

1 (12:13 p.m.)

2 THE COURT: Okay, let's get the jury.

3 (Whereupon, the jury returned to the courtroom.)

4 THE COURT: Mr. Schmidtlein?

5 MR. SCHMIDTLEIN: Thank you, Your Honor.

6 Q. (Mr. Schmidtlein) If I could have -- if I could  
7 ask, could you put up your demonstrative 359, the MiddleWare  
8 examples? Thank you. There we go.

9 You were shown this slide earlier this morning by  
10 Mr. Holley. Do you recall that Dr. Bennett?

11 A. Yes, sir.

12 Q. And before our break, I asked you about the  
13 MiddleWare definition in the Microsoft dictionary. Do you  
14 recall that?

15 A. Yes.

16 Q. Okay. If you were to adopt the MiddleWare  
17 definition used in Microsoft's dictionary, would NetScape  
18 Navigator qualify as MiddleWare?

19 A. There are three definitions. Do you want me to  
20 consider them in aggregate or how should I respond?

21 Q. Does NetScape Navigator meet any of the  
22 definitions offered in Microsoft's dictionary?

23 A. By itself, no.

24 Q. You don't believe that NetScape Navigator is  
25 software that sits between two or more types of software and

1 translates information in between them?

2 A. That would not be how I represent it.

3 MR. HOLLEY: Your Honor, I would just object to this  
4 entire line of questioning as impeaching the findings of  
5 fact as to which Novell sought and obtained collateral  
6 estoppel.

7 THE COURT: I have been waiting for an objection. If  
8 you all want to approach the bench we can discuss it more.

9 (Whereupon, a bench conference was held out of  
10 the presence of the jury.)

11 THE COURT: I had -- I mean I don't see how you can  
12 define MiddleWare simply in the abstract without relating to  
13 the claim asserted in this case it has to do certain things  
14 with the operating system.

15 MR. HOLLEY: Yes, Your Honor. Otherwise it is a  
16 meaning --

17 THE COURT: I don't get it. But it seems to me that  
18 whatever definition MiddleWare applies, it has to take into  
19 account how it is used in terms of this case. It is not  
20 simply anybody's definition of MiddleWare, it has to be  
21 MiddleWare to threat the operating systems and a generalized  
22 definition, it may or may not be a threat to operating  
23 systems.

24 MR. SCHMIDTLEIN: I have been -- I have been precluded  
25 in the past from trying to offer testimony from their

1 witnesses in the government case where they said it was a  
2 threat to the operating system.

3 THE COURT: I haven't precluded you from asking any  
4 question. I'm sustaining the objection to this question.

5 MR. HOLLEY: Thank you, Your Honor.

6 (Whereupon, the sidebar conference concluded.)

7 Q. (By Mr. Schmidtlein) Sir, are you familiar with  
8 any testimony that has been given in this case with respect  
9 to AppWare and whether Microsoft thought AppWare was  
10 MiddleWare?

11 A. I guess I would want you to show it to me.

12 Q. Have you got demonstrative 17?

13 THE COURT: I think this falls in the same category of  
14 Mr. Holley's objection before. Microsoft has asked  
15 technical questions of this witness and you have asked  
16 technical questions in response and you have got plenty of  
17 evidence and you're free to argue it but you are not free to  
18 use the witness as a medium for making your closing  
19 arguments.

20 MR. SCHMIDTLEIN: Certainly.

21 Q. (By Mr. Schmidtlein) Do you know whether AppWare  
22 was designed to be a layer that would provide all of the  
23 services required by an application?

24 A. I believe it was represented in the media as  
25 such. I am only aware of the existence of the product for a

1 few years, but at the most sophisticated period of  
2 development of which I am aware, it was a significantly  
3 limited development platform.

4 Q. Have you reviewed any testimony in this case as  
5 to whether Microsoft thought AppWare was a layer that would  
6 provide all the services required by applications?

7 MR. HOLLEY: I think, Your Honor, we're right back to  
8 where we started.

9 THE COURT: I think we are but overruled. I'll let  
10 Mr. Schmidtlein --

11 Q. (By Mr. Schmidtlein) Have you reviewed any  
12 testimony on the subject that you took into consideration in  
13 forming your opinions in this case?

14 A. I recall testimony, but I didn't memorize it. If  
15 you want to ask me about it, I would like you to show it to  
16 me.

17 Q. Now, sir, is it your opinion that the  
18 functionality that would be provided by the Microsoft common  
19 file open dialog was absolutely equivalent to the  
20 functionality that would be provided by the NameSpace  
21 Extension APIs?

22 A. That wasn't my testimony.

23 Q. And, in fact, there were things that Novell  
24 wanted to do to implement with the NameSpace Extension APIs  
25 that, in fact, the Microsoft common file open dialog did not

1 allow; isn't that correct?

2 A. The Microsoft common open file dialog by itself  
3 and not taken into account other Windows APIs; that is  
4 correct.

5 Q. Now, did Marvel use the Microsoft common file  
6 open dialog?

7 A. I don't recall.

8 Q. Did --

9 A. It may have.

10 Q. Did Athena use the common open file dialog?

11 A. I haven't looked at the source code for either of  
12 those products, and my analysis was focused on whether the  
13 NameSpace Extensions were used. So I hesitate to answer.

14 Q. And certainly Athena and Marvel didn't use the  
15 Chico app, did they?

16 A. I don't know.

17 Q. And Internet Explorer didn't use Chico app, did  
18 it?

19 A. I don't know.

20 Q. You are aware that Microsoft Office implemented  
21 its own custom file open dialog; correct?

22 A. Yes, I believe that is true.

23 Q. And Microsoft Office didn't use the Chico App,  
24 did they?

25 A. It may have. I don't know.

1 Q. Now, I believe Mr. Holley asked you some  
2 questions about work you have done for Microsoft in the past  
3 this morning. And did I hear you say earlier that you  
4 worked for a company that worked with Microsoft?

5 A. Yes.

6 Q. And which company was that?

7 A. A company called Pacific Mountain Research.

8 Q. And Microsoft was a partner or a client of  
9 Pacific Mountain Research?

10 A. It would be more accurate to say, well, we  
11 developed hardware and software for them in the mid 80s.

12 Q. And am I right, did I read on your website, that  
13 you have actually taught a course teaching students how to  
14 write games for the XBox?

15 A. That is correct.

16 Q. Have you written courses for the Play Station?

17 A. No, sir.

18 Q. How about the Nintendo Wii?

19 A. No. Well, we have talked about those interfaces,  
20 but Microsoft makes the XBox interface freely available for  
21 educational institutions so we use that.

22 Q. Am I correct that in the past you have received  
23 funding for research projects over the years from Microsoft?

24 A. On occasion, yes.

25 Q. I will show you what we have marked as

1 Demonstrative 20. And I know in your expert -- in your  
2 expert report you attached a CV or a resume; is that right?

3 A. Yes, sir.

4 Q. Okay. And as part of your expert report you  
5 listed a number of research grants that you have received;  
6 is that right?

7 A. Yes, sir.

8 Q. Okay. And does this accurately reflect, at least  
9 I guess as of the time of your expert report, all of the  
10 research funding that you have received from Microsoft?

11 A. It would appear to be. I don't have my CV in  
12 front of me.

13 Q. Okay. Have there been any additional research  
14 funding grants that you have received from Microsoft since  
15 you submitted your expert report in I guess it was 2009?

16 A. No, sir.

17 Q. Now, take that down. Mr. Holley also asked you  
18 earlier today whether you had been retained as an expert for  
19 Microsoft before and I think you said yes. Is that right?

20 A. Just to be clear, I was retained by counsel for  
21 Microsoft, but yes.

22 Q. And you were -- you were retained to present  
23 expert testimony on behalf of Microsoft; correct?

24 A. Correct.

25 Q. And how many cases have you been retained by

1 Microsoft, Microsoft lawyers?

2 A. In the order of eight or nine.

3 Q. I will show you what we have marked as  
4 Demonstrative 27. And again, I took these from what was  
5 listed in your expert report. Is this an accurate list of  
6 the cases that you at least put in your expert report as  
7 having been retained on behalf of Microsoft?

8 A. This looks accurate.

9 Q. Okay. And the Caldera case, was that the first  
10 case that you have been retained?

11 A. By attorneys for Microsoft?

12 Q. Correct.

13 A. Yes.

14 Q. Okay. And that was back in late -- late 1997 or  
15 around that time period?

16 A. In that timeframe, yes, sir.

17 Q. Okay. And I believe at your deposition you  
18 indicated that you had between the time you filed your  
19 report and had put together a list, this list, had you been  
20 retained in additional cases?

21 A. I am pausing. Do you mean additional cases of  
22 any kind or additional cases --

23 Q. Additional cases on behalf of Microsoft?

24 A. Not that I recall.

25 Q. We'll get that for you. I think at your



1 deposition you testified that there were -- there had been a  
2 couple more cases that you had been retained since you had  
3 -- had put your --

4 A. There may have been I --

5 Q. Are you familiar with the Go Corporation case?

6 A. Yes, I apologize. Yes.

7 Q. And were you retained on Microsoft in that case?

8 A. Yes, I was.

9 Q. Do you remember there being another Mississippi  
10 case?

11 A. Yes.

12 Q. And so that would be in addition to -- in  
13 addition to the nine cases on the demonstrative, there were  
14 two more cases that at least you were able to identify in  
15 your deposition; is that right?

16 A. Correct.

17 Q. And since the time we took your deposition, have  
18 you been retained by Microsoft in any other cases?

19 A. No.

20 Q. And am I correct that in each one of these cases  
21 you were retained to offer technical opinions in connection  
22 with -- in connection with cases where Microsoft was a  
23 party; is that right?

24 A. Yes.

25 Q. And is it fair to say that you have been retained

1 on behalf of Microsoft more than any other -- any other  
2 company in terms of your expert witness engagements?

3 A. I have no idea.

4 Q. Well, I believe you testified this morning, if I  
5 get the number wrong I apologize, that you thought you had  
6 been retained as an expert in did you say like 19 cases,  
7 20 cases?

8 A. That sounds about right.

9 Q. Okay. And by my count we have got nine plus two  
10 is 11, so is it fair to say that in over half of the cases  
11 that you have served as an expert witness, it has been on  
12 behalf of Microsoft; is that right?

13 A. Sure.

14 Q. Okay. And in each one of these cases you offered  
15 technical opinions to support Microsoft's legal position; is  
16 that right?

17 A. I think it would be more accurate to say I  
18 offered technical opinions that represented my evaluation of  
19 the issues at hand.

20 Q. Okay. Has there ever been a case where Microsoft  
21 -- Microsoft asked you to consider being an expert witness  
22 where after reviewing the facts in the case you concluded  
23 you couldn't because your position would not square with  
24 Microsoft's position in the case?

