

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
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

December 14, 2011

Jury Trial

A P P E A R A N C E S

1
2
3 For Plaintiff:

PAUL TASKIER
JEFFREY JOHNSON
MIRIAM VISHIO
1825 Eye Street, N.W.
Washington, D.C.

6 JOHN SCHMIDTLEIN
7 725 Twelfth Street, N.W.
Washington, D.C.

8 MAX WHEELER
9 10 Exchange Place
11th Floor
10 Salt Lake City, Utah

11 For Defendant:

DAVID TULCHIN
STEVEN HOLLEY
SHARON NELLES
12 125 Broad Street
13 New York, New York

14 STEVE AESCHBACHER
15 One Microsoft Way
Redmond, Washington

16 JAMES JARDINE
17 36 South State Street
Suite 140
18 Salt Lake City, Utah

19
20
21
22 Court Reporters:

Ed Young
247 U.S. Courthouse
23 350 South Main Street
Salt Lake City, Utah
24 (801) 328-3202
25

1 December 14, 2011

8:00 a.m.

2 P R O C E E D I N G S

3
4 THE COURT: All right. Before the jury comes in
5 we have to talk about this instruction. I obviously
6 prepared my draft before I received the response from
7 Novell's lawyers. Novell's lawyers' response does not
8 change my view about this in any way whatsoever. You have
9 an exception to my giving the instruction.

10 Theresa, please get my office on the line. I hope
11 my law clerks will hear this, because I am beside myself.

12 THE CLERK: Judge, could you just give me the
13 phone number.

14 THE COURT: Of course you have an exception to me
15 giving any instruction, and, of course, it is not the
16 instruction Microsoft wants. Is there anything either side
17 has to say about the form of the instruction? I'm going to
18 give the instruction.

19 MR. TULCHIN: Nothing from us, Your Honor.

20 MR. SCHMIDTLEIN: You say the form of the
21 instruction, Your Honor?

22 THE COURT: Yes, the form. I'm going to give the
23 instruction. You have the exception to my giving it, Mr.
24 Schmidtlein.

25 I certainly hope you were not involved in the

1 decision, Mr. Schmidtlein.

2 Let me make a few other observations before the
3 jury comes in.

4 THE CLERK: Judge, could you give me the phone
5 number, please.

6 THE COURT: I have discussed this with my office,
7 and I want my secretary and my law clerks to hear what I
8 think about this.

9 As I have said, I'm going to give the instruction
10 that I have prepared. The instruction that I have prepared,
11 and I had not received a response from Mr. Johnson when I
12 prepared the instruction, but I have now reviewed the
13 response and I have not changed my mind in any way that the
14 curative instruction should be given. Novell, of course,
15 has an objection to me giving the instruction, but as far as
16 the form of the instruction I have asked counsel if there is
17 anything about it that they want to fine tune and they
18 don't.

19 I want to make a few other observations before the
20 jury comes in. First, in my judgment the curative
21 instruction I am giving may not be enough to remedy the harm
22 that has occurred. The legal system itself has been injured
23 by what I consider to be in language that perhaps is
24 outdated, an extreme of sharp practice. I hope that this
25 injury can be remedied by a simple apology to the Court and

1 opposing counsel. Absent that, further action, perhaps
2 communications with the managing partners of any firm
3 involved in the decision to omit significant portions of
4 DX-21 in the slide shown to the jury, or with the judges of
5 the District of Utah, in which this case is being tried, or
6 with bar associations will be required.

7 Second, there were other aspects of Mr. Johnson's
8 closing argument, rebuttal argument about which I am
9 concerned. On several occasions Mr. Johnson accused Mr.
10 Tulchin of misdirection. Perhaps that was fair game, but it
11 was more personal than I would have liked. Mr. Johnson also
12 referred to, quote, aspersions, unquote, that Mr. Tulchin
13 cast upon Mr. Gibb. I recall no such aspersions. Indeed, I
14 felt Mr. Tulchin, perhaps for tactical reasons, went out of
15 his way not to attack personally Novell's witnesses. Again,
16 however, perhaps Mr. Johnson's comments were fair game in
17 light of the fact that by emphasizing Microsoft's contention
18 that the non-development of QuattroPro was the cause of
19 delay in the release of Perfect Office for Windows 95. Mr.
20 Tulchin's argument could be interpreted as an attack upon
21 Mr. Gibb.

22 What clearly was unprofessional, however, was Mr.
23 Johnson's argument that it was, quote, inappropriate for
24 Mr. Tulchin to argue that when Mr. Gates made the decision
25 to withdraw the documentation for the namespace extension

1 APIs, Mr. Gates did not know that the decision would harm
2 Novell. Mr. Johnson made this argument based upon an e-mail
3 sent to Mr. Gates by Mr. Silverberg after Mr. Gates had made
4 his decision. In contrast, Mr. Tulchin based his argument
5 upon a survey of certain ISVs conducted before Mr. Gates
6 made his decision.

7 Arguably, there is a factual dispute in the record
8 about the state of Mr. Gates' knowledge. What is
9 indisputable, however, is that it was not, quote,
10 inappropriate for Mr. Tulchin to make the argument that he
11 did.

12 Again, I hope that an apology will be forthcoming.
13 Life is too short for grievances harbored by me or by
14 anybody else.

15 Let's get the jury.

16 (WHEREUPON, the jury enters the proceedings.)

