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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

NOVELL, INC.,)
Plaintiff,)
vs.) Case No. 2:04-CV-1045 JFM
MICROSOFT CORPORATION,)
Defendant.)
_____)

BEFORE THE HONORABLE J. FREDERICK MOTZ

DATE: DECEMBER 13, 2011

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

REPORTED BY: Patti Walker, CSR, RPR, CP
350 South Main Street, #146, Salt Lake City, Utah 84101

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A P P E A R A N C E S

For Plaintiff:

DICKSTEIN SHAPIRO
BY: Paul R. Taskier
Jeffrey M. Johnson
Miriam R. Vishio
1825 Eye Street N.W.
Washington, D.D. 20006

WILLIAMS & CONNOLLY
BY: John E. Schmittlein
725 Twelfth Street N.W.
Washington, D.C. 20006

SNOW CHRISTENSEN & MARTINEAU
BY: Max D. Wheeler
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84111

NOVELL, INC.
BY: Jim F. Lundberg
1800 South Novell Place, H-544
Provo, Utah 84606

For Defendant:

SULLIVAN & CROMWELL
BY: David B. Tulchin
Steven L. Holley
Sharon L. Nelles
125 Broad Street
New York, New York 10004

MICROSOFT CORPORATION
BY: Steve Aeschbacher
One Microsoft Way
Redmond, Washington 98052

RAY QUINNEY & NEBEKER
BY: James S. Jardine
36 South State Street, #140
Salt Lake City, Utah 84111

1 SALT LAKE CITY, UTAH; TUESDAY, DECEMBER 13, 2011; 7:45 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning, everybody.

4 Please be seated.

5 Okay. I now have a written response from Novell,
6 late though it is. Does Microsoft want to -- now that
7 they've seen it in black and white, what it is --

8 MR. TULCHIN: Your Honor, just one quick thing.
9 We just saw this a minute ago. But as I recollect things, I
10 showed the jury Exhibit 230 in my opening statement, which
11 is the document from December 23rd, 1995 that says an
12 additional 15 Quattro Pro developers resigned. And the
13 point that I made in my opening statement was exactly the
14 points that Novell now says Mr. Gibb could rebut. Of
15 course, the time for him to have offered that testimony was
16 during the day or so that he was on the witness stand. But
17 Novell chose to ask none of the questions on the subjects
18 that they set forth towards the end of their brief.

19 If Mr. Gibb is here and they want to make a
20 proffer of what he would say outside the presence of the
21 jury, I suppose we should call him and see. But the bigger
22 point, of course, is that this was not unanticipated.

23 The criminal cases that they cite, one after the
24 other, starting on page 1, United States against Kelley,
25 then on page 2, United States against Harpster, United

1 States against Morris, United States against Tejada, United
2 States against Rucker, the criminal cases are all quite
3 different. And making sure that the defendant has due
4 process when faced with a criminal charge in a federal court
5 is somewhat different than the absolute discretion that the
6 Tenth Circuit says a district court has in a civil case to
7 control the order of proof.

8 Nothing in here is really rebuttal, Your Honor,
9 and the Court's ruling yesterday was correct.

10 THE COURT: I still don't understand why you all
11 didn't produce this in your case in chief. It clearly was
12 an issue. Is there anything specific here that couldn't
13 have been brought out in direct?

14 MR. SCHMIDTLEIN: Again, Your Honor, we understand
15 your ruling --

16 THE COURT: No. No. I am debating if Mr. Gibb is
17 here, if there is something -- I mean there are a couple of
18 things in here which I just -- I mean, in fact, there are --
19 I mean the fact that prerelease versions were sent to
20 journalists in the fall of 1995. I mean I don't understand
21 why there wasn't on direct, but on the other hand if it's
22 true, it's true.

23 MR. SCHMIDTLEIN: Your Honor, we thought his
24 testimony, because he testified broadly about his views
25 about where they were in the development process, what he

1 believed the product would have been released but for the
2 conduct. The issue that was raised by Mr. Larsen was this
3 issue of -- you know, which again was not testified to ---

4 THE COURT: Who took the deposition?

5 MR. SCHMIDTLEIN: He was deposed by Microsoft. He
6 was noticed by Microsoft. He's obviously an adverse witness
7 to us. Microsoft took his deposition. We crossed him. He
8 mentioned it in passing, oh, yes, during his depo, yeah, I
9 worked in Scotts Valley for three or four weeks, or five
10 weeks. Neither side, I think, had any clue that he was
11 going to offer the testimony that he did -- or maybe
12 Microsoft knew and they didn't elicit it during his
13 deposition. We certainly didn't know. So that's the point.

14 MR. TULCHIN: Of course, the purpose of a
15 cross-examination at deposition is to extract from the
16 witness the facts that he was aware of. It's quite plain
17 Novell didn't ask the questions of Mr. Larsen at deposition
18 that would have elicited this testimony. We weren't
19 required to do so. We called him as a witness and he
20 testified.

21 All of this was plain and simple. It was right in
22 front of their face. It was raised by me in opening
23 statement. If Quattro Pro was sent to journalists in the
24 fall of 1995, my gosh, based on what is in the pretrial
25 order and what I said in my opening, that would have been

1 hugely important. And if Novell just chose to do it
2 apparently relying on the idea that they can go first in a
3 trial and also last, well, they made a tactical choice,
4 which has now come back to haunt them, and that's just the
5 way it is.

6 THE COURT: Let me ask you, did Mr. LeFevre
7 testify before the trial who the members of the committee
8 were? The focus has been on Mr. Larsen. The very first
9 thing is it may be proper rebuttal to the first point they
10 made that the team always included Quattro Pro developers.
11 Mr. LeFevre testified it didn't. It was the marketing and
12 the three shared code group.

13 MR. TULCHIN: Your Honor, honestly I don't
14 remember if he did or didn't in his deposition.

15 MR. JOHNSON: I think the point -- I think Your
16 Honor has perhaps misconstrued what Mr. LeFevre said. There
17 are documents in the record I think that made clear that
18 there were always -- on the Project Storm team, there were
19 always representatives there from Quattro Pro. I think what
20 Mr. LeFevre was talking about was there was a group of three
21 or four of them that sort of had ultimate responsibility
22 about what functionality was going to make the final
23 product. We never said that somebody from Quattro Pro --

24 THE COURT: I understand. Thank you very much for
25 clarifying my misunderstanding.

1 Okay. I'm not going to allow the rebuttal. We'll
2 go to closing arguments.

3 A couple of minor and really just typos, so I
4 haven't -- I want you all to know what I'm going to say. I
5 picked up a couple of things. On page 2, second full
6 paragraph, the second line, after it became a monopoly
7 power, I should have added in the PC operating system world.

8 MR. JOHNSON: I'm sorry, Your Honor. Could you
9 give us that page again?

10 THE COURT: I'm sorry. Page 2, second paragraph,
11 second line, monopoly power, I should have added in the PC
12 operating system world.

13 It's part two. I'm sorry.

14 MR. JOHNSON: Thank you.

15 THE COURT: No change in substance at all, but at
16 the bottom of page 3, the very last line, they suggested
17 that I add -- probably a good suggestion -- question one
18 asks.

19 The thing that is arguably the most substantive,
20 and I think they switched the order, I keep forgetting what
21 the test that Microsoft says, whether it's contributing
22 significantly or significantly contributing. I think
23 somewhere in the instructions and also on the very -- the
24 fifth question on the bottom, it's actually Novell's
25 proposed, reasonably capable of contributing significantly.

1 Why didn't they change -- I don't know. Never mind.

2 On six and seven, this is the one I may -- I think
3 it was clearer before, they've added if your answer to
4 either question four or question five is yes.

5 MR. HOLLEY: Your Honor, just to be clear,
6 yesterday we sent some proposed revisions to the
7 instructions and the verdict form which Novell did not
8 object to. And then they made a suggested change, which I
9 thought was very good. Is the Court going to accept those
10 changes?

11 THE COURT: I must have missed them.

12 MR. HOLLEY: Well, they are all technical.

13 THE COURT: As long as you all know, as long as
14 you all agree, that's fine with me. I'm going over this now
15 with you all.

16 MR. HOLLEY: Thank you, Your Honor.

17 THE COURT: Let me just say and add that the only
18 other thing about the instructions, and I don't -- I had
19 actually made four and five disjunctive for the benefit of
20 Novell. Novell objected to me doing so. I'm perfectly
21 willing to make it either way. I thought -- I thought that
22 if the jury found the stricter standard, which is four,
23 which is basically Microsoft's theory, then they didn't have
24 to reach five. That's why I -- but I am perfectly willing
25 if Novell wants me to ask both, that's fine. I just wanted

1 to explain the reason I made it disjunctive was because I
2 really thought it was in Novell's interest. Any technical
3 change, I can't promise you I'm going to make it, but I
4 haven't seen it, but --

5 MR. HOLLEY: Your Honor, I have both Novell's
6 letter and Microsoft's letter and, as I said, we have
7 absolutely no objection to the suggestion.

8 THE COURT: You just hand them to me.

9 MR. HOLLEY: Thank you, Your Honor.

10 THE COURT: They look good to me.

11 Time-wise what I thought, we would go, because we
12 may be a little late, from eight to ten or a little after.

13 I assume you want a half hour for rebuttal?

14 MR. JOHNSON: Yes, Your Honor.

15 THE COURT: We go two hours with Mr. Johnson.

16 Then I thought -- I will be glad to hear from Mr. Tulchin.
17 I suggested we split your -- you want two and half, right?

18 MR. TULCHIN: Yes, sir.

19 THE COURT: I suggested we split yours, go one and
20 half until around 11:45, then an hour after lunch, and then
21 pick up the half hour.

22 MR. TULCHIN: That's perfect, Your Honor.

23 THE COURT: Let's get the jury. Thank you.

24 Thank you all for -- I know the instructions --
25 your exceptions are exceptions, but I appreciate the way

1 that you've tried to work with me.

2 (Jury present)

3 THE COURT: Please be seated.

4 It is with great regret that I tell you the
5 evidence is closed. So we're going to go to closing
6 argument.

7 Let me tell you, to make sure it's consistent,
8 we're going to spend the whole day on arguments. We're
9 going to go first -- Mr. Johnson is going to give about two
10 hours. Then Mr. Tulchin is going to go for about an hour
11 and a half before lunch and then after lunch. Because the
12 plaintiff has the burden of proof, the plaintiff gets to go
13 first, and Mr. Johnson reserves a half hour for rebuttal.
14 That gets us to around 2:15. Is that all right?

15 And let me also say, my preference is, although
16 it's not what the rules require, I try to give you all most
17 of the instructions first just so counsel can refer back to
18 what I've said. They know what I'm going to instruct. They
19 know already, so they can certainly refer to what I'm going
20 to instruct. But just the way the timing works out, it
21 makes more sense to instruct you tomorrow.

22 With that said, Mr. Johnson. Sorry to have taken
23 your time.

24 MR. JOHNSON: That's it. Thank you very much,
25 Your Honor.

1 Good morning. It's my privilege and my pleasure
2 to talk to you this morning about the evidence that you have
3 heard and have seen over the last two months. I know some
4 of this has been rather tedious. I apologize for my part in
5 that. I hope that some of what we had to say was
6 interesting. I know you have met some interesting people,
7 and Mr. Nakajima comes to mind first.

8 Before we get going, let me pause and say thank
9 you for myself, for my colleagues, for Mr. Goldberg, for
10 Novell/WordPerfect for your service and your commitment to
11 this process. It means a lot to us and we are extremely
12 grateful. It's been a long couple of months. We appreciate
13 your time, your attention, and your generous hospitality,
14 particularly that dip. That was terrific. We understand
15 the great personal sacrifice that all of you have made.

16 When we began this case on October 17th, I told
17 you this case was about fair play. Novell wanted nothing
18 more than to compete on the merits of its products.
19 Unfortunately, as you have seen, Mr. Gates and Microsoft had
20 other plans. I think by now you probably know these facts
21 as well as I do, and I would just like to review some of the
22 highlights with you.

23 This executive retreat at Hood Canal is the
24 genesis of Mr. Gates' thinking of the ways to advantage
25 Microsoft's applications by gaining the extensibility

1 interphases within Chicago. Entitled the Radical Extreme,
2 it was a plan to hold the extensible shell for Office,
3 cutting out WordPerfect and other ISVs under a sham excuse,
4 quote, we couldn't get it done in time.

5 This wasn't some casual musings. This was a plan
6 developed at a high level executive retreat designed to
7 leverage Microsoft's systems technology for the benefit of
8 Microsoft's applications. The contemporaneous evidence
9 shows that Bill Gates personally embraced the office shell
10 plan. Bill G says do it.

