

1 THE COURT: Are we going to finish today?

2 MR. JOHNSON: We are, Your Honor. I just wanted
3 to say what my plan is is that after this witness, I would
4 like to tell the jury that we're closing, but we will, after
5 they depart, have some issues to deal with with respect to
6 exhibits.

7 THE COURT: That's appropriately fine.

8 MR. TULCHIN: Does that mean, Your Honor, that
9 Novell is resting? I don't know what closing is --

10 THE COURT: He means resting, but subject to me
11 ruling upon the exhibits.

12 MR. TULCHIN: I understand.

13 (Jury present)

14 THE COURT: I'm sorry for the delay. I made the
15 mistake of making a telephone call and I couldn't come up
16 with an easy solution.

17 Okay. Doctor, resume the witness stand.

18 We are going to make it today, aren't we,
19 Mr. Jardine?

20 MR. JARDINE: Absolutely, Your Honor.

21 BY MR. JARDINE:

22 Q When we took our break, Dr. Warren-Boulton, we were
23 talking about the fact that you and Professor Hubbard had
24 different approaches for how you constructed the model by
25 which you forecast revenue and profits, and that he looked

1 at separate market shares for each of the suites, word
2 processor and spreadsheet, correct?

3 A Correct.

4 Q And you combined them?

5 A Correct.

6 Q And the effect of that is significant in the way in
7 which the model works, right? It causes you and Professor
8 Hubbard to arrive at very different places?

9 A Correct.

10 Q Let me put up slide 28-B-2. And this is sort of where
11 you go in terms of how he arrives at a lost profits result
12 and you arrived at a \$378 million profit because of those
13 choices, among other things, correct?

14 A Yeah. I get an estimate of significant loss because of
15 Microsoft's actions and he gets a significant gain.

16 MR. JARDINE: I have no further questions, Your
17 Honor.

18 THE COURT: Thank you, Mr. Jardine.

19 MR. TASKIER: I'm settling in.

20 THE WITNESS: Mr. Jardine is the most popular man
21 in this courtroom at the moment.

22 MR. TASKIER: Let me gather myself.

23 REDIRECT EXAMINATION

24 BY MR. TASKIER:

25 Q First of recall, Dr. Warren-Boulton, I just want to say

1 that I can't imagine wanting to spend my birthday doing
2 this, but happy birthday anyway.

3 A Thank you very much.

4 Q Second of all, yesterday do you recall being asked
5 about the reduced -- one of the two reasons you had for the
6 damage to Novell, which was delay and reduced functionality
7 in their PerfectOffice Word Windows 95 product?

8 A Yes.

9 Q And do you recall testing that you relied on fact
10 witnesses for the reduced functionality?

11 A Yes.

12 Q And when you were discussing that -- when you and
13 Mr. Jardine were discussing that, His Honor mentioned that I
14 had said at a side-bar that you relied on Mr. Gibb's
15 testimony and His Honor commented that he didn't recall
16 that, but he took my word for it. But His Honor allowed us
17 to show the Gibb testimony and the Harral testimony, which I
18 believe you referred to, so that you can confirm that.

19 MR. TASKIER: Can you put up Mr. Gibb's testimony
20 at page 815.

21 BY MR. TASKIER:

22 Q So at 815 it says, during the development -- Question:
23 During the development process, did Novell consider cutting
24 functionality to help speed up the development of
25 PerfectOffice 95? Answer: Always. Like I say, when we're

1 talking about critical path, I guess I didn't mention that.
2 But certainly one of the things you do is you talk about
3 cutting the scope. So what you're going to deliver, but,
4 you know, we talked about it. File open had been a code
5 competency and something that people looked to for a long
6 time to be -- you know, this is -- WordPerfect is synonymous
7 with doing that well. And so customers who come from our
8 previous products would expect us to do very well in that
9 same area. So it was painful to consider, you know,
10 dropping back -- we actually -- I mean -- and there's a
11 little problem with the court reporter. Question: Did
12 Novell actually reduce functionality -- Answer: Oh, sorry,
13 yeah -- Question: -- in the PerfectOffice suite to help
14 speed up the development process? Answer: So we certainly
15 cut back some. So part of that panic mode, we had like 90
16 features that we were going to add inside the file open
17 dialog. And so one of the steps we took, as painful as it
18 was, we cut back some. But we didn't want to cut back to an
19 extreme because, again, it was core differentiator was one
20 of the areas we would like to lead out in. And so we did
21 have painful meetings where we, you know, evaluated cutting
22 options and kind of did everything we thought we could.