17 THE COURT: Good morning, everybody.

18 We are now ready for the jury instructions and for
19 you all to conduct your deliberations. I understand that
20 you are prepared to stay until you return a verdict or until
21 8:00, and if you don't return your verdict today you will
22 come back tomorrow. I also understand that around 4:30 some
23 of you may have to move your cars which, of course, is fine,
24 so we'll talk about that.

25 Now, before I give you my instructions there is

1 one thing I want to mention. During his rebuttal argument
2 yesterday Mr. Johnson argued that QuattroPro was, quote,
3 complete, unquote, by August 23, 1995 based upon DX-231, a
4 January 11, 1996 Novell document entitled, quote,
5 development project status. Although DX-231 is in evidence,
6 no witness testified about it. Mr. Johnson put on the
7 screen a slide showing a portion of the second page of
8 DX-231 containing a column entitled, quote, code complete,
9 unquote, in which the August 23, 1995 date referred to by
10 Mr. Johnson in his argument is stated.

11 The slide shown to you by Mr. Johnson omitted
12 another column entitled, quote, RTM, which, according to the
13 testimony of Mr. Frankenberg, means ready to manufacture.
14 The date under that column indicates the ready to
15 manufacture date for QuattroPro was March 31, 1996. Another
16 date on DX-231 indicates that the, quote, code complete,
17 unquote, date for Perfect Fit, figs, and I think that was
18 language, French, Italian, German and --

19 MR. HOLLEY: Spanish, Your Honor.

20 THE COURT: -- Spanish was October 31, 1995.

21 To the extent that you consider DX-231 to be
22 relevant to the issues you're being asked to decide, you
23 should consider the entire exhibit, not simply the portion
24 of the exhibit appearing on the slide shown to you by Mr.
25 Johnson during his rebuttal argument.

1 I will now give you my instructions.

2 Theresa has just given you my instructions and the
3 verdict form. Invariably I find when I give instructions I
4 find a typo, so I may take these back from you, but you'll
5 have them with you. I'm just going to go through them.

6 Excuse me. Here comes the verdict form.

7 Let me thank you at the outset, as counsel have
8 already done, for the attention which you have paid to the
9 lawyers and the witnesses in the case and to the evidence
10 that has been introduced. I also want to thank you for your
11 patience in enduring the occasional delays and hearings
12 outside of your presence which are inevitable in any case.
13 In this case counsel on both sides has done an extraordinary
14 job if minimizing the number of bench conferences, and we
15 have taken issues up outside of your presence, and I commend
16 counsel on both sides.

17 My instructions to you are organized into three
18 parts. The first part deals with civil cases generally, the
19 second to the law applicable to the specific claims asserted
20 in this case and, the third, and, thankfully the shortest,
21 to what I call the mechanics and procedures of your
22 deliberations.

23 As you know, the functions of the judge and of the
24 jury in a case of this kind are quite different from one
25 another. It is my duty as the judge to instruct you as to

1 the law which applies to the case. It is your duty to
2 decide the facts, and in deciding the facts to comply with
3 the rules of the law and apply them as I state them to be,
4 without regard to what you think the law is or what you
5 think the law should be.

6 In deciding the facts and issues of fact you must
7 decide them without prejudice or bias or sympathy.

8 Corporations, and, of course, there are two corporations
9 involved in this case -- I meant to delete this, but I
10 didn't -- stand equal before the law and are entitled to the
11 same treatment as are individuals under the law. That
12 instruction usually is relevant when there is an individual
13 on one side and a corporation on the other. Here we have
14 two corporations.

15 If during the course of these instructions I state
16 any rule, direction or idea in varying ways, no emphasis is
17 intended by me and none must be inferred by you. You are
18 not to single out any certain sentence or individual point
19 or instruction and ignore the others. Rather, you are to
20 consider all of my instructions as a whole, and you are to
21 regard each instruction in the light of all others.

22 You and only you are the judges of the facts. If
23 any expression of mine or anything I may have done or said
24 or any questions I might have asked would seem to indicate
25 any opinion relating to any factual matter, I instruct you

1 to disregard it.

2 During their arguments counsel have referred to
3 some of the evidence. In deciding the facts you may
4 consider not only the evidence referred to by counsel, but
5 any which you believe to be material.

6 If any reference by counsel to matters of evidence
7 does not coincide with your own recollection, it is your
8 recollection which is to control during your deliberations.
9 You are to consider only the evidence, but in your
10 consideration of the evidence you are not limited to the
11 bald statements of the witnesses. On the contrary, you are
12 permitted to draw from facts which you find to have been
13 proven such reasonable inferences as seemed justified in the
14 light of your own experience.

15 The statements and arguments of counsel and
16 questions which they ask which contain assertions of fact
17 are not evidence, and should not be considered as evidence
18 unless any such statement was made as a stipulation
19 conceding the existence of a fact or facts. When the
20 attorneys on both sides stipulate or agree as to the
21 existence of a fact, you should consider that fact as you do
22 all other evidence in the case.

23 At times throughout the trial I have been called
24 upon to pass on the admissibility of certain evidence. You
25 should not be concerned with my rulings or the reasons for

1 them. Whether evidence which has been offered is admissible
2 or is not admissible is purely a question of law, and from
3 such a ruling on such a question you are not to draw any
4 inference.

5 In admitting evidence to which an objection has
6 been made, the Court does not determine what weight should
7 be given to the evidence. You must not guess what the
8 answer might have been to any question to which an objection
9 was sustained, and you must not speculate as to the reason
10 the question was asked or the reason for the objection.