11 The Office shell plan was advanced within
12 Microsoft as a way to gain a very significant lead over
13 Microsoft's application competitors --

14 THE COURT: Excuse me. If there is confusion, I'm
15 trying to get a telephone line back to my office so my law
16 clerks and secretary can hear the closing argument. So I'm
17 sorry, Mr. Johnson.

18 MR. JOHNSON: That's all right.

19 The Office shell plan was advanced within
20 Microsoft as a way to gain a very significant lead over
21 Microsoft's application competitors and make its
22 competitors' products look old.

23 In discussions about the Office shell plan in
24 1993, Mr. Muglia recognized that if ISVs were provided with
25 the extensibility provided by the Chicago shell, Microsoft's

1 Word and Excel would be forced to battle against their
2 competitors on even turf. Given that Lotus and WordPerfect
3 have largely caught up, and that's according to Mr. Muglia,
4 Word and Excel will either lose market share or be forced to
5 lower their price. Now that's, with apologies to
6 Dr. Hubbard, that's economics 101.

7 I think it's working. Hopefully the time won't
8 count against me.

9 THE COURT: It won't count against you.

10 All set?

11 MR. JOHNSON: What Mr. Muglia said about what
12 would happen to Word and Excel is economics 101. If you
13 have real competition, you either have to lower your prices
14 or lose market share. When competitors battle on an even
15 turf, that's good for consumers. It leads to lower prices
16 and better products. That's what the antitrust laws are all
17 about, making sure that a monopolist is not destroying the
18 competitive process.

19 Now many within Microsoft didn't like the Office
20 shell plan. You saw that. This is Tandy Trower, the
21 director of the user interface architecture. He told
22 Mr. Gates directly that the plan stinks. It stinks of
23 proprietary-ness. Withholding functionalities so that
24 Microsoft could uniquely leverage it was beneath Microsoft's
25 character. If only Mr. Gates had listened to Mr. Trower.

1 We also learned about Capone, Microsoft's e-mail
2 application. Mr. Gates wanted to bundle Capone with Chicago
3 in order to dominate the e-mail application market. In
4 other words, he wanted to monopolize another market, the
5 e-mail applications market. But this case, of course, is
6 not about monopolizing the e-mail market. So why did we
7 talk so much about Capone? Two reasons.

8 First, Capone was using the namespace extensions
9 to integrate into the Chicago shell. So there is no
10 ambiguity in the evidence about what we're talking about
11 here when we're talking about Capone and extensibility.
12 Second, Capone gave us another look into the mind-set of
13 Bill Gates. As Mr. Belfiore wrote here, it's unclear
14 whether Microsoft will publish the namespace extensions, but
15 Bill is very aware of this as an issue.

16 Many within Microsoft disagreed with Mr. Gates'
17 position. This is John Lazarus. He was the vice president
18 of strategic relations at Microsoft. Consistent with his
19 adoption of the Office shell plan, Mr. Gates said no, do not
20 publish the namespace extensions. Here Mr. Lazarus
21 succinctly sums up the situation, this is done.

22 Brad Silverberg, the head of Chicago development,
23 made his views equally clear, we clearly have to publish
24 whatever APIs Capone uses.

25 Now Doug Henrich was the head of the developer

1 relations group. Mr. Henrich recognized immediately that
2 not publishing the extensions would raise serious public
3 relations concerns. The recognition that there would be
4 serious public relations concerns will reappear at the time
5 of Mr. Gates' decision.

6 Why were all these Microsoft executives so upset?
7 We got a little truth on this from Mr. Nakajima, who
8 carefully admitted that there was a strict rule within
9 Microsoft that if Microsoft applications were using APIs,
10 then the APIs must be published to ISVs. As Mr. Nakajima
11 recognized, Capone was an application. It was not a part of
12 the operating system. This strict rule was a matter of
13 fairness.

14 After I referred him to his testimony, I said, so
15 does that refresh your recollection that, in fact, you
16 understood that in order to be fair, it was a strict rule
17 within Microsoft that if Microsoft's applications were using
18 these APIs, they had to be published, right? Answer: Yes.
19 It seems like I used the word strict rule, yeah. I would
20 use more general term policy, but it seems like that was my
21 word. Question: Yes. That's what you believed, right?
22 Answer: Right. I mean it's fair.

23 Now despite Mr. Gates' views on this subject,
24 sanity prevailed within the highest ranks of Microsoft's
25 systems division. By September 27th, 1993, the decision was

1 made to document the namespace extensions as well as the
2 other shell extensions within Chicago. As Mr. Silverberg
3 reports, we decided it was A-list.

4 Now Mr. Muglia tried to downplay his agreement to
5 publish these extensions, but he didn't deny that he had
6 this discussion with Mr. Silverberg and Mr. Allchin in
7 September of 1993. There is no debate here about what
8 A-listing an API means. It means fully documented and fully
9 supported not only in the current versions of Windows, but
10 on future releases as well. It was perfectly reasonable for
11 WordPerfect to have the same understanding as well.

12 As you will remember, Mr. Muglia tried to walk
13 away from the decision to A-list the namespace extensions.
14 But here we show that Steve Madigan, the program manager for
15 the Cairo shell, certainly knew about that decision, and
16 Mr. Madigan reported directly to Mr. Muglia.

17 If Cairo and Chicago were really fighting like
18 cats and dogs over this issue, are we really supposed to
19 believe that Mr. Muglia didn't know about the decision to
20 A-list these APIs?

21 Now there is evidence that Mr. Allchin was upset
22 over this decision. Mr. Allchin was the head of Windows NT.
23 And what does he say in that communication to Mr. Maritz and
24 Mr. Silverberg? He's worried that publishing the shell
25 extensions, quote, will give competitors an advantage over

1 Microsoft apps because Ray and everyone else will use the
2 extensions before our apps group, for sure Office. Pretty
3 damn discouraging.

4 This mirrors Mr. Muglia's comments. He was afraid
5 that everybody else was going to get on the bandwagon and
6 Office would miss the boat and they would be in trouble
7 competitive-wise. Ray is Ray Ozzie of Lotus, Mr. Gates'
8 second target.

9 Let's turn to the public face of Microsoft,
10 evangelism. I doubt you will ever hear that word again
11 without thinking about this case.

12 We heard quite a bit of evidence of Microsoft's
13 evangelism of ISVs to write to Microsoft's operating
14 systems. We presented evidence on that subject going back
15 all the way to the late 1980s with the testimony of
16 Mr. Cameron Myhrvold. Why did we present so much of this
17 subject? Because as Judge Motz will instruct you tomorrow,
18 while a monopolist generally has no duty to cooperate with a
19 competitor, a refusal to cooperative can constitute
20 anticompetitive conduct where a monopolist ends a voluntary
21 course of dealings. So we wanted you to understand fully
22 that Microsoft's course of conduct was both voluntary and
23 long standing, a relationship built on mutual benefit and
24 mutual trust.

25 You may remember this e-mail from Mr. Henson, at

1 that time the head of the developer relations group, when he
2 learned in August of 1995 that Athena was using the
3 namespace extensions, the exact thing he had been telling
4 ISVs they could and should not do. What did he go on to
5 say? I can't even express how bad this is. We lose
6 everything when we do this, credibility, trust, the works.
7 That's how important trust is to this relationship between
8 the ISVs and the operating systems vendor.

9 Now what was the purpose of telling ISVs about the
10 new interfaces being planned for Chicago? Believe it not, I
11 think Mr. Muglia stated it best.

12 Question: Now you would agree with me,
13 Mr. Muglia, that it is a goal of Microsoft to make sure that
14 all of the developers in Windows have early access to
15 Microsoft's plans to add new interfaces, right? Answer:
16 That is right. Of course. Question: It is important to
17 share plans for the operating system because that helps
18 Microsoft's ISV community know where Microsoft is going, and
19 then the ISVs can plan their applications accordingly and
20 move forward, right, sir? Answer: Yes, that is correct.
21 Question: And it was in Microsoft's own interest to give
22 WordPerfect early access to its plans to add new interfaces
23 in order to help WordPerfect come to market with a product
24 at roughly the same time Windows 95 released, correct, sir?
25 Answer: Yes.

1 As we know, Microsoft directly evangelized the
2 namespace extensions to WordPerfect. You know this e-mail
3 by heart, but just let me mention a couple of reasons why
4 it's important. This is mid November 1993. This wasn't
5 just a bunch of DRG people coming to meet with WordPerfect.
6 This was David Cole, the co-general manager for Windows 95,
7 the man who reported directly to Brad Silverberg.

8 He is meeting with ten WP guys, VP developer lead
9 types, from WordPerfect. This was an important meeting.
10 Mr. Cole was evangelizing the namespace extensions and
11 learning exactly how WordPerfect intended to use those
12 extensions with its WordPerfect product. Mr. Harral was at
13 this meeting. This is what he testified.

14 Question: Now looking a little further down in
15 this e-mail, Mr. Cole states that they, meaning WordPerfect,
16 were very happy about us deciding to document the shell
17 extensions. Do you recall being told by Microsoft at this
18 meeting that they had decided to document the shell
19 extensions? Answer: Yes. It was one of the reasons for
20 the meeting, was gathering the -- and even -- and we would
21 not have had more than half of the conversation if that was
22 not happening.

23 Now what's also important about Plaintiff's
24 Exhibit 105 is that Mr. Silverberg copies Jim Allchin, Bob
25 Muglia and Paul Maritz on the WordPerfect visit e-mail. So

1 the highest ranks within Microsoft plainly knew that the
2 decision had been made to publish the namespace extensions,
3 that WordPerfect intended to use them in its Chicago
4 product, and even knew several of the ways WordPerfect would
5 be using the extensions.

6 If these extensions were so bad, if this was so
7 devastating for NT and Cairo, why didn't they do anything to
8 stop publication of the namespace extensions? The answer is
9 plain from the documents. Everybody understood that the
10 decision had been made to A-list these extensions.

11 Microsoft's executives also understood that the
12 extensions were going to be OLE compatible and they would
13 run fine on Cairo and NT. Mr. Gates understood these facts
14 as well. We're looking at Plaintiff's Exhibit 94.

15 Mr. Maritz writes, recognizing that Chicago is the next ISV
16 target, Mr. Gates is informed in October of 1993 by
17 Mr. Maritz that the shell extension APIs were being made OLE
18 compatible and that the ISVs' applications would run just
19 fine on Cairo.

20 Now the evangelization of the namespace extensions
21 wasn't just to WordPerfect, it was to the ISV community at
22 large. This, of course, is Mr. Belfiore's December 1993
23 presentation. We don't need to look at this again in
24 detail. Here is another one you know by heart. Microsoft
25 was in full selling mode. There is nothing preliminary or

1 tentative about Microsoft's sales pitch of the namespace
2 extensions. Mr. Belfiore was telling ISVs that the
3 namespace extensions were perfect for document management
4 systems and e-mail, the exact uses that Mr. Cole understood
5 WordPerfect intended.

6 WordPerfect understood that you don't edit
7 documents within an explorer extension. That was not what
8 Microsoft was selling and that was not what WordPerfect was
9 planning.

10 Now in his testimony in this case, Mr. Belfiore
11 tried mightily to minimize the importance of the namespace
12 extensions, but the contemporaneous documents at the time
13 tell a different story. Here we see Mr. Belfiore indicating
14 that the namespace extension functionality should be
15 conveyed to a writer from PC Magazine that was doing a piece
16 on Chicago.

17 In this e-mail, Mr. Belfiore is bragging that the
18 namespace extensions is one of the reasons Chicago is so
19 much better than the Mac. Mr. Belfiore points out that ISVs
20 would use the namespace extensions to allow the Explorer,
21 this very powerful application, to be used as a browser for
22 all kinds of information stored in all kinds of places.
23 That's exactly what WordPerfect wanted to do. Because as
24 Microsoft was saying at the time, the Windows Explorer was
25 a, quote, single view on a world of information. The very

1 eyes of Chicago, allowing a user to browse the whole of a
2 single, unified namespace from 10,000 feet down to ten
3 inches. This is, of course, exactly what Mr. Nakajima
4 intended.

5 There was another guy at Microsoft that tried to
6 minimize the importance of the namespace extensions. His
7 name is Bill Gates. Do you remember his deposition? It was
8 our first video. He repeatedly called the namespace
9 extensions trivial and unimportant, hardly worth his time
10 really. Mr. Gates' testimony won't withstand even casual
11 scrutiny.

12 Let's take a look at Plaintiff's Exhibit 134.
13 Here Mr. Gates acknowledges that the tree view in the
14 Chicago Explorer is central and critical to Microsoft's
15 whole strategy because the ability to see the real namespace
16 of the system where Microsoft is putting everything only
17 exists there.

