

1 (Recess)

2 THE COURT: I will stop a little before 12:00.

3 MR. TULCHIN: Thank you, Your Honor.

4 One thing before the jury comes in, Your Honor.
5 Actually, two, if I could, but the first is more immediate.
6 Mr. Johnson, I think it was at nine after 9:00, put up on
7 the screen a portion of the transcript where the Court
8 admonished me, I would say lightly, for saying in my opening
9 statement that the suit was filed in 2004. The Court's
10 statement, which now the jury has seen in Mr. Johnson's
11 closing, was pay no attention to the fact that the lawsuit
12 was filed nine or ten years after the events in question.
13 That is not a quote. It was something like that.

14 It seems to me that that opens the door for me to
15 make a comment that Novell never complained to Microsoft
16 about the namespace extension APIs until 2003. If
17 Mr. Johnson can use it to attack me, I should certainly be
18 able to use it for the truth.

19 THE COURT: What else? There were a couple of
20 things?

21 MR. TULCHIN: Yes. There were a number of things
22 in the summation and, of course, I don't interrupt other
23 people's summations, but that just are not in evidence at
24 all. I mean, the long deposition excerpt from Mr. Muglia is
25 not in evidence, at least if my memory is correct.

1 MR. JOHNSON: It --

2 MR. TULCHIN: The fact that Schulman's book says
3 nothing about the namespace extension APIs, the fact that
4 there was an appraisal for Morgan Stanley, which was an
5 extensive analysis and an actual valuation. That is not in
6 evidence. And a number of others things, but I don't want
7 to slow anything down for that, but it just struck me that a
8 deposition transcript of Mr. Muglia -- I don't think that
9 was played for the jury. I may be wrong.

10 THE COURT: Okay.

11 MR. JOHNSON: Your Honor, it was in the trial
12 testimony. I brought it out.

13 THE COURT: We'll just move on. We went over the
14 other thing yesterday. I wish I had not included it in the
15 closing argument, but let's just get the jury and don't make
16 that comment.

17 MR. TULCHIN: Can I say something about the
18 October 2003 -- is that all right, Your Honor?

19 THE COURT: I would rather have you not. I would
20 rather have you not, unless you really need it.

21 MR. TULCHIN: Well, if you would rather that I
22 not, then I won't.

23 THE COURT: If it becomes an issue in rebuttal --

24 MR. TULCHIN: Thank you, Your Honor.

25 (WHEREUPON, the jury enters the proceedings.)

1 THE COURT: Mr. Tulchin.

2 MR. TULCHIN: Thank you, Your Honor.

3 Ladies and gentlemen of the jury, Judge Motz,
4 opposing counsel, it is my pleasure to be able to address
5 you this morning and into the afternoon. There are, of
6 course, a lot of things that I have to say. I hope you'll
7 be patient and hear me out.

8 The first thing, of course, is just our thanks,
9 everyone on our side of the room in particular, and I'm sure
10 everyone joins in this, for the great service that you have
11 given thus far. We appreciate the fact that you're punctual
12 every day, and that clearly all 12 of you are taking this
13 job seriously and conscientiously. It has actually been
14 quite striking and we really, really thank you.

15 Your jury service is important. It is important
16 not just because of this case, and clearly it is important
17 for that, but it is one of the things that as citizens we do
18 in effect to thank our country for all of the great things
19 that are done for us by virtue of our living here.

20 You will see in the Court's instructions tomorrow
21 morning that the role of the jury is to determine the facts.
22 One of the things that the jury is to do is to determine
23 credibility. I was struck this morning by some comments
24 that Novell's lawyer made. He said, and these are the best
25 notes that I have, and I hope they are pretty close, he said

1 that one witness was not truthful, another had provided
2 bogus reasons, he used the words deceit and deceitful, I
3 think even as to Brad Struss. He accused other people of
4 being misleading. He said expressly that some witnesses
5 were not telling the truth. He used the phrase big spin. I
6 think he even -- maybe this was directed at me, I don't
7 know -- said that there were efforts at misdirection.

8 All of this, ladies and gentlemen, is for you as
9 the jury to decide. I don't think the lawyers on either
10 side will tell you what evidence you must or should accept,
11 and who you should decide is telling the truth. Indeed, I
12 think the witnesses who came into this courtroom did do
13 their best to tell the truth and I wouldn't say otherwise.

14 Interestingly, and we'll get to these questions
15 one by one, but interestingly I noted, and I want to say at
16 the outset, that Mr. Johnson showed you not one document,
17 not one in his closing, and I don't think there was one
18 during the trial, in which Novell complained to Microsoft
19 that it was the namespace extension APIs that had caused it
20 any injury in 1994 or five. Now, a company that gets harmed
21 to the extent that Mr. Johnson claims of a billion dollars,
22 one would think would speak up. And, indeed, the evidence
23 as we go through it is just to the contrary, that at the
24 time Novell said we are okay with the decision.

25 There was also not one document, if I am correct,

1 not one, that Mr. Johnson showed you, and I don't think
2 there was one shown to you during the trial, that attributed
3 the delay in getting out Perfect Office to anything
4 Microsoft had done. There is not any document
5 contemporaneous from Novell saying it is the namespace
6 extension decision that is causing our products to be
7 delayed. Not one.

8 Just a couple of other comments about what was not
9 in the summation from Novell. I don't think there was any
10 mention of the fact that the namespace extension APIs were
11 Microsoft's technology. They were in fact patented by Mr.
12 Nakajima as we know. They were Microsoft's technology and
13 Microsoft's property. I don't think there was mention of
14 the fact that the essence of Novell's claim here, if you
15 step back just a half a step and think about it, the essence
16 of the claim is once an operating system company sends out a
17 beta version of the operating system, the company that
18 developed all of that technology is frozen and cannot make a
19 change, that if a change is made that somehow you owe these
20 astronomical sums of money.

21 There was also no explicit mention of the fact
22 that Novell says 100 percent of the decline in its business
23 is attributable to the namespace extensions. That is what
24 Dr. Warren-Boulton asked you to accept, that there was no
25 other cause. His damage calculation, and I know there is a

1 lot a cover, but I will get to them, depends on that and
2 that just boggles the mind.

3 I don't think there was any mention of what
4 actually happened in Scotts Valley in early 1996. And, of
5 course, this is so key in deciding who is to blame for the
6 delay. And perhaps Mr. Johnson touched on this point, I am
7 not sure, but the very idea that Microsoft did this to
8 advantage its own products is absolutely disproven by the
9 fact that everyone has acknowledged, including Mr. Alepin,
10 Novell's technical expert, that Microsoft Office, Microsoft
11 Word and Microsoft Excel did not make use of the namespace
12 extension APIs. So if Microsoft wanted to do something to
13 give it an advantage, it is a strange world, indeed.
14 Everyone has agreed, and I will get to that too, that
15 Microsoft's product that competed with these Novell products
16 never used the namespace extensions.