23 Do you recall that testimony?

24 A Yes, quite well. Particularly the panic mode part.

25 Q Is that part of what you relied on in your answer --

1 A Yes, it was.

2 Q -- and your analysis?

3 Let me show you Mr. Harral's testimony. It's page 355
4 of the transcript. Question: Did Microsoft's decisions to
5 withdraw the namespace extensions affect the functionality
6 that Novell, and ultimately Corel, was able to provide in
7 these products? Answer: I've said this before. From an
8 architectural perspective and from what I worked on, we
9 released a product for Windows 98, which was the next
10 version of Windows. The version that we released for
11 Windows 98 was the version of the part that we envisioned
12 that we could release Windows 95.

13 That is also something you relied on, sir?

14 A Yes.

15 Q Now you were also asked --

16 THE COURT: I'm sorry, I missed that.

17 MR. TASKIER: That's all right, Your Honor. We're
18 not the most fluent speakers. It's hard to get these things
19 out sometimes.

20 BY MR. TASKIER:

21 Q You were also asked, sir, with respect to the Lotus
22 \$1.3 million bid for WordPerfect, whether there was a bid
23 document you relied on. I believe you said you didn't --
24 there was no bid document, but that you relied on other
25 evidence in the record.

1 MR. TASKIER: Let me show Mr. Jardine.

2 So this is Plaintiff's Exhibit 418.

3 Can you put that up, Mr. Goldberg?

4 BY MR. TASKIER:

5 Q Do you recognize this document?

6 A I've either seen it or something much like it.

7 Q Let's just look at the first page under where it says
8 Lotus, and just that first paragraph, sub I, it says, offer
9 or 1.2 billion based on a \$70 share price, equates to 26.5
10 percent of the combined company. At market price, \$77.75,
11 on date of offer the market value of the offer was 1.34
12 billion. Then it looks like a lot of investment banker
13 talk.

14 Is that what you relied on when you understood there
15 was an offer that was being considered by WordPerfect?

16 A Yes, and I think I've seen another document as well,
17 but --

18 Q Let me also show you Plaintiff's Exhibit 153.

19 Plaintiff's Exhibit 153 is a March 20th, 1994 minutes of
20 meeting of the board of directors. I believe the jury has
21 seen this before.

22 I would like to turn to page 3 of the document. And in
23 the first full paragraph, second paragraph on the page, you
24 will see the number three in parentheses. And it says,
25 Lotus Development Corporation was continuing to up its

1 proposed purchase price for WordPerfect over and above what
2 Novell was willing to pay. As a result, any delay in the
3 WordPerfect definitive agreement could force Novell to pay a
4 substantially higher price in order to acquire WordPerfect
5 Corporation.

6 Did you rely on this as evidence that there was
7 continuing effort by Lotus to buy WordPerfect?

8 A Yes, that's my recollection too.

9 Q Thank you.

10 All right. So now my last point. This is going to be
11 a little bit of work, I think.

12 THE COURT: Did I hear the word last?

13 MR. TASKIER: Yes, sir. Yes, Judge. Put a smile
14 on everyone's face.

15 MR. TASKIER: All right. So can you, please,
16 Mr. Goldberg, bring up Mr. Jardine's figure 10 from
17 yesterday, the one he used before he corrected this morning.

18 BY MR. TASKIER:

19 Q And that's the operating income for WordPerfect; is
20 that correct?

21 A That's correct.

22 Q You testified about that yesterday, correct?

23 A Yes.

24 Q You testified that that's not a correct representation
25 of what the operating income --

1 A I don't regard it as such, yes.

2 Q And as I recall, you said at the time that there were
3 two reasons -- you essentially said three, or three reasons,
4 two reasons with respect to the numbers, why you thought
5 this was wrong; is that correct?

6 A That's correct.

7 Q One of the reasons I believe your testimony was was
8 there were one time expenses that were accrued in fiscal
9 year 1992, fiscal year 1993, and fiscal year 1994 from prior
10 purchases by WordPerfect where they wrote down their losses
11 for tax reason; is that correct?

12 A Yes, and other write downs.

13 Q And that those were not reflected, and that they
14 artificially depressed the operating income?

15 A That's right. Those are one time expenses.

16 Q You said that was wrong because of that?

17 A It's wrong as an indication of what's going on. It
18 creates an artificial appearance of --

19 Q A company in trouble?

20 A Yes.

21 Q You also said that there was another problem with it,
22 correct?

23 A Yes, that was salesforce.

24 Q You went on at some length, and I'm sure the jury
25 recalls --

1 A Certainly at some length, yes.

2 Q -- about the different models. Your testimony was
3 there were different models, that Novell had a direct sales
4 model -- excuse me, that WordPerfect had a direct sales
5 model, Novell had a dealership model, and that the
6 dealership model was much more efficient and the WordPerfect
7 model had loaded expenses?