18 Do you remember when Mr. Gates tried to tell you
19 this e-mail was about Cairo? This e-mail is about the
20 Chicago Explorer. It's addressed to Brad Silverberg. It's
21 talking about Chicago. It doesn't even mention the word
22 Cairo.

23 Now on redirect with Mr. Muglia, Mr. Holley tried
24 to diminish the importance of this exhibit by trying to get
25 Mr. Muglia to say that the namespace extensions were not

1 important to Mr. Gates, and a little truth was put on the
2 table by Mr. Muglia.

3 Question: Now you were asked a question by
4 Mr. Johnson on cross-examination about Mr. Gates' interest
5 in the hierarchical view presented by the Windows Explorer.
6 Is that the same thing as saying Mr. Gates thought that the
7 namespace extensions API mechanism was important? Answer:
8 He did think that having a mechanism that would do that was
9 important, yes, which was why -- one of the reasons why this
10 was debated so endlessly.

11 So when Mr. Gates came in here and told you that
12 this technology was trivial and unimportant, he wasn't
13 telling the truth. It was important to him, as Mr. Muglia
14 so admitted.

15 Now Mr. Gates was not the only one who thought the
16 namespace extensions were important. So did the developers
17 at WordPerfect. We got to hear directly from those
18 developers, a long time ago, I know, Mr. Harral and Mr.
19 Richardson. As Mr. Harral states here, the namespace
20 extensions were a key element of moving into Windows 95.
21 And Mr. Richardson understood that the namespace extensions
22 would allow WordPerfect to do some really powerful things
23 for WordPerfect's users.

24 The developers at WordPerfect understood that the
25 namespace extensions were powerful technology. As

1 Mr. Nakajima testified, the use of the namespace extensions
2 was only limited by a developer's imagination. The document
3 up above, PX355, is something that was written by Microsoft
4 of what kind of things you could do with the namespace
5 extension. And so I asked -- I showed that to Mr. Nakajima
6 and I asked him, question: So certainly it's fair to say
7 it's not even limited to the items listed here? Answer:
8 Right. Question: It's only limited by the imagination of
9 the developer? Answer: Right. You're right. It's up to
10 ISVs.

11 The developers at WordPerfect had a lot of
12 imagination. They planned to use the namespace extensions
13 for multiple purposes, a graphical library, in
14 presentations, WordPerfect's document management system,
15 WordPerfect's e-mail product, integration of WordPerfect's
16 powerful QuickFinder technology, integration of Netscape
17 Navigator, the same thing Mr. Nakajima did later with
18 Internet Explorer. All of these things would be a part of
19 WordPerfect and a part of the PerfectOffice Suite.

20 As you will recall, as Microsoft had promised, the
21 M6 beta included partial documentation for the namespace
22 extensions in an SDK, those software development kits that
23 we have talked about so much. Is it important to understand
24 that the M6 beta was a late step in the development process.
25 This is PX179, Mr. Cole's report on the release of M6 to

1 20,000 cities worldwide. M6 was the third milestone release
2 of Chicago to developers. In other words, Chicago is a long
3 way down this development path by the time we get to the M6
4 release.

5 Now the partial documentation of the namespace
6 extensions in the M6 beta has significance in this case. If
7 there was ever any real concern about these extensions
8 within Microsoft, this is the time they should have been
9 withdrawn. As Mr. Raikes testified in his deposition video,
10 the purpose of documenting an API is to put a stake in the
11 ground. Its purpose is to encourage application developers
12 to bet on your operating system. As Mr. Raikes
13 acknowledges, this goes to the principles about how the
14 software industry works.

15 Question: You testified at your prior deposition
16 that, quote, the purpose of documenting an API is, in
17 effect, to put a stake in the ground and say this is
18 something that you as an application developer can count on
19 as being available to you in an operating service today and
20 in the future in order to ensure compatibility, and the
21 quote goes, but I'll stop there and ask do did you recall
22 giving that testimony? Answer: I don't recall the specific
23 testimony. Question: Do you continue to agree with that
24 statement? Answer: I would say in -- from what I recall of
25 what you just read, I would say yes, in that, you know, when

1 you're an application developer, again, back to principles
2 about how the industry worked, you will encourage
3 application developers to bet on your operating system if
4 they know clearly which application programming interfaces
5 you have and what you're intending to support now and in the
6 future.

7 Now at deposition Mr. Muglia was shown Plaintiff's
8 Exhibit 105, that e-mail we looked at earlier memorializing
9 Mr. Cole's trip to WordPerfect where he informed the
10 WordPerfect developers that Microsoft had decided to
11 document the namespace extensions. He was asked his
12 understanding of what that meant.

13 Question, now, Mr. Cole reports at the top of this
14 fourth paragraph that they were very happy about us deciding
15 to document the shell extensions, close quote. And you
16 answer I do. Question, does that indicate to you that as of
17 this time Microsoft was planning to document the shell
18 extensions? Answer, it would appear so. Question, okay.
19 Answer, what I would say is, I mean given what I know right
20 now, is that what they meant is that we would take the shell
21 extensions off of the B-lists, essentially eliminating the
22 concept of B-lists, and commit long term to fully supporting
23 those extensions in future versions of Windows.

24 Of course, Mr. Muglia disowned this testimony at
25 trial. I think the testimony is more properly understood as

1 an admission of the industry's understanding of what it
2 means when an operating systems vendor promises to document
3 a set of APIs. WordPerfect understood it in the same way.
4 As Mr. Harral testified, in his 31 years in the software
5 business, he had never seen a software vendor remove a major
6 feature from a published beta.

7 Question: How long have you worked as a software
8 engineer? Answer: 31 years. Question: In your 31 years,
9 have you ever experienced an operating system vendor remove
10 a major feature from a published beta? Answer: No. The
11 designation of beta in the software industry is that it is
12 for ferreting out problems to be fixed, not for changes in
13 the features. That's what alpha is for. So no.

14 Now ladies and gentlemen of the jury, this is not
15 to say that a beta can never change. One of the purposes of
16 a beta is to get feedback from developers about what
17 problems or issues may exist that need to be addressed by
18 the operating systems vendor. In the history of software
19 development, there are certainly instances where
20 functionality has been withdrawn because of problems with
21 the product. But in this case, there is no evidence that
22 there were any problems revealed by the beta process about
23 the namespace extensions. Indeed, the evidence is to the
24 contrary.

25 Mr. Nakajima didn't remember any negative feedback

1 in connection with any beta release suggesting that there
2 was any problem with the namespace extensions.

3 Question: And one of the purposes of widely
4 distributing a beta release is to provide feedback to
5 Microsoft about the features being offered by the new
6 operating system, right? Answer: Yes. Question: And do
7 you recall whether there was any feedback from ISVs
8 regarding the shell extensions? Answer: Yeah, I do
9 remember some. I actually went to some supporting site I
10 think. I don't remember, it was like a discussion group
11 that ISVs can post comments and questions, and I read some
12 of those, yes. Question: Was that feedback good? Did they
13 like your extensions? Answer: Uh-huh. (Affirmative),
14 yeah. Yeah. Question: These were ISVs that you were
15 talking to, right? Answer: Third-party ISVs.

16 In fact, it is undisputed that the namespace
17 extensions never changed in any material way from
18 Mr. Nakajima's creation of that lightweight OLE
19 implementation in early 1994 all the way through the
20 republication in 1996 and beyond. Here he is talking about
21 using the extension to integrate Internet Explorer into
22 Windows.

23 Question: Now the namespace extensions that you
24 used, are those the same extensions that we have been
25 talking about -- Answer: Yes. Question: Here? Answer:

1 Yes. Question: Were those changed in any significant way
2 between what they were in, say, June of 1994 and when you
3 were using them? Answer: No, no change. Question: Would
4 that still have been running in the same process as
5 Explorer? Answer: Uh-huh. (Affirmative)

6 Nor may Microsoft rely on its boilerplate
7 disclaimers in its beta agreements to escape liability in
8 this case. As Judge Motz instructed you during the course
9 of this trial, I'm going to let the document in. We
10 obviously previously discussed about this outside of your
11 presence and I am going to let the document in. I just want
12 to let you know that if you find that Microsoft committed
13 antitrust violations in this case, that the contract which I
14 am letting in does not excuse Microsoft's conduct or protect
15 it from damages for antitrust violations.

16 Now having received the partial documentation in
17 the M6 beta, WordPerfect shared code team immediately
18 started working with namespace extensions. All this
19 nonsense you heard from Microsoft that WordPerfect didn't
20 start working on its product for Windows 95 until sometime
21 after PerfectOffice 3.0 was released in December is just
22 misdirection. It doesn't square with the facts. As
23 Mr. Harral states here, after receipt of the M6 beta,
24 WordPerfect started to actually hook in the WordPerfect
25 code. We've highlighted that portion here in his answer.

1 As Mr. Gibb testified, the shared code team had
2 already started work on PerfectOffice for Windows 95 before
3 he had even gotten involved. The shared code developers
4 were the experts on the platform.

5 And Mr. Harral went on to explain that shared code
6 comes first in the development process because it is the
7 foundation upon which all the application engines build.

8 And in June of 1994 through October of 1994, the
9 shared code team, specifically Mr. Steve Giles, was busy
10 coding to the namespace extensions for WordPerfect's custom
11 file open dialog.

12 Question: Now do I understand you correctly this
13 morning, Mr. Richardson, to say that between the receipt of
14 the M6 documentation in June of 1994, for the namespace
15 extension APIs, and October of 1994, when Microsoft informed
16 Novell that it no longer was committing to support those
17 APIs in the future, that you had already written code that
18 called upon the APIs? Answer: That is my understanding.

19 Question: Did you write that code, sir? Answer: I did
20 not. Question: Who did? Answer: Steve Giles was the
21 primary developer on the file open dialog functionality, and
22 Adam Harral was the technical lead for that group.

23 Question: Did you ever see, with your own eyes, any such
24 code? Answer: I did see demos.

25 By October of 1994, they were 80 percent complete

1 with this process of hooking the shared code pieces into
2 Windows 95.

3 Question: When you talk about hooking things in,
4 are you referring to hooking into the beta that had been
5 provided by Microsoft? Answer: Yes. And for how long did
6 you get in that process? Answer: For the shared code or
7 for everything? Question: Shared code. Answer: For
8 shared code we were about 80 percent of the way through --
9 well, in that process to what point? Question: Let's talk
10 up to October of 1994. Answer: We were about 80 percent of
11 the way through hooking up the shared code pieces into the
12 Windows 95 system.

13 I want to stop the action for a moment to talk
14 about WordPerfect's file open dialog. As Mr. Gibb's told
15 you, WordPerfect traditionally had a very powerful file open
16 dialog.

17 Question: Was the open dialog or sometimes
18 referred to as the file open dialog technology, was that
19 something that WordPerfect thought it had a competitive
20 advantage with? Answer: Yes. I mean because people just
21 lived in it. I mean they used it so much that we thought of
22 it as a key thing for us. File open had been code
23 competency and something that people looked to for a long
24 time to be -- you know, this is -- WordPerfect is synonymous
25 with doing that well.

1 Now this is not just WordPerfect talking here.
2 This is a Microsoft document. As Microsoft states here,
3 WordPerfect was getting rave reviews for its new file open
4 dialog. Microsoft is talking here about the file open
5 dialog on WordPerfect 6.0A. Where WordPerfect was
6 particularly strong was in their document management
7 capabilities. Microsoft also recognized WordPerfect's
8 strength and the importance of document management for
9 office productivity software.

10 This is Plaintiff's Exhibit 273. This is a
11 Microsoft document. It's discussing the importance of
12 integrating document management into office software.
13 Microsoft recognizes here that, quote, the success of office
14 software is becoming dependent on how well it is integrated
15 with document management solutions.

16 Microsoft recognized here in March of 1995 that it
17 was behind WordPerfect and Lotus, and was only now
18 responding to WordPerfect's QuickFinder technology.

19 Now you will recall that document management and
20 QuickFinder were two of the things that WordPerfect intended
21 to use the namespace extensions for. It is no coincidence
22 that Mr. Gates wanted to make sure that WordPerfect and
23 Lotus would not be able to exploit the namespace extensions
24 for the document management purpose.

25 On October 3rd, 1994, Mr. Gates made the decision

1 to pull the namespace extensions. This is, of course, PX1.
2 You know it well. There is no ambiguity in this e-mail
3 about why Mr. Gates made this decision. He states in plain
4 English that he's pulling these extensions to enable
5 Microsoft to achieve a high level of integration in Office
6 96 that will be harder for the likes of Lotus Notes and
7 WordPerfect to achieve, and which will give Office a real
8 advantage. This is a purely predatory action unrelated to
9 any pro-competitive purpose.

