 THE COURT: -- if they didn't do that, how is it
7 that the destruction of WordPerfect maintained monopoly in the
8 operating system?

9 MR. JOHNSON: Because --

10 THE COURT: What specifically would have happened?

11 MR. JOHNSON: Because what would happen as Dr. Noll
12 explained, if you have this cross-platform -- and I found it
13 very amusing that Dr. Murphy today tried to use PerfectOffice,
14 which we weren't apparently allowed to use as the middleware
15 threat. But he only referred to the fact that PerfectOffice
16 wasn't cross-platformed. And, of course, as you know, Your
17 Honor, we've had -- we had days of debate about whether we
18 could even mention PerfectOffice in connection with what we
19 were talking about because WordPerfect, of course, during this
20 time period was cross-platformed, had been ported to many
21 different operating systems and was a part of PerfectOffice.

22 So the notion that PerfectOffice wasn't
23 cross-platformed is entirely meaningless to our theory of the
24 case, which was WordPerfect combined with AppWare combined
25 with OpenDoc combined with the PerfectFit that was part of the

1 WordPerfect was a middleware threat that Microsoft recognized.

2 THE COURT: No. No. No. But I'm still trying
3 to -- what would have happened, if they hadn't destroyed
4 WordPerfect as you say they did, what would have happened?

5 MR. JOHNSON: If they hadn't destroyed WordPerfect,
6 if they hadn't destroyed Netscape, if they hadn't destroyed
7 Sun, you may remember, Your Honor, the findings of fact 68
8 which is collaterally estopped in this case, which states
9 Microsoft feared middleware --

10 THE COURT: Right now I'm interested in -- I'm
11 interested because your theory, one of two theories is these
12 were going to be middleware. It wasn't that Netscape was
13 going to be middleware, Java. It was that your product was
14 going to be middleware. I just want to --

15 MR. JOHNSON: Sure.

16 THE COURT: Am I just missing something? Does that
17 mean if it's not -- if not full service APIs so that you can
18 use it for everything, what would have happened in your view?

19 MR. JOHNSON: It would have led to more competition
20 in the operating systems market because many applications,
21 many applications would have been written to that middleware.

22 THE COURT: Like what?

23 MR. JOHNSON: Like the thousands of partners that
24 we had that were writing to our middleware at the time, like
25 the applications that Microsoft itself testified could be

1 written to AppWare because AppWare essentially replaced the
2 operating system.

3 And what would have happened is -- you've got to
4 remember you're talking about full-service applications.
5 That's what we were. We provided the Office productivity
6 applications on other platforms. Now, if other applications
7 in addition to us could then come on board with our
8 middleware, we would gain the critical mass as it were to
9 create competition. Now, not defeat Windows --

10 THE COURT: No. No. No. No. No. I'm just
11 trying -- you may have a theory which I've dismissed, which is
12 your existing customers would have -- they really didn't care
13 about -- they didn't care about the other bells and the other
14 things that were being -- the other diverse applications.
15 They were mainly worried about Office productivity.

16 MR. JOHNSON: Well --

17 THE COURT: And, you know, because obviously based
18 upon the testimony, these products and the findings, these
19 products shouldn't be used for these things. And I'm just
20 trying -- I'm not trying to argue with you, I'm just trying to
21 understand what you and Mr. Schmidtlein said. Is it with your
22 sophisticated enterprise customers, they were using
23 WordPerfect, they would have used the suites. They really
24 didn't care about the other applications; correct?

25 MR. JOHNSON: I don't want to say that. That's too

1 far. What I'm saying and what Dr. Noll testified to, if those
2 people had been able to buy WordPerfect, and there were, as we
3 see, an installed base of very loyal customers to WordPerfect
4 that clearly would have bought the WordPerfect suite had it
5 come out in a timely manner on Windows 95. If those people,
6 had we been allowed to survive and grow with our middleware,
7 if those people when they were getting ready, and Dr. Noll
8 talked about this, the three-year cycle, and they would get to
9 the next point where they were choosing something else, and by
10 that time, what does a business enterprise need? It needs a
11 word processor and spreadsheet, you know, needs these Office
12 productivity applications, we provided that, and there would
13 have been sufficient other applications, we were going to
14 bundle Internet. There's testimony of that in there, too. So
15 we would have handled that part of it, as well. And these
16 customers would suddenly have not had to pay for Windows.
17 They could have made another choice.