8 A Yes.

9 Q And that they weren't reflected in this either?

10 A Correct.

11 Q And this morning we heard Mr. Jardine advise us that
12 his economist elves last night worked overnight and
13 corrected the things you pointed out?

14 A Yes. Well, corrected I think the first --

15 Q That's the point I'm trying to come to.

16 MR. TASKIER: Can you bring up 10-A, which was
17 this morning's. So yesterday's -- is it possible to put
18 them side by side?

19 I'm challenging the technical capacities.

20 BY MR. TASKIER:

21 Q So that's today's corrected for the adjustments that
22 you mentioned, and that's yesterday's on the right?

23 A Yes.

24 Q There is, you see, an adjustment in fiscal year 1992,
25 fiscal year 1993, and fiscal year 1994?

1 A All three years, yes.

2 Q Now let me turn your attention to the S4, which was the
3 Securities and Exchange Commission filing by Novell -- by
4 WordPerfect. Excuse me. And let me turn you to page 79 of
5 that document.

6 Do you have a copy of that?

7 THE COURT: I'm sorry. Again, I'm just confused.
8 Is this in connection with -- WordPerfect was a privately
9 held company. Did it have to file anyway?

10 MR. TASKIER: It filed anyway, Your Honor.

11 THE COURT: This is the filing.

12 BY MR. TASKIER:

13 Q Let's turn to page 79. Let's look at the bottom half
14 of the page.

15 A Seventy-nine.

16 Q Seventy-nine -- actually it may not be the number you
17 have. I apologize.

18 MR. TASKIER: Sorry, Your Honor. The copy I have
19 has a different set of numbers on it.

20 BY MR. TASKIER:

21 Q Okay. Dr. Warren-Boulton, it shows a consolidated
22 statement of income, and it shows for 1991 on the right?

23 A Yes.

24 Q And 1992, and then 1993. And it shows that the net
25 sales in 1991 were 621 million, in 1992, 579 million, and in

1 1993, 707 million?

2 A That's what I've testified to, yes.

3 Q And it shows in gross margin that the margin is
4 increasing -- it actually decreased from '91 to '92, and
5 then it increased again?

6 A Got it.

7 Q Now let's go to the selling and marketing line. The
8 selling and marketing line is right below that. And that
9 line shows that in 1991, it was \$110 million, in 1992, it
10 was \$148 million, and in 1993, it was \$251 million.

11 Let's go back to 10-A. And 10-A -- does 10-A reflect
12 an adjustment as far as you are able to tell for the
13 \$148 million in 1992?

14 A No, it doesn't.

15 Q Or the \$250 million in 1993?

16 A No. I think you would have to add the increase in
17 marketing expenses to get a better idea of what was likely
18 to happen under Novell.

19 Q So if you corrected it, as it was represented to be
20 corrected, these would be up here, and that would be a
21 correct reflection of what actually was going on in the
22 company; is that correct?

23 A Yes. You are moving from -- I lost track, but it's
24 about \$100 million.

25 Q If you added in missing selling expenses, those three

1 declining red bars would be much higher?

2 A Much higher.

3 Q All right. Now you were shown 24-M. Now that purports
4 to show in a graph form the operating income from 10-A. Is
5 that a correct representation of what the operating income
6 really was going on?

7 A In terms of what you could expect under Novell as a
8 forward looking valuation, no. I think you would have to
9 include the difference in the selling -- increase in the
10 selling costs and, of course, all one time events.

11 Q So it's distorted by the omission of all of those
12 million of dollars?

13 A It's missing something.

14 Q So I take it the same problem is true with respect to
15 24-A?

16 A Yes.

17 Q Which has the exact same graph pushed forward?

18 A Yes.

19 Q That would not be a correct representation of what was
20 going on?

21 THE COURT: Rephrase the question.

22 BY MR. TASKIER:

23 Q With respect to the actual experience and the forward
24 looking intentions of Novell, would that be a correct
25 representation of what the operating income was expected to

1 be?

2 A No. It wouldn't take into account the kind of
3 efficiency that Novell was expecting to achieve through the
4 merger.

5 MR. TASKIER: I have no further questions, Your
6 Honor.

7 THE COURT: Thank you, Mr. Taskier.

8 Mr. Jardine.

9 RECROSS-EXAMINATION

10 BY MR. JARDINE:

11 Q Do you have the S4 in front of you?

12 A Yes.

13 Q You are not claiming that WordPerfect or Novell
14 misrepresented its numbers to the SEC, are you?

15 A Certainly not.

16 Q What you are saying is, I think, that while these
17 numbers are accurate, that if you were projecting Novell
18 taking it over in its management in future years, the hope
19 would be to reduce the costs. Is that what you were
20 testifying to?