11 As I hope I told you at the very beginning of the
12 case, every party has the right, indeed, the duty to object
13 to evidence and to obtain from the Court its opinion as to
14 whether or not the evidence is admissible and, if
15 permissible, for what purposes and to what extent. You are
16 not to infer that any objection had any other purpose. Any
17 evidence as to which an objection was sustained by the
18 Court, and any evidence which I ordered stricken must be
19 entirely disregarded.

20 There are two types of evidence from which a jury
21 may properly decide what the facts are. One is direct
22 evidence, such as the testimony of an eyewitness. The other
23 is circumstantial evidence, the proof of a chain of
24 circumstances pointing to the existence or non-existence of
25 certain facts. As a general rule, the law makes no

1 distinction between direct and circumstantial evidence.

2 The burden is on the plaintiff in a civil action,
3 such as this, to prove every essential element of each of
4 its claims by a preponderance of the evidence. If the proof
5 should fail to establish any essential element of any one of
6 the plaintiffs' claims by a preponderance of the evidence,
7 you should find for the defendant as to that claim. Of
8 course, here we only have one claim.

9 To, quote, establish by a preponderance of the
10 evidence, means to prove that something is more likely so
11 than not so. In other words, a preponderance of the
12 evidence in the case means such evidence as when considered
13 and compared with that opposed to it has more convincing
14 force, and produces in your minds a belief that what is
15 sought to be proven is more likely true than not true.

16 In determining whether any fact in issue has been
17 proven by a preponderance of the evidence you may consider
18 the testimony of all witnesses, regardless of who may have
19 call them, and all exhibits received in evidence, regardless
20 of who may have produced them.

21 You as jurors are the sole judges of the
22 credibility of the witnesses and the weight their testimony
23 deserves. You should carefully scrutinize the testimony
24 given by each witness and the circumstances under which each
25 witness has testified, and every matter in evidence which

1 tends to indicate whether the witness is worthy of belief.
2 Consider each witness's intelligence, motive and state of
3 mind and his or her demeanor and manner while on the stand.

4 I think they were all male witnesses, now that I
5 think about it.

6 Consider also any relation each witness may bear
7 to either side of the case, whether a witness has
8 demonstrated any bias, prejudice or hostility toward a
9 party, and the manner in which each witness might be
10 affected by the verdict, and the extent to which, if at all,
11 each witness is either supported or contradicted by other
12 evidence.

13 Inconsistencies or discrepancies in the testimony
14 of a witness or between the testimony of different witnesses
15 may or may not cause you to discredit such testimony. Two
16 or more persons witnessing an incident may see or hear it
17 differently. An innocent misrecollection, like failure of
18 recollection, is not an uncommon experience.

19 A witness may be discredited or impeached not only
20 by contradictory evidence, but also by evidence that at
21 other times the witness has made statements which are
22 inconsistent with his or her present testimony.

23 Inconsistencies or discrepancies in the testimony of a
24 witness or between the testimony of differing witnesses
25 should be consider by you, but in weighing their effect you

1 should consider whether they pertain to a matter of
2 importance or to an unimportant detail, and whether you
3 believe they result from innocent error or a wilful
4 falsehood.

5 After you have considered all of the factors
6 bearing upon the credibility of a witness, which I have
7 mentioned, you may conclude to reject all of the testimony
8 of a particular witness, none of the testimony of a
9 particular witness, or part of the testimony of a particular
10 witness. In other words, you may give the testimony of any
11 witness such credibility, if any, as you may think it
12 deserves.

13 During the trial of this case certain testimony
14 has been read to you or shown to you by video by way of
15 deposition, consisting of sworn recorded answers to
16 questions asked of the witness in advance of the trial by
17 one or more of the attorneys for the parties to the case.
18 The testimony of a witness who for some reason cannot be
19 present to testify from the witness stand, may be presented
20 under oath in the form of a deposition. Such testimony is
21 entitled to the same consideration, and is to be judged as
22 to credibility and weighed and otherwise considered by you,
23 insofar as possible, in the same way as if the witness had
24 been present and testified from the witness stand.

25 In the case you have also heard what is called

1 expert testimony. I believe each side had three experts,
2 six in all. A witness who by education and experience has
3 become an expert in any art, science, profession or calling
4 may be permitted to state his or her, in this case his,
5 opinion as to a matter in which he is versed and which is
6 material to the case. He may also state the reasons for his
7 opinions. You should consider each expert opinion received
8 in evidence and give it such weight as you think it
9 deserves, and you may reject it entirely if you conclude
10 that the reasons given in support of the opinion are
11 unsound.

12 If you find that the facts upon which the
13 particular expert relied are not sufficient to support the
14 opinion, or that the facts relied upon are erroneous, you
15 may reject the opinion.

16 Now, if you look at the page numbers it is a
17 little confusing. Obviously my first and third pages or
18 parts are all part of my form instructions, and in the
19 middle I didn't re-create the document, so we have got
20 different page numbers. Now let me instruct you on the law
21 specifically applicable to this case. Counsel referred to
22 it appropriately during the arguments yesterday, but let me
23 tell you exactly the law that applies.

24 This case is brought under Section Two of what is
25 called the Sherman Act. The purpose of the Sherman Act is

1 to preserve free and unfettered competition in the
2 marketplace. The Sherman Act rests on the central premise
3 that competition produces the best allocation of our
4 economic resources, the lowest prices, the highest quality
5 and the greatest material progress.