18 And we talked about this in terms of, you know,
19 Little America and Grand America. There comes a point when
20 Grand America is too expensive. And that's what we talked
21 about the barriers of entry. It's not just whether they would
22 have switched, but whether it would affect its price, because
23 if, even if you -- because Microsoft has a choice. It's a
24 monopolist. They have the power to exclude competition, and
25 they have the power to ask any price they want.

1 But if you -- if you're on the playing field, you
2 can bring down that and force Microsoft to compete by either
3 lowering its price or allowing other entrants to gain some
4 market share. That's what happens in the market.

5 And through this process of us being alive and
6 being a cross-platformed Office productivity application on
7 Windows and on other platforms, that the next time around
8 there would have been some competition. But what happened is
9 Microsoft destroyed it all. And that's true with respect to
10 us.

11 THE COURT: Let me just ask you this. That's fine.

12 MR. JOHNSON: Yes.

13 THE COURT: Why did Dr. Noll -- if you're right,
14 why did he agree to the second requirement, to be -- to be
15 effective middleware had to be ubiquitous? I'm just
16 intellectually confused. It seems to me that under your
17 theory you don't have to be ubiquitous. What you have to have
18 is a body of loyal enterprise customers.

19 MR. JOHNSON: You don't have to be -- again, this
20 gets into the fact that middleware is a category. It is not
21 just us, Your Honor. And this was --

22 THE COURT: But it is you because it's your theory
23 that you would have been middleware.

24 MR. JOHNSON: But again, this is an antitrust case.
25 This is not a tort case. This is not just about us.

1 THE COURT: This part is about you. This is your
2 theory that we would have been middleware, and that that's got
3 nothing to do with that. I mean, that's -- I mean, I
4 understand your argument about -- all in terms of what Mr.
5 Martin was pressing. I understand that. But this is you. I
6 mean, this is two theories about how your products could have
7 threatened their operation system market, and one was
8 franchise and the other was middleware.

9 MR. JOHNSON: Franchise, I don't know where that
10 word came from.

11 THE COURT: I'm just using it. It doesn't matter.

12 MR. JOHNSON: It was not Professor Noll's --

13 THE COURT: It's a good -- popularity. Popularity.

14 MR. JOHNSON: Right. And one of the ways we did
15 that, of course, is by bringing in Netscape and bundling it
16 with our products. And as I said, it's a category. You
17 cannot -- I guess the word is disaggregate what was happening
18 in the market at the time. You cannot disaggregate the
19 middleware products which were the threat that Microsoft
20 targeted for destruction. And it's inappropriate to, in
21 essence, pull one thing out and say, well, that alone is not
22 sufficient, because it was the entire category of middleware
23 which was causing the problem which Microsoft attacked.

24 Now, all of this -- all of these cases are about
25 Microsoft attacking early enough before the threat was

1 realized. I mean, I don't think there can be any real debate
2 about that. Microsoft killed the child before it was an adult
3 in all of these cases. And, of course, what you said in your
4 opinion was that we're not going to allow a monopolist --

5 THE COURT: I understand that. We've been there
6 before.

7 MR. JOHNSON: To say that --

8 THE COURT: We don't have to go there again.

9 MR. JOHNSON: It's -- what's amazing about this
10 case is given the evidence that Microsoft has tried to put in
11 about, you know, we were this sinking ship, and we were late,
12 and we were lousy product, why the heck did they trip a
13 cripple? I mean, when you hear this evidence you just got
14 to -- you just got to shake your head and say, if we were that
15 bad, if we were that late, if we were that lousy --

16 THE COURT: They didn't know then what they know
17 now.

18 MR. JOHNSON: Well, I'll tell you, Mr. Gates has
19 sure spent a lot of time with us if we were all the things
20 they say we are.