25 A. Yes.

1 Q. And how many of those cases?

2 A. One that comes to mind.

3 MR. SCHMIDTLEIN: That is all I have, Your Honor.

4 THE COURT: Mr. Holley?

5 MR. HOLLEY: Yes, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. HOLLEY:

8 Q. Professor Bennett, directing your attention to  
9 Demonstrative Exhibit 28 which Mr. Schmidtlein showed you  
10 relating to research funding obtained from Microsoft, what  
11 were those monies used for?

12 A. Shall I go down the list?

13 Q. Sure.

14 A. So the AIR Project was a national competition for  
15 projects that would be using computer technology to  
16 alleviate poverty and improve the quality of life in the  
17 developing world. This funding supported a graduate student  
18 of mine who worked on that project.

19 The Rural Engineering Program was funds provided  
20 by Microsoft that went to support an initiative of mine when  
21 I was the Associate Dean of Engineering that provided  
22 technical classes in science, technology, engineering and  
23 mathematics to students in Grand Junction, Colorado in the  
24 western slope.

25 The BiFrost Location Independent Computing System

1 was, and the next three, to try to move things along, were  
2 research, you know, competitions where people from all --  
3 researchers from all over the country, all around the  
4 country wrote proposals and we were funded at this level by  
5 Microsoft. In each of these cases the funds went to support  
6 graduate students or to purchase equipment. I'll stop.

7 Q. Professor Bennett, have you received any similar  
8 funding from any other computer software vendors besides  
9 Microsoft?

10 A. Yes, I have.

11 Q. And can you tell us some of the other software  
12 companies that have funded the projects in your academic  
13 career?

14 A. Compaq Computer Company, Sun, I am -- I am low  
15 blood sugar and having a little time recalling things, but  
16 there are several.

17 Q. Okay. How, if at all, Professor Bennett, were  
18 the opinions that you gave today affected by the fact that  
19 Microsoft funded research projects that you were involved  
20 in?

21 A. It had no impact whatsoever.

22 Q. Now, I would like you to take a look at  
23 Mr. Schmidtlein's list of cases in which you provided expert  
24 testimony at the request of Microsoft's counsel. In looking  
25 at the cases, three, the case in Washington, D.C., the

1 California Consumer cases, the MDL case, the Friedman case,  
2 the Gordon case, the Comes case and the Hood case, is there  
3 any relationship between the technical issues in those  
4 different cases?

5 A. The technical subject matter raised in those  
6 cases was virtually identical.

7 Q. How many times did Ron Alepin show up  
8 representing the plaintiffs in those cases?

9 A. Most of them.

10 MR. SCHMIDTLEIN: Objection, Your Honor.

11 THE COURT: Overruled. Absolutely overruled.

12 Q. (By Mr. Holley) Now, Mr. Schmidtlein showed you,  
13 but didn't really show you on cross-examination Plaintiff's  
14 Exhibit Number 113. I would like to give it to you. And  
15 with Mr. Goldberg's cooperation, I would like to put it up  
16 on the screen because Novell has a much prettier copy than  
17 we do.

18 Directing your attention, Professor Bennett, to  
19 the page which is internally numbered 19 up at the top, no  
20 I'm sorry, number 20 at the top, and it has a Bates Number  
21 4390, just tell me when you're there.

22 A. I am there.

23 Q. Okay. The statement here, Explorer Integration  
24 Details, first bullet, not for most applications,  
25 exclamation mark. How, if at all, does that statement in

1           this document relate to the testimony that you gave earlier  
2           today about the kinds of applications that in your view  
3           could make use of the NameSpace Extension APIs?

4           A.    This statement is consistent with my testimony  
5           and my understanding.

6           Q.    And can you explain briefly why?

7           A.    This goes back to my analogy of, you know, the  
8           closet with my clothes and my clothes in the suitcase.  If  
9           my clothes are already in the closet, I don't need a special  
10          tool to see what they are I can just look.

11          Q.    Now, Mr. Schmidtlein showed you Plaintiff's  
12          Exhibit Number 105 which I think you described as a trip  
13          report from November of 1993.  Tell me if you have that up  
14          there with you, sir?

15          A.    I do but you're going to have to give me a  
16          moment.

17          Q.    Okay.  Professor Bennett, just to move things  
18          along --

19          A.    PX-105.

20          Q.    105, great.

21          A.    I have it.

22          Q.    Thank you.  Now, Mr. Schmidtlein directed your  
23          attention to the paragraph that begins, "They were very  
24          happy" and asked you about the sentence that says, "since  
25          they just acquired a document management system, I assume

1           they will want to plug that in, plus WP mail." Is it  
2           correct or incorrect, based on your knowledge of WordPerfect  
3           Office 7 released for Windows 95, that there was no document  
4           management system or WordPerfect e-mail client included in  
5           that product?

6           A.     Certainly not in the box of the product that I  
7           examined.

8           Q.     Now Mr. Schmidtlein asked you some questions  
9           about the purposes of an operating system vendor telling  
10          ISVs about features in a new operating system under  
11          development. Do you recall that, sir?

12          A.     Yes, sir.

13          Q.     And you said that one of the reasons that an  
14          operating system vendor might do that was to get ISVs to use  
15          the feature, and you said there were others but you weren't  
16          asked what they were. What other reasons would there be in  
17          your experience?

18          A.     When especially during the development phase  
19          there are, you know, I'll say ideas cooked up by developers  
20          or by companies, and often a developer will float a trial  
21          balloon to say we could do the following, or we have  
22          implemented an example of the following functionality, what  
23          do you think?

24          Q.     In your experience have you seen operating  
25          systems vendors do that, what you just said?

1           A.    Yes, I have.

2           Q.    Now Mr. Schmidtlein asked you some questions in  
3           which he said or suggested that the documentation for the  
4           NameSpace Extension APIs was withdrawn as of October 1994.  
5           What, if anything, happened to the APIs themselves after  
6           October 1994?

7           A.    To my knowledge nothing.

8           Q.    To your knowledge, based on your review of the  
9           record, did Microsoft make any effort to take back the  
10          documentation and sample code that it had provided to  
11          software developers with the M6 beta of Windows 95?

12          A.    Not to my knowledge.

13          Q.    Now Mr. Schmidtlein showed you a piece of your  
14          deposition at Page 84 and you suggested in response that it  
15          might be useful to look at the surrounding context. Do you  
16          still have that up there with you, sir?

17          A.    Yes, sir.

18          Q.    And what, if anything, can you tell us about the  
19          pages before and the pages after the piece of this  
20          deposition that Mr. Schmidtlein showed you that in your view  
21          are relevant to the context of the answer that he showed  
22          you?

23          A.    Well, I was asked a series of questions about the  
24          subject matter, and I would like all of my testimony to be  
25          considered in context. I guess the best summary I would



1 point to Page 83 starting at Line 6 where the question is  
2 asked, "What is your point" -- "what then is the point of  
3 your discussion of the ability to use the undocumented  
4 APIs?" And my answer was, "My point is that these  
5 interfaces existed in the operating system. One of the  
6 options available to WordPerfect or any developer was to use  
7 them. WordPerfect had in the past followed that practice."

8 Q. Now directing your attention to Page 85 of this  
9 deposition, you were asked, "do you offer any opinion with  
10 respect to which approach was better, and by that I mean  
11 comparing the use of the undocumented APIs to the course  
12 that they did follow." And what did you say in response to  
13 that, sir?

14 A. I said that there was not enough information to  
15 perform the analysis. I know that they did not use them.

16 Q. And what did you mean when you said that there  
17 wasn't enough information to perform the analysis of whether  
18 it was better for WordPerfect to continue calling the  
19 NameSpace Extension APIs, if that is in fact what they did,  
20 versus creating their own file open dialog for Windows 95?

21 A. My point was that there was not enough  
22 information in the evidentiary record produced to me to form  
23 an opinion.

24 Q. Now, Mr. Schmidlein asked you various questions  
25 about rooted versus nonrooted versions of the Windows

1 Explorer. Can you explain to us why the word "rooted" is  
2 being used in that context? What does it mean to say that  
3 the Explorer is either rooted or nonrooted?

4 A. It has to do with what represents the top of the  
5 tree view which is the left hand view of what is being  
6 explored. A rooted implementation means that at the top you  
7 can't go any farther. And unrooted means that you can  
8 continue to browse up into the system NameSpace.

9 Q. And why is the distinction between -- or let me  
10 ask it this way. Is the distinction between saying  
11 something is rooted and nonrooted necessarily connected to  
12 whether that version of the Explorer is running in the same  
13 process as the rest of the operating system shell?

14 A. It may be, but it is not necessarily so as I  
15 tried to explain.

16 Q. Now, Mr. Schmidlein asked you certain questions  
17 about the MSN client software in Windows 95 code named  
18 Marvel. Do you recall that?

19 A. Yes, sir.

20 Q. What significance, if any, do you attribute to  
21 the fact that Marvel was shipped as part of Windows 95 in  
22 terms of potential reliability and robustness issues from  
23 its use of the NameSpace Extension APIs?

24 A. Because Marvel was developed and tested with all  
25 other trusted operating system components, there was an

1 opportunity to expose potential problems during the  
2 operating systems testing phase. So it is another example  
3 of what I referred to in my earlier testimony as a trusted  
4 operating system component.

5 Q. Now, I would like to show you some testimony  
6 given by Novell's technical expert in this case and ask you  
7 how, if at all, this testimony bears on the definition that  
8 you used in this case for what is MiddleWare as that term is  
9 understood in computer science.

10 A. Well, Mr. Alepin was asked whether or not it is  
11 enough to say to describe MiddleWare as something that  
12 exposes APIs and he answered there's got to be more, there's  
13 got to be more than just the exposure of APIs or the  
14 encapsulation of meaningful abstractions of APIs. You need  
15 more.

16 Q. And do you agree or disagree with Mr. Alepin in  
17 this regard?

18 A. I agree.

19 MR. HOLLEY: Your Honor, I have no further questions.

20 THE COURT: Anything further, Mr. Schmidtlein?

21 MR. SCHMIDTLEIN: No, Your Honor.

22 THE COURT: Thank you very much.

23 THE WITNESS: Thank you.

24 THE COURT: Mr. Tulchin, I assume but for the exhibits  
25 that closes Microsoft's case?

1 MR. HOLLEY: Yes, Your Honor. But Mr. Tulchin has  
2 something he would like to say.

3 MR. TULCHIN: There is just one exhibit, Your Honor,  
4 as to which there is a dispute. But subject to the  
5 admission of that one exhibit, which is DX-346, Microsoft  
6 rests.

7 THE COURT: All right. Ladies and gentlemen, I had no  
8 idea what the scheduling was going to be, see you at 8:00  
9 and have a nice evening and have a nice afternoon and a nice  
10 evening.

11 THE CLERK: Judge, juror number six has to be out by  
12 2:15 tomorrow. Is that right?

13 JUROR NUMBER 6: I could probably go to 2:30 and be  
14 okay.

15 (Whereupon, the jury left the courtroom.)