10 Now Mr. Gates' decision mirrors the radical
11 extreme proposal advanced and accepted by Mr. Gates in July
12 of 1993. First, the Chicago shell would have limited
13 extensibility. Second, only Office would be able to take
14 advantage of the namespace extensions. Third, the
15 technology would not be available to other ISVs until a year
16 after Office 96 had captured the market. Fourth, all for
17 the purpose of disadvantaging Microsoft's application
18 competitors.

19 It is a fair inference from this evidence that
20 Mr. Gates' intentions never changed. It was always his plan
21 and intention to deny the ISVs the power of the namespace
22 extensions in order to advantage Office 96.

23 Mr. Gates' decision came just two weeks after
24 Mr. Gates saw Mr. Frankenberg's demonstration at the agenda
25 conference, confirming to Mr. Gates that Novell was a lot

1 more aware of how the world was changing than Mr. Gates
2 thought they were. It reinforced for Mr. Gates the
3 importance of Microsoft's shell integration made possible by
4 the namespace extensions.

5 The evidence also shows that Mr. Gates' decision
6 presented a real problem for Microsoft. Remember when
7 Mr. Henson had said that not publishing the APIs Capone was
8 using would creative a big PR problem? Now we have
9 Mr. Gates pulling published APIs for a blatantly
10 anticompetitive purpose. How was Microsoft going to handle
11 that?

12 Mr. Creighton had told Microsoft prior to
13 Mr. Gates' decision that there would be hell to pay in the
14 press if they changed the interfaces. Mr. Gates wasn't just
15 changing the interfaces, he was de-documenting them
16 entirely.

17 Mr. Silverberg told Mr. Gates two days after the
18 decision that there would likely be a firestorm of protest
19 over the decision. He predicted it would play out on page
20 one of the weeklies and lead to calls to the DOJ to
21 investigate. That's exactly what would have happened if
22 Microsoft had been honest about why Mr. Gates pulled the
23 namespace extensions. So what to do?

24 The evidence is plain on its face, manufacture a
25 bunch of bogus reasons to feed to the ISVs to avoid the

1 firestorm of protest which would have followed the
2 revelation of Mr. Gates' decision.

3 Plaintiff's Exhibit 225 is the heart of Microsoft
4 deceit. It is a carefully prepared script designed to throw
5 off ISVs and the press off of the real reason for
6 de-documenting the namespace extensions. Let's take a
7 closer look.

8 Quote, we are faced with the challenge of going to
9 our ISVs and telling them about Bill G's recent decision to
10 return the namespace extension APIs to their original
11 system-level status, notice the wording. Let's try not to
12 use the word undocumented or private APIs. This has a
13 negative connotation to most ISVs.

14 Mr. Struss makes it plain as day that Microsoft is
15 worried about the press reaction. He wants to develop a
16 press reference list with any good comments from ISVs. This
17 script was all about avoiding that firestorm of protest. He
18 goes on in the same exhibit, we are also working on a list
19 of ISVs for press references if and when the press gets wind
20 of this.

21 Microsoft even tried to prevent ISVs from even
22 talking to the press by stressing their confidentiality
23 obligations under Microsoft's nondisclosure agreements.
24 Again, this script was all about avoiding the firestorm of
25 protest.

1 Microsoft employees were further instructed to
2 tell ISVs to keep Mr. Gates' decision close to their chests.
3 They were asked not to post anything on CompuServe about the
4 matter.

5 And here comes the big spin, quote, the position
6 to take with your ISVs is that we are going -- we are being
7 proactive with information and keeping them from going down
8 a dead-end development path. As we know, there was nothing
9 dead end about the namespace extensions. They were never
10 changed, they were never removed, and Microsoft continued to
11 use them in its applications and in Windows 95 itself.

12 And then we have the purported justifications
13 advanced by Microsoft. The number one justification
14 underlined in the original question and answer attachment is
15 compatibility. They are telling ISVs that these interfaces
16 would go away in the future. Compatibility. We have
17 determined that it will be very difficult to support these
18 APIs for applications as we move forward with our operating
19 systems. We did not want to encourage ISVs to support
20 interfaces that would go away in the future.

21 We know that this purported justification is
22 false. It was designed to mislead ISVs the namespace
23 extensions would be going away in the future and were not
24 compatible with Microsoft's future operating systems.

25 The unrebutted evidence is that the decision to

1 port the Chicago shell code base to Windows NT occurred
2 prior to Mr. Gates' decision to de-document the namespace
3 extensions. This meant that the namespace extensions were
4 now running on Windows NT.

5 Question to Mr. Nakajima: And one implication of
6 that decision was that the namespace extension APIs started
7 working on Windows NT, right? Answer: Yes. Question: So
8 that decision was made at the same time as the decision to
9 cancel Cairo, right? Answer: According to this e-mail,
10 yes. Question: That time period, if we look at the date of
11 Mr. Allchin's e-mail, going to the front again, would have
12 been at some point prior to September 27th, 1994, right?
13 Answer: Uh-huh, (affirmative), yes.

14 Mr. Muglia flat out admitted that once the Cairo
15 shell was canceled in September of 1994, there was no
16 remaining concerns about compatibility. In other words,
17 there was no remaining concerns about compatibility prior to
18 Mr. Gates' decision.

19 So that was Microsoft's first two lies to the
20 ISVs, that there were compatibility issues and that these
21 interfaces, quote, would go away in the future. Both of
22 those representations to ISVs were false.

23 This is from Microsoft's opening statement in this
24 case. Microsoft told you in opening that one of the reasons
25 for withdrawing support for the namespace extensions was

1 that they were not compatible with future versions of
2 Windows under development in 1994. That was not true.

3 You may have also noted that Dr. Bennett,
4 Microsoft's technical expert, never mentioned compatibility
5 as a reason for de-documenting the namespace extensions.
6 Yet, here it is being sold to ISVs as the number one reason
7 for de-documenting the namespace extensions.

8 Let's go back to the spin. The second reason
9 given to ISVs for Mr. Gates' decision was system robustness.
10 System robustness. Namespace extensions were designed -- I
11 assume that's designed -- to be part of the system. As
12 such, they run in the explorer's process space. Badly
13 written namespace extensions could cause the reliability of
14 Windows 95 to be less than what it should.

15 It's worth noting here that even in this question
16 and answer, the alleged robustness concerns don't mention
17 anything about crashing any shells. It just says it would
18 cause the reliability of Windows 95 to be less than it
19 should. This crashing of the shell thing must be a later
20 invention.

21 We also know that robustness concerns were not
22 mentioned by Mr. Gates as a reason for his decision in PX1.
23 What we now know, however, is that if there were any real
24 robustness concerns, they were resolved within a month of
25 Mr. Gates' decision.

1 These all say the same thing. Let me read in what
2 Mr. Belfiore admitted.

3 Question: Does this refresh your recollection
4 that the fix, so to speak, to deal with any robustness
5 concerns was taken care of within a month of Mr. Gates'
6 decision? Answer: It does appear as if that's true, yes,
7 and that is a month later than his decision, but, yes.

8 In other words, it was an easy fix. Any
9 robustness concerns were resolved many, many months before
10 the release of Windows 95. It was not a legitimate
11 justification for withholding the namespace extensions from
12 ISVs.

13 The third reason given to ISVs for Mr. Gates'
14 decision was ship schedule. We have determined the amount
15 of development and testing time it would take to support
16 these APIs for the entire development cycle as a tremendous
17 amount of overhead to our very rigid deadlines.

18 This sounds like the radical extreme, or the
19 excuse to be given ISVs was we couldn't get it done in time.
20 This was also pure spin. The namespace extensions were
21 settled, essentially done in early 1994. No changes were
22 made to those extensions right through their republication
23 in 1996.

24 The notion that these namespace extensions needed
25 further development or testing is particularly gullible.

1 Here Mr. Kallen reports in February of 1994 that the
2 namespace extensions were the result of many months of
3 tuning, and it would be very nice to use for a Lotus viewer.

4 Finally, in the last piece of spin, Microsoft
5 tried to sell controls which purportedly gave the same look
6 and feel as the namespace extensions. You may remember
7 discussion of Chico app. That's this same look and feel
8 stuff. Mr. Harral addressed this point directly in his
9 testimony.

10 Question: And based upon the documentation that
11 you reviewed, would CHICOAPP be a substitute for the
12 namespace extensions APIs? Answer: No. The namespace --
13 there is a difference between window dressing and file
14 management. If I buy a fender kit and screw a jaguar on the
15 front of my car, it's not going to make it go from zero to
16 60 in four seconds. Just because I can display something
17 that looks like a shell doesn't mean I'm touching the
18 object. CHICOAPP is saying that there's a tree and here's a
19 view, and you can put them together and you can put up
20 menus, and here's how you put up menus. But it's not tied
21 to the namespaces.

22 In short, the same look and feel stuff is not
23 equal for the same functionality. As Mr. Harral noted, it
24 was window dressing.

25 You can use your common sense here too. If the

1 same look and feel was really equivalent, why didn't Marvel
2 use it? Why was it such a bombshell for Marvel, Mr. Gates'
3 decision?

4 Back to Plaintiff's Exhibit 225, further
5 misleading information provided to the ISVs. Quote, all
6 applications within Microsoft which were originally
7 implementing these interfaces have been required to stop.
8 Of course, that representation to the ISVs was followed by
9 multiple instructions not to mention Marvel in any
10 conversation with any ISV. Why? It wasn't because of that
11 convoluted answer that Mr. Struss gave about Marvel being
12 some secret. It was because Microsoft already knew that
13 Marvel would have to continue to use these extensions.

14 In order to further discourage ISVs that had
15 received the preliminary documentation from using the
16 extensions, Microsoft falsely stated that the extensions may
17 not even work even in interim beta builds as shown here.
18 The evidence shows that this was another obvious untruth.

19 As Mr. Silverberg states to Mr. Gates here, we
20 have not yet figured out how to really take them out, as the
21 shell needs them itself.

22 This is one of my favorite bits of testimony,
23 Mr. Nakajima calling me smart. That was pretty fun. He was
24 definitely the smartest man in the room. So how did Chicago
25 shell use the namespace extensions?

1 Question: In fact, the namespace extensions were
2 also used within Windows 95 to provide objects like Recycle
3 Bin, Network Neighborhood, and My Briefcase, right? Answer:
4 Yes. You are smart. I am surprised. True. True. Yes, I
5 was amazed. Nobody actually mentioned that because I came
6 up with the namespace extensions first because I was in
7 charge of both integrating multiple views, like a file
8 manager, program manager, control manager. So I needed to
9 create this kind of mechanism to myself to integrate. So,
10 as I said, Recycle Bin and everything was using that
11 mechanism, yes, you are absolutely right.

12 So what Mr. Nakajima is saying here is that the
13 namespace extensions were not only used to create the
14 Recycle Bin, Network Neighborhood and My Briefcase, the
15 namespace extensions were what enabled Windows 95 to
16 integrate all those separate manager dialogs in Windows
17 93 -- in Windows 3.1, excuse me, into Windows 95.

18 You will recall the testimony about how this was
19 one of the great advances of Windows 95, combining all those
20 program management dialogs into one single dialog. In other
21 words, the fundamental change from Windows 3.1 to Windows 95
22 was Mr. Nakajima's namespace extensions. And Mr. Gates had
23 the nerve to come in here and tell you that this technology
24 was trivial and unimportant.

25 Now, unfortunately, based on Mr. Gates' decision,

1 Mr. Nakajima was required to take the necessary steps to
2 hide the namespace extensions from ISVs.

3 The evidence shows that despite Mr. Gates'
4 decision, Novell continued to press for information about
5 them well into 1994. For example, Novell's Kelly
6 Sonderegger sought information about the namespace
7 extensions from Brad Struss in November of 1994. Mr. Struss
8 responded, this functionality as described is no longer
9 available. This response was carefully crafted. Notice
10 that he says here the functionality as described is no
11 longer available. This wording was intentional. The
12 functionality as described in M6 was no longer available
13 because by this point the semantic change to open up in a
14 separate window had already occurred.

15 As Mr. Struss admits in Plaintiff's Exhibit 259,
16 the response being used with Mr. Sonderegger basically
17 sidesteps the question. Now why did Mr. Struss feel the
18 need to sidestep the question? I invite you to draw your
19 own inferences.