17 Now, it is true that components of the operating
18 system did like Marvel but, of course, this is Microsoft's
19 technology, and it can use the technology that it developed
20 and paid its own software people to write within the
21 operating system. That is a whole different thing than
22 trying to compete against Novell by taking advantage of
23 Microsoft's own property and not allowing Novell to use it.
24 That is not what happened.

25 Let's look at the first slide.

1 I will try to get to the verdict form. Mr.
2 Johnson showed you the questions that the Court will ask you
3 to answer. At the very end, if I have time, I will show you
4 the verdict form and I am not going to check any boxes for
5 you, because I think you should make up your own minds about
6 the right answers to each of these questions. I'm confident
7 that as a matter of logic and the evidence your answers will
8 be what they should be.

9 What we have done is to try to boil down the
10 questions on the verdict form to the three questions that we
11 have here. The first two questions on the verdict form in
12 effect ask you did the act in question, and you know what
13 that is, the withdrawal of support for the namespace
14 extension APIs in October of 1994, cause injury to Novell's
15 products, WordPerfect, QuattroPro and Perfect Office?
16 Question three on the verdict form is was that act
17 anticompetitive? I will show you what I think the Court's
18 instructions will be in part on this in a moment.

19 The third question is did the withdrawal of
20 support for those APIs allow Microsoft to maintain its
21 monopoly? We'll show you those. We agree with Novell's
22 lawyer that there are two separate questions there using two
23 different legal standards. I think the answer will be the
24 same in either case.

25 I want to note to you that, of course, on each of

1 these elements, each of these issues, Novell has the burden
2 of proof, and I believe Judge Motz will so instruct you
3 tomorrow morning. You have to answer yes to all of the
4 questions before you even get to the question of damages.

5 So looking at the next slide, this is on that
6 first question of causation, and I believe this will be part
7 of the Court's instructions to you, the charge. In order to
8 prevail, Novell must also prove that the anticompetitive
9 conduct it alleges was engaged in by Microsoft in fact
10 caused the damage Novell claims it suffered. The causation
11 we're going to get to in some detail.

12 Let's look at the next slide.

13 This is on the subject of whether the withdrawal
14 of support for the namespace extension APIs was
15 anticompetitive or whether it was legitimate business
16 conduct. You'll see the Court has some instructions on how
17 you determine that, including whether the conduct would make
18 business sense, and we'll go through that as well.

19 In fact, it is not disputed that if there is a
20 portion of the operating system that could cause the whole
21 system to crash it makes sense, of course, to address that
22 problem, and we'll hear that from Professor Noll.

23 Let's go to the next one.

24 Novell's lawyer I don't think touched on this in
25 his summation, and I think this is a matter that you

1 probably appreciate as a matter of common sense as well,
2 that antitrust law does not impose a general duty upon a
3 monopolist to cooperate with a competitor or to share its
4 intellectual property with a competitor. If Microsoft
5 develops innovations, APIs that its own developers write,
6 there is not a general duty to share them, even if those
7 innovations, Mr. Nakajima's patented innovations, might be
8 useful to the competitor in developing its products.

9 We are not saying in this case that because this
10 is intellectual property we should win. Not at all. It is
11 a factor to consider here, and the Court's instructions that
12 there is no general duty to share with Novell, to cooperate
13 with Novell are an important context. There is an exception
14 under certain circumstances where a monopolist has ended a
15 voluntary course of dealing, and I just want to stop there
16 for a moment. No course of dealing was ended. The evidence
17 is very strong, and I think you will remember a lot of this,
18 that Microsoft continued to try to assist Novell, answered
19 questions and did what it could to help Novell develop
20 products for Windows 95.

21 Microsoft did not cut off Novell. Indeed, we'll
22 never know what would have happened if Novell had come to
23 Mr. Gates, or if Mr. Creighton had asked Brad Struss, or
24 Mr. Caulkins had written an e-mail, and we'll cover all
25 this, saying we need the namespace extension APIs. They

1 never did ask. Microsoft, of course, thought that Novell
2 was not using them.

3 Now, before I go through each of these issues, and
4 I will do it as efficiently as I can, because there is just
5 so much here, I want to just note a couple of, I guess I
6 would say, interesting aspects of the trial. Novell called
7 only four fact witnesses to the stand plus three experts.
8 Microsoft actually called six former Novell or WordPerfect
9 people. I was quite surprised to hear Mr. Johnson say in
10 his summation that Microsoft had the ability to serve a
11 subpoena on anyone in Utah, so as to bring that witness
12 here, because, of course, Novell had the same ability. This
13 was not just something that Microsoft could do.

14 Mr. Johnson poo-poo'd the testimony of the six
15 witnesses, former Novell and WordPerfect witnesses who we
16 brought in here, but I don't think that there is any
17 rational basis for rejecting their testimony. I want to
18 just look first at Craig Bushman. Let's show his picture so
19 that you remember him. He is the former international
20 product marketing manager at Novell.

21 Let's look at slide 406.

22 I'm starting with just a few notable moments in
23 the trial that I think are important for you to remember.
24 This is Mr. Bushman talking about a visit that he made to
25 California to the office of Mary Burnside, who was the chief

1 operating officer of Novell. He said that Joe Merangi came
2 into the room as well. Mr. Merangi reported directly to
3 Frankenberg, one level down. He was the executive V.P. of
4 worldwide sales. I think you'll remember Mr. Bushman's
5 testimony. This is in 1994, not long after the merger, and
6 at that point he said, referring to Mr. Merangi, WordPerfect
7 is a mistake and we should kill it. Now, this is in the
8 context of the case in which Novell says all of the decline
9 in value of these products is the fault of Microsoft for the
10 namespace extension APIs.

11 Let's look at 407.

12 The last question on direct to Mr. Bushman, and
13 you'll remember this, I think, as well, that he laughed out
14 loud when he heard about the lawsuit on the radio. I always
15 thought if there was a lawsuit it would be by Novell's
16 shareholders on how mismanaged the product line was.

17 Let's look at Nolan Larsen. Let's look at his
18 picture first so that you'll remember who he was. By the
19 way, I should have said at the outset, we have been here for
20 seven or eight weeks, and I really do appreciate everyone's
21 patience. It has been a long haul. Nolan Larsen was here
22 as well.

23 Let's look at slide -- I'm sorry. We'll get to
24 that later.

25 Nolan Larsen was the man who was the director of

1 human factors at Novell in 1995. And then in early January
2 '96, and we'll come to Exhibit 230, but after that e-mail
3 Mr. Larsen was actually sent to Scotts Valley to the offices
4 of QuattroPro. Of course, Mr. Larsen testified that the
5 product wasn't ready in January or February of '96, not by
6 any stretch of the imagination. That was on November 30th.

7 Let's look at Karl Ford. That is slide 48.

8 This is Mr. Ford's testimony.

9 Can we put that slide up? I'm sorry.

10 You'll recall that in 1995 Mr. Ford went to
11 meetings with Mr. Gibb and Steve Weitzel and said flat out
12 if you're concerned about the schedule, that is can we get
13 the products out in time, on a timely manner, then the
14 common open dialogue would be the safest route. Well, you
15 know about this, and we'll get to it in more detail.