21 A I think that's what the expectation was, yes.

22 Q So if we put 10-A back up, which is the revised chart,
23 that is accurate for the years represented, correct?

24 A Well, they are all accurate in the same way -- I mean
25 in some way. I mean your chart is accurate in one way.

1 Adding nonrecurring is, I think, more accurate if you are
2 trying to find out what's actually happening to earnings as
3 opposed to just an accounting, you know, decrease. And
4 adding the sales differential is the best way to then get to
5 what somebody looking at this data would say this is what it
6 should be worth to Novell.

7 Q So if I understand what you are saying, this is
8 accurate, but in future years Novell might say to itself,
9 looking back, we could perhaps subtract selling costs?

10 A Subtract the costs --

11 MR. JARDINE: I'm trying to make the point --

12 THE COURT: I understand.

13 BY MR. JARDINE:

14 Q But you're saying, I think, and maybe I misstated it.
15 Let me state it again. As I understand your testimony, it
16 is that someone thinking about buying WordPerfect would look
17 at those selling costs and think maybe we could reduce them
18 and therefore the chart might look different?

19 A I'm saying to begin with anybody looking at this -- at
20 this would -- in terms of trying to use these data to make a
21 decision, the first thing they would always do is take out
22 the nonrecurring expenses. I mean that's just an
23 accounting -- how to describe it. But then in addition,
24 since everybody was aware of the problems involved with the
25 growing sales expense, if you could eliminate that growing

1 sales expense, that's the efficiency justification for the
2 merger, and that would be built into the purchase price.

3 Q My concern, and I think you've answered it, was I was
4 afraid the jury might think you were saying that we put a
5 slide up that wasn't factually historically accurate?

6 A Oh, no. I think all three slides are factually correct
7 in their own way. It depends on what you would use them
8 for. I don't think anybody is accusing you of --

9 Q Have you done any study with respect to why the selling
10 costs increased for WordPerfect?

11 A No.

12 Q You mentioned yesterday that there was the intent --
13 that in this period price competition was significantly
14 increasing. Do you think selling and marketing costs might
15 have had to increase to address the intensifying of
16 competition in that period?

17 A It's possible, but as a matter of economic theory,
18 usually -- and this is economic theory, the optimal amount
19 of selling expense depends on your margin. So the higher
20 your margin, the more profit there is to spend more money on
21 selling. But generally speaking what happens is if there's
22 price competition in what you do is your margin shrinks,
23 right. The profitability of a selling effort goes down. So
24 usually it's the other way around.

25 MR. JARDINE: Your Honor, I have no other

1 questions.

2 THE COURT: Thank you, Mr. Jardine.

3 Mr. Johnson.

4 MR. JOHNSON: Thank you very much, Your Honor.

5 I'm pleased to report that plaintiff rests its case subject
6 to the reservation we spoke of.

7 THE COURT: Thank you. I often say that if
8 lawyers and judges were to go in the construction business,
9 we would all go bankrupt because we're such bad estimators
10 of time. Counsel here have done a remarkable job in a very
11 complicated case of presenting the case in accordance with
12 the time they anticipated. So thank you all very much.

13 You don't have to sit tomorrow. You can leave
14 now. I will see you all at eight o'clock on Monday morning.
15 And next week we're going to only sit two days because
16 people have, including me, Thanksgiving plans, and I don't
17 particularly want to have trial on Wednesday. So next week
18 it will just be Monday and Tuesday. Have a great weekend.
19 Don't talk about the case. See you all at eight o'clock on
20 Monday morning.

21 Excuse me. You're excused, Doctor.

22 (Jury excused)

23 THE COURT: Some unfinished business from
24 yesterday. I did review the deposition of Mr. Cole. I
25 decided essentially that Mr. Holley and Microsoft were right

1 that, in fact, if you look at the testimony, it referred
2 back I think to things that had been discussed before. So I
3 called counsel for each side and said that I would allow
4 Microsoft's designations to be read, and it was perfectly
5 appropriate. In light of that decision, Mr. Johnson decided
6 not to put it in.

7 MR. JOHNSON: Thank you, Your Honor, for doing
8 that.

9 MR. TULCHIN: Your Honor, I think I should say
10 before we proceed that there may be some reservation here,
11 but under Rule 50 of the Federal Rules of Civil Procedure,
12 Microsoft's moves for judgment as a matter of law. Perhaps
13 we can discuss whether you want to hear argument and how we
14 should proceed, but I didn't want to fail to say that.

15 THE COURT: Thank you.

16 Mr. Johnson -- and obviously it is subject to --
17 the evidence is in subject to me ruling upon the proper
18 exhibits.