20 Mr. Sonderegger was not the only Novell employee
21 who continued to pursue information on the namespace
22 extensions. Plaintiff's Exhibit 238 shows that Richard
23 Humes of WordPerfect's Orem office also sought information
24 on the namespace extensions and was told that the APIs were
25 being taken internal because Microsoft didn't want to

1 support them long term. In other words, the misleading
2 deceptive statements from Microsoft continued.

3 We also know that Adam Harral continued to press
4 for information about the namespace extensions from Premier
5 Support, and the response was that Premier Support shut down
6 all the information on the shell even if the requests
7 involved documented APIs.

8 Mr. Harral responds, we found that as we went down
9 that road that it was difficult for Premier Support to get
10 help on the shell in general. So Premier Support was
11 starting to give us less and less information about the
12 shell in general. And so at that point we realized that we
13 really could not continue trying to explore the namespaces
14 because even on documented APIs we were not getting the
15 level of help and it was diminishing, so we were going to
16 have to move to something else.

17 Question: I want to make sure we understand this
18 right. You are calling Premier Support and seeking
19 information on this shell with respect to documented APIs,
20 and what was the response? Answer: They were not providing
21 the answers that -- or the answers about things like they
22 had in the past, so we were getting less and less help.

23 Question: And that's with respect to the entire shell?

24 Answer: The entire shell.

25 We also know that Mr. Frankenberg complained

1 repeatedly to Mr. Gates about undocumented APIs in 1995 and
2 that Mr. Gates refused to discuss the issue. Of course,
3 Mr. Frankenberg didn't know the truth back in 1995. The
4 truth wouldn't emerge until years later. And Mr. Gates, of
5 course, admitted that Mr. Frankenberg had complained about
6 the issue of undocumented APIs.

7 Question: Mr. Gates isn't it a fact, sir, that
8 Mr. Frankenberg, the CEO of Novell, contacted you several
9 times on the issue of undocumented APIs? Answer: There
10 were some letters he wrote where that was one of the topics
11 in some of those letters.

12 Now there is a handsome man.

13 THE COURT: You've got pictures of everybody.

14 MR. JOHNSON: It's a great picture, Your Honor.

15 Microsoft has cried long and hard in this case
16 about the alleged failure of Novell to press the issue.
17 What exactly was Novell left to press? Despite repeated
18 inquiries, Novell was told over and over that Microsoft
19 would not be supporting the namespace extensions on future
20 operating systems, that they were going to disappear,
21 allegedly because of all those pretextual reasons we looked
22 at earlier. Should Novell have assumed Microsoft was lying?
23 Did they have any reason to know that the developer
24 relations group was just putting out PR spin? Did Novell
25 have any truth of what was really going on in 1994? The

1 answer is no.

2 You will remember that Judge Motz told you not to
3 worry about the timing of this suit, that Novell was within
4 its legal rights to file this suit when it did. So I ask
5 that you remember the Judge's instruction that this matter
6 should not be of concern to you.

7 THE COURT: That's what I said and that's the
8 truth. I'm not siding with anybody's argument on either
9 side.

10 MR. JOHNSON: So Novell took Microsoft at its
11 word. I think it was Mr. Peterson who said that Utah
12 developers were good at following the rules. Another way to
13 say that is that the folks in Utah wouldn't presume that
14 they were being lied to. So what did Mr. Harral and rest of
15 the shared code team do? They tried to solve the problem.

16 First, they tried, through 1994, to go ahead and
17 try to use the namespace extensions as partially documented.
18 That option had to be abandoned when Premier Support shut
19 down information on the shell even in regard to documented
20 interfaces.

21 Second, they considered the possibility of trying
22 to use Microsoft's common file open dialog. As
23 Mr. Richardson concludes in this answer, it was a huge step
24 backwards for us. And we felt it simply wasn't an option.
25 If we were to go with that option, we didn't really have a

1 product. So we were left with the third option.

2 As Dr. Noll told you, using the common file open
3 dialog would be just another way of committing suicide.

4 Even Mr. LeFevre, a current Microsoft employee,
5 for many years admitted that the lead developers outvoted
6 him three to one about using the common file open dialog.

7 That left us one viable option to try and
8 re-create the functionality from scratch. Mr. Richardson:
9 We also then looked at saying, well, how do we work around
10 the problem? How do we build up the part of the system that
11 Microsoft isn't letting us use so we can get the same
12 functionality and be able to move forward? If we didn't do
13 that, then I don't believe that we had a product that we
14 could ship on Windows 95. If you're a word processor and
15 you can't access your files or if you can't save your files,
16 then you don't really have a word processor. Yes, we could
17 edit the documents, but we didn't have a way to get access
18 to the place where the documents were stored or any access
19 enough with the locations to give us a WordPerfect product.
20 We had to meet at least the level of where our last product
21 had been and be able to access all the areas that were
22 important to access in the new operating system. So we had
23 no choice but to move forward. The options we had were
24 either revert in functionality to something that was
25 unacceptable or simply not be able to access our files in

1 Windows 95.

2 In trying to become a great application on Windows
3 95 turned into a nightmare for Mr. Harral, Mr. Richardson,
4 and the rest of the shared code team at Novell.

5 Mr. Richardson spoke of the hardship of those many
6 months. The only time he took off was to go to church on
7 Sundays. He recalled barely seeing his family for that
8 entire year.

9 Microsoft is essentially telling you that
10 Mr. Richardson and Mr. Harral were stupid. Dr. Bennett came
11 in here and told you that Novell could have used the
12 namespace extensions or they could have used the common file
13 open dialog.

14 Novell developers were not stupid. They knew
15 being successful in Windows 95 meant that they had to build
16 an integrated product that worked within the new Windows 95
17 paradigm. Mr. Gates knew it too, and that's why he pulled
18 the extensions, to prevent WordPerfect from achieving a
19 level of integration that would have put Office to shame.

20 We also got to hear from Gary Gibb, the product
21 manager of the PerfectOffice Suite for Windows 95. Mr. Gibb
22 spoke of his weekly meetings with the development team and
23 how they discussed what was critical path for the project.
24 He testified how week after week and month after month
25 shared code was critical path. Every application within the

1 PerfectOffice Suite was dependent upon shared code to
2 provide the bridge between the applications and the
3 operating system. Shared code was responsible for the file
4 open dialog. It sounds pretty obvious, but each of the
5 applications needed to be able to open. They had to have a
6 file open dialog.

7 As a result of Microsoft's anticompetitive
8 conduct, Novell was unable to produce a PerfectOffice Suite
9 for Windows 95 within that crucial time to market window
10 within two or three months of the release of Windows 95.

11 Question: Did Quattro Pro end up being critical
12 path on the PerfectOffice Suite 95 development? Answer:
13 No. I mean absolutely not. It was shocking actually, and
14 they had a lot of challenges to do, but every week, week
15 after week, it was shared code, shared code. It was not
16 Quattro Pro. Question: Were you aware of sort of the
17 critical circumstances that underlie this document prior to
18 July of 1995? Yeah. I mean obviously we didn't wait until
19 the last minute to add this. This is something, like I
20 mentioned towards the end of quarter one and the first part
21 of quarter two, they started to become critical path. So in
22 the regular reports we received every week, we said,
23 PerfectFit, PerfectFit, PerfectFit, PerfectFit. PerfectFit,
24 of course, being the same thing as shared code.

25 The suite that was ultimately released by Corel

1 lacked much of the functionality originally planned for the
2 product. As Mr. Harral testified, it took until 1998 for
3 Corel to release a product that had the functionality that
4 had been planned for the 1995 release.

5 You heard a lot in this case about the but for
6 world. This is an important concept for you to keep in mind
7 as you review the evidence in this case. In the but for
8 world, you have to think about what would have happened if
9 Mr. Gates had not decided to tilt the playing field against
10 WordPerfect and Lotus. In that world, the namespace
11 extensions would have been fully documented. In that world,
12 Microsoft's Premier Support would have continued assisting
13 WordPerfect to integrate into the Chicago shell.

14 In the but for world, there are also certain
15 things we can be fairly certain about. At the time of
16 Mr. Gates' decision in early October of 1994, the shared
17 code team was 80 percent finished with its work on the file
18 open dialog. This file open dialog was a necessary first
19 step in the process of assembling the PerfectOffice Suite.

20 Mr. Harral testified that absent Mr. Gates'
21 decision, shared code would have been basically done within
22 two months.

23 Question: Hypothetically speaking, if you had
24 received the final documentation from Microsoft with respect
25 to the namespace extension APIs, how long do you think it

1 would have taken the shared code group to complete the
2 process? Answer: It probably would have been before
3 December of that year. Question: December of 1994?
4 Answer: '94.

5 So as you consider the but for world in your
6 deliberations, think about what that would have meant to the
7 development of the PerfectOffice Suite. One shared code was
8 complete in 1994. All that would have been left would be
9 for the engine groups, WordPerfect, Quattro Pro and the rest
10 of the Office productivity applications, to finish
11 converting to 32 bit and adding any features within the
12 crucial time to market window. We can also look to the past
13 as a guide to what Novell was capable of.

14 WordPerfect and Quattro Pro joined Novell in June
15 of 1994. In a matter of seven months, Novell released
16 WordPerfect for Windows 6.1 and PerfectOffice 3.0. These
17 were good products, highly acclaimed in the trade press and
18 selling well. During that same seven-month period, Novell
19 released WordPerfect 6.0 for Unix and WordPerfect 3.1 for
20 Macintosh.

21 The notion that Novell would have missed the
22 crucial time to market in the but for world for Windows 95
23 is preposterous. We had 11 months if the shared code was
24 complete incentive to get this done.

25 We also know that Mr. Harral and the WordPerfect

1 developers had years of experience on 32-bit systems, long
2 before Microsoft had its first 32-bit product. We still had
3 already been working, like for WordPerfect, they had been
4 working on 32-bit applications in Next, OS/2, and they had
5 years of experience already working in those areas. In the
6 but for world, WordPerfect would have had no problem meeting
7 the crucial time to market window.

8 Mr. Gibb also told us about their experience
9 writing for 32 bit. Indeed, half the code was already 32
10 bit because WordPerfect, as you will remember, was
11 cross-platform to that bit systems.

12 Question: Is it fair to say it began -- before
13 you began work, the engine team began work on the 32-bit
14 product for Windows that you had already been working on
15 32-bit operating systems? Answer: Oh, yeah. Question:
16 Throughout? Answer: I think probably more than half the
17 code, and it was all 32 bit because, like I said, it was
18 cross-platform. And everything under the Windows was 32
19 bit. So it was certainly 32 bit.

20 So it's just not reasonable to say that Novell
21 would have dropped the ball on the all important release for
22 Windows 95 because of any issue with 32-bit development.

23 At the time of Mr. Gates' decision in October of
24 1994, Novell's schedule called for PerfectOffice to ship by
25 September 1 of 1995. This is an October of 24th, 1994

1 scheduling document for PerfectOffice 95, code name Storm.
2 It shows the projected ship date of September 1st, 1995.
3 That's a period of 11 months to develop PerfectOffice for
4 Windows 95.

5 Now while, of course, it's impossible to say with
6 certainty what would have happened in the but for world,
7 because everything changes after Mr. Gates' decision, what
8 is not fair to say is that Quattro Pro would have held up
9 this process.

10 As witness after witness testified, Mr. Gibb was
11 in the best position to know that the Novell suite would
12 have been timely but for the problems encountered by shared
13 code. This is, of course, the testimony of Mr. Harral and
14 Mr. Frankenberg. But let's turn to Microsoft's witnesses.

15 Even the witnesses Microsoft brought in all
16 admitted that Mr. Gibb would know if Quattro Pro was the
17 problem. Mr. Larsen. Question: Are you in a position to
18 dispute Gary Gibb in that statement? Answer: In which
19 statement? Question: That shared code was the critical
20 path for the Windows WordPerfect Suite? Answer: No, I'm
21 not in a position to dispute that.

22 Mr. Ford. Question: And isn't it fair to say
23 that if there were issues with Quattro Pro or how that
24 affected the development of the PerfectOffice Suite, that
25 Gary Gibb would be more knowledgeable than you as to

1 whatever those issues might be; is that correct? Answer:
2 Yes. Yes, he would be.

3 Mr. Bushman. Question: Again, Mr. Gibb would be
4 somebody who would be very knowledgeable about which
5 elements were critical path for PerfectOffice 95, right?
6 Answer: For that section of the suite, yes.

7 So we have these admissions from Microsoft's own
8 witnesses that Mr. Gibb would be the man to know.

9 Now Microsoft has spent much of this trial trying
10 to prove Mr. Gibb a liar, trying to show that Quattro Pro
11 wouldn't have been ready in the but for world. But as
12 Mr. Gibb testified, Quattro Pro was not the problem.