6 It is undisputed that during the period that
7 Novell owned WordPerfect and QuattroPro, which is 1994 to
8 1996, Microsoft had a monopoly in the PC operating system
9 market. Monopoly power is the power to control prices or to
10 exclude competition. Novell claims that Microsoft injured
11 Novell by engaging in anticompetitive conduct directed
12 against it. Specifically, Novell alleges that in violation
13 of Section Two of the Sherman Act, Microsoft damaged its
14 office productivity applications, WordPerfect, QuattroPro
15 and Perfect Office, by withdrawing support for the namespace
16 extension application programming interfaces, APIs, and from
17 now on I will refer to them as APIs, and to preserve
18 Microsoft's monopoly in the PC operating system market.

19 Because neither Perfect Office nor WordPerfect nor
20 QuattroPro was a PC operating system, this claim may require
21 a little more explanation. Novell presents two theories
22 that underlie it. First, Novell contends that its office
23 productivity applications were, quote, cross-platform,
24 unquote, software or such importance that their ability to
25 run on other non-Microsoft operating systems posed a threat

1 to Microsoft's monopoly in the market for PC operating
2 systems.

3 Specifically, Novell says that the availability of
4 WordPerfect, QuattroPro and Perfect Office on non-Microsoft
5 operating systems would have substantially reduced the
6 dominance of Microsoft's PC operating system.

7 Second, Novell claims that Perfect Office,
8 WordPerfect and QuattroPro, including technologies called
9 AppWare and Open Doc, represented a form of, quote,
10 middleware, that threatened the applications barrier to
11 entry, that protected Microsoft's monopoly in the PC
12 operating market, the market for PC operating systems.
13 Therefore, according to Novell, Microsoft purposely harmed
14 Novell's office productivity applications in order to
15 protect its monopoly in the PC operating systems market.

16 Although, as I have just stated, Novell claims
17 that Microsoft engaged in anticompetitive conduct against
18 its office productivity applications in order to maintain
19 its monopoly in the PC operating system market, Novell is
20 not claiming that Microsoft attempted to monopolize the
21 product applications market itself, i.e., the market in
22 which Novell's Perfect Office, WordPerfect and QuattroPro,
23 and Microsoft's Office, Word and Excel were direct
24 competitors.

25 In order to prevail Novell must prove by a

1 preponderance of the evidence that Microsoft unlawfully
2 maintained its monopoly power in the PC operating system
3 market by engaging in anticompetitive conduct directed at
4 Novell's office productivity applications.

5 Anticompetitive conduct is conduct other than
6 competition on the merits that has the effect of preventing
7 or excluding competition or frustrating the efforts of other
8 companies to compete for customers in the relevant market.
9 Harm to competition is to be distinguished from harm to a
10 single competitor or group of competitors which does not
11 necessarily constitute harm to competition.

12 The difference between anticompetitive conduct and
13 conduct that has a legitimate business purpose can be
14 difficult to determine. This is because all companies have
15 a desire to increase their profits and increase their market
16 share. These goals are an essential part of a competitive
17 marketplace, and the antitrust laws do not make these goals
18 or the achievement of these goals unlawful, as long as a
19 company does not use anticompetitive means to achieve those
20 goals.

21 In determining whether Microsoft's conduct was
22 anticompetitive or whether it was legitimate business
23 conduct, you should determine whether the conduct is
24 consistent with competition on the merits, whether the
25 conduct provides benefit to consumers, and whether the

1 conduct would make business sense apart from any effect it
2 has on excluding competition or harming competitors.

3 You should consider whether Microsoft had
4 legitimate business reasons for withdrawing support for the
5 namespace extension APIs. You should also distinguish
6 maintenance of monopoly power through anticompetitive acts
7 from the maintenance of monopoly power by supplying better
8 products or services, possessing superior business skills or
9 because of luck, which are not unlawful. You should
10 consider all of the characteristics of the relevant market
11 and evaluate Microsoft's conduct as a whole.

12 Antitrust law does not impose a general duty upon
13 a monopolist to cooperate with a competitor or to share its
14 intellectual property with a competitor, even if the
15 innovations or intellectual property might be useful to the
16 competitor in developing its product. However, intellectual
17 property rights do not confer a privilege to violate the
18 antitrust laws, and under certain circumstances the refusal
19 to cooperate with rivals can constitute anticompetitive
20 conduct, such as when a monopolist has ended a voluntary,
21 and thus presumed profitable course of dealing, or when a
22 monopolist has engaged in deceptive conduct reasonably
23 relied upon by a competitor, that has the purpose and effect
24 of preventing a competitor from developing in a timely
25 manner a product that would enhance competition by

1 threatening a monopolist's monopoly power in the relevant
2 market. Here, as you know, that is the PC operating systems
3 market.

4 Anticompetitive intent is not alone sufficient to
5 establish a violation of the antitrust laws. While intent
6 is not necessary to prove a violation of Section Two of the
7 Sherman Act, it is not irrelevant as to whether a violation
8 occurred. You may consider Microsoft's intent in order to
9 understand the likely effect of its conduct and to evaluate
10 whether Microsoft's conduct was competition on the merits,
11 and whether the conduct harmed competition in the PC
12 operating system market.

13 In order to prevail, Novell must also prove that
14 the anticompetitive conduct it alleges was engaged in by
15 Microsoft, in fact caused the damage Novell claims it
16 suffered.

17 Against the background of these rules and
18 principles you are being asked to answer certain questions.
19 The questions are set forth on the special verdict form that
20 Theresa will now hand to you. She has already handed it to
21 you. Let's go over the verdict form.

