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

_____	)	
NOVELL, INC.,	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case 2:04-CV-1045 JFM
	)	
MICROSOFT CORPORATION,	)	
	)	
Defendant.	)	
_____	)	

BEFORE THE HONORABLE J. FREDERICK MOTZ

DATE: DECEMBER 15, 2011

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

Reported by: KELLY BROWN HICKEN, CSR, RPR, RMR

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1 SALT LAKE CITY, THURSDAY, DECEMBER 15, 2011

2 \* \* \* \* \*

3 THE COURT: Good morning again. You have a note  
4 which is:

5 Does, quote, PC operating systems, unquote, include  
6 middleware that supports apps?

7 Apparently it's from juror Number 4. My proposed  
8 answer is as follows:

9 No. As the instructions I previously had given to  
10 you indicate, quote, middleware, unquote, is relevant to this  
11 case only because one of the Novell's claims is that its  
12 Office productivity applications constituted middleware that  
13 threatened Microsoft's monopoly in the PC operating systems.

14 MR. TULCHIN: I'm sorry. I didn't quite get that.

15 THE COURT: I'll do it again.

16 MR. TULCHIN: Would you?

17 THE COURT: This is my proposed answer:

18 No. As by the instructions I have previously given  
19 you indicate, quote, middleware, unquote, is relevant to this  
20 case only because one of Novell's claims is that its Office  
21 productivity applications constituted, quote, middleware that  
22 threatened Microsoft's monopoly in the PC operating systems  
23 market.

24 MR. TULCHIN: Your Honor, I think that's fine. But  
25 I do think that we should add to it. I think this emphasizes

1 the importance of some instruction about what middleware is  
2 along the lines of the letter that we sent in this morning,  
3 Your Honor. You might even make it a little more abbreviated  
4 than what we suggested by saying something like, middleware as  
5 the term is used in this case is software that sits on top of  
6 an operating system that is, one, cross-platform; two, is  
7 available on all or nearly all PCs, and that's -- both of  
8 those things are exactly what Professor Noll said; and, three,  
9 exposes a sufficient number of APIs to make it feasible for  
10 full-featured office -- sorry -- productivity applications to  
11 run on top of the middleware.

12 And again, I'd be happy to show you  
13 Professor Noll's testimony on this, but that is the theory,  
14 not only the theory that exists in the complaint which is how  
15 we got here, how the tolling provision of Clayton -- of the  
16 Clayton Act was invoked in the first place, but that is what  
17 Dr. Noll's theory is.

18 The first two of the three requirements are  
19 precisely from his mouth, that the middleware must be  
20 cross-platform and must be available on all or nearly all PCs.  
21 We've had a debate about what the third is. But, I mean, I  
22 think our view is the correct one, the complaint adopts the  
23 definition in the government case.

24 And I'm afraid, Your Honor, that these notes are so  
25 confused and reflect such a lack of understanding of what

1 middleware is and what an operating system is that we're  
2 really at a point that some guidance from the Court is  
3 necessary. I mean, we've been here eight weeks, and it seems  
4 to me that the jury at this point not only is entitled to  
5 know, but really must know what middleware is and what it  
6 isn't.

7 THE COURT: What's your understanding of how  
8 Dr. Noll differs on the third element?

9 MR. TULCHIN: Well, I can get his testimony, Your  
10 Honor. He said he didn't -- Dr. Noll didn't define exactly  
11 what he meant, but he said it had to expose a sufficient  
12 number of APIs, and then I don't have the exact words, but to  
13 be attractive enough so that other ISVs would write  
14 applications to that middleware.

15 And I do think that Ron Alepin provided the third  
16 requirement probably a little more clearly than Professor Noll  
17 did. And I think Alepin's statement that you need  
18 full-featured productivity applications, which is what I  
19 recall him saying, is consistent with what Novell adopted from  
20 the government case. So the answer the Court --

21 THE COURT: I understand.

22 MR. TULCHIN: You know, it's a good start, Your  
23 Honor. I think we have to go on and give the rest of it.

24 THE COURT: Mr. Johnson?

25 MR. JOHNSON: Yes. We've been around this horn so

1 many times. That was not what Professor Noll said, and he did  
2 not agree with anything other than it has to be  
3 cross-platform. What he said about being on a lot of PCs and  
4 what he said about writing applications to the middleware,  
5 that it was entirely a continuum and that the more that  
6 applications were written even partially to middleware that  
7 that alone reduces porting costs and therefore reduces the  
8 application barrier to entry.

9 THE COURT: How is that -- how is his definition  
10 consistent with your complaint in the tolling?

11 MR. JOHNSON: Both our complaint and the finding of  
12 facts, in fact, agree completely, Your Honor, with our theory  
13 of middleware. Remember --

14 THE COURT: How are the findings of fact possibly  
15 consistent with your theory of middleware?

16 MR. JOHNSON: Because as the findings of fact say  
17 so as middleware grew in popularity and exposed more APIs,  
18 there would be further applications written to the middleware.  
19 And it is a continuum. Again, the standard --

20 THE COURT: Does the word continuum come out of the  
21 findings of fact?

22 MR. JOHNSON: Your Honor, if I may.

23 THE COURT: No. I just asked you a question. You  
24 just said continuum, and continuum is nowhere in the findings  
25 of fact, that I'm aware of. And my question is a simple one.

1 Does the word continuum appear in the findings of fact?

2 MR. JOHNSON: The word continuum does not appear.  
3 However, the words which state that as middleware became more  
4 popular and as more applications were written to the  
5 middleware that this would cause a reduction. It would cause  
6 it to erode. I believe that's the word. I can find it for  
7 you if you'd like. Eroding is not the same as destroying.  
8 But what Microsoft continues to do, Your Honor, is to want to  
9 define the term middleware --

10 THE COURT: The simple fact is middleware is no  
11 threat to the operating system unless it exposes lots of APIs  
12 that people are going to write to instead of the operating  
13 system. It's as simple as that, as far as I'm concerned. I  
14 mean, I don't see how any other theory is -- there might be  
15 lots of arguments short of that. But the principle has got to  
16 be that your theory is that middleware constituted a threat to  
17 the operating system. How middleware which doesn't suppose --  
18 expose sufficient APIs to mirror closely or at least in some  
19 close approximation the functionality and operating system, it  
20 doesn't -- you know, I mean, we can argue around the edges,  
21 but that has got to be true. It can't be that middleware,  
22 quote, middleware to which you write, the analogy I remember  
23 or the example I remember was box scores on top of a  
24 spreadsheet is not full function and is no threat to an  
25 operating system.