16 THE COURT: Please be seated. Mr. Tulchin, what is  
17 the dispute on the exhibit?

18 MR. TULCHIN: The exhibit is 346, Your Honor, but  
19 before we get to that, two other things, if I could, I don't  
20 think it will be lengthy.

21 The first is that while I'm not sure it is  
22 required, out of an excess of caution, Microsoft renews its  
23 motion under Rule 50 for judgment as a matter of law for all  
24 of the same reasons set forth in our brief and oral argument  
25 of that motion two or three weeks ago.

1 THE COURT: That motion is denied with the same --  
2 again I'm not sure whether it is denied or whether it is  
3 deferred or whatever, it is going to the jury and then I'll  
4 focus upon it after that.

5 MR. TULCHIN: Thank you, Your Honor.

6 THE COURT: And I will also deny formally the motion  
7 to reopen the case filed by Novell.

8 MR. TULCHIN: The only other thing I would say, Your  
9 Honor, is we have been asking now for a week, formally and  
10 informally, for Novell to tell us who, if anyone, they  
11 intended to call in a rebuttal case. Yesterday morning at  
12 about 7:15 --

13 THE COURT: I have read your letter and I have read  
14 the cases you cite so let's start off with the three who at  
15 least so far have been proffered.

16 MR. TULCHIN: Well, the only point I want to make, I'm  
17 happy to address this --

18 THE COURT: I know your position. Let's get Novell's.

19 MR. TULCHIN: We still haven't been told if they -- if  
20 they intend to do any of this. And I asked again at the  
21 lunch break and Mr. Schmidtlein wouldn't answer.

22 THE COURT: I guess now we need to know.

23 MR. TULCHIN: I guess we do.

24 MR. SCHMIDTLEIN: Well --

25 MR. JOHNSON: Well, Your Honor, one of the discussions

1 we obviously were going to have is in light of Mr. -- of Dr.  
2 Bennett's testimony which of these witnesses do we want to  
3 bring in. There is also, of course, testimony from prior  
4 witnesses which we wish to address. We do not think --  
5 obviously we got their motion --

6 THE COURT: I'm entitled to know this.

7 MR. JOHNSON: We did not get an opportunity to  
8 respond. If you want something in writing, we would be  
9 happy to do so. But the fact is --

10 THE COURT: We can do that, that part we can do but  
11 maybe you don't -- maybe you recognize the case and you  
12 don't intend to call people about Quattro Pro. And so I  
13 don't want to rule upon something which may be academic.

14 MR. JOHNSON: I'm sorry, Your Honor.

15 THE COURT: I don't want to rule on something which  
16 may be academic, having read the authority cited by  
17 Microsoft and understanding the situation, it may be that  
18 you understand it is appropriate not to call people to  
19 testify about things that you clearly could have anticipated  
20 before.

21 MR. JOHNSON: Well, no, Your Honor, we don't agree  
22 with that.

23 THE COURT: Tell me why not? I think it is so clear  
24 that you just want to have the last word from the three of  
25 them that there is no reason to offer, not to have

1           anticipated this, it was actually in the pretrial order they  
2           talked about localization, but it was also in opening  
3           statement. If you didn't know that they were going to fight  
4           hard on the issue of Quattro Pro, then I know you did.

5           MR. JOHNSON: Well, I don't think localization was the  
6           issue we were concerned about, Your Honor.

7           THE COURT: I don't know what case you were listening  
8           to.

9           MR. JOHNSON: What we are concerned about is  
10          Mr. Larsen's testimony which was inconsistent with what he  
11          said in his deposition with respect to not even being able  
12          to find code and the like when he appeared in December after  
13          the developers left the Quattro Pro campus. In other words,  
14          his testimony at trial was in variance, it was quite a bit  
15          more expanded than we had heard in his deposition. And so  
16          yes, we do wish to --

17          THE COURT: But Mr. Larsen says -- what else didn't  
18          you anticipate?

19          MR. JOHNSON: We wish to address that, Your Honor. We  
20          also --

21          THE COURT: Is there any evidence that the three of  
22          them ever went to California?

23          MR. JOHNSON: Yes. Mr. Gibbs did go to California,  
24          Your Honor, and he was there and, in fact, he knows  
25          Mr. Larsen and he knows the circumstances under which

1 Mr. Larsen was there and left. And frankly, we were not  
2 expecting this guy to come in because he had agreed with us  
3 that Mr. Gibb was the appropriate person that would know  
4 what was critical path and what was going on with the  
5 PerfectOffice suite. For him to come in and say Quattro Pro  
6 was not finished emphatically before this jury frankly is  
7 wrong.

8 THE COURT: You got him to admit here that -- go  
9 ahead.

10 MR. JOHNSON: As a matter of fact, and we wish to  
11 provide some rebuttal with respect to that issue. The other  
12 things that we're looking at to provide some rebuttal on is  
13 that Microsoft came in here and suggested time and time  
14 again to this jury that somehow it would have been  
15 satisfactory for WordPerfect to simply put an icon on the  
16 desktop and this -- and that the NameSpace Extensions were  
17 all about simply opening the applications. That is -- that  
18 certainly is not what we understood coming into this trial.

19 I don't think Mr. Nakajima or anyone else would  
20 suggest that that is what the NameSpace Extensions were all  
21 about, and they keep trying to belittle the notion that a  
22 word processor wouldn't have any use for the NameSpace  
23 Extensions. So --

24 THE COURT: Who do you want to call about that?

25 MR. JOHNSON: Well, it would be either Mr. Harral or



1 Mr. Richardson. We haven't made a final determination on  
2 that. But let me assure you of something, Your Honor.  
3 We're talking about -- I mean we have had a two month trial  
4 here, and we're talking about combined half a day of  
5 testimony maximum.

6 THE COURT: I don't care half day or not, but let me  
7 hear first about Quattro Pro was so teed up that how you --  
8 why you -- what you want is you want the last word, you want  
9 Gary Gibb, Adam Harral, and Greg Richardson to be the last  
10 people.

11 MR. JOHNSON: No, we want the record to be complete.

12 THE COURT: Well, the record is complete. As far as  
13 I'm concerned, you know, that is not the way the trial  
14 process works. So Mr. Tulchin, tell me exactly -- tell me  
15 about Mr. Larsen. Tell me about -- I mean God knows you  
16 have highlighted this issue from opening statement, I look  
17 back in the pretrial order and it is not extensive but there  
18 is mention of localization and localization is all -- this  
19 case certainly what happened out there is certainly relevant  
20 to localization and international localization.

21 MR. TULCHIN: I did mention in my opening statement  
22 the issues that Mr. Johnson is referring to, both of them.  
23 The time to address them through Harral, Gibb or Richardson  
24 was during their testimony. And of course what Mr. Johnson  
25 says about Larsen is strange, I would say of maybe worse

1 than strange. If anything Mr. Larsen said was inconsistent  
2 with the statement that he made in his deposition, the time  
3 to cross-examine him was when he was on the stand. There  
4 was nothing as far as I am aware that was inconsistent.

5 THE COURT: Somebody, and I don't know who, it may  
6 have been Mr. LeFevre, it may have been Larsen too, they  
7 were questioned, more than one person deferred to Mr. Gibb.  
8 But that really is a -- in terms of knowing where a shared  
9 code stood but the -- that is not what they testified to.  
10 They testified to -- what they testified to was the fact  
11 what they saw in California.

12 MR. JOHNSON: Your Honor --

13 MR. TULCHIN: And I asked Mr. Larsen when he was  
14 here --

15 THE COURT: Nobody said -- nobody said, you know,  
16 we're going to listen to Mr. Gibb and he is going to tell us  
17 what happened in California.

18 MR. TULCHIN: Correct. And I asked Mr. Larsen did  
19 Mr. Gibb go with you on any of those trips in 1996 to Scotts  
20 Valley and he said no. On cross, Mr. Wheeler, the only  
21 thing Mr. Wheeler did of Mr. Larsen was to say, as best I  
22 remember it, to Mr. Larsen, is it possible that Mr. Gibb has  
23 the source code which verges on the preposterous. If he  
24 still has it somewhere I guess it should have been produced  
25 in discovery. But leaving that aside, I mean there is

1 nothing new here. And rebuttal is supposed to be for the  
2 unanticipated.

3 The plaintiff gets a big advantage, and we saw  
4 this with a note from one of the jurors, of getting to go  
5 first. The juror note complained that another juror perhaps  
6 had reached conclusions without listening to Microsoft's  
7 evidence.

8 THE COURT: Maybe they reached a conclusion your way  
9 but they didn't want to hear the rest of the case.

10 MR. TULCHIN: Maybe so.

11 THE COURT: That is not --

12 MR. TULCHIN: But the idea that Novell gets to go  
13 first and last with this same witnesses seems very, very  
14 wrong.

15 THE COURT: I agree with you. So what is it about  
16 Mr. Larsen that he really testified -- what did he testify  
17 differently that you recall from that he -- do you recall  
18 any major difference from his deposition?

19 MR. TULCHIN: No, there is nothing in his deposition  
20 that was inconsistent with his testimony that he went out to  
21 Scotts Valley in January and every week thereafter until he  
22 left the company in March, and that Quattro Pro, as a  
23 stand-alone and as a component to the PerfectOffice, wasn't  
24 ready by any stretch of the imagination, is what he said.  
25 There is nothing inconsistent in the deposition as far as I

1 know. I don't think that counsel for Novell asked any  
2 questions about those visits to Scotts Valley, at least not  
3 as far as I remember, Your Honor.

4 And Your Honor I know Mr. Johnson has his  
5 summation ready, at least he has been looking at it today as  
6 far as I can tell, but one of the things that I'm concerned  
7 about --

8 THE COURT: Well, I think you're both good enough  
9 trial lawyers that your summation should have been in draft  
10 before you even began the case.

11 MR. TULCHIN: Well, we're ready to proceed, Your  
12 Honor, with summation. What I'm concerned about is that we  
13 filed that brief yesterday at 1:30 in the afternoon, Your  
14 Honor.

15 THE COURT: I'm not going to give you a chance to  
16 respond. I'm entitled to tell the jury where we're going to  
17 go. Frankly, I'm entitled to my own schedule and --

18 MR. TULCHIN: Of course.

19 THE COURT: -- and I realize how long the jury  
20 deliberates is up to the jury and I'm going to defer to the  
21 jury. I told you all a long time ago, all things being  
22 equal, I would like to be back on Friday, I have hearings  
23 scheduled but I think that is probably unlikely.

24 MR. TULCHIN: I'm a little concerned that by leaving  
25 things open what Mr. Johnson is trying to do is come in

1 here --

2 THE COURT: We're going to have him tied up by the  
3 time we leave today.

4 MR. TULCHIN: I'm sorry?

5 THE COURT: We're going to have him tied up by the  
6 time we leave today.

7 MR. TULCHIN: Good. Good.

8 THE COURT: The second issue is --

9 MR. TULCHIN: The second issue was launching the  
10 applications. I said this in my opening. I am not sure  
11 what Mr. Johnson's point is. I was responding to  
12 Paragraph 70 and 75 in the Complaint which say, and I think  
13 it is a violation of Rule 11 of the Federal Rules of Civil  
14 Procedure, but which say that WordPerfect could not be  
15 launched, that it was not available to users on Windows 95  
16 because of the NameSpace Extensions.