19 MR. JOHNSON: Thank you, Your Honor. I doubt
20 Mr. Tulchin would fail to say that under any circumstances.

21 Just a couple of housekeeping items and then we do
22 have a bit of argument that we need to have.

23 First of all, I understand from Microsoft's
24 counsel that the list of 46 exhibits we proffered yesterday
25 are all clear and are therefore admitted into evidence, and

1 the record should so reflect.

2 MR. PARIS: That's correct, Your Honor.

3 THE COURT: Thank you, Mr. Pairs.

4 MR. JOHNSON: Second, just to let you know, Your
5 Honor, we filed our proffer with respect to Professor Noll
6 this morning. If you would like a copy of that, I can pass
7 one up.

8 THE COURT: If you would. I don't have it. I
9 don't think -- I don't have it, do I, Kate?

10 MR. JOHNSON: And then you received a separate
11 report, a humongous file this morning containing a large
12 number of exhibits as to which the parties could not agree.
13 There were only a few of those that I felt I really wanted
14 in prior to consideration of the motion. So I'm prepared to
15 address those now, if that's agreeable to you.

16 THE COURT: Why don't you address them and then I
17 will find out whether Microsoft wants to address them now or
18 later. That's fine.

19 MR. JOHNSON: Amongst the documents that we wish
20 to get admitted into evidence was a group of documents --
21 nine of them to be specific, which are -- pertaining to
22 alternative development platform threats to Microsoft,
23 specifically documents that deal with the threat presented
24 by the middleware platform Lotus notes.

25 THE COURT: I understand, I'll hear from Microsoft

1 on that. But I don't -- I haven't looked at the particular
2 exhibits, but I understand, particularly in light of the way
3 I analyzed the case, I think in theory they should be in.
4 There may be problems with that, but I think that since one
5 of them -- it would hardly would be fair for me to exclude
6 evidence and then say you haven't proved your case. So,
7 conceptually, I understand.

8 MR. JOHNSON: Thank you, Your Honor. That's
9 helpful.

10 Let me just for the record state what the exhibits
11 are. Plaintiff's Exhibit 30, 89, 112, 303, 306, 307, 342,
12 393, and 459. And with that, I will let Microsoft --

13 THE COURT: Do you want to speak on it today or do
14 you want to wait until tomorrow? Whatever you say, Mr.
15 Paris.

16 MR. PARIS: I'll speak to it right now, Your
17 Honor.

18 THE COURT: The first thing, regardless of the
19 specific exhibits there may be a problem with, the
20 conceptual problem as I've thought this case through, I'm
21 finally able to articulate this morning I think in item four
22 on my levels of analysis as to the potential -- what I've
23 been trying to say for a long time and haven't articulated,
24 I certainly conceptualize, as I just told Mr. Johnson, it's
25 hard for me to say there may be an issue whether they proved

1 the case when I've excluded the evidence.

2 MR. PARIS: Good afternoon, Your Honor. I'm Adam
3 Paris for Microsoft.

4 I understand the conceptual problem that you've
5 raised -- or posed. I think it helps to take a step back.
6 There's already a lot of evidence in the record that you
7 permitted to come in in this case with respect to what
8 Mr. Johnson has characterized as alternative platform
9 threats.

10 The reason -- I think the principal reason that
11 none of these documents are properly admitted into evidence
12 is because this is an example of the sort of, you know,
13 piling on/cumulative business that we first raised with Your
14 Honor back in Baltimore when we were talking about
15 collateral estoppel. We have a series of findings of fact,
16 which were evidence in this case, upon which Microsoft has
17 been collaterally estopped, that deal with specifically the
18 issues that Mr. Johnson raised in the briefs and that these
19 documents speak to. What we said at the time was here's the
20 problem, if I collaterally estop Microsoft on the findings
21 of fact -- we're bound by them of course, but what they
22 can't then do is then pile on on top of us with further
23 evidence relating to matters which have been collaterally
24 estopped. They said they weren't going to do that. Then
25 that's precisely what they did.

1 They came here, they read the findings of fact to
2 the jury, so the jury has got it. Then Professor Noll got
3 up here and testified for, you know, a day and they heard a
4 bunch of that. There was the alphabet soup of MAPI and RNA
5 and OS/2, and all this stuff now on top of it. So the jury
6 has got that, and Your Honor permitted that.

7 Now what they want to do is submit, for example,
8 on this particular one, nine more documents, none of which
9 have the slightest bit of anything to do --

10 THE COURT: Tell me what your understanding of the
11 state of the record is on -- I guess it's mainly OS/2 -- or
12 tell me, and I'll hear from Mr. Johnson on OS/2, which may
13 not be included in these exhibits, but Lotus and Netscape.