1 MR. JOHNSON: Your Honor, if I may, I think part of  
2 the reason for the confusion is what you just said. Microsoft  
3 has defined middleware in such a way that it is an operating  
4 system. And that is why you get a question like we did  
5 yesterday, is an operating system middleware? Because  
6 Microsoft's definition takes it to the extreme, which is --

7 THE COURT: Yeah. But Microsoft's definition is  
8 not and from my judgment relevant to your theory of the case,  
9 which is -- I mean, Microsoft can define it any way it wants  
10 for purposes of its dictionary. You have defined it in your  
11 complaint, and you have a theory that somehow middleware, and  
12 middleware makes sense in your theory only if it exposes some  
13 degree of functionality which makes it a threat to operating  
14 systems.

15 I don't care what Microsoft defines it as in its  
16 dictionary. It doesn't matter. You've got a theory of the  
17 case that got you beyond -- got you past limitations and got  
18 you to the jury. And I just don't -- I don't care what  
19 Microsoft's definition is.

20 MR. JOHNSON: Your Honor, I wasn't actually even  
21 talking about Microsoft's definition in their dictionary at  
22 all. I was talking about the definition they want you to  
23 instruct the jury on, the definition that they want you to  
24 instruct the jury on, which would be directing a verdict, by  
25 the way, and that's what it would be here --



1 THE COURT: No, it wouldn't. You still have your  
2 franchise theory.

3 MR. JOHNSON: It would be directing a verdict on  
4 that portion of our theory.

5 THE COURT: I agree with that. Maybe so, maybe  
6 not. That's why I've got to be careful what I say. But they  
7 want me to direct a verdict.

8 MR. JOHNSON: Of course. Of course. And that's  
9 understandable given that we have no verdict, and they would  
10 like you to, frankly, tip the scale. I don't think that would  
11 be appropriate. Your Honor made this judgment carefully  
12 sometime ago after this argument was had for about the fifth  
13 or --

14 THE COURT: I understand.

15 MR. JOHNSON: -- fifth or sixth time. And Your  
16 Honor made a reason of judgment. And I don't think that it  
17 would be appropriate for you to change that judgment now.

18 I will point out that Mr. Alepin did not agree with  
19 their definition. I read from his testimony at Page 1396.

20 Question. You're familiar with the term  
21 middleware?

22 Answer. Yes, I am.

23 Question. The first bullet point there, software  
24 that runs on top of an operating system and exposes APIs that  
25 encapsulates meaningful functionality. Is that the sort of

1 definition of middleware that you're comfortable with?

2 Answer. Yes.

3 So middleware does expose APIs. It does contain  
4 meaningful functionality. But that does not mean, Your Honor,  
5 that it's capable of being an operating system in running --  
6 that you're able to create whatever their term they want to  
7 use, full-service Office productivity applications on it.  
8 That's a different thing. If middleware got to that goal,  
9 achieved that goal, it would, in fact, destroy the application  
10 barrier to entry, and there would be wide open competition.

11 But, of course, this case is not about that. If we  
12 had to destroy the applications barrier to entry in order to  
13 win, we could not be here today. What we have is --

14 THE COURT: Yes, you could. But that's a whole  
15 different question. You could have said -- in a but for world  
16 you could have had a technical expert who would have said that  
17 it would have existed in which you didn't produce, that but  
18 for Microsoft's conduct, the applications to the barrier to  
19 entry would have been effectively destroyed. So you could  
20 have, but you didn't.

21 MR. JOHNSON: What we had, though, Your Honor, was  
22 an expert that came in and said, as applications are written  
23 to the middleware either partially, whether it's 60 percent or  
24 40 percent or whatever it is, that that therefore reduces  
25 porting costs to other operating systems and therefore reduces

1 the applications barrier to entry. And that's what Dr. Noll  
2 testified to in this case. And again, Your Honor, this is all  
3 a --

4 THE COURT: Actually it's apropos of nothing. It  
5 seems to me that one of your experts, I think it was Noll but  
6 it could have been Alepin, actually in his -- it's not in  
7 evidence, but in his demonstration did have it destroyed. I  
8 remember him showing the wall all the way knocked down.

9 MR. TULCHIN: He did.

10 MR. JOHNSON: Your Honor, the visual that you saw  
11 showed the wall down. But the testimony of Professor Noll was  
12 not to that effect. Clearly, Your Honor, we have two  
13 positions with respect to the impact of middleware. Microsoft  
14 is defining middleware in such a way that it is an operating  
15 system which engenders frankly the confusion the jury feels  
16 because they're saying --

17 THE COURT: The jury -- the fact of the matter is  
18 the jury is just confused. I mean, I'm not sure that I  
19 shouldn't revisit my decision because I was basing upon the  
20 fact that the jury would have its head on straight. But it  
21 doesn't, obviously doesn't have its head on straight.

22 MR. JOHNSON: Your Honor, if I could, if I may,  
23 just to end this. As we said at the time, Your Honor would be  
24 directing a verdict on that issue.

25 THE COURT: That's true.

1 MR. JOHNSON: And I don't think that that would be  
2 appropriate.

3 THE COURT: It's not the time to direct a verdict  
4 yet.

5 MR. JOHNSON: Thank you, Your Honor.

6 MR. TULCHIN: Your Honor, if I could point out the  
7 testimony that I was referring to. On Pages 1925 to 1926  
8 Professor Noll says:

9 That the middleware program has to be present on  
10 all or nearly all of the PCs that use the operating system to  
11 which the application otherwise would be written, and that the  
12 middleware program has to be cross-platform.

13 With respect to Mr. Alepin, and I'll just stick  
14 with him for a moment on this third requirement, Mr. Johnson  
15 read an answer that he gave on Page 1396 that it has to be  
16 software that exposes APIs that encapsulate meaningful  
17 functionality. And on cross at Page 1461 to 1462, Mr. Holley  
18 asks:

19 In fact, there are literally thousands and  
20 thousands of software products that expose some APIs that can  
21 be called by other software products. Isn't that right, sir?

22 Answer. Absolutely. And in part that was the  
23 purpose of the refinement in the definition of middleware,  
24 that they have -- there has to be some other thing that they  
25 do other than just expose APIs. Otherwise, it's just -- it's

1 a program with APIs.

2 And Mr. Holley went on:

3 So it's not enough to say that something is  
4 middleware, and it isn't even enough to say that something is  
5 middleware that exposes some APIs or that software product  
6 that referring to to constitute any sort of a threat to  
7 Windows; isn't that right?

8 Answer. There's got to be more, yes. There's got  
9 to be more than just the exposure of APIs or the encapsulation  
10 of meaningful abstraction of APIs. You need more.

11 So if I can back up for a second --

12 THE COURT: And that was Alepin or Holley?

13 MR. TULCHIN: I'm sorry?

14 THE COURT: Who said you need more?

15 MR. TULCHIN: Yes.

16 THE COURT: What's more?

17 MR. TULCHIN: That was Mr. Alepin. That you need  
18 more. There's got to be more.

19 The point I'm making, Your Honor, is that the first  
20 two requirements are not in dispute; has to be available, has  
21 to be cross-platform. Available on a number of alternative  
22 operating system platforms. That's -- I'm reading Dr. Noll.  
23 The second requirement is that it has to be available on all  
24 or nearly all of the PCs.