17 I pointed out in my opening that you didn't need  
18 the NameSpace Extensions to have the applications available  
19 both on the desktop and on the start button. You could have  
20 an icon on the desktop or get it through the start button,  
21 there is nothing new about that. I must say that Novell, I  
22 think, is going way from the allegations in 70 and 75 of the  
23 complaint. But I can't imagine what in rebuttal Mr. Harral  
24 or Mr. Richardson would say about that.

25 Mr. Harral was very clear in his testimony, Your

1 Honor, that there were three choices that Novell had after  
2 October '94. Continue to use the NameSpace Extensions to  
3 write their file open dialog, use the Windows common file  
4 open dialog, he said they didn't want to do that because  
5 their customers were used to seeing something better, and  
6 you may remember, Your Honor, in Exhibit 110, I think it is  
7 PX-110, in an earlier version WordPerfect had a fancier file  
8 open dialog which they could have continued to use, they  
9 developed that without the NameSpace Extensions. And option  
10 three, of course, Your Honor, was to go and embark on this  
11 very lengthy process to write an advanced customized file  
12 open dialog. That is what they tried to do. Whether they  
13 were successful or not is hard to tell because there aren't  
14 any documents on the subject, but there are documents which  
15 are very clear that the reason for the delay was Quattro  
16 Pro.

17 And we asked Mr. Gibb about this when he was here  
18 the first time, Your Honor, and he said, and I'll get you  
19 the line and page if you want it, I don't have it in front  
20 of me, but Mr. Gibb said there could have been a number of  
21 reasons that PerfectOffice was late. I know that shared  
22 code was critical path and there could have been other  
23 reasons as well. I believe that is a quote. So I don't see  
24 how he could come in here, in any event, even if it were  
25 proper rebuttal, and say that he knows that Mr. Larsen is

1 mistaken when he said he got up every Monday morning and  
2 flew to California and spent the week at Scotts Valley and  
3 there was chaos there and there was -- there were pieces of  
4 the source code missing. I know Mr. Gibb can't say that. I  
5 don't know what the rebuttal would be. So Your Honor, I  
6 think our position is clear. I would be happy to answer any  
7 other questions.

8 THE COURT: All right. Let me hear from Mr. Johnson.

9 MR. TULCHIN: Thank you, sir.

10 MR. JOHNSON: Thank you, Your Honor. Of course the  
11 reason why the plaintiff gets the first and last word is it  
12 is the plaintiff's burden. And that has been traditional at  
13 least as long as I have been trying cases and I don't think  
14 that rule has changed.

15 THE COURT: I'm sorry, I just didn't hear you.

16 MR. JOHNSON: I'm sorry. The reason that the  
17 plaintiff gets to go first, and the plaintiff also gets to  
18 go last, is because the plaintiff has the burden --

19 THE COURT: Yeah, that is true.

20 MR. JOHNSON: -- of proof. I mean that is --

21 THE COURT: That is certainly a true statement.

22 MR. JOHNSON: That is what the trial process is all  
23 about, and that is what it has been for at least as many  
24 years as I have been doing this. I don't think that has  
25 changed.

1           THE COURT: You're a young man but you have been doing  
2 it for a while.

3           MR. JOHNSON: Thank you, Your Honor. I don't feel  
4 young right now. But we didn't say what -- Mr. Tulchin  
5 distorts just about every single document that he looks at.  
6 In Paragraph 75, we said we couldn't get our documents open.  
7 We could not open a document that we previously created and  
8 saved and that was because of the file management system and  
9 the document management system that we wanted to have  
10 prevented us from doing that. And Mr. Richardson testified  
11 about that subject. So it wasn't about clicking on an icon  
12 to open up a PerfectOffice. That is not what the NameSpace  
13 Extensions do, that is not what our complaint was, nor did  
14 we ever suggest that we -- that there wasn't ultimately a  
15 version of PerfectOffice that was running on Windows 95.  
16 But unfortunately, it was too late by the time it got there.  
17 So that is just a gross mischaracterization of what is in  
18 our complaint. And getting back to the situation at Scotts  
19 Valley, obviously we did not know that Mr. Larsen was going  
20 to come in and tell this jury in unequivocal terms that  
21 Quattro Pro was not ready and tried to in essence --

22           THE COURT: Why not? He was deposed?

23           MR. JOHNSON: In essence overrule Mr. Gibb after he  
24 had in fact told us that Mr. Gibb would be the person to  
25 know. So when -- when Mr. Tulchin says well you had a



1 chance to cross-examine him --

2 THE COURT: Well, I'll make it simple. You can't have  
3 any rebuttal testimony about Quattro Pro. That was in the  
4 case. If you didn't know what he was going to say, bad for  
5 you, you deposed him. That was an issue that has been teed  
6 up as early as the pretrial order and certainly was teed up  
7 on opening statement. The evidence relating to Quattro Pro  
8 stands. People want to think that Mr. Gibb really knew what  
9 was going on out there and that -- and that he, you know,  
10 what people said was if he really says he knew what the  
11 situation was and, boy, I didn't bother about them because I  
12 knew they were going to come on board by the time we got the  
13 shared code ready, that is fine. That is bad management to  
14 say, you know, what I really think happened, I think that  
15 this -- I don't think -- I think that -- never mind. But  
16 the deadline sure is important in this lawsuit. I'm not at  
17 all sure it was important when WordPerfect, if it was going  
18 to win this game in the long run, it was going to win on the  
19 quality of the products. I wonder how important this  
20 deadline was. And I think it is perfectly rational for  
21 WordPerfect to have said, look, we're going to wait until we  
22 can get the very best product out, and we're going to get  
23 back and we are going to get the people in our install base  
24 who we think are important to our future and the only way to  
25 win them is by having the very best product available and we

1 need the time to get it. If it takes time to do the share  
2 code and then time to bring Quattro Pro along, so be it. Be  
3 that as it may, that is -- I'm not sure anybody has acted in  
4 bad faith or anything else, I'm not saying they did, I think  
5 there is a perfectly reasonable explanation exactly for what  
6 happened in this case. And what has intervened is, for  
7 purposes of the lawsuit, the 60 to 90 days within August  
8 of '94 has become important. But be that as it may, I'm  
9 simply not -- the issue about what was going on in Scotts  
10 Valley couldn't have been more clearly your responsibility  
11 in your direct case to bring out the best testimony you  
12 could as to why Quattro Pro -- what happened out there was  
13 wrong. So Microsoft's motion is granted to that extent. So  
14 the next issue I'm not --

15 MR. JOHNSON: Well, Your Honor, can I just, for the  
16 record, register our objection to your not permitting us --

17 THE COURT: Of course.

18 MR. JOHNSON: -- to address what is obviously in your  
19 mind a very important issue.

20 THE COURT: You're darn right it is and it should have  
21 been in your mind, too. That is exactly why you should have  
22 anticipated it. That is -- I don't understand but I got --  
23 I have ruled. It is within, as I read the Tenth Circuit  
24 cases, it is entirely within my discretion. I am relying  
25 upon my discretion. There is absolutely no reason,

1 absolutely -- I absolutely understand the burden of proof,  
2 that does not mean that the government in a criminal case  
3 has got a higher burden and can bring back witnesses to  
4 testify about things that they should have anticipated to  
5 begin with. It doesn't work that way. You could have -- it  
6 was teed up and you just want the last word and you're not  
7 going to get it except in terms of argument which, of  
8 course, you are going to get.

9 MR. JOHNSON: Well, Your Honor --

10 THE COURT: As you should.

11 MR. JOHNSON: -- just for the record, the Tenth  
12 Circuit case of United States versus Kelly, rebuttal  
13 evidence may be introduced to explain, repel, contradict or  
14 disprove an adversary's proof. The fact that testimony  
15 would have been more appropriately offered during the  
16 proponent's case in chief does not preclude its admission as  
17 rebuttal evidence.

18 THE COURT: It doesn't preclude it. It is -- I  
19 haven't read that case, but it is in my discretion.

20 MR. TULCHIN: Your Honor, and of course it sounds like  
21 a criminal case, Your Honor, where, of course, things are  
22 somewhat a little different.

23 MR. JOHNSON: And, of course, we didn't get a chance  
24 to offer a written response to this.

25 THE COURT: Well, wait a minute. You got it at 1:30

1           yesterday. I've been flying back and forth. Don't tell me  
2           you don't have time. You have got lawyers sitting out  
3           there, you have breakfast every morning, and I am just not  
4           going to put up with this. This is eight weeks of absolute  
5           over litigation as far as I'm concerned. You have got  
6           people, you have got plenty of people. If you had wanted to  
7           respond to that letter, I could have had it this morning.  
8           You have had plenty of opportunity to respond. In any  
9           event, I have told you I have a right to be -- this jury has  
10          a right to know what is going to happen and I'm not going to  
11          give time for you to go back and write a letter saying what  
12          Richardson you have a response right now and you lose this  
13          issue. I mean it is just clear to me that Quattro Pro was  
14          teed up and you should have -- you should have presented  
15          your very best case as to why it was what happened you say  
16          at Scotts Valley was, you know, was irrelevant. You did.  
17          You had Mr. Gibb's -- Mr. Gibb testify that what was going  
18          on out there was irrelevant because he knew that -- I don't  
19          know quite what he was thinking, but I believe he was a  
20          WordPerfect guy focusing upon WordPerfect, but be that as it  
21          may, I'm not faulting him. I am saying you did put on the  
22          best you could which is, you know, what was going on out  
23          there it is irrelevant. It wasn't irrelevant. You can't do  
24          things, you can't manage a business, be that as it may, what  
25          he did is what he did.

1 MR. JOHNSON: I understand. I understand.

2 THE COURT: And then there's no more testimony on that  
3 issue. What is the next issue that you might want rebuttal  
4 on?

5 MR. JOHNSON: As I said, Your Honor, we would  
6 potentially bring back Mr. Harral or Mr. Richardson with  
7 respect to the notions advanced by the plaintiff -- by the  
8 defendant in their case that this was somehow this was about  
9 the word processor using NameSpace Extensions for its  
10 documents or files. That is just not true. They keep  
11 pressing the jury --

12 MR. TULCHIN: The whole complaint refers to  
13 WordPerfect.

14 MR. JOHNSON: They keep pressing this jury that it is  
15 all about sticking an icon on the desktop, and that merely  
16 opening the application is somehow equivalent or has some  
17 meaning to what the NameSpace Extension is.