22 The first two questions on the form relate to the
23 issue of causation, about which I just instructed you.

24 First, question one asks has Novell proven by a
25 preponderance of the evidence that Microsoft's decision to

1 withdraw support for the namespace extension APIs caused
2 Novell's productivity applications, of which are described,
3 to be late to the market? The answer is yes or no.

4 If you answer yes, you go on to the next
5 questions. If you answer no, that is the end. Just go to
6 the bottom and have the foreman sign it and that is it, go
7 home.

8 The second question which you reach, if you have
9 answered question one yes, is has Novell proven by a
10 preponderance of the evidence that but for Microsoft's
11 decision to withdraw support for the namespace extension
12 APIs, Novell's productivity applications would have been
13 released to the market either about the time that Windows 95
14 was released, which was I think it is agreed August 24,
15 1995, or within a sufficiently short time period thereafter
16 to take advantage of the release? Again, that is yes or no.
17 That is the causation question.

18 I think counsel mentioned yesterday one and two
19 really are variants of the same thing, but they are the
20 causation questions. Whatever Microsoft's conduct, whatever
21 it was, did it cause the damage? If you want to you can
22 focus on that first. You can focus on these in any order
23 you want, but they are the first two questions.

24 The third question, and you don't reach the third
25 question unless you have answered both one and two yes, is

1 has Novell proven by a preponderance of the evidence that
2 Microsoft engaged in anticompetitive conduct by deciding to
3 withdraw support for the namespace extension APIs? Again,
4 yes or no. If you answer no, that is the end. The
5 anticompetitive conduct, you have heard the evidence and you
6 have the instructions as to what anticompetitive conduct is.

7 Fourth, has Novell proved by a preponderance of
8 the evidence that Microsoft's withdrawal of support for the
9 namespace extension APIs caused harm to competition in the
10 market for PC operating systems and contributed
11 significantly to the maintenance of Microsoft's monopoly in
12 that market?

13 Four and five are the ones that really are -- they
14 just apply different legal standards. There is a legitimate
15 dispute about what the governing standard is. You all are a
16 wonderful jury, and if you reach questions four and five you
17 answer each of them, but they apply slightly different
18 standard. Five, has Novell proven by a preponderance of the
19 evidence that Microsoft's withdrawal of support of the
20 namespace extension APIs was reasonably capable of
21 contributing significantly to the maintenance of Microsoft's
22 monopoly in the market for PS operating systems? So four
23 and five, it is an element of the proof of Novell, and I
24 don't know what the answer is, and so I have asked you to
25 find it both ways. By doing that, if I guess wrong as to

1 what the governing standard is some other jury would have to
2 go through eight weeks of trial perhaps, and I don't want
3 that to happen, so I just ask you to answer that.

4 Let me say that counsel have been extraordinary
5 helpful. This is a difficult area of the law. They agree
6 with some of the things I have said and disagree with some
7 of the things I say, but when push comes to shove we tried
8 to work to get a fairly balanced set of instructions to you
9 and questions for you to answer that hopefully will make
10 your job easier.

11 Again, my job is to make some rulings, and I have
12 made them, and to the extent one side or the other objects,
13 they have a perfect right to and they should, but they have
14 been extraordinarily cooperative. We started this process
15 of writing the instructions a long time ago so that they
16 would generally know what was going on, and they have been
17 very helpful on both sides.

18 Six. As you know, and I told you earlier, and you
19 know very well there are two different theories, and I don't
20 quite know how to describe them. If your answer to
21 questions four or five, to either or both is yes, and if
22 your answer is no that is the end, but if you answer both of
23 them yes, is your answer based upon Novell's claim that its
24 applications, WordPerfect, QuattroPro and/or Perfect Office
25 offered competing operating systems the prospect of lowering

1 the applications barrier to entry, because the competing
2 operating system, running the Novell applications, would
3 offer consumers an attractive alternative to Windows? There
4 has been evidence, and I think Microsoft refers to that as
5 the franchise application theory, and I sometimes refer to
6 it as the popular applications theory, but that is the first
7 claim that they assert.

8 The second is the middleware claim. If your
9 answer to either questions four or five is yes, is your
10 answer based upon Novell's claim that WordPerfect,
11 QuattroPro and/or Perfect Office constituted a, quote,
12 middleware threat to Microsoft's monopoly in the PC
13 operating system market. If your answers to both of those
14 questions are no, that too is the end, but if you answer
15 either or both yes, then you go on to eight which is very
16 simple. What amount of damages, if any, you award in favor
17 of Novell against Microsoft.

18 If you have questions about these as you go along,
19 fine, but I think they are pretty straightforward. One, two
20 or three you have to answer yes in order to go further. If
21 you answer any one of those no, you just go right to the
22 bottom. Four and five is the one about there is a dispute,
23 and if you answer either of them yes you go on to six or
24 seven. If you answer six or seven, either or both yes, then
25 you go on to damages. If you have questions come back and

1 let us know. If I have not made it clear come on back and
2 we'll explain it to you.

3 Question eight, as you know, relates to the
4 question of damages. If you have answered yes to questions
5 one, two and three, and yes to either questions four and
6 five -- if you have answered yes to either or both questions
7 four and question five, and yes to either or both questions
8 six and seven, then you go on to eight. I changed the
9 verdict form, but I didn't chance the instructions. If you
10 have any questions about this, and I can retype it myself or
11 else you can interlineate it. I think the verdict form
12 speaks for itself.

13 Therefore, I am now going to instruction you on
14 issues concerning damages. However, the fact that I am
15 doing so should not be considered as indicating any view of
16 mine as to which party is entitled to your ruling.