16 Novell simply made a bad choice, a choice to try
17 to write an advanced, what Mr. Gibb called a cool,
18 customized file open dialogue, and they couldn't get it
19 done. PerfectFit shared code could have used the common
20 file open dialogue. There is no dispute about that.

21 Then there is Dave LeFevre. Dave LeFevre you'll
22 remember as well said it would be better just to use the
23 common file open dialogue. We'll get to his testimony
24 later. It is quite striking. He was in meetings almost
25 every day, and he kept urging let's just get shared code's

1 work done and use the common file open dialogue. When he
2 was asked on the witness stand when was the first time that
3 you heard that the namespace extension issue had caused any
4 delay? He said at my deposition in 2008. This is a man who
5 was in meetings every day with Mr. Gibb and Mr. Weitzel.

6 Then there is David Acheson, the salesman. I
7 thought it was interesting that Mr. Acheson talked about how
8 difficult Novell made it to sell the WordPerfect products,
9 and Novell's lawyer pointed out that his law firm in
10 Washington, D.C., the law firm of Dickstein Shapiro had
11 chosen to use the Lotus products in the 1990s. Even
12 WordPerfect's own lawyers were not using their products.

13 Then Pete Peterson is the last of the six --

14 THE COURT: I will strike that.

15 MR. JOHNSON: Thank you, Your Honor.

16 MR. TULCHIN: -- former Novell and WordPerfect
17 employees, and Mr. Peterson left WordPerfect in 1992. In
18 effect, he was running the business up until then. You'll
19 remember that he thought when he left that the DOS business,
20 where WordPerfect had been the king, that is where they had
21 been so successful, would decline more and more until it was
22 just almost nothing.

23 Mr. Peterson is the witness who said that as of
24 1992 I felt like WordPerfect had been bloodied in the
25 battle. The image was that we were in the road bleeding.

1 That is the company Novell bought later on. It is not
2 logical, I submit to you, for Novell to blame that decline,
3 the continued slope downward on the namespace extension
4 decision.

5 Ladies and gentlemen, besides the fact that there
6 is no document from Novell, and it is really quite stunning,
7 which says that it was the namespace extension problem that
8 caused the delay, or that made it impossible to get the
9 product out, and there is also the fact of who didn't
10 testify at this trial, because we had Harral and Richardson
11 and Gibb, developers, the first two, and then Mr.
12 Frankenberg as the C.E.O., but there was no testimony from
13 Tom Creighton. We'll get to Mr. Struss's testimony that
14 Struss and Creighton were in frequent contact with one
15 another, but Mr. Creighton never showed up. Mr. Struss's
16 testimony on this subject stands alone, unrebutted. Mr.
17 Frankenberg testified on November 7th.

18 First let's look at 410.

19 He said there had been some question at Novell
20 about what choice to make when the namespace extension
21 problem arose. We can't use it, what should we do?
22 Remember the three choices, and we'll come to them. Mr.
23 Frankenberg said that the decision would have been entrusted
24 to the executives, Reitveld, Moon, Caulkins and Mella. Of
25 course, he said, and he said by then Mr. Waxman may have

1 replaced Mr. Reitveld, and that occurred in the middle of
2 '95. Mr. Reitveld resigned and Jeff Waxman took his spot.
3 But Mr. Frankenberg, of course, said, as you would expect,
4 if something Microsoft had done was threatening to cause
5 Novell a huge problem, where their products couldn't get out
6 the door in time and they might lose tons and tons of money
7 as a result, who would have been involved? The four
8 executives. That is what Frankenberg said. He also said
9 that he was not involved. He didn't make the decision. He
10 thought these four people would have been asked to make the
11 decision about what to do.

12 Well, a couple of things. Not one of these four
13 people testified. Reitveld, Moon, Caulkins and Mella, none
14 of them came in here to tell you anything that they knew.
15 And strikingly, of course, there are no documents from them
16 which say that it is the namespace extension APIs that
17 caused the problem.

18 Let's look at slide 411.

19 You'll remember that there was a question in early
20 1995 at Novell about what to do with the fact that Microsoft
21 was not providing an exception to Novell to allow Novell to
22 use the Windows 95 logo on the boxes that Novell was
23 intending to ship its product in. Microsoft had a logo
24 program for some ISVs to use it. There were criteria to
25 comply with it. Novell had its own logo program with

1 NetWare. Very similar. The relevance of this for our
2 purposes now is not the logo program, because Novell has not
3 made any complaint about this at the trial, but the fact
4 that when a decision came up what should we do on this
5 issue, here is what happened. Ryan Richards wrote a
6 memorandum. It says Novell legal department memorandum to
7 Mark Caulkins, one of the four executives, and he copies the
8 other three, Glenn Mella, Dave Moon and Ad Rietveld, and he
9 even sent a copy to Bob Frankenberg. The memo has lots in
10 it. The contents are not important for our purposes, I
11 don't think, although I'm sure you're free to look at it in
12 the jury room in your deliberations if you ask the Court for
13 a copy.

14 The point here is that Mr. Frankenberg testified,
15 and I'll read you the question and answer. This was on
16 November 8th. In any business organization faced with an
17 important decision, it would normally be the case that a
18 memorandum such as this -- and I was asking him about this
19 document, Exhibit 155 -- would be written laying out the
20 concerns and the issues and the considerations facing that
21 business in making some strategic or tactical choice, true?
22 Answer, that would normally happen but, as I have said, I
23 don't know of any such memorandum.

24 Perhaps, ladies and gentlemen, the answer here is
25 the reason you have seen no memorandum like this, when it

1 comes to the namespace extensions is that, one, Novell
2 didn't feel that it had been hurt by that decision and, two,
3 shared code, Perfect Fit didn't matter. The delay in
4 getting out the product was because of QuattroPro, as you
5 know, and we'll come to that.

6 Let's just talk briefly, and I will try to go
7 briefly, about some of the background, because the events
8 before '94 when Novell bought the company are in fact quite
9 important in understanding why was Novell delayed in 1995.
10 Novell was late. It was always behind. It was playing
11 catch-up. Of course, Mr. Peterson, and let's look at 412,
12 testified on December 7th, and it was only last week, that
13 in 1989 Mr. Gates told him -- Peterson testified, quote, he
14 stopped me and said you need to write for Windows, unquote.
15 But we know what happened. Mr. Peterson decided not to do
16 that for his own reasons, and I'll mention them briefly in a
17 moment.

18 Windows 3.0 was released six months after this,
19 May of 1990. You will remember Mr. Frankenberg saying that
20 at the time, and he was the head of the PC business in the
21 early 1990s at Hewlett Packard, a big computer company that
22 makes PCs, and Frankenberg when he was at Hewlett Packard
23 brought that PC business from the 25th largest in the
24 country to the seventh. I asked him how did that happen?
25 He said he could not have done it if he had not used

1 Windows. The next question was you recognized in this
2 period from '91 to '94 that users across the United States
3 and elsewhere were clamoring for Windows? Mr. Frankenberg
4 said that is true.