18 THE COURT: Whatever the evidence is, why wasn't that  
19 teed up? I mean it couldn't have been -- I mean frankly  
20 that surprised me because it -- because it shook -- when I  
21 had been mistaken, a premise of mine was WordPerfect or  
22 PerfectOffice would not work with Windows 95. So I sure  
23 understood, I was surprised when I learned actually I think  
24 there were more ways, I think on the bottom bar, but I'm not  
25 sure, but something there are two other ways I -- and you're

1 smarter than I am, and I sure understood, and I don't  
2 understand why -- why that came up only in the defense case  
3 when it came up in the opening statement.

4 So if that is -- if that is -- I mean I  
5 understand we have got more sophisticated and I think we  
6 have all learned more and, in fact, it was to use the  
7 database that the grammatical error that has been driving me  
8 nuts, I think it says, I don't know who they purchased it  
9 from who, from who instead of from whom, be that as it may,  
10 I have read to the extent there is a database involved. It  
11 seems to me that is what is in evidence. And in terms of  
12 alerting you to what was obviously their theory was that the  
13 icon at the desktop on the start button was sufficient.  
14 That couldn't have been more teed up by the opening  
15 statement. So you can't have rebuttal on that either.  
16 Unless -- if there is something in that area tomorrow, if  
17 technically there is something, I mean I'll hear you, but in  
18 terms of --

19 MR. HOLLEY: But Your Honor is exactly right. I mean  
20 as to the question of whether there is anything technical,  
21 all you need to look at is Slide 20 of Plaintiff's Exhibit  
22 113. And this issue was teed up in the pretrial order.  
23 There are paragraphs which discuss whether the NameSpace  
24 Extensions were important or not. Mr. Gates testified at  
25 his deposition that they were in his view trivial because

1 they weren't needed by word processors and spreadsheets.

2 THE COURT: He thought Capone was trivial and he  
3 thought that -- he wouldn't admit to what evangelization was  
4 and --

5 MR. HOLLEY: Well, Your Honor, the fact of the matter  
6 is that there isn't anybody who has disagreed with  
7 Plaintiff's Exhibit 113. And it is amazing, frankly, for  
8 Novell to now stand before the Court and say that it doesn't  
9 matter whether WordPerfect and Quattro Pro used the  
10 NameSpace Extension APIs. We have been here for more than  
11 seven weeks because they claimed that they couldn't run  
12 without them. And now we know, and I think the jury is very  
13 clear on this point, that they had no use for them. So it  
14 is bizarre, frankly Your Honor, and for them to say that  
15 Mr. Harral and Mr. Richardson need to come back in these  
16 circumstances is just a redo, Your Honor. There are no  
17 surprises. We outlined this. We have known that this was  
18 our theory for months and months and months if not years.

19 THE COURT: Well, you say that there is no -- as I  
20 understand already the plaintiffs case is but I don't need  
21 any rebuttal, that they did need it for something else.  
22 They needed it to -- right or wrong, the theory of the case  
23 is that they had to take the third option because through  
24 preferred partners or whatever, they had worked out  
25 sophisticated customized dialog with their customers.

1           MR. HOLLEY: Actually not. One would think that that  
2           would be the case, but in fact it is not the case. The case  
3           is that the custom file open dialog in WordPerfect and  
4           Quattro had no use for the NameSpace Extensions. It is the  
5           evidence. What the evidence --

6           MR. JOHNSON: That is a total distortion.

7           MR. HOLLEY: Excuse me, Mr. Johnson.

8           MR. JOHNSON: A complete distortion.

9           MR. HOLLEY: Let me finish, please. What the evidence  
10          is, is that five other products, none of which is mentioned  
11          in the complaint in this case, needed the NameSpace  
12          Extensions. That is a basis for awarding judgment against  
13          Novell, but it is not a basis for asking Harral and  
14          Richardson to come back and try to do a better job of what  
15          they said the first time they were here. There is no  
16          surprise, Your Honor. No surprise.

17          Mr. Tulchin said in his opening what we were  
18          going to say about the NameSpace Extensions. They knew  
19          that. I cross-examined Richardson; Mr. Tulchin  
20          cross-examined Harral. We outlined all of our themes in  
21          those crosses. They had a right to redirect those  
22          witnesses. They had a right to call Mr. Creighton. They  
23          had a right to call Mr. Johnson.

24          THE COURT: That is a good question. I wondered about  
25          Mr. Creighton but that is not for me to speculate.



1           MR. HOLLEY: But the fact of the matter is before they  
2           closed their case, they could have tried to buttress what  
3           these two low level developers said. They didn't. So you  
4           can't -- they can't sort of have a second bite at the apple,  
5           Your Honor. There is no surprise.

6           THE COURT: Let me hear an exact proffer of what  
7           Harral and Richardson will talk about in terms of this?

8           MR. JOHNSON: Your Honor, we would -- it is clear what  
9           Your Honor thinks. We withdraw --

10          THE COURT: No. No.

11          MR. JOHNSON: We would withdraw --

12          THE COURT: It is clear what I think on the Scotts  
13          Valley, it is not clear on what I think about this. I would  
14          like a proffer.

15          MR. JOHNSON: Your Honor, I gave you the proffer. I  
16          said that they have advanced a theory that they're trying to  
17          make it seem that WordPerfect didn't have any use for the  
18          NameSpace Extensions. What do you think Mr. Harral and  
19          Mr. Richardson were working on? They were working on the  
20          shared code for WordPerfect. The shared code for  
21          WordPerfect would have included these additional facilities  
22          that WordPerfect traditionally had including document  
23          management, including Quickfinder, and including some of the  
24          new things that were going to be added to the WordPerfect  
25          product like internet, and like ClipArt, and other things.

1           These weren't separate products.  These were going to be a  
2           part of WordPerfect, the stand-alone product, and  
3           WordPerfect in the -- in the PerfectOffice suite.  So you  
4           know to sit here and say --

5           THE COURT:  I thought they weren't in the suite?

6           MR. JOHNSON:  What?

7           THE COURT:  They weren't in the suite.

8           MR. JOHNSON:  Your Honor, because of what happened.

9           THE COURT:  I have never heard that they didn't  
10          develop the suite the way they wanted it because of what  
11          happened.

12          MR. JOHNSON:  This is what happened.  It is not true  
13          to say that they weren't ever in there.  Some of those were  
14          in there.  Quickfinder, for instance, was always in the  
15          older versions of the PerfectOffice suite and WordPerfect  
16          before that.  So some of these products were.  And they have  
17          always had, WordPerfect had always had tremendous document  
18          management capabilities.  And one of the problems was not  
19          having access -- having taken away the access to the  
20          NameSpace Extensions, and Mr. Richardson can testify about  
21          this, is that they couldn't access through Windows 95 their  
22          documents and the things that they needed to get to in the  
23          file management system which was a very important part of  
24          word processors at this point in time in history.  But Your  
25          Honor --

1           THE COURT: Let me ask you more specifically. What is  
2           it they would testify new that they haven't testified to  
3           already?

4           MR. JOHNSON: Frankly, Your Honor, after Mr. Bennett's  
5           testimony we were going back to talk to them. We didn't  
6           know that Your Honor was going to rule that no rebuttal case  
7           could be brought in. So I can't -- I can't sit here and  
8           specifically say --

9           THE COURT: What I have ruled is you can't bring in  
10          Scotts Valley.

11          MR. TULCHIN: Well, Your Honor, a couple of things if  
12          I might. One, everything that Mr. Johnson just said was  
13          fair game on direct or redirect when Harral and Richardson  
14          and Gibb were here in October. I think they testified for a  
15          total of four days, I may be wrong about that, but that is  
16          my memory. It was all fair game for them to say --

17          THE COURT: Well be that as it may, if you have a  
18          specific proffer that you want, we'll be here -- I'll be  
19          here at 7:45 tomorrow morning and I'll get a proffer.

20          MR. TULCHIN: One other thing, Your Honor.

21          THE COURT: But the one thing I'm ruling clearly on is  
22          because it is clear to me that Scotts Valley was absolutely  
23          in this case from the beginning. I think this was in too,  
24          but I'm not sure. If there is something specific you want  
25          to go back and talk to Harral and Richardson about, I will

1 hear the proffer. Nothing frankly that I have heard they  
2 didn't testify to begin with. I fully understand that they  
3 felt that they needed the full functionality that the  
4 NameSpace Extension APIs gave to them in order to continue  
5 to interact with their clients the way they had. That to me  
6 is not new. But if there is something new, I'll -- I'll  
7 take a proffer. The Scotts Valley is clear to me.

8 MR. JOHNSON: Your Honor, if I could turn to just some  
9 better news. Both sides dropped everything with respect to  
10 exhibits except for one apparently.

11 THE COURT: So they are all coming in?

12 MR. JOHNSON: No, they don't come in.

13 THE COURT: They don't come in. One way or the other  
14 that is good news one way or the other.

15 MR. JOHNSON: We dropped our --

16 THE COURT: I am happy. Let's hear about the one.

17 MR. JOHNSON: About this one, and this is what really  
18 concerns me about this one, Your Honor, I reached an  
19 agreement with Mr. Paris yesterday.

20 THE COURT: How are you feeling? We have two  
21 casualties.

22 MR. JOHNSON: We really do.

23 THE COURT: You got run over by a car but I worry  
24 about Mr. Taskier --

25 MR. JOHNSON: That is what happens when you have a two

1 month trial, Your Honor, stuff happens.

2 So Your Honor, I have handed up to you  
3 Mr. Paris's e-mail to me on Sunday. We had talked about  
4 this before, we had actually talked about this in court on  
5 Friday and suggested that at that time that we would both  
6 stand down with respect to exhibits. And I agreed to this.  
7 And so we both said -- I mean the agreement is that there  
8 would be no more exhibits attempted to be admitted into  
9 evidence except for such that might be used in the testimony  
10 of Mr. Bennett and/or the rebuttal case.

11 THE COURT: Well, let me hear from Mr. Paris. Let me  
12 hear from him why this ought to come in?

13 MR. PARIS: I will be very clear, Your Honor. It was  
14 an issue of wires being crossed at the end where I came to  
15 the agreement with Mr. Johnson just as he just represented  
16 to the court. This was something that we talked about on  
17 Friday. Over the weekend, before we had an agreement we  
18 went back and checked all, you know, 270 of the exhibits.

19 THE COURT: What is it --

20 MR. PARIS: That we're concerned about. As to this  
21 one, we thought it was in evidence. We actually thought it  
22 was used with Dr. Noll. Some of the subjects that it  
23 covered were used with -- were discussed with Dr. Noll but  
24 the document itself wasn't. It was only at the last moment,  
25 actually about 10 minutes after I sent the e-mail to

1 Mr. Johnson that I realized that this one which I thought  
2 had been in wasn't in, it hadn't been admitted because there  
3 had been a hearsay objection to it. We resolved that  
4 objection last night by taking out the embedded hearsay  
5 which they were concerned with. So we would ask --

6 THE COURT: What is it that you want it in for?

7 MR. PARIS: It is simply for the proposition of the  
8 PerfectOffice's market shares at the time covered by this  
9 document. And it is Novell's own business plan talking  
10 about where they were and I think it is on both Page 2 and I  
11 think again on Page 6. Those are the only -- that is really  
12 the only point for which we want the document in evidence.