14 MR. PARIS: In terms of what's in taking it from I
15 guess backwards to forward.

16 THE COURT: And anything else that I've missed.

17 MR. PARIS: Those are the ones that Your Honor is
18 correct that covered -- I think those were the three that
19 are covered by the nine exhibits which we're talking about
20 this afternoon. Netscape, obviously they put in evidence,
21 you know, through I think Mr. Alepin and Professor Noll, and
22 discussed Netscape and introduced their license agreement
23 with Netscape, for example. That's the state of the record
24 there.

25 On OS/2 --

1 THE COURT: Anything else about Netscape about
2 conduct directed by Microsoft?

3 MR. PARIS: Are we talking about other than the
4 findings of fact?

5 THE COURT: Including the findings of fact.

6 MR. PARIS: I think that's the been the
7 principal -- actually, give me one second.

8 I suppose on Netscape, there was also testimony I
9 believe from one of the fact witnesses, and right now I'm
10 forgetting who, maybe Mr. Richardson -- thank you, Mr.
11 Holley. Mr. Richardson talked extensively about Netscape as
12 well. I think those are the three software people who spoke
13 to it.

14 OS/2, it was Professor Noll -- and, I'm sorry, who
15 was the third -- Lotus. And Lotus I think has come up from
16 time to time at various places. I think, again, that was
17 principally Professor Noll.

18 THE COURT: So essentially your position in regard
19 to these nine exhibits, so I can stay focused, is the
20 evidence is already in, this is cumulative, and it's also
21 they shouldn't be able to put in evidence about things which
22 are collaterally estopped.

23 MR. PARIS: Precisely, Your Honor.

24 THE COURT: Mr. Johnson.

25 MR. JOHNSON: Thank you, Your Honor.

1 Most of these documents -- the majority of them --
2 maybe it's about half of that, there are nine, are about
3 Lotus, and there's no collateral estoppel facts with respect
4 to Lotus. And as a matter of fact, Lotus is a platform
5 threat and that evidence, we didn't get any collateral
6 estoppel with respect to that. So it's wrong to say that
7 this is a pile on. This is separate evidence with respect
8 to the platform threat represented by Lotus Notes.

9 It is certainly true that we have some documents
10 in the record that reflect the threat presented by Lotus
11 Notes to Microsoft. But these are additional documents
12 within the relevant time period about the platform threat
13 presented by Lotus and the middleware threat presented by
14 Lotus to Microsoft that, of course, in our view, is not only
15 highly relevant to harm the competition, but is also
16 instructive with respect to why Mr. Gates said that his
17 purpose in redocumenting the namespace extensions was to
18 make sure that both WordPerfect and Notes -- he used the
19 word Notes -- would not be able to achieve the level of
20 integration that Office 96 could. He said -- he
21 specifically called out Notes in his decision memo. So this
22 is highly relevant to what happened in this case.

23 THE COURT: Would it be helpful, and I'm not
24 saying you should do this, I know you've worked hard
25 already, and I'll have to do my job, but would it be helpful

1 for you all to meet and confer one more time? You've maybe
2 addressed this already. To the extent you say Lotus is not
3 covered by -- I am sympathetic to the argument that you all
4 should not be able to relitigate things which are
5 collaterally estopped. To the extent they weren't
6 collaterally estopped, I would be inclined to let the
7 documents in unless they were just purely cumulative, but I
8 would be inclined to let them in.

9 MR. JOHNSON: Your Honor, I must say, we have -- I
10 mean our people have been at this day and night.

11 THE COURT: No. No. I don't want you to waste
12 your time. I just thought if I gave you the guidance that I
13 don't think these ought to be collaterally estopped, Lotus
14 ought to come in. If it doesn't, I'm here.

15 MR. JOHNSON: It is with great reluctance that we
16 filed that enormous language today with some 50 or 80
17 exhibits that we couldn't reach agreement on, and these are
18 business records that under our stipulations are not
19 hearsay, and they are clearly admissible and relevant to
20 this action based upon, frankly, what Your Honor said on the
21 motion for summary judgment, which we were -- in fact, Dr.
22 Noll was entirely correct in considering the weakened state
23 of other ISVs and other applications in making his
24 determinations with respect to harm to competition.

25 So when people stand up and say, well, you can't

1 get that in because it might be cumulative or you can't get
2 that in because of -- you know, the collaterally estopped
3 facts stop at a certain point. They, for instance, do not
4 address Microsoft's purported justifications. They do not
5 address the outcome of the case with respect to those facts.
6 And that's part of our proffer with respect to Dr. Noll is
7 that we have tried to -- you have constricted our ability to
8 prove up that which both you and the Fourth Circuit said was
9 appropriate to look at.