25 And as to the third, we think that our letter of

1 this morning is direct, that the definition in the government  
2 case was adopted in Paragraphs 44 and 48 of Novell's  
3 complaint.

4 THE COURT: But that would be the equivalent of a  
5 directed verdict.

6 MR. TULCHIN: Your Honor, I think on that theory,  
7 it probably would, although the jury is so confused I'm not  
8 sure what they would do.

9 But even if you went with what Mr. Alepin says that  
10 the third requirement is that the middleware expose a  
11 sufficient number of APIs to be a threat to Windows that it's  
12 not enough for middleware simply to expose some APIs, that  
13 there has to be more.

14 THE COURT: Let me ask you this. I mean, you've  
15 got your point on the directed verdict, and frankly, I think  
16 you might be right. I think if the jury came back saying they  
17 accepted the middleware claim but not the franchise claim, it  
18 is within my power to still grant you a directed verdict. I  
19 mean, it's within that -- whether that's right or wrong we'll  
20 hear argument on it, but you could be right about that, and I  
21 hear you. I mean, I frankly don't see that -- but that's  
22 another issue than what I should tell the jury.

23 What about --

24 MR. SCHMIDTLEIN: Your Honor, not to complicate  
25 things further, but actually technically, does a PC operating

1 system include middleware? Their position is that  
2 Internet Explorer is part of the operating system. They have  
3 said that over -- that is their position. Internet Explorer  
4 is part of Windows. Internet Explorer is middleware.

5 MR. TULCHIN: Well, we don't agree with that, Your  
6 Honor, and it's not even relevant.

7 THE COURT: I'm not going there.

8 My -- what about adding, because the jury is  
9 obviously hung up about that, a definition of middleware that  
10 says, at the least, middleware must, then the things that Noll  
11 said, that it's got to be on virtually all operating systems?  
12 And secondly, has to be cross-platform, third -- at the least;  
13 and, thirdly, it has to expose enough APIs to constitute  
14 whatever that language was, encapsulate -- what is it?  
15 Substantial functionality or something like that?

16 MR. TULCHIN: Well, I think at the very least we  
17 should say that, Your Honor. I think it would be helpful for  
18 the jury. He said there's got to be more than just the  
19 exposure of the APIs.

20 THE COURT: Well, before the more. The definition  
21 he gave on direct, because I don't know what the more is. He  
22 says more, actually, but maybe he encapsulates --

23 MR. HOLLEY: Your Honor, what he clearly meant by  
24 more, if you continue reading, because I then took him through  
25 every one of the alleged middleware products, and he said no,

1 there are no applications written to that. So what he meant  
2 by more is elucidated by the continuation of the cross. And  
3 by the end of the cross, it was clear what he meant was  
4 exactly what Novell said in Paragraphs 44 and 48 of the  
5 complaint, which is you have to, as Your Honor said, it's  
6 obvious as a matter of law logic, you have to have enough APIs  
7 to serve as an alternate development platform to Windows.  
8 Otherwise, the middleware --

9 THE COURT: If that's right, the jury shouldn't  
10 even have the question. Wouldn't you agree, Mr. Holley?

11 MR. TULCHIN: We agree with that, Your Honor.

12 THE COURT: And I know that. But I'm not -- the  
13 jury does have the question. It seems to me, and you could be  
14 right. I'm not saying you're right or you're wrong. But I  
15 understand your position, and I'm inclined to think you're  
16 right. But I don't -- it seems to me that where we are at  
17 this stage of the litigation it would be to give the  
18 definition which incorporates the two things Novell agrees to  
19 and then whatever it was that he testified to on direct, it  
20 was something like encapsulate substantial functionality,  
21 something like that.

22 MR. TULCHIN: And that's what I would suggest to  
23 Your Honor, to say at the very least after we talk about the  
24 first two requirements, when we get to the third to say that  
25 at the very least, middleware must expose a sufficient number



1 of APIs to be a potential threat to Windows.

2 And maybe just leaving it vague that way. I mean,  
3 that, after all, is what -- there can't be any dispute about  
4 that. That's what they say. That's the idea. And without  
5 going further, I agree with you that if you --

6 THE COURT: I hear you. Okay.

7 MR. SCHMIDTLEIN: Your Honor, this is obviously a  
8 very serious and controversial issue. They're making  
9 representations about what they think our experts say.

10 THE COURT: They're quoting from testimony.

11 MR. SCHMIDTLEIN: I understand. But they're  
12 quoting from parts of the testimony. I don't think we  
13 entirely agree --

14 THE COURT: What's wrong -- with your theory, why  
15 shouldn't it be that middleware must, one, be cross-platform;  
16 two, whatever it is, whatever the language is --

17 MR. TULCHIN: Must be present on all or nearly all  
18 of the PCs.

19 THE COURT: Must be present on all or nearly all  
20 PCs?

21 MR. TULCHIN: That use the operating system. I  
22 would say that use Windows. That's at the very least what  
23 Professor Noll said.

24 THE COURT: They use Windows? Why they use  
25 Windows?

1 MR. TULCHIN: I mean, arguably it's on all or  
2 nearly all PCs. That's what I think --

3 THE COURT: Okay. All PCs.

4 MR. TULCHIN: That's what I think their theory is.

5 THE COURT: And then, three, must expose sufficient  
6 APIs as to threaten Microsoft's monopoly in the PC operating  
7 system market.

8 MR. TULCHIN: Your Honor, that seems to me to be a  
9 sensible answer to the question. I don't think it goes far  
10 enough for purposes of the theory that Novell has. But we  
11 would -- in the interest of trying to eliminate some of the  
12 confusion among jurors, we would be amenable to that  
13 instruction without waiving our position that, indeed,  
14 Novell's theory requires more than that. I want to be clear  
15 that we're not waiving that. And that --

16 THE COURT: No. No. Absolutely.

17 MR. TULCHIN: And that we still have the argument.

18 MR. SCHMIDTLEIN: Your Honor, my point is simply  
19 this. The question that was asked was, do PC operating  
20 systems include middleware that supports applications or apps?  
21 This definition of middleware obviously is going well beyond  
22 answering this question. I understand everybody --

23 THE COURT: Oh, no. I'm not buying that one.  
24 They're confused, and this clearly shows -- they should have a  
25 definition of middleware. And so I don't -- this does not

1 fall within the two questions of yesterday. So let me --

2 MR. JOHNSON: Your Honor, may I respond briefly?

3 THE COURT: Sure.

4 MR. JOHNSON: Professor Noll does not agree with  
5 the second requirement which you are putting in this  
6 definition. He does not agree with it. What he said was,  
7 Your Honor, Mr. Tulchin asked him a series of questions about  
8 middleware, and he went through the three requirements that  
9 Microsoft likes, and I will get his testimony for you. And he  
10 said, what you're describing is a definition that would reduce  
11 Windows to a commodity; in other words, would destroy the  
12 applications barrier to entry.