21 MR. HOLLEY: Well, Your Honor --

22 MR. JOHNSON: Thank you, Your Honor.

23 MR. HOLLEY: -- could I very briefly respond to
24 that?

25 There is a complete lack of intellectual rigor in

1 what you just heard. There has to be some reasonable
2 probability that the alleged middleware product could serve as
3 some alternative platform to Windows.

4 THE COURT: That's the whole theory of the case.

5 MR. HOLLEY: It is the theory of the case, Your
6 Honor. And the irony is remarkable that the act that
7 allegedly was anticompetitive was an act which would have tied
8 their product very, very tightly to Windows. How crazy is
9 that? So the withdrawal of support of the NameSpace extension
10 APIs kept them more cross-platformed than they otherwise would
11 have been.

12 This is really Alice in Wonderland, Your Honor.
13 The claim is that they wanted to write to APIs in Windows that
14 were not available on any other operating system. So we did
15 them a favor. Even assuming that those APIs had any utility
16 to the products that are at issue in this case and the
17 evidence is absolutely unequivocal, absolutely unequivocal
18 that the word processor, the spreadsheet and the presentation
19 graphic software had no use for the NameSpace extension APIs.
20 Mr. Johnson even asked a question to elicit that testimony --

21 THE COURT: It's the database. It's the database.
22 It's the only remaining thing is the database.

23 MR. HOLLEY: But, Your Honor, not a database like a
24 database product. A database inside an application that is --
25 and I don't mean to be technical, but a database that is

1 invisible to the file system to the operating system. So the
2 only things --

3 THE COURT: Yeah. But somebody at Microsoft
4 thought they were going to use the NameSpace extensions for
5 the e-mail client and for the --

6 MR. HOLLEY: Well, the document management system,
7 Your Honor. And it's fascinating to note --

8 THE COURT: I don't think that was document
9 management. Maybe it was document. They just bought it from
10 somebody. We don't know who as opposed to whom.

11 MR. HOLLEY: Well, (unintelligible) is not in this
12 case, Your Honor. And the document management system is not
13 part of the PerfectOffice. You can look at the box and you
14 won't see it, and it isn't mentioned in the complaint.

15 So this is all very interesting, but it isn't the
16 case they brought. The case they brought is about WordPerfect
17 and Quattro Pro and maybe if you give them a break
18 PerfectOffice. The NameSpace extension APIs had no utility
19 whatsoever to those three products, and the evidence could not
20 be more clear.

21 So -- but back to the middleware point, Your
22 Honor --

23 THE COURT: I guess that also goes to your
24 knowledge about wherein you thought that and you never heard
25 from them. So why would Mr. Gates ever do it to destroy

1 WordPerfect because he never thought it had anything to do
2 with WordPerfect to begin with?

3 MR. HOLLEY: That's right. And the beta --

4 THE COURT: But that's for the jury.

5 MR. HOLLEY: Well, yes. But back to the question
6 which is not for the jury, Your Honor, and that is, what is
7 middleware. It has to have these characteristics. Otherwise,
8 it's just some product.

9 THE COURT: All right. Thank you.

10 MR. HOLLEY: Thank you, Your Honor.

11 MR. TULCHIN: Your Honor, on a different subject,
12 could we get a copy of the note that you read? Would that be
13 possible?

14 THE COURT: You sure can.

15 MR. TULCHIN: Thank you, Your Honor.

16 (Whereupon, the court proceedings were concluded.)

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1 STATE OF UTAH)

2) ss.

3 COUNTY OF SALT LAKE)

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

6 That as such reporter, I attended the hearing of
7 the foregoing matter on December 7, 2011, and thereat reported
8 in Stenotype all of the testimony and proceedings had, and
9 caused said notes to be transcribed into typewriting; and the
10 foregoing pages number from 4770 through 4876 constitute a
11 full, true and correct report of the same.

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

14 And hereby set my hand and seal, this ____ day of
15 _____ 2007.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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