17 Instructions on the measure of damages are given only for
18 your guidance in the event that you should find in favor of
19 Novell on the questions I have outlined in accordance with
20 the other instructions. If you find by a preponderance of
21 the evidence that Microsoft violated the antitrust laws, and
22 that this violation caused injury to Novell, then you must
23 determine the amount of damages, if any, Novell is entitled
24 to recover.

25 The law provides that Novell should be fairly

1 compensated for all damages to its business or property that
2 were a direct result or a likely consequence of the conduct
3 that you have found to be unlawful. The purpose of awarding
4 damages in an antitrust action is to put an injured party as
5 nearly as possible in the position in which it would have
6 been if the alleged antitrust violation had not occurred.
7 The law does not permit you to award damages to punish a
8 wrongdoer, what we sometimes refer to as punitive damages,
9 or to deter a monopolist from particular conduct in the
10 future, or to provide a windfall to someone who has been the
11 victim of an antitrust violation.

12 You are also not permitted to award to Novell an
13 amount of attorneys' fees for costs of maintaining this
14 lawsuit. Antitrust damages are compensatory only. In other
15 words, they are designed to compensate Novell for the
16 particular injury it claims to have suffered as a result of
17 the anticompetitive conduct engaged in by Microsoft. You
18 are permitted to make reasonable estimates in calculating
19 damages. It may be difficult for you to determine the
20 precise amount of damages Novell suffered. If Novell has
21 established with reasonable probability the existence of
22 injury proximately caused by Microsoft's decision to
23 withdraw support for the namespace extension APIs, then you
24 are permitted to make a just and reasonable estimate of the
25 damages. So long as there is a reasonable basis in the

1 evidence for a damages award, Novell should not be denied a
2 right to be fairly compensated just because damages cannot
3 be determined with absolute mathematical certainty. The
4 amount of damages must, however, be based on reasonable and
5 non-speculative assumptions and estimates supported by the
6 evidence.

7 If you find that Novell's alleged injury was
8 caused in part by Microsoft's decision to withdraw support
9 of the namespace extension APIs, then you may award damages
10 only for that portion of Novell's alleged injuries that was
11 caused by Microsoft's conduct. Novell's burden of proving
12 damages with reasonable certainty includes the burden of
13 apportioning damages between the injury to Novell that was
14 caused by Microsoft's decision to withdraw the support for
15 the namespace extension APIs and any harm Novell may have
16 suffered as a result of other factors.

17 In sum, an award of damages may not be based on
18 guesswork or speculation. If you find that a damages
19 calculation cannot be based on evidence and reasonable
20 inferences, and instead can only be reached through
21 guesswork or speculation, then you may not award damages.

22 That concludes the second part of the
23 instructions.

24 I am now turning to the third and not very long
25 portion about the mechanics and procedures of your

1 deliberations. When you retire to the jury room your first
2 job will be to select one of yourselves to act as a
3 foreperson. How you do that is entirely up to you. That
4 person will preside over your deliberations and speak for
5 you here in court. I don't think there is a lot of speaking
6 involved. As I understand the practice here, is you hand
7 the verdict to Theresa, who then hands it to me, and then
8 she reads the verdict form.

9 Is that right, Theresa?

10 THE CLERK: Yes.

11 THE COURT: So there is not a lot of speaking in
12 court.

13 If it become necessary during your deliberations
14 to communicate with me, you may sign a note through the
15 bailiff, and I assume the bailiff is going to be sworn in a
16 minute, signed by your foreperson.

17 Is that the practice here?

18 THE CLERK: Yes.

19 THE COURT: He keeps you all sequestered.

20 Hand a note to the bailiff, who is Phil Vigil.

21 THE CLERK: Rob Humpherys.

22 THE COURT: He is going to take an oath. Frankly,
23 sometimes one person is w worn back home, and I don't know
24 what happens here, but their successor comes in on another
25 shift, but, in any event, the purpose of the bailiff is to

1 keep you all sequestered and to keep people away from you,
2 including me.

3 If it becomes necessary to communicate with me,
4 send a note. Your foreperson usually signs it, but any of
5 you can sign it. None of you should ever attempt to
6 communicate with me by any means other than a signed
7 writing, and I will never communicate with any of you on any
8 subject touching the merits of the case otherwise than in
9 writing or orally here in open court.

10 Usually here I say something about cells phones,
11 but cell phones are allowed in this courthouse; is that
12 right?

13 THE CLERK: I believe the jurors can have cell
14 phones.

15 THE COURT: Turn them off.

16 An experience we had back home in Maryland was a
17 juror told the bailiff that they needed to get home because
18 somebody was sick. We arranged for that, of course, and
19 then somebody asked how did the juror know that somebody was
20 sick at home? That was because they had their cell phone.
21 Turn your cell phones off. Give them to Theresa. You
22 should not be in communication with the outside world. This
23 is not the millionaire show. You can't call up and -- any
24 communication is going to be in writing by me. If you have
25 a question I'll get with counsel and write back, or if you

1 have any questions or if there is something you want to see
2 or something, you'll have a copy of the exhibits with you,
3 but if you want to come back into court just let us know and
4 we'll all be here.

5 Now, you will note from the oath that the bailiff
6 is about to take that he, as well as anybody else, is
7 forbidden to communicate in any way or in any manner with
8 any member of the jury on any subject touching the merits of
9 the case.

10 Bear in mind also that you are not to reveal to
11 any person, including me, how you stand numerically or
12 otherwise on the issues to be decided until you have reached
13 a unanimous verdict.