5 Windows 3.0 was a C change. That is what Nolan
6 Larsen called it on November 30th. Mr. Larsen said that we
7 felt like maybe we had been a little bit complacent.

8 If we can look at slide 413.

9 This is, again, Nolan Larsen. What happened is
10 that it took WordPerfect 18 months before they got out a
11 product that would run on the Windows platform. You'll
12 remember that it was November of '91 that WordPerfect came
13 out with its first Windows word processing software. And
14 Mr. Larsen said that 18 month period, that lateness to get
15 to Windows changed the perception in the marketplace of
16 WordPerfect as the technological leader. We were trying to
17 play catch-up.

18 Mr. Middleton testified by deposition on December
19 5th and said that Windows 3.0 was a big leap forward in the
20 industry. Professor Noll said it was a revolutionary
21 technological leap. Everything started to change. Now, Mr.
22 Peterson said that the reason that he didn't want to write
23 for Windows was because he didn't want to help Microsoft
24 win. He didn't want Microsoft's operating system to be
25 successful.

1 That was a choice for WordPerfect to make. The
2 result was that it made WordPerfect way behind, very late,
3 and Mr. Peterson said on December 7th that for their first
4 Windows product, and it was called WordPerfect 5.1 for
5 Windows, that the reviews were lukewarm. We had some bugs
6 in the product.

7 You have seen a lot of that evidence. You'll
8 remember Mr. Frankenberg saying it, that in a dynamic
9 industry like software, being 18 months late to a market
10 could be a big disadvantage. And remember he called it
11 the -- I think I called it the first mover advantage and he
12 corrected me and said it is the first in advantage, that the
13 company first in, and here it was Microsoft with software
14 for the Windows platform, that the company first has an
15 advantage. He called it a big advantage.

16 So we know that WordPerfect was late coming to
17 Windows. We won't spent much time on this, but we also know
18 that Mr. Gates told you in detail when he was here just
19 before Thanksgiving that he bet his whole company on the
20 idea of a graphical user interface. Going back to the mid
21 eighties Microsoft could have stayed just where it was, king
22 of the DOS operating system. Mr. Gates had that other idea,
23 that a GUI, a graphical user system would be easier for all
24 of us to use, and that eventually there would be a computer
25 in every home and in every workplace, and Mr. Gates made

1 that bet and it turned out to be the right one.

2 There is nothing wrong with WordPerfect making the
3 wrong bet. It does not make them bad people, it just turned
4 out to be a business mistake. Craig Bushman testified on
5 November 28th that when he was at WordPerfect, Pete Peterson
6 disliked Bill Gates and he didn't want to put in any effort
7 into writing word processing for Windows. Mr. Peterson, as
8 I said earlier, said the same thing.

9 Then even more stunning and maybe more important
10 was the fact that WordPerfect was late to suites. Because,
11 again, by '94 and '95 when someone wanted to buy a word
12 processor, almost everybody was buying a suite. We'll come
13 to that in just a moment.

14 Mr. Gibb said way back on October 26th that
15 Microsoft created the concept of the suite and released the
16 first version of Microsoft Office in 1990. Mr. Bushman
17 actually used the word that I used a moment ago. His
18 testimony on November 28th was this. It was a stunning
19 development, a suite version, drop the priced, and combine
20 the products together which had interoperability, a singular
21 look and feel. We thought it was a brilliant move, and it
22 put us, speaking of WordPerfect, in a very difficult
23 position.

24 Novell recognized that as well after it had
25 acquired WordPerfect.

1 Let's look at 414.

2 You'll remember this document. It is the Novell
3 business applications business plan. It is from 1995. So
4 I'm jumping forward now to the time when Novell owns the
5 product. The document points out a couple of things. One,
6 that Office at that time had 86 percent of the suite market.
7 This becomes very important when you're thinking about the
8 impact on competition, this theory that Professor Noll had,
9 that it impacted competition in the PC operating system
10 market, because Professor Noll testified that for his theory
11 to work Perfect Office would have to be highly popular.
12 Highly popular. Well, in 1995 Perfect Office 3.0, which had
13 come out in December of '94 and Mr. Johnson said was such a
14 good product, had a very small share. I will give you more
15 on that later.

16 Let's look at the next slide.

17 Novell recognized, and this is in '95, that there
18 were company weaknesses that hindered its business
19 applications. Here is a good one. Weak vis-a-vis Microsoft
20 in perception for corporate strategy vision and ability to
21 develop software. Again, this is a case in which Novell's
22 lawyers say that we want a billion dollars because our
23 inability to develop software in a timely way is all because
24 of the namespace extensions. There is not a single word
25 about that subject in this business plan document, but what

1 it does say is that there is a perception that Novell is
2 weak in the ability to do just that. And, of course, going
3 back to suites it says third to suite market. Microsoft has
4 enormous momentum.

5 Let's look at the next slide.

6 Mr. Frankenberg said the same thing. We're
7 talking about why was Novell always late? Microsoft had a
8 huge head start in suites? Mr. Frankenberg said correct.

9 Let's look at slide 417.

10 Here is a 1994 business plan. It was written in
11 August of 1994, as you can see, after Novell owned
12 WordPerfect. We won't spend a lot of time on this. I know
13 you remember all this evidence. WordPerfect didn't have a
14 spreadsheet. They partnered with a company in California
15 called Borland that then owned QuattroPro, and they tried to
16 come out with their own spreadsheet that would compete with
17 Office. Ladies and gentlemen, sometimes in the world, I
18 would say that almost always, it is the best product that is
19 the most popular.

20 And here Microsoft Office everyone acknowledges
21 was the best. Borland Office has not been met with great
22 enthusiasm. It has been labeled by some as the sort of
23 suite. Remember, this is now into 1994. WordPerfect Novell
24 is recognizing that their product was not very good. David
25 Acheson testified on December 2nd, a couple Fridays ago, and

1 here was the question. How did your customers react to
2 Borland Office? Answer, not well. The reaction was that,
3 and I agreed, that it was separate applications that were
4 put together in a cardboard box.

5 Mr. Gibb, Gary Gibb himself way back in October
6 testified that Borland Office was a stopgap product. Mr.
7 Larsen on November 30th testified that there was no
8 consistency at how the spreadsheet and the word processor
9 behaved together in Borland Office and also how they looked.
10 It was a jarring experience to transfer from one application
11 to another.

12 Let's look at slide 418.

13 This is, again, in the summer of '94 after Novell
14 acquires WordPerfect. This business review exercise says
15 Microsoft Office is currently the industry leading suite.
16 Its one, two punch, Word and Excel, is the strongest in the
17 industry. And, interestingly, this goes to Professor Noll's
18 theory about how competition in the operating system market
19 could have been effected, and the first line says Perfect
20 Office will not, in italics, focus on unseating Microsoft
21 initially. In other words, Perfect Office had a very low
22 market share and Novell was not going to focus on trying to
23 make it very large.