13 MR. TULCHIN: It's not true, Your Honor.

14 MR. JOHNSON: And the wall would be completely  
15 down. That's what Professor Noll stated. And then he went on  
16 to say, I'm getting the testimony right now, Your Honor. He  
17 went on to say that it is a continuum. The one thing he did  
18 agree to, Your Honor, he agreed that the middleware needed to  
19 be cross-platform. But with respect to the number of PCs he  
20 was on, number two, and with respect to its abilities to  
21 support full service, whatever the phrase is they use, he said  
22 no, that's not how it works. That if a middle -- if  
23 applications are written some portion of which to the  
24 middleware, that that would reduce porting costs and will  
25 reduce the applications barrier to entry, and that it is a

1 continuum. Obviously it has to be significant. It can't be  
2 de minimis. But it is simply not true to say that  
3 Professor Noll agreed that it had to be on all PCs or the  
4 majority of PCs.

5 He said, and I asked the question, Your Honor on  
6 Page 1958:

7 It was quite a bit of cross-examination with  
8 respect to whether or not full-featured applications had been  
9 written to middleware during various time periods, and I ask  
10 you, sir, if applications were writing to middleware that  
11 still had relying in some senses on operating systems beneath,  
12 does that have any affect on increasing competition?

13 Answer. The effect on competition in the operating  
14 system market depends on the degree to which the middleware is  
15 reducing the porting costs of becoming cross-platform, that if  
16 middleware is exposing a certain number of APIs, you can write  
17 to those APIs and be on an access function in multiple  
18 operating systems. You may have to write additional codes  
19 separately for each operating system. But if the middleware  
20 reduces the amount of code you have to write to be  
21 cross-platform, then it makes being cross-platform more  
22 attractive. And obviously, it's a continuous relationship  
23 that the higher the fraction of functions that can be accessed  
24 through the middleware, the more the porting costs have been  
25 reduced and, hence, the more the middleware affects

1 competition.

2 So that's why it's a continuous process. It's not  
3 an either/or process. Middleware can begin to have an affect  
4 on competition in the operating systems market if it starts to  
5 be used because it's reducing porting costs and, therefore,  
6 increasing the number of applications that are cross-platform  
7 and thereby reducing the application barrier to entry.

8 So, Your Honor, Professor Noll testified  
9 unambiguously that it is a continuum. It is not an either/or.  
10 The more middleware is exposed on more PCs, not on all PCs or  
11 most PCs, but on more PCs, and the more applications use that  
12 middleware to port in part or in whole, in other words, reduce  
13 their dependency on the underlying Windows, that reduces  
14 porting costs and, therefore, increases competition in the  
15 PC operating systems market.

16 MR. TULCHIN: Your Honor, that --

17 MR. JOHNSON: So if you're going to accurately  
18 provide the jury with what it at least has to be, that would  
19 be something that you would need to take into consideration.  
20 And I thought, Your Honor, frankly, that because this issue is  
21 clearly highly contested --

22 THE COURT: We won't go there. It's contested  
23 right now. I'm not sure you're even here if I buy your theory  
24 of the events -- I mean your theory, because we're here  
25 because you got limitations tolled, which was based on the

1 government's case.

2 MR. TULCHIN: Your Honor --

3 MR. JOHNSON: Yes, Your Honor. And I believe that  
4 our theory is entirely consistent with the government case.  
5 You may recall, Your Honor, that neither Java nor Netscape had  
6 sufficient APIs to meet the requirements being put forth now.  
7 And what they were talking about in that findings of fact 28  
8 is that if ultimately, if ultimately middleware achieved this  
9 higher goal, they could reduce Windows to a commodity. That  
10 never happened. But it was sufficient in the government case,  
11 even though Netscape and Java would not have met the  
12 definition posed by Microsoft here, it was sufficient in that  
13 case to find that they were a threat and that they had the  
14 potential -- sorry, Your Honor. I had this on in case of  
15 another note.

16 THE COURT: Don't worry about that.

17 MR. JOHNSON: Have the potential --

18 THE COURT: Do you want to see if it's important?  
19 The jury is not here.

20 MR. JOHNSON: I had it on because I was obviously  
21 waiting for notes, so I needed to keep my phone on. I forgot  
22 to turn it off when I came in this morning.

23 THE COURT: Okay. Let me --

24 MR. JOHNSON: So --

25 THE COURT: I want to hear from Mr. Tulchin. I

1 understand your position.

2 Mr. Tulchin?

3 MR. TULCHIN: Mr. Johnson, of course, is correct  
4 that Java and Netscape didn't meet the definition of  
5 middleware as it was used in the government case. It didn't  
6 because of the edentulous causation test.

7 THE COURT: Exactly.

8 MR. TULCHIN: And the Court of Appeals was very  
9 clear, I think Judge Jackson was, as well, that these were  
10 nascent threats. They were newborn threats. They couldn't  
11 affect Microsoft's position in the PC operating system market,  
12 precisely because they didn't meet the third requirement here.  
13 But in a government enforcement case, of course, the attorney  
14 general, the Department of Justice --

15 THE COURT: I understand. I understand.

16 MR. TULCHIN: But there's a second point, Your  
17 Honor. Mr. Johnson's statement about Dr. Noll's question on  
18 redirect didn't go to the first of the two requirements, the  
19 first two, I should say, of the three requirements. The first  
20 one that it has to be cross-platform. He said this on 1925 to  
21 1926. It has to be cross-platform, and it has to be available  
22 on all or nearly all of the PCs.

23 So that part of it should be clear. I don't think  
24 there can be any dispute. I believe that Mr. Johnson used a  
25 slide on the direct examination of Professor Noll which says

1 that. And certainly -- and the answers at Page 1925 Line 25  
2 through 1926 Line 13, that's what Professor Noll said.

3 So I do -- the response, Your Honor, that you  
4 propose to give to the jury's question seems to me to be a  
5 reasonable response. Again, our position is that it doesn't  
6 fully reflect the proper --

7 THE COURT: No. Your position is simply that they  
8 cannot prevail on the middleware claim. I mean --

9 MR. TULCHIN: Yes, but --

10 THE COURT: And I understand it, but we're not  
11 there.

12 MR. TULCHIN: For present purposes, Your Honor, we  
13 do think the jury should be told something so that some of  
14 this confusion can be, I hope, ameliorated.

15 THE COURT: What does it mean to be on all or  
16 nearly all PCs?

17 MR. TULCHIN: Well, the theory here of middleware,  
18 which, of course, you know, it's an interesting theory, is  
19 that you can't threaten Windows, you can't threaten Windows  
20 market share or position in the market unless the middleware  
21 is available on all or almost all, nearly all of the PCs.  
22 Without that, something like WordPerfect or PerfectOffice  
23 could not become a device by which millions of consumers would  
24 be transferring to Linux or OS/2 or some other operating  
25 system. It's only when it's so pervasive that the many, many



1 millions and millions of users of Windows worldwide would have  
2 some easily portable way, to use the phrase that  
3 Professor Noll used, some easy access to some competing  
4 operating system.