10 So we're trying to get in this evidence --

11 THE COURT: The only thing for me to do, unless
12 Mr. Paris tells me to the contrary, I read these exhibits,
13 read the proffer, and take this up first thing in the
14 morning.

15 Mr. Paris, which is fine with me.

16 MR. PARIS: That's fine, Your Honor. Although I
17 think it's the sort of thing I can finish the argument right
18 now and Your Honor can issue a ruling tomorrow.

19 I can finish my argument, Your Honor, than decide
20 if you want to hear more. Of course we'll be here.

21 With respect to Lotus, I think there are only four
22 of the nine documents that at issue here. It's PX30 and 89,
23 and I'm sure I will corrected if I'm wrong, but I think it's
24 PX30 and 89, 112 and 393. Those are on the Lotus related
25 documents. The first three are all from 1993, and they

1 simply have nothing to do whatsoever with really anything in
2 this case other than, you know, there is some language in
3 there about we don't want Windows to be reduced to a C
4 prompt. Okay, I suppose, but if we were litigating that
5 question, that would have been a whole different kind of
6 case, I suspect. So three of them are really out of time.

7 The other one is undated, and I think it came in.
8 I apologize, I don't have it with me, but in one of the
9 depositions. And, again, it's sort of just a strange -- you
10 know, it's a document just generally talking about, you
11 know, Microsoft Office competition with Lotus Notes. If you
12 read these documents, you are going to see they are not
13 about alternative platform threats. What they are about is
14 the applications competing on -- Microsoft's Office
15 applications competing with Lotus Notes. In the ones they
16 selected, sure there will be some comment about this is a
17 threat to us, this is a threat to Windows. But what the
18 documents discuss is, and there's been no testimony as to
19 any of them except I think 393, is the competition between
20 Office applications and Notes, and, of course, that's not
21 the issue in this case.

22 THE COURT: And the other five documents are just
23 cumulative?

24 MR. PARIS: Sure. The other five deal I think
25 with Java. There is a memo on Internet. There is a memo

1 about, you know, just generally developing, you know,
2 Microsoft's Web capabilities. I believe that's two of them.
3 Sort of, you know, really honestly random documents that
4 really aren't footed at all in anything in this case except
5 that at times they show Microsoft's competition with all of
6 its competitors. You know, Mr. Gates' Internet memo is one
7 of them. It's a just a talking piece, a thought piece on
8 where the world is going. You know, there is mention in
9 there made of Netscape. That's sort of what these look
10 like.

11 THE COURT: This is not -- it's not what I'll base
12 my ruling upon, I assure you, but I am a practical person.
13 Since I have identified, right or wrong, a potential problem
14 in the case, and I don't know which way I would rule, I
15 don't, but the lack of an alternative platform. As a
16 practical matter, my inclination would be to let the things
17 in so that the record was as complete as Novell wanted it to
18 be, subject to -- the countervailing question becomes is
19 there anything in these documents that's particularly
20 prejudicial to Microsoft under 403.

21 MR. JOHNSON: And, Your Honor, I might add to
22 that. I mean if this is all about application competition
23 and really doesn't have anything to do with this case, well,
24 why are they fighting so hard?

25 THE COURT: They are fighting because --

1 MR. JOHNSON: If there is nothing in here that
2 hurts them, what are we arguing about?

3 THE COURT: I'm sure they have their reasons,
4 including that they want to keep the record limited to
5 relevant evidence.

6 MR. PARIS: That's precisely right, Your Honor,
7 and this jury has been fantastic. And when they are
8 reviewing evidence, we want to make sure they are reviewing
9 proper evidence. We will withdraw our 403 objection.

10 THE COURT: I understand that, but that's not
11 being pressed right now. It's not being argued right now.
12 But, okay, I'm going to let these nine in.

13 (Plaintiff's Exhibits 30, 89, 112, 303, 306, 307,
14 342, 393 and 459 were received into evidence.)

15 MR. PARIS: That's fine.

16 MR. JOHNSON: Thank you. Thank you very much.

17 We also had a motion with respect to some MAPI
18 documents, but we don't think that's critical since
19 Mr. Alepin did testify about that issue. So we can just
20 reserve on that for another day, if that's all right with
21 you.