24 Karl Ford you may remember testified that in 1994
25 Steve Weitzel called a meeting outside building E because of

1 the problems and the bugs in their products, and Steve
2 Weitzel broke down into tears basically, and Don Levane, our
3 Q.A. director, and I think that means quality assurance, but
4 the answer does not say that, said that this is basically
5 our last chance to get this thing right.

6 So that is where things stood as of 1994. As you
7 know, in the high-tech world where things move quickly, if
8 you make bad choices or produce products that people don't
9 like, that are buggy, or if you're not the first one in, if
10 you're 18 months late with your word processor on the
11 Windows platform, or you're two and a half years late with a
12 suite, the market can punish you. And instead of being king
13 on DOS as WordPerfect was, when this unexpected shift
14 happened first to Windows and next to suites, WordPerfect
15 found itself with low market share.

16 Let's look at 419 and then the next two.

17 You have seen these types of slides before, maybe
18 this exact slide. This is from Professor Murphy. This is
19 word processing software on Windows. When WordPerfect first
20 came out in '91 with a product for Windows it had a low
21 share. It jumped up the second year, precisely because
22 there were so many WordPerfect fans and they were used to
23 using it on DOS, and people liked WordPerfect as it ran on
24 DOS.

25 But what happened later? This can't be the fault

1 of the namespace extensions. That decision wasn't even made
2 until the end of '94. WordPerfect begins its decline.

3 Let's look at the next slide.

4 Here we are on spreadsheet. It is QuattroPro,
5 first owned by Borland until June of '94 when Novell bought
6 it, but the QuattroPro product, as everyone recognized at
7 trial, was number three in that market. It was a weak
8 product. Its market share never even hit ten percent. When
9 you combine a word processor with a market share of let's
10 say 20 or so percent, with a spreadsheet that has a very low
11 percentage, let's call it five or eight or somewhere in
12 there, what happens with the combination of one pretty
13 decent product and one very, very weak product? Well, here
14 we go. These are the market shares for suites.

15 Thank you.

16 You can see again in 1993 and 1994 the Borland
17 Office suite, and that was WordPerfect and QuattroPro, and
18 then the Perfect Office suite, the same two products, has a
19 very, very low market share. That is just the natural
20 market reaction to the quality of the products. It has
21 nothing to do with the namespace extensions. That decision
22 was not made until the end of '94, and it couldn't have
23 effected Novell until they came out with products that were
24 written for Windows 95.

25 Let's look at the next two slides.

1 We'll go through this and what happened when
2 Novell bought WordPerfect? The market saw the same facts
3 that I just showed you. WordPerfect was late to Windows and
4 late to suites and that its products were running two or
5 three with low market shares. This is Dr. Hubbard, who is
6 the dean of the Columbia Business School, and this was his
7 slide. You can see that when Novell made the announcement,
8 the stock drops like a stone. It does not come back in this
9 period at all.

10 Let's go to the next one, which just concentrates
11 on those couple of days, the few days around the
12 announcement. Again, you can see, and you'll remember this,
13 that the market, and that is just people buying and selling
14 stock, thought that Novell had made a big mistake. As Dean
15 Hubbard, Glenn Hubbard, the Dean of Columbia said, the
16 market essentially valued WordPerfect in Novell's hands as
17 worth zero. It essentially valued it at zero.

18 Now, Novell says that it was worth a billion, over
19 a billion, and Microsoft should pay us for the whole
20 decline. What the market saw right at the first day or two
21 was that WordPerfect and Perfect Office were declining, and
22 those lines downward were going to continue. In fact, it
23 makes no difference really for this purpose. It makes a
24 difference when thinking about damages if you ever get
25 there, but it makes no difference for this purpose to think

1 about whether its loss of focus, because Novell's executives
2 should have been concentrating on their big product,
3 NetWare, or whether it is overpayment. Either way, and Dr.
4 Warren-Boulton said this as well, the stock market saw the
5 value of the WordPerfect deal as zero, either because
6 Novell's executives were going to lose their focus on the
7 main product, and try to deal with all of the problems at
8 WordPerfect, or because as Professor Hubbard says it was
9 primarily an overpayment, a misjudgment in the value.

10 Let's look at Exhibit 637 quickly.

11 You'll remember that the stock market wasn't the
12 only one to see all of this. This was an ad that Lotus
13 Development Company put in newspapers after Novell announced
14 in October of '95 that it was going to sell WordPerfect. By
15 the way, the stock market went up when Novell said it was
16 going to sell by ten percent, Novell's stock went up by ten
17 percent and, again, the stock market thought this
18 combination of Novell and WordPerfect was never going to
19 work. Here is Lotus saying now may be the time to give up
20 on WordPerfect. Obviously Novell thinks so.

21 Here today in 2011 Novell's lawyers say it is all
22 Microsoft's fault for the namespace extensions. I don't
23 think it makes any sense to say that. Right after Novell
24 closed the deal we know what happened. There is the
25 memorandum, Exhibit 15, in which there is a list of

1 employees being laid off, and Mr. Frankenberg testified that
2 93 percent of the people on that list, almost 400 people,
3 were being laid off and had come from WordPerfect.

4 Let's look at 424.

5 These facts, again, are important in thinking
6 about what caused the problems at WordPerfect. Here is
7 Mr. Acheson, the salesman. I was a little struck that on
8 cross-examination the cross-examiner said, well, you're just
9 a salesman, right? It offended me a little bit, because my
10 father his whole life was a salesman. I don't think being a
11 salesman means you can't tell what was going on inside of
12 the company. Mr. Acheson testified that the layoffs felt
13 like a slap in the face. There was total demoralization.
14 Let's look at the next one.

15 Here is Mr. LeFevre talking again about the impact
16 of those layoffs that Mr. Frankenberg ordered. He said they
17 cut deeply into our development teams, into our testing
18 team, and probably most significantly into our sales
19 organization. Mr. Frankenberg said on November 7th himself
20 it did have an impact on moral. You will remember
21 Defendant's Exhibit 16 from May of '95, so this is much
22 later, saying that 48 percent of the former WordPerfect
23 employees are thinking about quitting. And you wonder why
24 they couldn't produce this product on time.

25 Then let's look at slide 426.

1 Now we are in April of '95, almost a year after
2 the layoffs took place, and the Novell document here,
3 Exhibit 271, recognizes that one of the weaknesses that
4 Novell has that hinders the business applications is that,
5 quote, over 50 percent of the sales force does not
6 understand applications. Changing, but slow. Six months
7 later Novell gave up on the product and announced it was
8 going to sell. I wonder why.

9 Then let's look at 427-A.

10 Mr. LeFevre is saying that the change in the sales
11 model from using direct salespeople to using this VAR model,
12 V-A-R, value added resellers, had a dramatic impact on our
13 sales. Novell blames everything on Microsoft. Mr. LeFevre
14 said otherwise. Mr. Acheson, 427-B, from your experience
15 did Novell's channel model, and that is this new VAR model
16 that Mr. Frankenberg wanted instead of using salespeople,
17 help to sell WordPerfect applications? No, not at all.