5 If, for example, PerfectOffice has 8 percent of the  
6 market, which is all it had before Windows 95 came out, that's  
7 what Professor Noll said, if it has 8 percent of the market,  
8 it cannot by definition be sufficiently ubiquitous to allow  
9 users to move to Linux. They have to go buy Linux or OS/2.

10 THE COURT: Well, again for free. That's another  
11 issue.

12 MR. TULCHIN: Well, not really, Your Honor. There  
13 was a version of Linux available for free, which no one really  
14 used. I mean, almost no one. No one obviously is too strong.  
15 And there were versions of Linux that were being sold by  
16 companies like SUSE Linux for, I think, 59.95 at the time  
17 that gave users a little more of the functionality that they  
18 were used to seeing in an operating system from PCs. So there  
19 was a version of Linux that was stripped down that was for  
20 free that almost no one chose.

21 In any event, Your Honor, I mean, the first two of  
22 the three requirements come from Professor Noll. And I just  
23 don't know how we could be debating those two. I understand  
24 how we can be debating the third, and I agree that there was  
25 testimony that wasn't crystal clear, although Mr. Alepin

1 certainly says it has to be more. It's not just exposing APIs  
2 so that a dental practice could use WordPerfect, which was  
3 conceivable. Could WordPerfect like any other form of  
4 application on top of Windows expose some API?

5 And I believe it's correct that a dental practice  
6 could use a piece of software written to call the APIs of  
7 WordPerfect to allow the dentist to send out automatic  
8 reminders to his patients or her patients of appointments  
9 upcoming. That in itself, of course, is no threat to Windows  
10 because it's such a narrow use of the APIs of WordPerfect that  
11 it doesn't comprise a sufficient threat to Windows and really  
12 no threat to Windows. You would still need the operating  
13 system. You're not commoditizing it through a dental practice  
14 reminder application.

15 So, I mean, the whole theory here is that it has to  
16 be broad enough so that many, many, millions of users around  
17 the world would be switching by the convenience of having  
18 WordPerfect or PerfectOffice available on two platforms or  
19 more, let's say Windows, let's say OS/2 or Linux, and you  
20 could easily move to that other platform. And again, it can't  
21 be 1 percent or 1/2 percent of the users in the world, it has  
22 to be all or nearly all. And that's the only way that Windows  
23 could be threatened at all. That's exactly what Noll said.

24 THE COURT: Yes, Mr. Johnson.

25 MR. JOHNSON: That is exactly what Dr. Noll did not

1 say. In fact, Mr. Tulchin was going along this same line of  
2 questioning at Page 1925. And he's talking about the  
3 conditions, these first two conditions, not the third. And  
4 Professor Noll answers:

5 You're overstating what I said. I said this  
6 alternative could be an attractive option if two conditions  
7 were met.

8 Fair enough.

9 That is what I said.

10 Fair enough. I'm with you.

11 And then he goes on to discuss those two  
12 conditions.

13 And the second condition being that the middleware  
14 program has to be cross-platform; correct?

15 Yes.

16 It has to be available on a number of alternative  
17 operating system platforms. And that's different from being  
18 on most or all PCs.

19 He says, yes.

20 Correct.

21 Yes.

22 Question. Okay.

23 Answer. Notice, although -- and he's talking about  
24 his report, this is Professor Noll. Notice, although, at the  
25 end it says this is a condition for eliminating the

1 applications barrier to entry commoditizing the operating  
2 system. It is not correct to say that something less than  
3 that couldn't increase competition. It is just that this last  
4 sentence is crucial. That's about eliminating the  
5 applications barrier to entry.

6 Professor Noll was absolutely clear --

7 MR. TULCHIN: No.

8 MR. JOHNSON: -- in what he said, that those  
9 conditions are only necessary to eliminate the applications  
10 barrier to entry, not necessary to increase competition. And  
11 he said this over and over again. And I read Your Honor  
12 before the continuum testimony and how as more applications  
13 are written to part of middleware it reduces porting costs and  
14 thereby increases competition.

15 So to state to the jury that it has to be at least  
16 those two conditions -- I agree it has to be cross-platform.  
17 I certainly agree to that. But to state that it has to be on  
18 all PCs or almost all PCs and it has to write -- you have to  
19 be able to actually be an operating system, again, as I said,  
20 that would be directing a verdict on this issue, and it would  
21 be inconsistent with Novell's position in this case, which is  
22 as Your Honor said, maybe we're wrong, but we have given this  
23 issue to the jury appropriately, I think, Your Honor, after  
24 careful consideration that you gave. And to be sitting here  
25 for the --

1 THE COURT: I really thought -- I thought before  
2 the only dispute was about the third one.

3 MR. TULCHIN: That was the only dispute, Your  
4 Honor.

5 MR. JOHNSON: No, Your Honor. Both the second and  
6 third are disputed. The first is not disputed. I certainly  
7 agree with that.

8 THE COURT: No. No. I'm just telling you what my  
9 understanding was. I understood that we were only talking  
10 about the third.

11 MR. JOHNSON: That's because Microsoft has been  
12 saying that over and over and over again --

13 THE COURT: Well, be that as it may, okay.

14 MR. JOHNSON: -- without reference to what  
15 Dr. Noll actually said.

16 MR. TULCHIN: My question, Your Honor, on 1925 was  
17 whether the conditions that I was talking about could become a  
18 threat to Windows. The question was not about eliminating the  
19 barrier, the question was becoming a threat. And he said all  
20 or nearly all. So --

21 THE COURT: Where we are, and suppose -- I'm just  
22 trying to answer the question, suppose the answer was, no.  
23 Quote, middleware must be cross-platform. And just forget  
24 two. And, two, expose sufficient APIs to whatever the  
25 language Mr. Alepin was exposed to encapsulate substantial

1 functionality --

2 MR. JOHNSON: Meaningful functionality is what you  
3 said.

4 THE COURT: -- meaningful functionality and  
5 threaten Microsoft's monopoly in the PC operating system  
6 market. Just make -- the question of threat is still there  
7 that it has to be nearly ubiquitous arguably, but that's  
8 something for the jury to decide. But just to say, no.  
9 Middleware is software that is, one, cross-platform; and, two,  
10 exposes sufficient APIs to encapsulate meaningful  
11 functionality and threaten Microsoft's monopoly in the PC  
12 operating market.

13 I understand that Microsoft objects to that on the  
14 grounds that basically I should direct a verdict and take the  
15 whole concept of middleware out of the case, which is a fair  
16 position. But short of that, the answer to the jury's  
17 question, short of direct the verdict, doesn't that get us  
18 where we need?

19 MR. TULCHIN: Your Honor, when you say  
20 cross-platform, could you at least say, in the sense that it  
21 runs on multiple operating systems, so that they understand  
22 what we're talking about here?