13 Question: Do you recall Quattro Pro, the
14 development of Quattro Pro causing a delay in the shipment
15 of PerfectOffice 95 suite? Answer: No. I mean early on,
16 like I said, when we were first speccing out Storm, we
17 thought Quattro Pro might be critical path. So early on
18 before we had project plans and before we tracked the
19 progress, we were nervous about Quattro Pro because they had
20 a lot of things to do. We were nervous that they might have
21 a hard time getting the schedule. But they were
22 conservative in their estimates and kind of over delivered.
23 So it turned out to be a pleasant surprise.

24 Mr. Gibb also covered the resignations of the 15
25 Quattro Pro developers in December of 1995. As he states

1 here, Quattro Pro was code complete long before the events
2 of December of 1995. They were basically code completed and
3 had basically everything in there. So, again, it
4 surprisingly wasn't critical path for releasing the product,
5 even though the bulk of the team quit, because they were
6 basically done.

7 There was also evidence presented with respect to
8 the localization issues with Quattro Pro. This has to do,
9 as you know, with foreign language versions of these
10 applications. Such issues were nothing new. PerfectOffice
11 3.0 had the same issue. That didn't hold up the release of
12 PerfectOffice 3.0 in December of 1994. The localized
13 version simply followed later.

14 In fact, the evidence shows that Microsoft did the
15 same thing with respect to the localization of its Office
16 suite. This is the plan shown here for Office 95,
17 Plaintiff's Exhibit 165. Under this schedule, it would take
18 a full six months to complete the localization process for
19 Office 95. This is just the way it was done in the industry
20 at the time.

21 This is the office localization plan for Office
22 96, PX273. Again, it indicates the release of localized
23 versions of Office 96 would be staggered over as much as six
24 months. In short, it's just not reasonable to assume that
25 Novell would have missed the Windows 95 boat for some

1 foreign language version. They would have done exactly what
2 they had done in the past and what Microsoft did as well,
3 they would have released those versions later.

4 I would like to talk about the B-list story for
5 just a moment. There is zero evidence in the record that
6 documentation of the namespace extensions was made available
7 to anyone prior to March of 1996. Andrew Schulman, he wrote
8 the book on documented Windows 95. Mr. Holley liked to wave
9 it around during some of his examinations. By the way, it
10 didn't include anything about the namespace extensions in
11 there. Mr. Schulman sought documentation on the namespace
12 extensions in January of 1995. It probably would have been
13 in his book had he gotten the information. Microsoft
14 brushed him off.

15 Brad Struss, the man behind the curtain, joked
16 that, quote, the docs will be hard to get for a while, dot,
17 dot, dot. This was all part of the deception. Microsoft
18 knew the namespace extensions were being used by Marvel.
19 They knew the namespace extensions were not going to be
20 changed. They knew those extensions were already running on
21 Windows NT. They new there were no compatibility issues.
22 They knew that any robustness concerns had already been
23 addressed.

24 So why not allow the ISVs to use them? One reason
25 and one reason alone, Bill Gates had decided to pull

1 technology that he thought was important in order to hurt
2 WordPerfect and Lotus and to reserve that technology for the
3 exclusive benefit of Office 96.

4 And, of course, as we saw, Mr. Schulman inquired
5 again in March of 1996, and he still hadn't gotten any
6 documentation for the namespace extensions. And Microsoft
7 was not able to provide you with a single piece of paper
8 that suggested in any form that any ISV received any
9 documentation on these namespace extensions that were
10 supposedly on some B-list.

11 Of course, we know that the crucial interfaces
12 that Microsoft planned to use in the Office Explorer for
13 Office 96 were the namespace extensions. This is, of
14 course, further evidence that there was nothing wrong with
15 the namespace extensions. If there was something wrong with
16 them, why would Office 96 developers be talking about them
17 as the crucial interfaces needed to achieve their
18 objectives?

19 What was the objective of the Office 96 Explorer?
20 Office Explorer will superset and replace the Chicago
21 Explorer to become the single place where users can find and
22 manipulate all their information irrespective of its type,
23 including all documents and files, in addition to personal
24 information such as appointments, task lists and mail.

25 If that sounds familiar, it's because that's how

1 Mr. Gates described the Chicago Explorer, that was central
2 and critical to Microsoft's, quote, strategy. He states,
3 the ability to see the real namespace of the system where we
4 are putting everything only exists there. The ability to
5 move things around easily only comes from there.

6 As Mr. Muglia admitted, the namespace extensions
7 were important for Mr. Gates to achieve the goal that he
8 placed in the hands of Office 96 to use the namespace
9 extensions before WordPerfect and Lotus would be able to do
10 so in order that Office 96 could achieve a level of
11 integration that WordPerfect and Lotus would not be able to
12 achieve.

13 Let's change gears a little and touch briefly upon
14 some of those former WordPerfect/Novell employees that
15 Microsoft brought into this trial. Mr. Bushman, Mr. Larsen,
16 Mr. Acheson. I think it was pretty clear that they had axes
17 to grind against Novell. Seeing that Microsoft had the
18 ability to subpoena anyone in the state -- anyone in the
19 State of Utah in this case, it's not hard to understand how
20 they could dig up a few disgruntled souls.

21 Microsoft's anticompetitive conduct destroyed a
22 great company and a great Utah product, WordPerfect. Many
23 here lost their jobs. Families were hurt. You could
24 probably find dozens --

25 THE COURT: Let's not draw sympathy into it. Just

1 argue the case.

2 MR. JOHNSON: These guys went beyond such bad
3 memories. Mr. Bushman, he lost money when Novell won the
4 SCO litigation. He was a creditor in SCO's bankruptcy.
5 Mr. Larsen, he clearly didn't like being demoted and sent
6 off to Scotts Valley. He quit after about five weeks of
7 being there. Mr. Acheson, I mean he flat out admitted he
8 loved Microsoft and he disliked Novell. None of these guys
9 had any real involvement in the central issues of this case.
10 They were just brought in to smear Novell.

11 There were a few other former WordPerfect/Novell
12 employees brought in by Microsoft as well. Mr. Ford,
13 Mr. LeFevre, Mr. Middleton and Mr. Peterson.

14 One thing I got out of Mr. Ford and Mr. LeFevre's
15 testimony was they still think WordPerfect was the greatest
16 word processor of all time, even after the events of this
17 lawsuit with respect to Mr. Ford. And Mr. LeFevre also told
18 us he was outvoted three to one by using the common file
19 open dialog.

20 Mr. Middleton, well, that video was interesting.
21 The only thing I learned from Mr. Middleton, unlike what
22 Mr. Larsen claimed, was that Mr. Middleton thought the
23 cultures of WordPerfect and Novell were very similar.

24 Finally, Mr. Peterson. Nice guy. What we learned
25 from him was that Microsoft was talking out of both sides of

1 their mouth as far back as the late 1980s with respect to
2 whether to develop for OS/2 or Windows.

3 Now Microsoft's spent a lot of time talking about
4 all this ancient history. OS/2, whether we were late to the
5 Windows, whether we were late to suites, whether we had
6 missed the boat. This is all an effort of misdirection.
7 The pertinent question is what was the situation in 1994
8 when Novell bought WordPerfect.

9 The first thing that's clear from the evidence is
10 that by 1994, WordPerfect/Novell was producing award winning
11 products. Don't worry, I'm not going to show you those
12 reviews again. You've seen them quite enough, thank you.
13 What I will show you, however, is Bill Gates' reaction to
14 WordPerfect's 6.0A which came out in April of 1994.
15 Mr. Gates states, I am amazed at their responsiveness. This
16 is very scary and somewhat depressing. This is as much as
17 we plan to do for 1995. A lot of work in this release.
18 Demonstrating once again that the Novell developers weren't
19 stupid. They were producing good products rapidly.

20 WordPerfect 6.1 and Office 3.0 were also highly
21 lauded in the trade press. Again, I am not going to show
22 you those trade presses again. Let's look at Microsoft's
23 own evaluation of WordPerfect 6.1. They concluded by
24 stating, the discipline and focus of this release show that
25 WordPerfect clearly has its act together and will remain a

1 formidable competitor for years to come.

2 Microsoft's evaluation of PerfectOffice 3.0 was
3 just as strong. Quote, the current suite of applications in
4 PerfectOffice are world class and there is reason for us to
5 follow the progress of this suite very carefully, especially
6 given the strength of Novell's networking and salesforce. I
7 guess at that time Microsoft didn't really think our
8 salesforce was in disarray.

9 All three of these releases were generating
10 hundreds of millions of dollars in Windows-based revenues.
11 You may remember that the blue bars represent WordPerfect
12 sales on Windows 3.1. And we see here revenues increasing
13 on Windows from 1991 to 1992 to 1993 and 1994. In short,
14 WordPerfect was anything but a sinking ship.

15 It is also undisputed that in 1994 WordPerfect
16 still maintained a huge user base that was very close if not
17 equal to Microsoft Word's user base.

18 Novell had information showing that 74 percent of
19 potential suite buyers had not yet made the decision about
20 which suite to purchase. In short, ladies and gentlemen,
21 the playing field was wide open in 1994. A good timely
22 product on Windows 95 would have been a game changer in the
23 but for world. That is the but for world that you should
24 consider in your deliberations.

25 I would like to talk now a little bit about

1 antitrust law and about the questions that you are going to
2 answer on the verdict sheet that His Honor will give to you
3 at the end of -- well, tomorrow, after Judge Motz gives you
4 his instructions.

5 Here's the verdict form that you will receive from
6 Judge Motz tomorrow. As to each of the questions presented,
7 you will be asked to make a determination of whether Novell
8 has provided -- has proved a fact or element of the claim by
9 a preponderance of the evidence. As Judge Motz will
10 instruct you to tomorrow, proving something by a
11 preponderance of the evidence simply means that something is
12 more likely so than not so. This is not a criminal trial,
13 and the notion of proof beyond a reasonable doubt is not a
14 part of this case.

15 Preponderance of the evidence simply means that if
16 you put all of the Microsoft evidence on an issue on one
17 side of the scale and all the Novell evidence on the other
18 side of the scale, the scale would tip towards Novell.

19 Let's look at question one. This is simply the
20 general question of whether Mr. Gates' decision caused
21 Novell to be late to market with its office productivity
22 applications for Windows 95 or whether some other factor
23 caused Novell to be late.

24 I should say now there might be a word or two
25 change in some of these questions simply because Judge Motz

1 may decide to change a word or two, but it won't change the
2 meaning of these questions.

3 The panic mode memo, July 28th, 1995, is
4 instructive. NSB refers to the namespace browser code. By
5 this time in July, Novell knew that the PerfectFit, Novell's
6 name for shared code, was in deep trouble, but eliminating
7 the feature altogether was not a reasonable option.

8 Let's make question one as simple as possible. If
9 you believe Mr. Harral, Mr. Richardson and Mr. Gibb, this
10 question must be answered yes, because it is more likely
11 than not that Mr. Gates' decision caused Novell to be late.

12 Now Microsoft wants you to believe that Quattro
13 Pro was the reason Novell was late. But, again, if you
14 believe Mr. Gibb, if you believe that this man who has no
15 connection to Novell anymore, has no interest in this
16 matter, that he came in here and put up with what he had to
17 put up here, that he wasn't telling the truth, then you
18 should vote against us. But if you believe Mr. Gibb was
19 telling the truth, you should vote yes to this question.
20 And we show you how to do that here.

21 Let's go to question two. Question two is simply
22 a variation of the first question. It asks more
23 specifically if Novell has shown by a preponderance of the
24 evidence that in the but for world Novell would have
25 released its products within a reasonable time period of the

1 release of Windows 95.

2 Now there is no exact date put on this question,
3 but you may recall that the goal of the First Wave Program,
4 of which WordPerfect was a member, called for a release
5 within 90 days of the release of Windows 95. And this is
6 just to remind us that the goal of the First Wave Program
7 was to ship within 90 days of Chicago's shipment, or Windows
8 95 shipment. As we talked about earlier, that was certainly
9 the goal of Novell.

10 Question: Did WordPerfect have a goal in mind
11 with respect to the time of release of its Windows 95
12 product? Answer: Yes, it did. Question: What was that
13 goal? Answer: To ship within 90 days of the release of
14 Windows 95.

15 And then to Mr. Gibb. Question: Did Novell want
16 to ship PerfectOffice 95 as soon as practicable after the
17 release of Windows 95? Answer: Oh, yeah. That was a huge
18 priority for us.