13 THE COURT: Is there anything new already in?

14 MR. PARIS: It is not -- no, in fact, I think there  
15 has been testimony on it, Your Honor, so you're right in a  
16 certain respect it would be cumulative. However, it does  
17 show, in Novell's own business documents from '96 the plan  
18 for '96 to '98 where it thought the PerfectOffice suites  
19 share of the market was and where it was headed. And we  
20 think that is important.

21 THE COURT: You have got plenty of evidence about  
22 that. I'm not going to let it in.

23 MR. JOHNSON: Thank you, Your Honor.

24 MR. PARIS: Thank you.

25 THE COURT: Now the other thing is, I will give

1 Ms. Nelles time to talk at 7:45 tomorrow, if you want, but  
2 it seems to me that part of the Microsoft case should be not  
3 read in front of the jury the stipulation as to when you all  
4 were first told about the suit. So that you argue something  
5 in evidence, it seems to me your position is correct but I  
6 haven't had a chance -- that I haven't had a chance to hear  
7 Mr. Johnson on.

8 MR. TULCHIN: I'm sorry, Your Honor --

9 THE COURT: I have two competing stipulations. It  
10 seems to me that yours is the right one and so we ought to  
11 put in your case when you all were first told which I think  
12 was October of '93?

13 MR. TULCHIN: 2003, October 2003.

14 THE COURT: It seems to me that is the relevant fact  
15 and we need to be concerned about nothing else.

16 MR. JOHNSON: Your Honor, may I address that?

17 THE COURT: Sure.

18 MR. JOHNSON: We obviously -- I brought to your  
19 attention that it was earlier in time than the filing of the  
20 case so that we thought that was certainly relevant to what  
21 we're talking about.

22 THE COURT: I agree.

23 MR. JOHNSON: But we also think it is highly relevant  
24 and we think it would be extremely unfair if it was also not  
25 known to the jury that the documents upon which we based our

1 case were not available to anyone from Novell until they  
2 became public in the -- in the case against Microsoft in  
3 Washington, D.C. in 1999. So that in essence what we have  
4 here, Your Honor, is that we were not aware of the reasons  
5 why Mr. Gates had done what he did until those documents  
6 became public in connection with that case.

7 THE COURT: But the question isn't what Mr. Gates did,  
8 the question is what you did or didn't do.

9 MR. JOHNSON: But the question is, Your Honor --

10 THE COURT: The whole piggy-backing issue which has  
11 been in this case throughout, they're the bad guys so you  
12 all win.

13 MR. JOHNSON: The question is when did we have notice  
14 that all of this junk that they had been feeding us about  
15 technical reasons and they weren't going to use these APIs  
16 in future versions of Windows, et cetera, et cetera, when  
17 did we know that that was all pretextual? When did he we  
18 learn --

19 THE COURT: The only issue that I understand this is  
20 being admitted for, and I don't particularly want anything  
21 more than that, is the fact that, as I understand the issue  
22 is, when did you tell them that their withdrawal of the  
23 documentation for the NameSpace Extension APIs prevented you  
24 from meeting the deadline, which is what your case is?

25 MR. JOHNSON: That is our case.



1           THE COURT: Whatever they did, whatever they did, if  
2           in fact you thought back then that that hurt you, then  
3           somebody should have told either Frankenberg in clear  
4           language about these particular APIs, or told Gates or  
5           probably more realistically Mr. Creighton or somebody should  
6           have told Mr. Struss or something, so that it could have  
7           been focused upon, and they may have said Mr. Gates may have  
8           said no, we're not going to give it to you, which would have  
9           strengthened your case. But as I understand the evidence,  
10          nobody -- and you can argue to the contrary, but it seems to  
11          me that if you believe Struss, if you believe the  
12          documentation, and I guess you can say that Frankenberg told  
13          Gates when he talked about APIs generally, but it seems to  
14          me that to be relevant is they -- they had to have -- it  
15          certainly is relevant to their case that they say they  
16          didn't even know this was a concern to you.

17          MR. SCHMIDTLEIN: Your Honor, at the very beginning we  
18          objected to a line of -- similar to this in the opening, and  
19          the point I think I made to you, and I think you gave the  
20          jury an instruction, sort of like don't worry about the  
21          timing of when the lawsuit was filed.

22          THE COURT: I agree with that. And it is -- you're  
23          well within your rights not to file the lawsuit. But the  
24          issue is knowledge about whether or not the withdrawal or  
25          the NameSpace Extensions APIs was hurting you. That to me

1 is relevant. I mean because it goes to their very  
2 knowledge. I mean your theory is that Mr. Gates was so  
3 spooked by Novell that he made the decision to withdraw the  
4 NameSpace Extension APIs when he did in October of '94, and  
5 there is evidence in the case (A) nobody ever told us about  
6 it contemporaneously, the lawsuit wasn't even filed until  
7 October -- whenever the date is, it now appears it is  
8 October, whatever the date is, but that is the first time  
9 that you ever told them that that was what was -- that that  
10 prevented you from getting WordPerfect to market on time,  
11 that they're -- the failure to do that ruined, you know, is  
12 what hurt you. And they have evidence at least, I don't  
13 know whether you believe it or not, but you have it from a  
14 lot of people including Belfiore, but there are other people  
15 who say it never occurred to us that that was going to hurt  
16 somebody in the word processing.

17 MR. JOHNSON: Your Honor, Mr. Tulchin is going to  
18 argue to this jury that we didn't -- we didn't raise this  
19 claim until October of 2003. And the reason we didn't raise  
20 this claim until October of 2003 is that we did not have the  
21 documents to know what had happened within Microsoft with  
22 respect to these NameSpace APIs. We had no idea that  
23 Mr. Gates had ordered their removal for the express purpose  
24 of hurting WordPerfect and Lotus as we believe is fairly  
25 expressed in PX-1. So it is almost like, you know,

1 discovery -- discovery notice. We didn't know that we had  
2 the case -- that we had the case that was presented to us  
3 when the -- in the government case suddenly Microsoft was  
4 forced to produce --

5 THE COURT: But that --

6 MR. JOHNSON: -- the documents which would allow  
7 them --

8 THE COURT: I tried to -- let me hear from -- that  
9 dirties them up. I understand you may have a stronger  
10 claim, but you knew, it would seem to me, that if in fact  
11 your concern back then is regardless of what the motivations  
12 were at Microsoft, if at that time you were concerned  
13 because Mr. Harral and Mr. Richardson were not able to write  
14 this code in time, that you were not going to get a product  
15 out, a suite out around the time of the -- of the issuance  
16 of Windows 95 regardless of what the memorandum at Microsoft  
17 said, it would seem to me that a businessman would say call  
18 up Brad Struss and say Brad, we are really hurting.

19 MR. JOHNSON: Your Honor --

20 MR. TULCHIN: That is, Your Honor --

21 MR. JOHNSON: Excuse me, Your Honor, --

22 THE COURT: And maybe I'm missing something.

23 MR. JOHNSON: You are missing something. Microsoft  
24 paraded out this long list of reasons why they had taken the  
25 action they had taken. They said it was compatibility.

1           They said it was robustness. They said it was ship  
2           schedule. They gave us a bunch of hoey. We did not know  
3           that their alleged justifications were not real. So when  
4           Novell developers are sitting there and Microsoft says to us  
5           we are not going to be keeping these APIs in future  
6           operating systems, future Windows operating systems, that is  
7           what they say. It was a lie, but that is what they said to  
8           us. We had no ability to know the truth that these  
9           proffered pretextual reasons were false. So the WordPerfect  
10          developers had to accept on face value that Microsoft was  
11          not deceiving them about what had -- what was really going  
12          on behind the curtain.

13                        If you read Mr. Gates' e-mail, it is  
14          diametrically opposed to the reasons fed to the ISVs by  
15          Mr. Struss and the DRG at the time of the events in  
16          question.

17                        THE COURT: Perhaps that would explain the delay in  
18          filing a lawsuit. I don't understand how it explains why  
19          somebody wouldn't approach Microsoft and say, boy, your  
20          withdrawal, we have a wonderful relationship with our  
21          enterprise customers. It would be a step backwards for us  
22          to use your common open file dialog. Please work with us so  
23          that -- and don't withdraw documentation for the -- for the  
24          -- and that seems to me that is -- that is a different thing  
25          as to why you didn't file a claim.

1           MR. SCHMIDTLEIN: And you're right, Your Honor. And  
2 they have gotten, you know, plenty of testimony in the case  
3 that we didn't complain at the time. They have got their  
4 documents they are going to show and we'll have our reasons  
5 to argue. But for them to say to -- I think there is a  
6 difference between saying you didn't complain to Mr. Struss  
7 or to Mr. Hansen or whoever, look at our little documents  
8 that says WordPerfect is okay with that and we have got as  
9 you have seen Creighton saying we are going to be careful  
10 about what we tell them and all that stuff. We can argue  
11 about that, what happened and what was said in '94. But for  
12 them to say -- be able to say go to the next step and say  
13 they didn't complain until 2003 when the legal claim was  
14 raised, I think the point we're saying is that is a step too  
15 far.

16           THE COURT: But why?

17           MR. TULCHIN: Really, Your Honor, the --

18           MR. SCHMIDTLEIN: Because we didn't know.

19           THE COURT: I understand what you're saying. Go  
20 ahead, Mr. Tulchin?

21           MR. TULCHIN: The reason for mentioning this at all is  
22 exactly what the court put forth a few minutes ago. Of  
23 course if WordPerfect or Novell had felt aggrieved or  
24 injured by our decision to withdraw support for the  
25 NameSpace Extension APIs, someone would have spoken up. And

1 Frankenberg said that he didn't, we have no witnesses --

2 THE COURT: Well, that is not clear. Frankenberg --  
3 doesn't Frankenberg say he talked and complained generally  
4 to gates about APIs?

5 MR. TULCHIN: Yes. Yes.

6 THE COURT: Your point it was a level of distraction  
7 not understood by Gates.

8 MR. TULCHIN: Correct, Your Honor. But the idea that  
9 you find out, I'm going to give Mr. Johnson the benefit of  
10 the doubt here because I think the evidence is  
11 overwhelmingly in the other direction, but let's say he is  
12 right that they look at Mr. Gates' e-mail and they say, boy,  
13 the reason here is the reason that we don't like. I don't  
14 know how you can read PX-1 objectively that way, but they  
15 read that e-mail many years later. And the idea that that  
16 is the first time that it occurred to them that they were  
17 injured by what Microsoft did because of course injury is an  
18 element of the claim, is consistent with the fact that the  
19 real reason they were delayed was Quattro Pro and what had  
20 happened in Scotts Valley which is what all the documents  
21 say. So --

22 THE COURT: The reason may be more complex than that  
23 but that is --

24 MR. JOHNSON: Your Honor, there is a difference --

25 THE COURT: As I said, I thought about this on Friday

1 a lot and talked to my law clerk --

2 MR. TULCHIN: But it is truthful -- it is truthful to  
3 say that the first time that Microsoft was told that Novell  
4 believed that the withdrawal of support for the NameSpace  
5 Extension APIs had injured Novell was in 2003. And that is  
6 what I propose to say. As I mentioned in my letter to the  
7 Court this morning, it is a truthful statement. I would be  
8 happy to add that the complaint was filed a year later or  
9 not add that as the Court wishes. But there is no more to  
10 be made of it than that. But it bears very, very directly  
11 on the very important theme, I'm not giving away too much of  
12 my summation because I think everyone knows that this will  
13 be part of it, and I hope we're doing these tomorrow Your  
14 Honor, but this will be very much a part of the theme that  
15 there was never a complaint.