18 Mr. Frankenberg testified that in 1994 there were
19 far more developers working on the 16 bit version of
20 Novell's products than on the Windows 95 version. He said
21 I'm sure that was the case. Mr. Gibb said that as well,
22 that during '94 Novell developers were focused on fixing
23 bugs in earlier versions of WordPerfect. So even by the end
24 of '94 Novell was still behind. They didn't start on a
25 major effort to bring out these new versions of Perfect

1 Office for Windows 95 until 1995.

2 Mr. Struss, and if we can look at slide 467, and I
3 know I'm going out of order, but we'll come back to this, of
4 course, and this is a Struss e-mail from October 12th. Mr.
5 Struss wrote in his e-mail to others at Microsoft that
6 WordPerfect had told them that there were limited resources
7 working on the Windows 95 version. Struss said that he was,
8 quote, working with their senior management to see about
9 getting more focus on their 32 bit release. So Novell
10 blames Microsoft. The evidence shows that Novell even in
11 the end of '94 was late. Most of their resources were on
12 fixing the 16 bit versions, the versions of their products
13 that ran on Windows 3.1, including Perfect Office 3.0 which
14 did not come out until December, the very last month of
15 1994.

16 Professor Noll testified, by the way, on November
17 15th that eight percent -- Perfect Office's share of the
18 suite category in 1995 and up until August was about eight
19 percent. He said I think that is roughly accurate. I have
20 no reason to disagree with that. So Perfect Office may have
21 gotten good reviews, the last version, Perfect Office 3.0,
22 at the end of '94, but their expert says that their market
23 share was about eight percent. Of course, that is
24 understandable and we all know this that reputation matters.
25 If you're late and not keeping up with developments in the

1 high-tech world, or if your products are slow and buggy, as
2 Novell's and WordPerfect's were, you get a reputation that
3 does not help you sell your products.

4 Mr. Frankenberg said this again on November 7th.
5 I asked him this. Did you perceive at the time that one of
6 the reasons that WordPerfect's products were falling, that
7 the sales were diminishing was because the prior products
8 had had this sort of bad reputation as being slow and buggy?
9 He said that would have been part of it, but the major
10 reason was we didn't have a suite to offer customers and
11 customers were buying suites. Of course, WordPerfect was
12 way behind.

13 Now, I want to talk about the first issue on the
14 verdict form, this very, very important issue of causation.
15 What caused Novell to be late getting out Perfect Office,
16 WordPerfect and QuattroPro? You know Novell can't win this
17 case unless, and the Court will so instruct you, unless you
18 find that the reason they were late and could not get their
19 products out within a short period of time after Windows 95
20 came out in August was the namespace extension APIs. Their
21 claim in the first instance hinges on that one point. They
22 have to show causation, that it was the namespace extension
23 APIs that caused Novell's products to be late to market.
24 The jury form will show you that and the instructions say
25 that as well.

1 Defendant's Exhibit 380 was the Novell 10-K form
2 that is filed with the Securities and Exchange Commission.
3 At page 10, and I showed this to Mr. Frankenberg when he
4 testified, Novell said to the world, and this is a publicly
5 filed document with the S.E.C., as is common in the computer
6 industry the company has experienced delays in its product
7 development and debugging efforts, and the company can be
8 expected to experience similar delays from time to time in
9 the future.

10 Mr. Frankenberg said the following when I asked
11 him about this document. Question, and people can go off in
12 the wrong direction and choose let's say a path that is more
13 difficult and complicated than might have been necessary,
14 just because judgments that human beings makes are not
15 always perfect. Is that fair? Answer, of course.
16 Question, so in the form 10-K, going back to that, Novell
17 was basically saying all that to the public? Answer,
18 correct.

19 Novell had experienced lots of delays. They told
20 the world they might experience delays in the future. They
21 did. The first question you will answer is were those
22 delays because of the namespace extensions? As I said to
23 you earlier, there is not a single document that Novell has
24 shown you which says that it was that decision which caused
25 the delay. In contrast, let's go through some of the

1 documents that say otherwise.

2 First, slide 428.

3 You'll remember this document. This is
4 Defendant's Exhibit 227. There is no date on it, but I
5 think we established that it couldn't have been written
6 later than December of '94. It says we all determined that
7 after we ship Perfect Office 3.0, our number one goal is to
8 get Perfect Office on Windows 95 ASAP. We initially
9 targeted October '95, but due to QuattroPro localization
10 delays we moved the date back to December '95.

11 The whole theory of this case, the whole theory is
12 that if it hadn't been for Bill Gates' decision that the
13 products would have been out around August, September, at
14 the latest October of '95. Not one document says that. But
15 here is Exhibit 227. By the way, it is addressed to Bob.
16 One might ask if that is Bob Frankenberg. That even going
17 back into December of '94 it was QuattroPro localization
18 delays that forced Novell to move the date back to December.

19 Now, let's look at the next slide.

20 There are a series of these, and with all respect
21 to Novell and its counsel, and I have great respect for all
22 of them, these documents are just as clear as they can be.
23 Here is Exhibit 219. It is notes from a meeting in February
24 of 1995. The QuattroPro folks still working on
25 international versions of QuatroPro 6.0. Expect to finish

1 that by end of March, and then will begin on the next
2 version of QuattroPro. QuattroPro 6.0 was released to the
3 market, and there is no dispute about this, that it came out
4 in the fall, October of '94. In February Novell was still
5 working on localizing the old 16 bit QuattroPro 6.0. They
6 were not going to begin work on QuattroPro for Windows 95
7 until they finished that around the end of March. Was it
8 really the namespace extensions?

9 Let's look at slide 430.

10 This is from Exhibit 211. Project proposal for
11 Storm. Of course, you will all remember that Storm was the
12 Novell code name for Perfect Office for Windows 95. You'll
13 remember this document, I'm sure. There were three options
14 proposed about what date to select as the target date. That
15 does not mean you can get it done necessarily, but the
16 target date, and here this document apparently written in
17 1994, and there is no date on it, says that option two is
18 the best option. That is the one being recommended, which
19 was to release Storm, Perfect Office for Windows 95, January
20 31, '96. There is no mention in this document, in Exhibits
21 211 or 219 which I showed you a moment ago, or 227, no
22 mention of the namespace extensions, no mention that
23 Microsoft was at fault for their choice to shoot for the end
24 of January of '96.

25 Then let's look at Exhibit 221. This is slide

1 431.