19 Now question two is one of those but for questions
20 we talked about earlier. It requires you to look at the
21 evidence in a world where Mr. Gates' decision doesn't
22 happen, where the shared code team finishes the new file
23 open dialog before December of 1994. In that world, I think
24 there can be little doubt that Novell would have been timely
25 to market. Question two should be answered yes.

1 Let's go to question three. This question asks
2 you was Mr. Gates' decision anticompetitive. In his
3 instructions Judge Motz will give you tomorrow, the Court
4 will include three factors to consider in distinguishing
5 anticompetitive conduct from legitimate business conduct.
6 Let's look at these factors.

7 First, whether the conduct is consistent with
8 competition on the merits. Second, whether the conduct
9 provides benefits to consumers. And, third, whether the
10 conduct will make business sense apart from any effect it
11 has on excluding competition or harming competitors.

12 Let's think about those three factors. Was
13 Mr. Gates' decision consistent with competition on the
14 merits? Mr. Gates made it clear he didn't want competition
15 on the merits. He wanted to withhold this technology for
16 Office 96, to deny Lotus the opportunity to compete on the
17 merits.

18 You may remember Mr. Muglia's e-mail. He said if
19 the shell extensions were given to the ISVs, Word and Excel
20 would be forced to compete on a level playing field. How
21 awful to have to compete on a level playing field.
22 Certainly Mr. Gates' decision was not consistent with
23 competition on the merits.

24 Did Mr. Gates' conduct provide benefits to
25 consumers? You won't find any benefits to consumers in this

1 decision. If Microsoft had acted in a pro-competitive
2 manner, consumers would have had a choice of office
3 productivity suites when Windows 95 came out. Having a
4 choice is good for consumers.

5 Consumers also likely would have had a wider range
6 of choices in the operating systems. Having more than one
7 choice usually leads to lower prices as well. Here
8 consumers had no choice. If they wanted Windows 95, the
9 only office productivity suite available that was built for
10 Windows 95 was Microsoft's Office. No other choice.
11 Microsoft's conduct did not benefit consumers.

12 Third, did Mr. Gates' conduct make business sense
13 apart from any effect it has on excluding competition or
14 harming competitors? We know that Mr. Gates wanted to
15 exclude WordPerfect and Lotus and to advantage Microsoft's
16 Office, but that's not what this test is. This test is does
17 it make business sense apart from any desire to harm
18 Microsoft's competitors.

19 Well, there were a lot of people back in the mid
20 1990s that loved the WordPerfect. Mr. Peterson's loyal
21 customers. They had been using WordPerfect for years.
22 Microsoft's conduct meant that a lot of those people
23 wouldn't buy Windows 95 because PerfectOffice for Windows 95
24 wasn't available to run on Windows 95. Microsoft was
25 willing to sacrifice those sales in Windows 95 to destroy

1 competitors in applications and to widen the moat protecting
2 its operating systems monopoly.

3 So under these factors, Microsoft's conduct,
4 Mr. Gates' conduct was plainly anticompetitive. It was not
5 legitimate business conduct. So question three should be
6 checked yes.

7 Let's go to question four and five. I put these
8 two together because they really ask the same question using
9 slightly different legal standards.

10 THE COURT: Let me tell you now, Mr. Johnson is
11 absolutely right, this is a disputed legal issue and so I
12 just decided to have you answer under two different
13 standards.

14 MR. JOHNSON: Thank you, Your Honor.

15 There may be potential legal uncertainties here.
16 Judge Motz doesn't want us to have to do this again. So
17 he's giving you both standards. And that way if any
18 appellate court has any questions about the standards, you
19 will have answered those questions. So that's why you've
20 got these two very similar questions, and your answers may
21 help us to avoid a retrial of this case.

22 One standard asks if Microsoft's conduct
23 contributed significantly to Microsoft's maintenance of its
24 operating systems monopoly. The other standard asks if
25 Microsoft's conduct was reasonably capable of significantly

1 contributing to Microsoft's maintenance of its operating
2 systems monopoly.

3 There are two independent ways in which Novell's
4 applications threatened Microsoft's operating systems
5 monopoly and therefore meet above of these standards. The
6 first is that WordPerfect was a key office productivity
7 application which Microsoft destroyed in order to maintain
8 its operating systems monopoly. The second is that
9 PerfectOffice included its own middleware which would
10 decrease the importance of the Windows operating system.

11 There has been lengthy testimony by our expert,
12 Professor Noll, and Microsoft's expert, Dr. Murphy, on these
13 topics. I'm going to talk about that debate between the
14 experts a little bit. But, fortunately, you don't have to
15 decide which expert is correct in order to check yes in
16 answers to question four and five of the verdict form. The
17 reason is that Microsoft's own documents -- contemporaneous
18 documents and the testimony of its executives alone are
19 enough for you to conclude that there was harm to
20 competition in the operating systems market. Let's look at
21 that evidence.

22 We start with Plaintiff's Exhibit 360, Microsoft
23 executive Jeff Raikes' e-mail to Warren Buffett. You saw
24 his videotaped deposition. He's explaining to Mr. Buffett
25 what Microsoft by 1997 has already done. He's looking back

1 and telling Mr. Buffett what Microsoft did to build and
2 protect its operating systems business. Quote, if we own
3 the key franchises built on top of the operating system, we
4 dramatically widen the moat that protects the operating
5 systems business. We've seen this e-mail before. I want to
6 spend a few minutes discussing it so you understand how it
7 alone answers question four and five.

8 Mr. Raikes said in his testimony that the key
9 franchises he's talking about are the office productivity
10 applications we've been discussing, word processors and
11 spreadsheets. Back in the mid 1990s, before Internet
12 browsing, the number one application that everybody used was
13 word processing and spreadsheets. In 1993, WordPerfect was
14 the most popular word processing application.

15 Mr. Raikes explained that owning these key
16 franchises was important to Microsoft because operating
17 systems are, as he says here, a bit invisible to the user.
18 What he's referring to is what you've heard about in this
19 case, that users are more loyal to their applications than
20 they are to the underlying operating system.

21 And he goes on to say, with respect to the
22 applications again, that users resist shifting brands.
23 Mr. Raikes is again referring to what you've heard a lot
24 about, users tend to remain loyal to their applications that
25 they have become accustomed to, and they don't want to spend

1 time and effort and money to switch to something new. You
2 heard a lot about the evidence of the strong loyalty of
3 WordPerfect customers.

4 Now let's look at Mr. Gates' analogy about the
5 moat. What does the moat protect? The moat protects the
6 castle. What is the castle? The castle is Microsoft's
7 operating systems monopoly. How does Microsoft owning the
8 key franchises widen the moat protecting its operating
9 systems monopoly? It's simple.

10 By 1997, as Mr. Raikes says, Microsoft Office has
11 about a 90-percent share. Microsoft has eliminated its
12 biggest application competitors, WordPerfect and Lotus. Now
13 customers were stuck with Microsoft Office. In fact,
14 Microsoft Office customers were locked in and Microsoft no
15 longer had to worry that a significant number of customers
16 would move from Windows to a different operating system to
17 use competing office applications. With those threats gone,
18 the moat has been dramatically widened, according to
19 Mr. Raikes.

20 This is enough standing alone to check yes right
21 here to questions four and five without even reaching the
22 expert debate. Dramatically widening the moat that
23 protected the operating system contributed significantly to
24 the maintenance of Microsoft's monopoly.

25 Now Microsoft, of course, would like you to answer

1 no to these two questions. They rely on Dr. Murphy.
2 Dr. Murphy would have you believe that Mr. Raikes' e-mail
3 doesn't mean what it says. It's Dr. Murphy's job to try to
4 explain away this evidence.

5 What was interesting I thought about Dr. Murphy's
6 testimony is that he never mentioned this e-mail. I don't
7 understand how one can rebut a theory of liability if you
8 don't address the evidence which directly supports a theory.

9 In any event, Dr. Murphy essentially argues that
10 the castle was invincible, even a challenge by WordPerfect,
11 the largest of the key franchises, was futile. To put this
12 in economic terms, he argues that Windows had such a high
13 market share that it didn't matter what applications
14 Microsoft destroyed because none of them could possibly have
15 caused Windows significant harm.

16 Let's put up Dr. Murphy's favorite chart. This
17 chart shows that Microsoft had a high share, but it's hard
18 to tell exactly what changed given the scale of this chart.

19 Let's tighten up the time frame and focus in on
20 what happened during the period between 1994 and 1999. As
21 you can see, once WordPerfect was out of the way,
22 Microsoft's share of the PC operating systems market
23 increased from about 86 percent to 96, and continued to rise
24 after, such that the share of competing operating systems
25 virtually disappeared. That means that Microsoft's share

1 rose about seven percent after knocking off WordPerfect and
2 Lotus.

3 Microsoft's competitors in the operating system
4 market had had about an 11 percent share. So they lost
5 seven percent. That is a huge reduction in the competitors'
6 share, well over half. Seven is more than half of 11.

7 This change in market share is also significant in
8 terms of dollars. Given the size and growth in the
9 operating systems market, that seven percent translates into
10 huge increases in Windows' revenues. That's revenue that
11 those competitors could have used to challenge Microsoft's
12 monopoly. That is certainly significant.

13 Far from disproving what Mr. Raikes' e-mail says,
14 this shows that Mr. Raikes was right, owning the key
15 franchises widened the moat. It raised Windows' market
16 share and cut out competing operating systems.

17 In addition to market shares, you need to consider
18 the potential effect of more competition on Microsoft's
19 Windows pricing. With more competition, Microsoft would
20 have had to choose between maintaining its monopoly market
21 share or its monopoly price. This is the economics 101 that
22 Mr. Muglia had talked about with respect to Word and Excel
23 if they were forced to battle on a level playing field. He
24 stated we're either going to lose share or we're going to
25 lose margin. We're going to lose and we'll have to lower

1 our price. You either have to give up market share or lower
2 your price in response to competition. Either way,
3 consumers benefit.

4 Now we don't know which of these Microsoft would
5 have chosen in the but for world, but, in fact, it doesn't
6 matter. Either one would result in a reduction in
7 Microsoft's monopoly power.

8 It's important to recognize that the competing
9 operating systems don't need to have all the functionality
10 of Windows to constrain Microsoft's behavior. To use an
11 analogy, while consumers would prefer to stay at the nicest
12 hotel in town, if the price for a more modest hotel is low
13 enough, people will chose to stay at the more modest hotel.

14 You may recall that Dr. Murphy conveniently did
15 not testify about pricing at all in his testimony.

16 Let's move now to the second way you can answer
17 yes to questions four and five. That is middleware. Here
18 again we have the contemporaneous e-mails in evidence to
19 consider before we even get to the testimony of the experts.
20 Novell and WordPerfect and by extension this PerfectOffice
21 Suite contained two middleware platforms, specifically
22 Novell's PerfectFit technologies and AppWare.

23 We know that Microsoft understood that AppWare
24 constituted a middleware platform. Mr. Silverberg didn't
25 mince words, AppWare is an operating system. I'm not going

1 to read this again. You've seen it enough. You remember
2 the testimony. It's a direct admission by Microsoft that
3 AppWare was middleware.

4 Mr. Maritz said much the same thing, and indeed he
5 regarded AppWare as a competitive threat.

6 Microsoft also understood that PerfectFit
7 represented a development platform as well. Here's the
8 testimony of Microsoft's Scott Raedeke that we showed to you
9 on videotape acknowledging that PerfectFit was a development
10 platform.

11 Question: Given what was listed in the PerfectFit
12 Partner SDK and the APIs it was exposing, is it fair to
13 state if those were released PerfectOffice could be
14 considered a development platform? Answer: Yes.

15 PerfectFit and AppWare are not some lodge in the
16 desert like Cairo. They were fully developed middleware
17 technologies that attracted over a thousand ISVs to develop
18 applications on top of Novell's middleware.

19 Even before Novell purchased WordPerfect, internal
20 communications between top Microsoft executives revealed
21 their fear of the middleware threat.

22 Here we have Jim Allchin, vice president of
23 advanced Windows systems groups, writes to Bill Gates, they,
24 meaning Novell, want to control the APIs, middleware, and as
25 many desktops as they can in addition to the server market

1 they already own. We need to start thinking about Novell as
2 the competitor to fight against -- not in one area of our
3 business, but all of them.

4 After Mr. Gates learned that Novell had bought
5 WordPerfect, he also wrote an e-mail. He said, due to the
6 merger, initiatives to promote anti-Microsoft platforms,
7 APIs, object models become easier to coordinate because
8 fewer companies are involved.