14 Ladies and gentlemen, the verdict must represent
15 the considered judgment of each juror. In order to return a
16 verdict it is necessary that each juror agree to it. Your
17 verdict must be unanimous. It is your duty as jurors to
18 consult with one another and to deliberate with a view to
19 reaching an agreement, if you can do so without violence to
20 individual judgment. Each of you must decide the case for
21 himself, and it should say or herself, but do so only after
22 an impartial consideration of the evidence with your fellow
23 jurors.

24 In the course of your deliberation do not hesitate
25 to reexamine your own views and to change your opinion if

1 convinced it is erroneous, but do not surrender your honest
2 conviction as to the weight or the effect of evidence solely
3 because of the opinion of your fellow jurors or for the mere
4 purpose of returning a verdict. Remember at all times that
5 you are not partisans, you are judges, judges of the facts.

6 Everything that we discussed before is
7 incorporated by reference. Have I misstated anything or --

8 MR. TULCHIN: No, Your Honor. Thank you very
9 much.

10 MR. JOHNSON: No exceptions, Your Honor.

11 THE COURT: Okay. Except as previously --

12 MR. JOHNSON: Of course.

13 THE COURT: -- discussed, which are perfectly
14 legitimate.

15 Swear the bailiff.

16 (WHEREUPON, an oath was administered.)

17 THE COURT: It is in your hands.

18 You can take with you the instructions. In that
19 last part I changed the verdict form, and it had not caught
20 up with the instructions, but if you have any questions feel
21 free to ask me, but the verdict form governs. Everything
22 else I think was a his or her left out here or there, but I
23 think they are fine. Take them with you.

24 The verdict form, and just be careful, and I think
25 it is helpful for each of you to have a copy of the verdict

1 form, but just make sure that the right one comes back in
2 signed by the foreperson. If you need another one,
3 obviously we can run it off easily. How you deliberate and
4 what you do is entirely up to you. If you have a question,
5 send it in writing. If you want to come back and see
6 something, but you will have copies of the exhibits, and Theresa
7 will --

8 THE CLERK: The exhibits will come in in the next
9 five minutes.

10 THE COURT: Theresa and counsel have already -- I
11 don't know how they have done what they have done -- they
12 will go back to you. There is only one copy of them. If
13 there is something that you need we may bring you back in
14 here. Basically from now on it is in your hands.

15 Thank you very much.

16 (WHEREUPON, the jury leaves the proceedings.)

17 THE COURT: You are free to go to Little America
18 or Hotel Monaco or outside or wherever you want to go. Just
19 let Theresa know where you're going to be.

20 Obviously I was a little exercised by what
21 happened at the end of yesterday, and this was a very
22 difficult thing to do, but you have done it and tried a very
23 professional case and I appreciate it.

24 I want to come down and shake everybody's hand.

25 MR. JOHNSON: Your Honor, if I may, you asked for

1 an apology and I give you one. I certainly didn't intend to
2 offend your --

3 THE COURT: That is all that I need. That is all
4 that I need. That is all I need and all I want. I
5 understand that when you got there that there were other
6 things that were displayed which wasn't the full thing and I
7 understand, I just think under the circumstances it was
8 appropriate to give the jury a curative instruction, and I
9 certainly accept your apology and I appreciate you having
10 given it, and as far as I'm concerned the matter is done.

11 MR. JOHNSON: Thank you.

12 (Recess)

13

14

15

16

17

18

19

20

21

22

23

24

25

1 11:30 a.m.

2
3 (WHEREUPON, the following was heard in open
4 court.)

5 THE COURT: Do you want to wait for other people
6 to come? That is entirely up to you all.

7 MR. TULCHIN: We are ready, Your Honor.

8 MR. JOHNSON: I think we're ready, Your Honor.

9 THE COURT: You have the question. Can APIs,
10 namespace extensions, be used on other operating systems
11 like Linux to access functionality of Perfect Office?

12 Any proposed answer?

13 MR. TULCHIN: The answer is no, Your Honor, and at
14 least three witnesses have said that.

15 THE COURT: Mr. Johnson, I think that is right.

16 MR. JOHNSON: I think the answer would be that
17 namespace extensions are on Windows 95.

18 THE COURT: Should I just answer it no?

19 MR. JOHNSON: Well, I guess I would like to chat
20 with my technical folks for a second.

21 THE COURT: Sure. I think the answer is no, but,
22 of course.

23 (Time lapse.)

24 MR. JOHNSON: Your Honor, I think more
25 appropriately it would be that the namespace extensions on

1 Windows 95 are not contained in Linux. Linux may very well
2 have namespace extensions or something like --

3 THE COURT: No. No. I hear you.

4 MR. HOLLEY: Actually, Your Honor --

5 MR. TULCHIN: That is not correct, Your Honor.

6 THE COURT: Go ahead.

7 MR. JOHNSON: There is certainly no testimony to
8 the contrary, Your Honor.

9 MR. HOLLEY: Your Honor --

10 MR. JOHNSON: It is a little bit of an incoherent
11 question in the way it is phrased.

12 THE COURT: I think what they are trying to get to
13 is something -- it is incoherent, perhaps.

14 Mr. Holley?

15 MR. HOLLEY: There are no namespace extension APIs
16 on any operating system but Microsoft Windows. The idea
17 that they are on Linux is interesting speculation, but there
18 is zero evidence to support that.