23 THE COURT: Okay. Cross-platform, i.e., run on  
24 multiple operating systems; and, two, expose sufficient APIs  
25 to encapsulate meaningful --

1 MR. JOHNSON: Functionality.

2 THE COURT: -- functionality?

3 MR. JOHNSON: Yes, Your Honor.

4 THE COURT: And threaten Microsoft's monopoly in  
5 the PC operating system market.

6 I'm just trying to move the jury along from that.  
7 And I understand Microsoft's position. Look, it shouldn't  
8 even be in the case because it doesn't expose sufficient APIs  
9 to -- it's not ubiquitous or there's no evidence that it was  
10 nearly going to be nearly ubiquitous, and that's a fair  
11 position. That's something that I've -- right now I've got to  
12 answer the question.

13 So the answer would be, no. Quote, middleware must  
14 be cross-platform, i.e., run on multiple operating systems;  
15 and, B, expose sufficient APIs to encapsulate meaningful  
16 functionality and threaten Microsoft's monopoly in the  
17 PC operating system market.

18 Nobody likes it. Nobody's satisfied with it, but  
19 I'm trying to -- is there any problem with that?

20 MR. JOHNSON: Your Honor, obviously we would like  
21 to reserve an exception to it.

22 THE COURT: Why?

23 MR. JOHNSON: Because we don't think you should be  
24 defining to the jury --

25 THE COURT: Okay.

1 MR. JOHNSON: I thought your original --

2 THE COURT: Oh, no. Mr. Schmidtlein's point to ask  
3 a question. That's right.

4 MR. JOHNSON: Yeah. So we would except to it on  
5 that basis.

6 THE COURT: Sure.

7 MR. JOHNSON: But it's certainly better than the  
8 alternative.

9 MR. TULCHIN: Well, for present purposes, I think  
10 we should go with that. Our position is --

11 THE COURT: No, I understand. I'm just trying --

12 MR. TULCHIN: Let's go with that for now.

13 THE COURT: Is it platformed or platform without  
14 the ed?

15 MR. HOLLEY: Platform.

16 MR. AESCHBACHER: Platform.

17 MR. TULCHIN: No ed. Sometimes it appears that  
18 way, but I think it's better to just have it cross-platform  
19 forward.

20 THE COURT: But sometimes I say Namestake.

21 (Time lapse.)

22 THE COURT: I can't even write it, answer it. I'm  
23 sure glad I'm not a patent lawyer. Can you imagine trying to  
24 translate these technical things into English for them and  
25 everybody attacks it?



1 MR. JOHNSON: It keeps a lot of lawyers busy, Your  
2 Honor.

3 THE COURT: I picked a good job.

4 Okay. This is the answer I propose one more time.

5 No. Quote, middleware, unquote, one, must be  
6 cross-platform, i.e., run on multiple operating systems; and,  
7 two, must expose sufficient APIs to encapsulate meaningful  
8 functionality and threaten Microsoft's monopoly in the  
9 PC operating system market.

10 I understand, and it's fair. But I just want, so  
11 the record is clear, Novell objects on the ground that I  
12 shouldn't define middleware at all. Microsoft objects on the  
13 ground that I should include something about ubiquity, and,  
14 frankly, I guess it objects on the grounds that I shouldn't  
15 define middleware at all but rather should take the middleware  
16 issue from the jury because there is insufficient evidence  
17 that Novell's product in question expose sufficient  
18 functionality so as to threaten -- I forget what the magic  
19 language is, but it's out of the findings of fact, but  
20 essentially the product in question, Novell's product in  
21 question simply in no sense could constitute middleware. And  
22 that's fair, and that's something depending on the jury's  
23 verdict I'll have to deal with in due course.

24 But subject to those exceptions, is this language  
25 okay?

1 MR. JOHNSON: Yes, subject to the exceptions.

2 THE COURT: Subject to the exceptions. And I have  
3 no quarrel with your exception. I'm just giving what I'm  
4 giving.

5 MR. JOHNSON: Just trying to make the record, Your  
6 Honor.

7 THE COURT: I hate to look over somebody's  
8 shoulder.

9 THE CLERK: No. I don't mind at all.

10 THE COURT: And we'll wait until the next question  
11 comes out to talk about it.

12 (Time lapse.)

13 THE COURT: One more time just so I've got it  
14 right.

15 Answer. No. Quote, middleware, one, must be  
16 cross-platform, i.e., run on multiple operating systems; and,  
17 two, must expose sufficient APIs to encapsulate meaningful  
18 functionality and threaten Microsoft's monopoly in the  
19 PC operating system market.

20 MR. HOLLEY: Yes, Your Honor.

21 THE COURT: And that's given with the exceptions  
22 which I understand.

23 THE CLERK: Operating systems. What is this?

24 THE COURT: Market.

25 And while I'm here, we won't give it now, but at

1 some appropriate time, does Novell have, this morning, have  
2 objection to me giving what seems to me to be a rather mild  
3 Allen charge? I'm having my law clerks research what an Allen  
4 charge in civil cases in the 10th Circuit is. But this one  
5 seems to me to be relatively mild.

6 MR. JOHNSON: No objection, Your Honor.

7 THE COURT: Good. Should I do that now?

8 MR. SCHMIDTLEIN: It's a little early.

9 THE COURT: We'll wait for the next question.

10 MR. JOHNSON: I think we'll get one, Your Honor.

11 THE COURT: I think we will, too. Thank you.

12 (Recess.)

13 THE COURT: Good afternoon.

14 MR. HOLLEY: Good afternoon, Your Honor.

15 THE COURT: This one I think I can answer, as

16 follows:

17 If you have a no answer to either of the two  
18 sub-questions in Question 4, your answer to the entire  
19 Question 4 must be no.

20 MR. TULCHIN: Agreed, Your Honor.

21 MR. JOHNSON: Your Honor -- sorry.

22 MR. TULCHIN: Sorry. I wrote out something that  
23 amounts to I think the same thing. I'll hand it up. I don't  
24 think it's all that different.

25 THE COURT: That's fine. It's probably a little

1 better.

2 MR. JOHNSON: You know, Your Honor, looking at the  
3 question, I don't know obviously which part they think they've  
4 answered yes to and which part they haven't.

5 THE COURT: I wouldn't speculate they think  
6 anything.

7 MR. JOHNSON: That's the difficulty. But my  
8 comment is 4 seems to have two parts.

9 THE COURT: Yeah, it does.

10 MR. JOHNSON: And 5 doesn't.

11 THE COURT: That's right. And that's because I  
12 thought I stated -- I thought that Microsoft's position was  
13 that you have to show both harm to competition and some  
14 significant contribution. I thought your position was that  
15 you did not have to show harm to competition, so I left it out  
16 of 5.