9 Now in response to the Novell/WordPerfect merger,
10 Microsoft's executive Bill Henningsgaard wrote an e-mail
11 too. Here he states, for Novell, the key goal will be to
12 maximize penetration of their suite to help them control
13 operating systems and workgroup standards. They want to
14 quit letting us dictate the PC technical agenda. If they
15 are successful at getting penetration with the suites, they
16 will be in a position to introduce alternative standards,
17 i.e. OpenDoc, that will give us a much harder time to drive
18 the operating system and apps agenda.

19 You can see here Microsoft's recognition of the
20 connection between the suite and the operating system, and
21 how we had the ability through the suite to drive the
22 operating systems agenda.

23 In other words, Mr. Henningsgaard understood if
24 Novell's suite was successful, it would help Novell control
25 the operating system. And that is why Novell's middleware

1 would have helped to lower the applications barrier to entry
2 in the operating systems market.

3 Once again, this evidence alone is enough to check
4 yes without even reaching the expert debate. Killing
5 PerfectOffice to harm its middleware contributed
6 significantly to the maintenance of Microsoft's monopoly in
7 operating systems.

8 Microsoft again wants you to answer no and they
9 rely on Dr. Murphy. He would have you believe that
10 Microsoft's own e-mails and testimony by Microsoft's
11 executives don't mean what they say.

12 Again, Dr. Murphy's job was to try to explain away
13 this evidence. To do this, Dr. Murphy and Microsoft argue
14 that no middleware ever threatened Microsoft's operating
15 system monopoly. This is just like the argument that there
16 is no key franchise to widen the moat.

17 They argue that Netscape didn't threaten
18 Microsoft's operating systems monopoly, java didn't
19 threaten, neither did AppWare and PerfectFit. This
20 overlooks the fact, of course, that Microsoft killed all
21 these threats.

22 Dr. Murphy wants you to ignore the contemporaneous
23 testimony and documents, instead to believe that there was
24 never any middleware threat to the Windows monopoly. The
25 only way Dr. Murphy can reach that conclusion is by holding

1 middleware to an unattainable standard, a standard that
2 Professor Noll disagrees with. So we have a debate among
3 the economists about what middleware has to be in order to
4 be a competitive threat.

5 Now yesterday Dr. Bennett used the same definition
6 of middleware that Dr. Murphy used. And we learned that
7 Microsoft's own computer dictionary doesn't define
8 middleware the way Microsoft has tried to define it in this
9 case. And the fact of the matter is that Microsoft's
10 dictionary middleware definition is consistent with
11 Dr. Noll's views.

12 Dr. Murphy, Dr. Bennett ignore Microsoft's own
13 dictionary definition of middleware and instead argue that
14 middleware, quote, must expose enough APIs to allow ISVs
15 profitably to write full-featured personal productivity
16 applications to rely solely on those APIs. He argues that
17 Novell's middleware does not meet this criteria because it
18 is not a complete substitute for Windows. In other words,
19 he says middleware can't be a competitive threat unless we
20 reduce the Windows castle to rubble.

21 Professor Noll, however, testified that middleware
22 is not required to support full-featured applications in
23 order to significantly increase competition.

24 Here's what Professor Noll said. The higher the
25 fraction of functions that can be accessed through the

1 middleware, the more the porting costs have been reduced
2 and, hence, the more the middleware affects competition. So
3 that's why it's a continuous process. It's not an either/or
4 process. Middleware can begin to have an effect on
5 competition in the operating system market if it starts to
6 be used because it's reducing porting costs and, therefore,
7 increasing the number of applications that are
8 cross-platform, and thereby reducing the applications
9 barrier to entry.

10 Let's use an example to explain this. Dr. Murphy
11 says you need to have applications written solely to the
12 middleware. That is 100 percent to the middleware and zero
13 percent to Windows APIs.

14 Professor Noll says applications can be written
15 partly to the middleware and partly to Windows, but that
16 would still enhance competition.

17 If 60 percent of the applications functionality
18 comes from middleware and 40 percent from Windows, the
19 application will be a lot easier to make cross-platform than
20 it would have been if it was written entirely to Windows.

21 Of course, over time as applications are written
22 for middleware, the middleware will be improved to have more
23 functionality, causing the applications to be written even
24 more directly to the middleware.

25 Professor Noll's view that the functionality of

1 middleware and the applications written to them will grow
2 over time is entirely consistent with the findings of fact
3 in the case against Microsoft in Washington, D.C.

4 Finding of fact 68 says, so the more popular
5 middleware became and the more APIs it exposed, the more the
6 positive feedback loop that sustains the applications
7 barrier to entry would dissipate.

8 I would like to emphasize that finding of fact 68
9 states the applications barrier would dissipate. That is it
10 would erode over time as middleware became more popular and
11 more APIs are exposed. It does not say that the barrier
12 would be completely destroyed.

13 This is consistent with Mr. Maritz's testimony
14 that in the long-term point of view, AppWare was one of
15 Microsoft's most serious competitors.

16 One last important point regarding the findings of
17 fact. Microsoft targeted and attacked Netscape and Java
18 which also didn't support full-featured applications. Why
19 did Microsoft do this? Because Microsoft viewed Netscape
20 and Navigator and Sun's Java as a middleware threat to
21 Windows, and Microsoft worried that this middleware would
22 grow to support full-featured applications.

23 In fact, the case against Microsoft in Washington,
24 D.C. agreed that Netscape and Java were middleware threats
25 and that Microsoft's conduct against them was

1 anticompetitive even though they did not yet support
2 full-featured applications.

3 Microsoft had the same fear about Novell's
4 middleware which we saw in Microsoft's own e-mails. You
5 have seen the testimony of Mr. Silverberg and Mr. Maritz.
6 They were scared of how Novell's middleware was a threat and
7 that threat that it posed to the operating systems model.

8 Now on cross-examination even Dr. Murphy had to
9 admit that reducing but not eliminating the applications
10 barrier to entry is beneficial to competition. And that is
11 exactly what Dr. Noll was talking about.

12 So middleware provides you with another way for
13 you to conclude that Microsoft's conduct against Novell
14 significantly contributed to Microsoft's maintenance of its
15 monopoly in the PC operating systems market.

16 Let's go to question six and seven. We actually
17 just covered question seven, so we'll take a look at it
18 first. This simply asks you that if your answers to
19 question four and/or five were yes, was that based upon
20 Novell's claim that its products constitute a middleware
21 threat to Microsoft's monopoly in the PC operating systems
22 market.

23 So if you agree that Novell's products, which
24 included middleware as admitted by Microsoft's own
25 executives, and that such middleware in the but for world

1 could have reduced the applications barrier to entry, then
2 you should answer yes to question seven.

3 Question six is equally easy. It asks again if
4 your answer to questions four and/or five is yes, was your
5 answer based upon Novell's products in the but for world had
6 the chance to offer competing operating systems, the
7 prospect of lowering the applications barrier to entry
8 because Novell applications, running on such competing
9 operating systems, would offer consumers an attractive
10 alternative to Windows.

11 This question is nothing more than a reflection of
12 Mr. Raikes' moat quote. It is simply saying that if
13 Microsoft had not destroyed WordPerfect and had not captured
14 the key franchises sitting on top of Windows, would Novell's
15 popular cross-platform application have lowered the
16 applications barrier to entry by running on competing
17 operating systems.

18 Now the evidence in this case is that WordPerfect
19 had a long history of being cross-platform and, in fact,
20 WordPerfect was released on platforms other than Windows
21 before and after Windows 95. So this question, number six,
22 should be answered yes as well.

23 By answering yes to questions six and seven, you
24 are simply confirming that you relied on both of Novell's
25 theories in answering yes to questions four and five about

1 harm to competition. Novell asks that you answer yes to
2 these questions.

3 THE COURT: Just so you know, you've gone two
4 hours even without crediting -- without taking out the time
5 of the phone call. So just to let you know.

6 MR. JOHNSON: Thank you, Your Honor.

7 Before we get to damages, it's important --
8 there's something important I need to tell you. If you
9 believe that Novell has satisfied its burden by a
10 preponderance of the evidence standard that we just
11 discussed, you need to answer yes to each and every question
12 posed in the verdict form. I can't stress how important
13 that is.

14 Let's turn to the question of damages. Judge Motz
15 will instruct you tomorrow that the purpose of awarding
16 damages in an antitrust action is to put an injured party as
17 nearly as possible in the position in which it would have
18 been if the antitrust violation had not occurred. In making
19 that determination, you are permitted to make reasonable
20 estimates.

21 We've heard from Dr. Warren-Boulton, who gave you
22 four different damage estimates ranging from 969 million to
23 1.329 billion. We don't need a chart for Dr. Hubbard. That
24 chart had one number on it, zero. In fact, I think I recall
25 Dr. Hubbard's number was actually negative. But for

1 purposes of our discussion, we'll call it zero.

2 Focusing on the purchase and sale approach,
3 everyone agrees that Novell paid 1.55 billion and sold in
4 less than two years for 146 million, for a real loss of 1.3
5 billion.

6 Dr. Hubbard needed a way to get that number to
7 zero. He does that by looking at the fall in Novell's stock
8 price when it bought WordPerfect. Yes, there was a large
9 drop. The drop was attributed to both overpayment and lack
10 of focus on the core business, the NetWare. The stock
11 market analysis at the time attributed it to both. This is
12 the kind of debate that only an economist would love. How
13 did the stock price change, how much of it was overpayment,
14 how much of it is because of loss of focus.

15 Loss of focus makes more sense. It's like a
16 college student who buys a \$5,000 car so he can visit his
17 girlfriend. His parents are concerned that he will lose
18 focus on his studies and his grades will go down, but that
19 doesn't mean the car isn't worth \$5,000.

20 Fortunately, though, we don't need to resolve the
21 debate between the economists and the real reasons for
22 movements in stock prices. There are at least four
23 approaches here that don't depend on interpreting those tea
24 leaves. First, there's the purchase and sale approach that
25 we just discussed. There is a loss there of \$1.33 billion.

1 Second, despite Dr. Hubbard's quibbling, we know
2 that Lotus was in the bidding war to buy WordPerfect and
3 that Lotus had offered 1.3 billion. We saw those documents.
4 A large, serious company like Lotus, or Novell for that
5 matter, doesn't go around offering to pay 1.3 billion for
6 something that is nearly worthless. Companies like these
7 don't make offers without being backed up by investment
8 bankers who study the deal in excruciating detail before any
9 offer is made.

10 Third, back in 1993, when WordPerfect was first
11 thinking about selling the company, it got an appraisal from
12 its bankers at Morgan Stanley. Their appraisal was
13 \$1.17 billion. This certainly confirms that Novell and
14 Lotus bids were in the ballpark.

15 Fourth, we saw a whole range of valuations based
16 on comparable companies earnings and sales. Then there was
17 a chart that compared those valuations with others I just
18 described. Let's look at that chart briefly.

19 The green bars are the independent evidence about
20 valuations. The blue bar represents Dr. Warren-Boulton's
21 middle of the road estimate. And the red bar represents
22 Dr. Hubbard's estimate. Obviously the odd duck here is
23 Dr. Hubbard.

24 Are we really to believe that both Novell and
25 Lotus made offers to purchase well in excess of a billion

1 dollars, but that it was only worth 207 million for Novell?
2 It doesn't pass the commonsense test. It probably makes no
3 sense.

4 So if you look at the actual purchase and sale
5 price and the actual Lotus bid, and the actual valuation of
6 WordPerfect by the investment bankers, and from the
7 comparables that we're talking about, damages should be in
8 the range of 976 million to 1.329 billion.

9 Now that is a lot of money, but given the evidence
10 you have heard and seen, a billion dollars is not a lot of
11 money in the worldwide software business.

12 Mr. Raikes told Mr. Buffett in that e-mail we
13 looked at that Microsoft made five billion on office
14 productivity applications back in 1997. So you have to
15 think about these numbers in the context of the business
16 we're talking about.

17 Finally, you've heard a lot from the economists
18 about what was the right way or the wrong way to do event
19 studies and that this announcement or that announcement
20 really mattered. Feel free to consider all of that if you
21 would like. Frankly, I didn't understand half of what they
22 were talking about. I won't even try to suggest to you
23 which method to choose or what number is the most reasonable
24 estimate. I'm confident that you will apply good common
25 sense and come up with a damages award that fairly

1 compensates Novell for its loss.

2 I'm going to stop now. It's Mr. Tulchin's turn
3 after the break, but then I get to come back and make a few
4 closing remarks to you.

5 Thank you.

6 THE COURT: Thank you, Mr. Johnson.

7 We'll take a short recess, and then we'll hear
8 from Mr. Tulchin for about an hour and a half. And then
9 break again. Then we'll hear from him for another hour.
10 Then you will hear the last 25 minutes of rebuttal.

11 (Jury excused)

12 (Recess)

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