2 This is an e-mail from Bruce Brereton. You'll
3 remember Mr. Brereton was Mr. Creighton's boss.
4 Mr. Creighton didn't explain what caused the delay. Mr.
5 Brereton didn't come here either and explain. He is writing
6 an e-mail on March 1st, '95. He is writing it to business
7 unit staff and business unit managers. He says we have
8 moved the Storm RTM date, release to manufacturing -- and
9 when I asked Mr. Frankenberg about this I made the mistake
10 of saying release to market, and Mr. Frankenberg corrected
11 me -- we have moved the Storm RTM date back by one month to
12 December 30th and have put WordPerfect on the same timeline
13 as Storm. There is no mention in this e-mail that Mr.
14 Brereton writes to managers that the namespace extensions is
15 the reason that the date is being pushed back to December
16 30th.

17 Then there are Exhibits 223 and 226. I want to
18 show them both to you. They both have -- 223 -- I beg your
19 pardon. I skipped a slide.

20 Let's go to slide 432.

21 This was Mr. Bushman who testified from this
22 witness stand on November 28th that QuattroPro was always
23 the boat anchor on this suite because it was having so many
24 architectural problems. It was delaying everything. That
25 was an answer he gave when we showed him Defendant's Exhibit

1 221 that I have just referred to.

2 Let's look at the next slide.

3 And you'll remember this table. The table
4 actually has 10 or 12 risks, major risks in the project. Of
5 the risks identified in both tables, shared code,
6 PerfectFit, is risk number five, and the table, according to
7 Novell's document, the table is ordered by overall risk.
8 And, by the way, of course, shared code was late. That is
9 not the issue. We know that they were late. We know why
10 they were late and we'll come to that, although I know I am
11 talking a lot of your time and I appreciate it, but Novell's
12 documents from March and from May both consistently in '95
13 say the number one risk is QuattroPro.

14 And under likelihood QuattroPro gets a one, which
15 is the highest risk. Shared code, which is risk number
16 five, got a two as far as likelihood goes. So, yes, shared
17 code was late and the developers made the wrong decision.
18 They tried to write this advanced file open dialogue instead
19 of using what Windows would give them for free, the file
20 open dialogue that Microsoft made available for free. It
21 had nothing to do with the namespace extensions.

22 Then, of course, there is Exhibit 434, which I
23 want to spend a little time with and some of the testimony
24 that goes with it.

25 Slide 434.

1 This is the e-mail from December 23rd, 1995.
2 Again, from Mr. Brereton and it goes to B Frank. Mr.
3 Frankenberg testified that was his e-mail alias. He made a
4 little joke about it, always be frank. It went to Jeff
5 Waxman who was a senior executive at the company. Update on
6 QuattroPro in December of '95. Remember, Novell's whole
7 case on causation depends on your concluding that their
8 products would have been out on the market by September,
9 October had it not been for the namespace extensions. And
10 now we're in December and Mr. Brereton writes to the CEO and
11 another top executive on this past Thursday, Friday about 15
12 additional people submitted their resignations.

13 Now, I think at one point Novell suggested, well,
14 that does not mean the product was not ready. That just
15 means people were resigning. Maybe they were doing other
16 things. Well, let's see what Mr. Frankenberg said about
17 that.

18 That is the next slide.

19 I asked Mr. Frankenberg about Exhibit 230. It was
20 exactly about that e-mail from December of '95. Question,
21 doesn't this tell you, Exhibit 230, Mr. Frankenberg, that
22 the QuattroPro team was not ready even then in December of
23 '95? And his answer is a long one, and it is all there for
24 you to read, but among the other things that he says is
25 this. So clearly the product was not complete.

1 What did Mr. Bushman say? That is slide 437. He
2 was asked about the same event, the resignation of these 15
3 QuattroPro developers just before Christmas. It meant that
4 there were only two left at Scotts Valley. Mr. Bushman, who
5 worked at the company at the time, said it was already the
6 product and the risk date for the ship date happening and
7 with this it was a death blow. It was just before
8 Christmas. It was stunning. Mr. Bushman said there were
9 issues, ongoing issues throughout that spring also.

10 Then let's go back to Nolan Larsen, slide 438.

11 Remember I showed you it at the beginning of my
12 summation, Mr. Larsen saying it was like kind of a train
13 wreck. It was very chaotic when we got there. Well, here
14 is Mr. Larsen. Mr. Gibb didn't go to Scotts Valley in
15 January of '96, but Mr. Larsen was asked to go. You'll
16 remember him sitting right here and saying every Monday
17 morning we flew out to California. I spent the week in
18 Scotts Valley and flew back Friday night. He was there
19 every week in January and February until he resigned from
20 the company in March. It just couldn't be clearer. It is
21 not possible for Novell to prevail on causation unless you
22 conclude somehow that Mr. Larsen lied on this witness stand
23 to you, and all the others as well, and I don't think that
24 you can conclude that. There is so much evidence, including
25 the e-mail, Exhibit 230.

1 We asked him, was the QuattroPro product to be
2 included in the Perfect Office suite for Windows 95? Was
3 that QuattroPro product ready to be shipped? Answer, not by
4 any stretch of the imagination. The next question, and I'm
5 going to shorthand it a little bit, did there ever come a
6 time during that period when the QuattroPro version for
7 Windows 95 became finalized and ready to be shipped? Not
8 while I was there, no. He resigned in March of '96.

9 Question, would it have been possible for Perfect
10 Office, the version that was being written for Windows 95,
11 to include QuattroPro and also get shipped to the market in
12 the state that you found things in Scotts Valley at that
13 time? Answer, no. It is clear as a bell. You'll remember
14 Mr. Larsen saying that when he got out there things were so
15 chaotic that they couldn't find the source code. The source
16 code is the software. Without it you have nothing.

17 Mr. Bushman's testimony is exactly in accord.
18 Again, on November 28th he was asked what caused the delays
19 and he said there were three things. First, the QuattroPro
20 product line, it was architected differently. It created a
21 significant impact in integration into the suite. Second
22 was the QuattroPro localization issues. The third was
23 operations. He said nothing about shared code or
24 PerfectFit.

25 Then there is Dave LeFevre.

1 Let's look at slide 440.

2 Mr. LeFevre also left in March of '96. Mr.
3 LeFevre and Mr. Larsen both told you the same thing. Was
4 the QuattroPro component for Perfect Office for Windows 95
5 ready to go on March 8th of '96? Answer, it was not. Of
6 course neither was the standalone product.

7 Now, there was a very brief mention of possibly
8 using coupons. Mr. Gibb said on October 26th, at page 866
9 of the transcript, I was being a little facetious when I
10 mentioned the possibility of using coupons. Mr. LeFevre and
11 Mr. Larsen addressed it and said that could not be done,
12 that Novell thought about it briefly and rejected the idea.
13 You don't have a suite without one of the two or three of
14 the main components. A suite is a word processor and a
15 spread sheet and maybe a presentation software like
16 PowerPoint or Presentations Manager.

17 We won't spend a lot of time with the other reason
18 WordPerfect shared code was late, but I want to go through
19 it quickly. You'll remember that Mr. Harral and Mr.
20 Richardson said that after Microsoft made the decision to
21 withdraw support for the namespace extensions they had three
22 choices.