17 MR. JOHNSON: And the reason is capable standard.  
18 That's true. That was our position.

19 THE COURT: Exactly.

20 MR. JOHNSON: I agree. I think you have to.

21 THE COURT: Okay. So actually --

22 MR. JOHNSON: I'm there with standard.

23 THE COURT: It's their theory of the case, so --

24 MR. JOHNSON: Yeah.

25 THE COURT: Let me -- did I give you -- I think

1 Mr. Tulchin's is a little better than mine, which is basically  
2 the same.

3 In order to answer yes to Question 4, you must find  
4 that Novell has proven both parts of Question 4. If you  
5 believe that either part of Questions 4 is no, then your  
6 answer in the verdict form should be no as to Question 4.

7 Okay.

8 MR. JOHNSON: I think that's a little more than you  
9 need, Your Honor, but okay.

10 THE COURT: Well, it just -- it probably is.

11 MR. JOHNSON: I don't think you have to tell them  
12 two or three times.

13 THE COURT: If you believe that the answer to --  
14 I'll say what I said. If you believe, which was, Theresa, if  
15 you have a, quote, no, unquote, answer to either of the two  
16 sub-questions in Question 4, your answer to the entire  
17 Question 4 must be no.

18 MR. JOHNSON: Thank you, Your Honor.

19 (Recess. )

20 THE COURT: Good afternoon.

21 MR. HOLLEY: Good afternoon, Your Honor.

22 THE COURT: I guess the time has come for the  
23 charge that we discussed this morning.

24 MR. TULCHIN: I think so, Your Honor. That's what  
25 I would suggest is that you give the charge that we sent in

1 this morning to bring some assembly to it.

2 THE COURT: I'm sure -- I just want to make it  
3 clear that what the note says is, may I talk to Theresa?  
4 Thank you. It has to do with a hung jury.

5 I'm sure you agree with me this is not a poor  
6 reflection on Theresa at all. I think that it's perfectly --  
7 it's nice she's established a nice relationship with them, and  
8 it's a natural thing for them to ask. But let's bring them  
9 in, and I'll give the jury the --

10 THE CLERK: Are you ready right now?

11 THE COURT: I'm as ready as I'll ever be. I'm just  
12 getting to know you guys.

13 (Whereupon, the jury returned to the court  
14 proceedings.)

15 THE COURT: Ladies and gentlemen, it's come to my  
16 attention that you may be having some difficulty in reaching a  
17 unanimous agreement. That's not unusual. Sometimes after  
18 further discussions jurors are able to work out their  
19 differences and agree. This is as you know an important case.  
20 All cases are important, but this one is lengthy, shall we  
21 say. If you should fail to agree upon a verdict, the case is  
22 left open and it may be tried again. Obviously another trial  
23 would require the parties to make another large investment of  
24 time and effort, and there's no reason to believe that the  
25 case can be tried by either side better or more exhaustively

1 than it's been tried before you.

2 It is your duty as jurors to consult with one  
3 another and deliberate with a view toward reaching an  
4 agreement if, and let me add, this is important, if you can do  
5 so without violence to your individual judgment. Each of you  
6 must decide the case for yourself. But as I said before, do  
7 so only after an impartial consideration of the evidence with  
8 your fellow jurors. In the course of your deliberations, do  
9 not hesitate to reexamine your own views and change your  
10 opinion if you are convinced it is erroneous. But do not  
11 surrender your honest conviction as to the weight of the  
12 evidence solely because the opinion of your fellow jurors or  
13 for the -- merely for the purpose of returning a verdict.

14 What I've just said is not meant to pressure you  
15 into agreeing on a verdict. Take the time you need to discuss  
16 this. There's not -- there is not an urgency or hurry, but I  
17 will ask you that you now retire once again and continue your  
18 deliberations with these additional comments in mind to be  
19 applied, of course, in conjunction with all of the  
20 instructions that I previously gave you. Thank you.

21 I'll stay here with counsel for a minute.

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

23 THE COURT: Please be seated. I guess I will not  
24 be conducting a hearing in Baltimore tomorrow.

25 I don't ask you all to agree to this at all.

1 Obviously I don't have anything to do, so I've been thinking  
2 about this. I actually thought about this last night. And I  
3 I've had my law clerks do some research on less than a  
4 unanimous verdict, and they haven't found anything.

5 Heaven knows what's happening. I don't know. I  
6 mean, one could infer one thing, and I'm not sure that's the  
7 proper inference. There are other inferences they try to find  
8 something that they could agree upon wherever they found it on  
9 the verdict form and couldn't find it.

10 I hesitate even to suggest this to you all, and I'm  
11 not twisting your arms. And there's no question that I think  
12 we would be making new law. But this is a very, very huge  
13 investment that you all put in this case, and that is to  
14 somehow try to come up with a solution which I either will  
15 impose upon you, which I don't think I will do, or with your  
16 agreement, which I don't expect to be forthcoming, to take  
17 less than a unanimous verdict. And let me tell you my  
18 thinking in that regard.

19 We have 12 jurors. All we need is six. In secular  
20 terms, we could ask jurors to abstain. I will tell you, I  
21 think I mentioned once before I went to a Quaker school, and  
22 I'm probably the only Quaker that tried to join the Marines.  
23 But I do have Quaker as my background. And they have -- and I  
24 do know from my experience that they have, and I think I'd  
25 like it better because more than abstention, it is stepping



1     aside from a consensus decision if you simply can't join in  
2     the consensus and act on the part of the person who does it  
3     who -- I came across as a young man when we were, frankly,  
4     incorporating friend school separately from the Quaker  
5     meeting, which was a big step for the meeting, and there were  
6     old timers that didn't think it should be done. But they  
7     realized that what was being proposed probably would be in  
8     everybody's interest, and they may be standing against a good  
9     decision and against the times. But their own royalties made  
10    it impossible for them to accept incorporation of a school  
11    separate from the meeting. So several stepped aside from the  
12    decision and allowed the decision to go forward by under  
13    Quaker procedure had to be a consensus decision. And they  
14    actively said, we will step aside. We recognize, we will step  
15    aside from the decision, and so be it.

16             I have no idea what's going on. I have no idea  
17    what the vote is. Everybody got's their risk in the case, and  
18    it existed throughout. And a way to do this would be to ask  
19    if the jurors would be willing, if there's a strong consensus  
20    on the other side, to be able to step aside and let the  
21    verdict be rendered without, you know, without them joining in  
22    it. It would leave the jurors' the decision to do that.  
23    it's -- I have no idea what it is that's motivating them. I  
24    don't know whether it's royalty to a -- it could be that a  
25    substantial number of jurors have decided Microsoft is right

1 and others out of loyalty to WordPerfect and Novell said, no,  
2 we can't -- we don't want to be associated with the  
3 pro-Microsoft verdict. It could be as to questions, the  
4 sequence of questions might be read as saying that the  
5 majority of the jurors are for the plaintiff. And yet there's  
6 just one holdout or two holdouts saying no, Microsoft,  
7 whatever.