16 In fact, if anything, the response that we got  
17 when we said we were going to withdraw support was okay.  
18 And Novell complained bitterly about lots of things and vice  
19 versa because Novell and Microsoft complained to one another  
20 a lot about competition in the server operating system  
21 business where Novell had NetWare. But the idea that  
22 nothing was said for nine years, I mean that speaks volumes  
23 about what this claim is.

24 MR. SCHMIDTLEIN: Your Honor, one minor point. This  
25 is, of course, all being discussed in the context of the

1 juror question which I believe was why did they wait so long  
2 to file the lawsuit. So if he is going to get -- be allowed  
3 to talk about 2003, then for the same reasons you and I  
4 discussed early on there has to be something, I mean we are  
5 allowed to wait to file a lawsuit. Legally there is no  
6 adverse inference to be drawn. That was the question raised  
7 by the juror.

8 MR. JOHNSON: And, Your Honor, if I could add just one  
9 thing. There is a difference between knowing you're harmed  
10 and knowing you may have a claim. Now -- and I think that  
11 is a pretty important point here. Because if Your Honor was  
12 right on the law, and you have expressed it pretty clearly,  
13 Microsoft had no duty to provide us with its intellectual  
14 property. And if they had good and sufficient reasons for  
15 doing what they did at the time, then we would have a  
16 problem establishing a claim. So knowing that you're  
17 harmed, I agree we knew we were harmed, but knowing whether  
18 you have a cognizable claim did not occur until we saw the  
19 curtain was lifted in the case against Microsoft in  
20 Washington, D.C. And when that curtain was lifted, we said  
21 my goodness this was deception. This was -- these were not  
22 legitimate reasons that had been given for this action. The  
23 real reason is expressed in Mr. Gates' e-mail. And in all  
24 of the documents, not just Mr. Gates' e-mail, it is all of  
25 the documents we have used in this entire case, none of



1 those were available for all of those years. So knowing  
2 that we were harmed is not the same as knowing that it is  
3 time to file a lawsuit. And I think, Your Honor --

4 THE COURT: The question is not knowing whether you  
5 were harmed, the question is whether you ever told  
6 Microsoft.

7 MR. TULCHIN: Correct, Your Honor.

8 MR. JOHNSON: Well, Your Honor, we're going to argue  
9 about that fact. We're going to argue about that factual  
10 issue.

11 MR. TULCHIN: We'll argue about it then I guess --

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

13 MR. JOHNSON: I certainly think it is fair game for  
14 them to make the argument that we should have complained  
15 louder or longer or something with respect to the NameSpace  
16 Extensions. I think that is fair argument, we're going have  
17 that debate. But I don't think it is fair argument for him  
18 to say they didn't file this claim until 2003 showing that  
19 it was some sort of lawyer manufactured thing and that they  
20 came up close to the statute of limitations because it  
21 wasn't.

22 We -- Novell didn't know it had a good claim  
23 until this mother load of documents came to light in the  
24 case against Microsoft. And it was only then that we could  
25 say not only were we harmed by this, but that was

1 anticompetitive. We didn't know at the time. We accepted  
2 their reasons at face value. We didn't know at the time  
3 that this action was taken for anticompetitive purpose. And  
4 we didn't know that all of the documents would reveal things  
5 like the fact that compatibility wasn't an issue at the time  
6 that the NameSpace Extensions were de-documented.

7 In fact, this expert witness that just got on the  
8 stand here never once mentioned compatibility.  
9 Compatibility is the number one reason that Microsoft gave  
10 to ISVs for withdrawing the documentation for the NameSpace  
11 Extensions. It was a falsehood. It was already resolved in  
12 September before Mr. Gates' decision. We didn't know that.  
13 We didn't have any idea that we could advance a claim  
14 against Microsoft for anticompetitive conduct until these  
15 documents came out. And when Novell saw that, they  
16 consulted with their lawyers and we pursued the matter with  
17 Microsoft and we tolled the statute a couple of times to  
18 engage in settlement talks. That didn't work out so we  
19 filed suit in a timely manner under the applicable law. So  
20 I think --

21 THE COURT: I got you.

22 MR. JOHNSON: So what I think, Your Honor, it is a  
23 fair game for them to say why didn't you tell us at the  
24 time. It is not fair game to say you didn't say anything  
25 until 2003.

1 THE COURT: Mr. Tulchin?

2 MR. TULCHIN: Well, Your Honor, the point, of course,  
3 is not that as Mr. Johnson keeps saying he is full of all  
4 these accusations that are sort of off the point about lying  
5 and deception and so on. The point is that business people  
6 when they deal with one another, as Novell and Microsoft did  
7 for years and years and years, and certainly were doing all  
8 through the 1990s and up to 2003, if they have an issue,  
9 they raise it. If you do something to hurt another company,  
10 Novell certainly would raise the question. It happened  
11 many, many times over the years. And the fact that they  
12 didn't, doesn't say whether their claim should be dismissed,  
13 that is not what we'll be saying to the jury. It doesn't go  
14 to whether the limitations period was satisfied, I'm not  
15 going to argue that to them either, I don't think they would  
16 know what it is. What it does go to is this very practical  
17 point. That if one company does something to another which  
18 hurts to the tune of a billion dollars, which causes death  
19 to their products, as Professor Noll said in one of his  
20 argumentative moments, it was suicide.

21 If one company does that to the other, the other  
22 doesn't wait nine years and convey the message through their  
23 lawyers in Washington to Microsoft's lawyers in New York.  
24 And that is the point. It doesn't suffice to say that they  
25 didn't raise this subject in 1994, 5 or 6, they didn't raise

1           it for many years after that. And it is one sentence and I  
2           think that the jury is entitled to hear it.

3           THE COURT: I think we have spent too much time on the  
4           sentence. I will reconsider it. I will let you know if I  
5           change my mind. As of right now don't mention it.

6           MR. JOHNSON: As of right now what, Your Honor?

7           THE COURT: Don't mention it.

8           MR. JOHNSON: Thank you, Your Honor.

9           THE COURT: It is just -- that is my judgment after  
10          hearing all of this. It is in the context that  
11          Mr. Schmidtlein says the juror's question. It seems to me  
12          there is plenty of evidence that you all can argue about and  
13          the real question is contemporaneous knowledge. And that --  
14          and beyond that it gets -- it just gets very fuzzy. So I  
15          understand your position. I'm not sure I absolutely  
16          understand the logic of it, but I think the best judgment is  
17          just don't mention it.

18          MR. JOHNSON: Thank you, Your Honor.

19          MR. TULCHIN: Your Honor on the subject of -- I'm  
20          sorry to go back to something that we have covered, but I  
21          just wanted some clarity here because otherwise we have to  
22          prepare to cross-examine their witnesses. I would like to  
23          know whether they intend to bring anyone. We have been  
24          asking for a week, we get no answers. We still don't really  
25          have an answer. And I am also a little bit worried that

1 we'll come in tomorrow at 7:45 and Novell's lawyers will say  
2 we don't have anyone, let's do the summations Wednesday. I  
3 mean if we're going to --

4 THE COURT: Summations are tomorrow.

5 MR. TULCHIN: Thank you, Your Honor.

6 THE COURT: Summations are tomorrow.

7 MR. JOHNSON: Your Honor, I am a little concerned  
8 about that. Mr. Tulchin indicated he wanted two and a half  
9 hours. So if I take two and a half hours and then you have  
10 to read your charge, we have already indicated that this  
11 juror --

12 THE COURT: Maybe what it will be is -- maybe it will  
13 be --

14 MR. JOHNSON: I mean I don't think we should be  
15 breaking it up.

16 THE COURT: How would you feel about Mr. Johnson  
17 getting his summation in and then doing yours and rebuttal  
18 the same day? I mean I assume you would rather split it up  
19 that way that have you give -- well let's see, if it is two  
20 and a half and two and a half, that is five, and an hour for  
21 me that is six. If we get started at eight, we can do it.

22 THE CLERK: Juror Number 6 said she could stay until  
23 2:30 tomorrow and then Wednesday, Thursday and Friday she is  
24 wide open, there is no problem.

25 THE COURT: Well maybe what we have to do is -- maybe

1           what we have to do is, and this is not my preference, but  
2           let me tell you all what my instructions are and if  
3           necessary I will reserve the instructions until Wednesday.  
4           Then we get -- then we clearly get the argument in.

5           MR. JOHNSON: Your Honor, that is so --

6           THE COURT: That is the way it is any way. And I  
7           always -- I always try to do it the other way so you all can  
8           refer to what I have said, but I will tell you what I'm  
9           going to say, and then you all can say the judge is going to  
10          tell you that. That may work better for time, I think.

11          MR. JOHNSON: We could live with that, Your Honor, as  
12          long as we know what you're going to say.

13          THE COURT: I'm going to tell you that. You will have  
14          them. And in terms of if there is rebuttal, it is not about  
15          Scotts Valley, it is the general area would be whether or  
16          not, and frankly I think the evidence is in, I think that  
17          they have put it in already, why it was that they thought  
18          that -- I mean clearly they were alerted to the start button  
19          desktop icon and I think frankly they addressed it. I mean  
20          I think this has been addressed.

21                 If there is something that I have missed, clearly  
22          it is your case has brought out more clearly that -- it is  
23          not so clear why among other things that they had a dialog  
24          back in the previous version. I mean there are things that  
25          -- there are things which seems to me in your case have

1 highlighted the issue more particularly say on that, for  
2 example, they may be asked well why did you need to use a  
3 custom whatever it is --

4 MR. JOHNSON: A file open dialog.

5 THE COURT: -- a file open dialog as opposed to what  
6 you used back in -- it seems to me that is appropriate  
7 rebuttal. That is something that has really got close up  
8 because it came out during your case which frankly I don't  
9 remember having been raised before.

10 MR. HOLLEY: But, Your Honor, just to be clear, during  
11 Mr. Richardson's cross-examination I showed him both dialog,  
12 the one in Windows 3.1 and so they could have done it on  
13 redirect, Your Honor.