23 Slide 441.

24 Mr. Harral said one option would be to continue to
25 use the namespace extensions. We could do it, and we were

1 told we shouldn't be using it, and they said they rejected
2 that option. But you'll remember, as slide 443 says, that
3 Mr. Richardson testified that between June when they got the
4 beta and October they had used the namespace extension APIs.
5 Mr. Giles, from the documentation in the beta, had used it
6 and had gotten it right, had actually written code that
7 called the Windows 95 shell extensions.

8 Well, of course, Novell rejected the first option.
9 I think we can understand that. Microsoft was saying we
10 might not support these APIs in later versions of the
11 operating system. That made it risky. Of course, if it was
12 necessary to get your product out, and you would suffer this
13 huge loss in income, maybe you would choose a risky path,
14 but we can certainly understand why one might have looked at
15 the second option.

16 Mr. Harral on October 24th said we considered the
17 second option many times. The second option was writing to
18 the Windows common file open dialogue that was available,
19 and that has nothing to do with the namespace extension
20 APIs, and it was available to Novell for free. Mr. Ford,
21 slide 444, testified that he was in meetings with Gary Gibb
22 and Steve Weitzel and, of course, they are talking about the
23 schedule. Mr. Ford testified that I stated to Gary Gibb and
24 Steve Weitzel that if they were concerned about scheduling,
25 and they wanted to schedule, then the common open dialogue

1 would be the safest route. Of course it would. They could
2 do that easily and in virtually no time at all.

3 Look at slide 445.

4 This is Mr. Gibb himself about option number two.
5 Novell was faced with the age-old tradeoff. You could get a
6 product out more quickly and sacrifice features, and that
7 was this advanced customized open dialogue that they were
8 trying to build, or you could delay until 1996 and try to
9 build a cooler product. Yes. Question, such as a custom
10 file open dialogue? Answer, yes. That was Novell's choice.
11 Of course Novell was entitled to make that choice. Do we
12 get the product out now in the middle of '95, at least the
13 shared code part of the product, and we know QuattroPro was
14 not ready anyway, but can shared code finish its work using
15 the common file open dialogue? That is one choice, option
16 two. Or should we try for this cooler more advanced custom
17 file open dialogue, something that Novell thought their
18 customers wanted? That was a choice.

19 If you make a bad choice in a business venture,
20 sometimes you don't succeed. There is no moral defect in
21 making a bad choice, all it means is it is peculiar, to say
22 the least, to stand in a courtroom and to blame Microsoft
23 for the choice that went wrong. We all have to live with
24 our choices.

25 Let's look at what Mr. Gibb said. Slide 448.

1 Sorry. Let's look at 447. I skipped that.

2 I just showed you Gibb now let's see Adam Harral.
3 Again, a bad choice too. Novell could have come out with a
4 product in '95 that utilized the Windows common file open
5 dialogue. That was a choice that Novell had? Answer, that
6 was the choice that they had. You know, documents showing
7 that executives actually made that choice like Exhibit 155,
8 the e-mail to Mr. Frankenberg and all the senior executives
9 about the logo program, but here Novell's own witness is
10 saying, yes, we had that choice.

11 Let's look at 448.

12 I understand what Mr. Gibb is saying here. Again,
13 option two. Novell's developers could have had the
14 applications in Perfect Office for the Windows 95 common
15 file open dialogue, right? Answer, it would have been
16 painful, but we could have done that, yes. Question,
17 actually it would have been quite easy physically? Answer,
18 it is easy to call, and that is what I have been telling you
19 that they could have done that almost immediately, and going
20 on with the answer, we thought it would be a huge step
21 backwards for our customers.

22 That was their choice. If they wanted to try to
23 write their own custom file open dialogue that they thought
24 was better, cooler, more advanced than what Microsoft could
25 do, that is what their developers should have done. But

1 when you make that choice knowingly, if you're in the shared
2 code group, do I get my product out now or do I try to do
3 this super duper advanced customized file open dialogue?

4 When you make that choice, you should live with it, instead
5 of coming into a courtroom and saying that is Microsoft's
6 fault. Our choice went wrong. Our product came out late.

7 You'll remember Mr. Ford and Mr. Gibb both
8 testifying that after Corel bought WordPerfect Perfect
9 Office from Novell, that Paul Skillen of Corel fired Jim
10 Johnson. Johnson was in the shared code group. He was
11 actually Adam Harral's boss and reported to Creighton, and
12 Paul Skillen of Corel fired Jim Johnson for refusing to
13 implement the Windows common file open dialogue. Mr. Ford
14 said so on November 30th, and Mr. Gibb said the same thing
15 on October 26th.

16 Apparently -- apparently, the choice that Novell
17 made, if I may say so, was a sort of stubborn choice. We
18 wanted to do something better. They were entitled to make
19 that choice. I don't think they are entitled to blame
20 Microsoft for being late. They could easily have had it
21 out.

22 Let's look at slide 449.

23 This is, again, Mr. Gibb himself on exactly the
24 same subject. You could have had the product out in '95 in
25 a timely way, but instead you wanted to spend a lot of time

1 to write your own custom file open dialogue, right? Answer,
2 yes. We wanted to write. We thought we wanted to exceed
3 what was the default stuff.

4 Then slide 450.

5 This is Mr. Harral saying the same thing. We
6 could have made the choice to use the common open dialogue
7 log, so to ship -- I think the word as is missing, but that
8 is for you to decide -- so to ship 95, but that also would
9 have been a choice to have disenfranchised our customer base
10 and apparently they, and we don't know the they is, because
11 the executives didn't come to the courtroom, and there are
12 no documents saying who made this decision, but apparently
13 they were not willing to make that choice at the time.

14 I have spent a lot of time on the first question,
15 causation. What caused the products to be late to the
16 market? It is the first two questions on the verdict form.
17 If you answer them no, you don't get to any of the other
18 questions. The evidence -- I mean, one can make arguments,
19 any clever lawyer can, but I have shown you the testimony
20 and the documents, and the evidence is just overwhelming on
21 this first question.

22 THE COURT: I guess it is time to break for lunch.

23 MR. TULCHIN: Thank you, Your Honor.

24 THE COURT: Okay. We'll take a short lunch. We
25 have 25 minutes of rebuttal after Mr. Tulchin finishes,

1 about another hour and five minutes.

2 One thing you may all want to consider, and this
3 is entirely up to you all, but I think that you can sit, as
4 I understand it, and there is no time limit tomorrow, but
5 decide what you want to do in terms of -- we'll accommodate
6 ourselves to your schedule -- but how long you sit is
7 entirely up to you. The reason I mention it now, is I have
8 no idea what the weather forecast is, and I know a couple
9 weeks ago there were bad winds, so if you all want to stay
10 here or whatever, and I am sure Teresa will enable you to do
11 that. You may want to go home and come back if there is a
12 bad forecast. I don't know what the forecast is. I have no
13 idea. Even if I did, it probably wouldn't make any
14 difference. I do know we had bad winds a couple weeks ago.
15 It is important to try to finish it up when you all come
16 back.

17 We will stand in recess.

18 (Recess)

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