8           So I'm not asking you to make -- to address it now.  
9 All you have to do is tell me no, and I probably won't do it.  
10 But it occurs to me we do have legally the possibility of  
11 doing that since really we only need six people to return the  
12 verdict and we have 12. I would not personally be comfortable  
13 with the process, which as I say in secular terms is basically  
14 asking the jurors to abstain, although I think there's a  
15 certain more active involvement of a juror stepping aside from  
16 a verdict. I would not be comfortable if it were more than  
17 three, to tell you truth. I've been trying to think this out.  
18 To have six step aside or abstain and leave it up to six, I  
19 would not be comfortable with that. If it was three, I think  
20 probably the maximum I would be comfortable with is nine if  
21 three stepped aside.

22           I'm not twisting your arms, but I know you all have  
23 a lot invested in this case. I know that nobody has any idea  
24 what is going on in that juryroom and who runs the risk of  
25 what I'm suggesting, if anybody. I mean, it could be that

1 jurors don't want to step aside, and they say no. It's got to  
2 be a unanimous verdict, and that's my right.

3 But consider it, think about it, and I'm going go  
4 call Delta and tell them I'm not going home tonight. Thank  
5 you.

6 MR. HOLLEY: Thank you.

7 THE COURT: Maybe if I call Delta they'll come back  
8 with a verdict.

9 (Recess.)

10 THE COURT: Let me ask you something less radical.  
11 They've been here since 8 o'clock this morning. I'm  
12 wondering, I would think it would probably be a good idea for  
13 Theresa to send them a note saying, do you prefer to stop  
14 deliberating around 5 o'clock tonight or deliberating until  
15 7:00 or 8:00.

16 The reason the question should be asked now rather  
17 than waiting is because they order dinner now, and frankly,  
18 there's just so much one can do. And I'm not one - this is a  
19 business-like kind of thing. If they -- I don't want -- it  
20 seems to me -- frankly, it seems to me if I were them I would  
21 want to stop at 5:00 and come back tomorrow.

22 MR. TULCHIN: I think that's a good idea, Your  
23 Honor. I don't know if I'm reading this right, but there  
24 looked to be a couple of faces that were maybe tense, maybe  
25 close to upset when they came out. And I think it might be a

1 good idea to let them go at 5:00 and tell them to come back in  
2 the morning.

3 THE COURT: Give them the choice.

4 MR. TULCHIN: Or give them the choice.

5 MR. SCHMIDTLEIN: Yeah. I think there are some of  
6 them who depending -- they've got long drives.

7 THE COURT: Yeah. And I can say 5:00. I can say,  
8 would you prefer to stop now or deliberate until around 5:00  
9 or around 7:00 or 8:00? So maybe it's now. Now that I look  
10 at the clock it's been eight hours.

11 MR. SCHMIDTLEIN: Just have Theresa go back and ask  
12 them?

13 THE COURT: Yeah. Why don't you go back and ask  
14 them.

15 MR. SCHMIDTLEIN: Instead of bringing them out here  
16 and putting them on the spot.

17 THE COURT: I was going to send them a note.

18 THE CLERK: Do you want me to do a note or go in  
19 and talk to them?

20 THE COURT: Either. Go in and ask them.

21 MR. JARDINE: They love you, Theresa.

22 MR. JOHNSON: We love you, Theresa.

23 THE COURT: And we can talk about that other thing  
24 tomorrow morning. We don't have to -- I don't need your  
25 answer now. I realize it's radical. I don't think it's --

1 and there are risks. And frankly I think it's a good idea.

2 MR. SCHMIDTLEIN: I think it's at the very least we  
3 need to talk to our client about this.

4 THE COURT: Yeah. Talk to your clients about it.

5 MR. JOHNSON: By the way, Your Honor, do you have  
6 any law on this?

7 THE COURT: It's like my summary judgment opinion,  
8 which you'd like to keep sending back to me. My guess is  
9 there is no law on this. I mean, the law clerks found nothing  
10 on it. The only thing that occurred to me was we might be  
11 able to do it because it's less than --

12 MR. JOHNSON: The door's not closed, Your Honor.

13 THE COURT: But, no.

14 MR. JOHNSON: Thank you for the constructive  
15 suggestion.

16 THE COURT: And if you all can find something, feel  
17 free.

18 MR. SCHMIDTLEIN: No. I think Mr. Johnson's  
19 question really was obviously part of the evaluating --

20 MR. JARDINE: You better close that door.

21 THE COURT: Feel free. You won't offend me if you  
22 try to find something.

23 (Whereupon, the Judge closed the door.)

24 THE COURT: At some point, and again, you all can  
25 think about this tonight, we also ought to discuss the

1 schedule for tomorrow. I mean, I do have to go back this  
2 weekend. But as of right now, there are seats available,  
3 there's a 5:15 flight, which would mean I would have to stop  
4 here by around 4:00. But there also is a flight at 10 o'clock  
5 the next morning on Saturday, which I can take, which is  
6 probably the most realistic thing.

7 You all should consider -- whatever you decide on  
8 this less than unanimous thing as to whether or not -- I mean,  
9 they may just -- they may enter, of course, saying they just  
10 can't reach it. But one thing you may consider is whether or  
11 not to --

12 THE CLERK: They said they're making progress, and  
13 they would like to stay at least until 7:00. And they are  
14 ordering dinner right now.

15 THE COURT: That answers that. Okay. The question  
16 is if they don't make enough progress whether or not they  
17 should come back on Monday. Just think about that.

18 MR. TULCHIN: Well --

19 THE COURT: Obviously we have to hear what they  
20 have to say. But that is a possibility.

21 MR. TULCHIN: Right. Your Honor, what I was going  
22 to say is that it might be helpful if you want to catch a  
23 plane tomorrow to tell them before they leave tonight that the  
24 schedule tomorrow is that they would deliberate 'til 3:30.  
25 And if they don't reach a verdict we'll come back Monday.

1                   THE COURT: I can do that. But, in fact, I have --  
2                   you know, it really doesn't matter. I mean, I lose my hearing  
3                   tomorrow, anyway, in Baltimore, so I probably can stay until  
4                   10:00. I mean, I can -- but maybe we ought -- before the  
5                   weekend maybe we ought to tell them we're going to stop at  
6                   sometime tomorrow, anyway. It is a weekend.

7                   MR. TULCHIN: Right.

8                   THE COURT: I hope they are making progress.

9                   MR. HOLLEY: Thank you, Your Honor.

10                  (Recess.)

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1 STATE OF UTAH )

2 ) ss.

3 COUNTY OF SALT LAKE )

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

6 That as such reporter, I attended the hearing of  
7 the foregoing matter on December 15, 2011, and thereat  
8 reported in Stenotype all of the testimony and proceedings  
9 had, and caused said notes to be transcribed into typewriting;  
10 and the foregoing pages number from 5429 through 5475  
11 constitute a full, true and correct report of the same.

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

14 And hereby set my hand and seal, this \_\_\_\_ day of  
15 \_\_\_\_\_ 2011.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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