14 THE COURT: They could have. And I'm not saying. I  
15 just think frankly I am just less clear on that. The Scotts  
16 Valley I'm clear on that they should have anticipated this.  
17 Something may have come out. And I'll help Mr. Tulchin out.  
18 If we have an area where there going to be testimony, it is  
19 going to be that. So you can prepare your cross, or have  
20 Mr. Holley prepare.

21 MR. TULCHIN: Well then, Your Honor, presumably  
22 Mr. Johnson's closing will be tomorrow and mine would be  
23 Wednesday morning?

24 THE COURT: No, no, no. Yours -- everything is going  
25 to be --

1 MR. JOHNSON: Tomorrow.

2 THE COURT: -- tomorrow.

3 MR. TULCHIN: -- tomorrow. If this takes -- if this  
4 takes time, Your Honor, we're going to get squeezed and --

5 THE COURT: If this takes time we're going to get  
6 squeezed and I'll give the instructions. And then we'll  
7 have all of the arguments on Wednesday. I don't think --  
8 I'm not going to split up the arguments. I want all of the  
9 arguments on the same day.

10 MR. JOHNSON: Thank you, Your Honor.

11 THE COURT: That seems to me to be the only fair way  
12 to do this.

13 MR. TULCHIN: But if there is rebuttal, Your Honor,  
14 and we're hear for a couple of hours, I mean with due  
15 respect to Juror Number 6 who has got to go.

16 THE COURT: I'm going to give --

17 MR. TULCHIN: I don't mind having her go if that is  
18 what you want to do, and we'll have 11 jurors.

19 THE COURT: No. No I will give the instructions and  
20 then we'll go home.

21 MR. JOHNSON: As we had planned.

22 MR. TULCHIN: I see. I see.

23 THE COURT: That is what we planned to do. I don't  
24 think there is going to be any rebuttal. But I -- frankly I  
25 don't want to be unfair. I am clear on the Scotts Valley.



1 That to me is as the letter addressed, it is clear to me.

2 That is I -- I honestly think that upon thinking about it,

3 Mr. Johnson, Mr. Schmidtlein, might say it is just not worth

4 it to come back for this because it is already in any way

5 but --

6 MR. JOHNSON: We're going to look at that, Your Honor.

7 THE COURT: But we will see at 7:45. I would love at

8 7:45 to get a message there is not going to be any. Then

9 we'll go with the arguments. Now in terms of one thing I am

10 going to forget, in terms of the exhibits, either you all

11 agree upon items one copy of the exhibits per side or two

12 copies. But it seems to me that it ought to be one. But if

13 it helps with the jury, if you all decide there ought to be

14 two or three, that is fine.

15 MR. SCHMIDTLEIN: When can we get your instructions?

16 THE COURT: Well, the instructions you're not going to

17 get until tomorrow.

18 MR. TULCHIN: One set is enough, Your Honor, one set.

19 MR. SCHMIDTLEIN: One set is fine.

20 THE COURT: Except 12 sets of Plaintiff's Exhibit 1.

21 MR. TULCHIN: We also, Your Honor, I think we have

22 submitted to Theresa, maybe we filed it as well, our exhibit

23 list in the form that is used in this district. And as I

24 understand it, Novell has cleared all of that.

25 THE COURT: Admitted to the extent that it is

1 admitted.

2 MR. SCHMIDTLEIN: If we do wind up giving closings  
3 tomorrow --

4 THE COURT: And I think you will.

5 MR. SCHMIDTLEIN: -- then we really do need your  
6 instructions.

7 THE COURT: You sure do. And I will tell you I can  
8 only do the best I can. I will tell you now where I am.

9 MR. SCHMIDTLEIN: Do you have those in writing?

10 THE COURT: Well, I have gotten what I did over the  
11 weekend, but then I have gotten submissions. Let me tell  
12 you where I am and tell you what else you need. If you want  
13 them later this afternoon, let me tell you where I am. I  
14 have added -- I have taken out the sentence about -- I have  
15 taken out the -- as I said I was going to, I have decided  
16 not to put in about the binding effect of the D.C. case. I  
17 have added -- I am going to leave in about -- and I  
18 understand Microsoft has an objection, I have -- I have let  
19 in what I still think is the best thing that I can do with  
20 the law about the exception if it prevented you all from  
21 bringing it prior to market. I have added those, if I were  
22 you all would be relevant to closing argument, the phrase  
23 engaged in deceptive conduct, reasonably relied upon by the  
24 competition. I have assumed I will hear from Mr. Tulchin  
25 that it is not reasonable to rely upon statements and I --

1 and I added that because I think it obviously belongs there.

2 I have, in terms of the verdict form, I have not  
3 but I really can't do yet, and I have got to go back, is to  
4 look at your, I think it is question six, your competing  
5 versions about the theory. I'm more inclined to let -- to  
6 use your theory, but I think you all assume a fact which is  
7 popular, I'll probably take out the adjective popular,  
8 because it really has become so popular that we would have  
9 done that. I really have to -- I have got a wordsmith I  
10 haven't done that. But the next question frankly I was just  
11 going to make it a very simple one, but I will, is about  
12 whether or not the second claim is whether or not they  
13 constitute a MiddleWare that threatened Microsoft's monopoly  
14 in the PC operating system.

15 I think -- I don't think you all -- I think you  
16 all sort of make that one more simplistic, it is the first  
17 one I think of competing versions. Damages, if you all want  
18 to argue on nominal damages you can but I'm not going to  
19 instruct on that. They can -- it seems to me in fairness  
20 with the law them saying look you can't tell give them a  
21 dollar. But I'm not going to put my imprimatur on that. It  
22 is not in the form instruction, it is from the U.S. Bell  
23 case but so I think the way to cut that let them argue it  
24 but not instruct on it. What were the other issues you  
25 all had?

1           MR. JOHNSON: Your Honor, there was -- I think you'll  
2           see it in our submission today, there was four and five were  
3           a little bit inconsistent in how --

4           THE COURT: I am going to make them consistent  
5           language.

6           MR. JOHNSON: Make them consistent in terms of what  
7           you're talking about.

8           THE COURT: Absolutely. And that is what I haven't  
9           done yet. And then there was something about  
10          anticompetitive.

11          MR. HOLLEY: Yes, Your Honor. Novell had requested  
12          that you add the definition of anticompetitive conduct which  
13          I -- with respect is not the way anticompetitive conduct is  
14          defined under section two because it is wildly overbroad.  
15          It cannot be that anything a monopolist does that is other  
16          than short term profit maximizing is anticompetitive if it  
17          hurts the competitor. For the reasons that we have  
18          explained in the letter, every time a monopolist builds a  
19          new factory, discounts prices, introduces a new product, it  
20          is probably doing things that hurt a competitor  
21          competitively and it isn't maximizing its next quarterly  
22          profits. But, you know, that would be a very strange test  
23          because people frequently make long term investment  
24          decisions, even monopolists do that. So the -- I know that  
25          there, you know, there was some study paper from the

1 Department of Justice at one point suggesting that as a  
2 test, and it was roundly denounced by, you know, from every  
3 quarter because the test would make things illegal that are  
4 perfectly normal competitive practice. So for the reasons  
5 we have explained in the letter we would prefer --

6 THE COURT: I'll take a look at that. I take it you  
7 all don't subscribe to my view on the evidence since you all  
8 want to violate the antitrust laws in another way, you  
9 know -- well, forget that. Forget -- forget that part. I  
10 mean I have said a couple of times, and I could be out on a  
11 limb where I don't belong, that you simply can't infer from  
12 the evidence in this case that Microsoft was going to take  
13 any short term loss any way because whatever loss in terms  
14 of the marginal sells of operating system sales they lost,  
15 it may have been made up for in terms of selling  
16 applications.

17 MR. HOLLEY: I think Your Honor's intuition is right.  
18 I don't think we don't propose to make that argument because  
19 implicit in that is that we did something wrong.

20 THE COURT: But I'm not -- I'm not out -- if I am out  
21 in left field on that, I want to be told because I still  
22 think, as I said, it is perfectly legitimate in addition to  
23 what you have said which I will take a look at. It still  
24 seems to me that it is a perfectly sound fundamental  
25 principle as long as factual inference can be drawn.

1           MR. HOLLEY: Your Honor is exactly right on and your  
2 intuition is exactly right. If one person -- if a  
3 monopolist had one line of business then that -- that  
4 intuition, the normal rule might apply, if in fact that were  
5 the normal rule. But when you have multiple lines of  
6 complimentary products, it is a very complex analysis.

7           THE COURT: For purposes of tomorrow you assume that I  
8 have not put it in, I will take a look at it, I will take a  
9 look, but assume that that is not there. Is there anything  
10 else that you all need?

11          MR. JOHNSON: We addressed that in the letter.

12          THE COURT: Sure. I have read that but I haven't -- I  
13 haven't had time to absorb what you all wrote and I haven't  
14 had -- I haven't -- one change which clearly seems  
15 appropriate between four and five. I think I basically want  
16 to give your instructions describing your claim in six.  
17 Seven I understand that there really isn't any dispute. But  
18 it seems to me that, and this is based upon a very quick  
19 glance, I think you all use the word your popular  
20 WordPerfect and PerfectOffice, I would probably strike the  
21 word popular.

22          MR. HOLLEY: Your Honor, just that may seem  
23 counter intuitive but actually we would oppose doing that  
24 because the theory is --

25          THE COURT: Whoa, whoa, whoa, talk to him.

1 MR. TULCHIN: If it is in the verdict form, Your  
2 Honor, is that what you are referring to?

3 THE COURT: Yes.

4 MR. TULCHIN: Yes, that should come out. It says so  
5 popular.

6 THE COURT: If you want it in tomorrow tell me. I'll  
7 put it back in.

8 MR. TULCHIN: No, we want it out.

9 THE COURT: I feel like I'm telling Paul Maritz and  
10 Bill Gates right here.

11 MR. JOHNSON: Your Honor --

12 THE COURT: And Brad Silverberg. Go ahead.

13 MR. TULCHIN: I have convinced Mr. Holley, Your  
14 Honor.

15 MR. JOHNSON: It is real important that we have at  
16 least the verdict form tonight. Can we get that?

17 THE COURT: I will do my best. I am going to go up  
18 and try to -- I will work on it now. If you all give  
19 numbers to Theresa I will obviously -- obviously you should  
20 have it. I want you to have it. It is just a time  
21 constraint. I mean I knew we were going have a time  
22 pressure, but I thought we had a little more time than we  
23 had. Assuming you all have argument tomorrow, I'll do the  
24 best I can and I think I can do it and Theresa will call  
25 you. I absolutely agree with you and I will --

1           MR. JOHNSON: Well, we want to get out of here so you  
2           can go to work.

3           THE COURT: Are there any other issue?

4           MR. SCHMIDTLEIN: No, I don't think so.

5           THE COURT: It actually shouldn't take long.

6           MR. JOHNSON: Yeah, and we have set forth our issues.

7           THE COURT: And the fact I have to use Word rather  
8           than WordPerfect.

9           (Whereupon, the hearing concluded at 1:55 p.m.)

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