19 MR. JOHNSON: I am not suggesting that the answer
20 would say that there are, but I am just suggesting that the
21 answer should be that the namespace extensions on Windows 95
22 are --

23 THE COURT: Suppose this. The namespace
24 extensions on Windows 95 came up. The namespace extensions
25 involved in this case cannot be used on other operating

1 systems like Linux.

2 MR. TULCHIN: That is fair, Your Honor. I think
3 the real answer is no, but I'm happy to take the Court's
4 version.

5 MR. JOHNSON: Actually, Your Honor, Windows can
6 run on Linux. It is a program called Wand.

7 MR. HOLLEY: Not before about 2007.

8 THE COURT: Can I have a pen?

9 MR. HOLLEY: That is an interesting fact, but
10 irrelevant to our time period.

11 MR. TULCHIN: The evidence here is from three
12 witnesses, Your Honor, and it is very clear, that the answer
13 from three witnesses, including Mr. Alepin, is no.

14 MR. JOHNSON: Your Honor, the answer we would
15 suggest, if I might, is that the namespace extension APIs
16 referenced in this case are only on Windows 95.

17 THE COURT: I understand that, but I'm going to be
18 as helpful to the jury as possible. The namespace extension
19 APIs -- what did you say -- referenced in this case?

20 MR. JOHNSON: Referenced in this case were only on
21 Windows 95.

22 THE COURT: But don't you think I should add and
23 cannot be used on any other operating system like Linux?

24 MR. TULCHIN: Or you could start the answer with
25 the word no, period, and then continue with that sentence.

1 Either way would be acceptable.

2 THE COURT: I hear you, but I really want to try
3 to answer the jury's question.

4 MR. TULCHIN: Yes, Your Honor.

5 I am suggesting that the answer be as follows.

6 THE COURT: Well, let me try it.

7 No. The namespace extension APIs involved in this
8 case are only on Windows 95 and cannot be used on other
9 operating systems like Linux to access functionality.

10 MR. TULCHIN: Correct, Your Honor.

11 THE COURT: Unless that's wrong.

12 MR. TULCHIN: No, that is correct.

13 THE COURT: Let's let Mr. Johnson confer to his
14 technical people.

15 MR. JOHNSON: Your Honor, once you have said no, I
16 don't think you need all that additional material.

17 THE COURT: I would be perfectly willing to say
18 no.

19 MR. TULCHIN: That is where we started, Your
20 Honor, and I am happy to either have the no with nothing
21 else or the sentence that you have. Either way is fine.

22 MR. JOHNSON: Hold on.

23 Can we have a moment?

24 THE COURT: Sure.

25 MR. SCHMIDTLEIN: I think there is some ambiguity

1 about this. To access functionality of Perfect Office?

2 There is obviously --

3 THE COURT: Well, I think what this goes to -- I
4 mean, it goes to the question of whether or not -- it goes
5 to a core issue in this case, and we might as well make sure
6 I'm understanding it, but about what middleware is. If you
7 sit Perfect Office on top of Windows, can you then cross
8 platform the APIs to another operating system? I think that
9 is what this goes to. I think the answer, according to the
10 evidence, is no.

11 I mean, I think it is an important question, but I
12 think the evidence gives an answer which is that everybody
13 agrees is no, that it does not work that way.

14 MR. TULCHIN: That is correct, Your Honor. There
15 are at least three witnesses that have said this including
16 Mr. Alepin.

17 THE COURT: It is not a trivial question.

18 MR. TULCHIN: No, not at all. It is not at all.

19 THE COURT: I want to make sure I give the right
20 answer, but I think that is what it goes to.

21 MR. TULCHIN: I think what Novell's counsel is
22 looking for is some way to give an answer that confuses the
23 jury, when everyone agrees that the correct and unambiguous
24 response is no.

25 MR. JOHNSON: I don't have any objection to no,

1 Your Honor. What I would like to say is no -- I mean, the
2 question is confused, because obviously the namespace
3 extensions are on Windows 95. If you took out the
4 parenthetical the answer would be yes, but the namespace
5 extensions obviously are only on Windows 95. We don't take
6 them with us. So what I would like to say simply is no, and
7 I think the answer is no, the namespace extension APIs
8 referenced in this case were only on Windows 95. I think
9 that is a correct answer.

10 THE COURT: How about that? No. The namespace
11 extension APIs involved in this case are only on Windows 95.

12 How is that?

13 MR. TULCHIN: That is fine, Your Honor.

14 MR. JOHNSON: Okay. Fair.

15 THE COURT: Okay. So we can do this by --

16 THE CLERK: If you want to handwrite it out, I
17 just need to keep a copy.

18 THE COURT: No. The namespace extensions involved
19 in this case are only on Windows 95.

20 You better type it. They may not understand my
21 handwriting.

22 No. The namespace extension APIs involved in this
23 case are only on Windows 95.

24 MR. JOHNSON: Right.

25 MR. TULCHIN: Yes.

1 THE COURT: Theresa, the answer is no. The
2 namespace extension APIs involved in this case are only on
3 Windows 95.

4 THE CLERK: I have referenced in this case. Is
5 that all right?

6 THE COURT: I think involved in this case. Okay.

7 THE CLERK: No. The namespace extension APIs
8 involved in this case are only on Windows 95.

9 THE COURT: Yes. No is the very first --

10 THE CLERK: Yes.

11 THE COURT: Thank you all very much.

12 MR. TULCHIN: Thank you.

13 THE COURT: This is not a trivial question and I
14 appreciate that.

15 (Recess)

16
17
18
19
20
21
22
23
24
25