22 THE COURT: Sure.

23 MR. TULCHIN: Your Honor, if I may. I assumed
24 from the Court's comments that what you want to do is to
25 hear our argument on the Rule 50 motion tomorrow. But if

1 you want to hear it today, of course we're ready. I heard
2 you say something --

3 THE COURT: No. No.

4 MR. JOHNSON: Your Honor --

5 THE COURT: Mr. Johnson wants it tomorrow.

6 MR. JOHNSON: We just received your revised --

7 THE COURT: It's the same --

8 MR. JOHNSON: It has been revised. There are some
9 new concepts of thought in there. Frankly, Your Honor,
10 you'll get a much better presentation tomorrow than you
11 would today.

12 THE COURT: Don't feel that you've got to address
13 those things. As I say, I have been sitting here and trying
14 to think. I'm trying to -- I mean in addition to the
15 evidence being complicated, the legal issues, I'm just
16 trying to peel the skin of the onion and trying to get
17 through.

18 MR. JOHNSON: Your Honor, we would be foolish not
19 to address your concerns, and we will.

20 THE COURT: That's probably true.

21 MR. TULCHIN: Your Honor, if I may, of course both
22 sides knew what was coming. We knew that Novell would be
23 resting eventually. There was even a prediction that it
24 might this be week. We prepared -- some of us stayed up all
25 night to do so -- a memorandum, which I hope will be helpful

1 to the Court, which I would like permission to hand up, in
2 support of a motion under Rule 50 for judgment as a matter
3 of law. If it's helpful for you to have this this afternoon
4 and to look through it, that would be great. It would
5 certainly, I think, expedite at least my presentation.

6 THE COURT: That's fine. That would be great.

7 MR. TULCHIN: We also have a lot of documents, the
8 documents that are referred to, attached to a declaration.
9 All of the documents attached to Mr. Holley's declaration
10 are in evidence.

11 There are also four demonstratives attached to the
12 brief, which are not in evidence, but they were used as
13 demonstrative exhibits during the trial.

14 And we've just given a copy to Mr. Johnson. I
15 hope this turns out to be useful to the Court. Of course --

16 THE COURT: Mr. Johnson, don't worry. If I read
17 this, which I probably, I'm going to be perfectly receptive
18 to your arguments tomorrow. The more I'm prepared, the
19 better.

20 MR. JOHNSON: Well, Your Honor, obviously we kind
21 of anticipated since Mr. Holley and Mr. Tulchin have been
22 working on that thing for the last three days, it was pretty
23 obvious that we were going to get a massive brief the day
24 before argument on probably the most important motion in the
25 case. But nonetheless, we have also prepared a submission,

1 which you will get tomorrow, probably the morning.

2 THE COURT: Could you get it to me later this
3 afternoon?

4 MR. JOHNSON: We'll try to get it to you later
5 today.

6 THE COURT: What time can you get it to me?

7 MR. JOHNSON: Can we get it today? I'm a little
8 reluctant to commit. Can I say we'll try get it to you
9 today? If we can't, it will be in the morning.

10 MR. SCHMIDTLEIN: How late are you here because --

11 THE COURT: It depends. I have been here -- I've
12 been here as little as 2:30 and go up and exercise, or I've
13 also been here as late as 5:00.

14 MR. JOHNSON: Do we have permission to deliver it
15 to your hotel?

16 MR. SCHMIDTLEIN: We can deliver it to your hotel.

17 THE COURT: Probably when I leave here, I try not
18 to think about -- I do think about it, but I try not to read
19 stuff. I don't care.

20 MR. JOHNSON: We'll try to get it here as quickly
21 as we can, and maybe we'll talk with Kate.

22 THE COURT: If I've got to leave, what number
23 should I have? Should I have Mr. Johnson's or should I take
24 Mr. Schmidtlein's?

25 MR. SCHMIDTLEIN: 202-421-7282.

1 THE COURT: So if we leave, we'll call.

2 MR. SCHMIDTLEIN: If you leave, then we'll get it
3 to you as quickly as we can. We too have had people staying
4 up very late.

5 MR. TULCHIN: Your Honor, one other small matter
6 that Ms. Bradley would like to address. It has to do with
7 the exhibit list that I think she helped you with yesterday.

8 MS. BRADLEY: Yes, Your Honor. We worked with
9 Novell last night and worked out any glitches in this, so
10 we're prepared to hand up what we believe is an agreed list
11 of the admitted defendant's exhibits.

12 THE COURT: So Mr. Johnson can let me know
13 tomorrow morning.

14 MR. JOHNSON: I believe we have worked this out.
15 You removed --

16 MS. BRADLEY: Yeah.

17 THE COURT: It's agreed subject to if you want to
18 look them over one more time, and subject to --

19 MR. JOHNSON: I'm sure it's fine, Your Honor, but
20 we will take a look at it.

21 MS. BRADLEY: We received a list from Novell
22 earlier today of plaintiff's exhibits. We'll look that over
23 as well and come to some understanding on those.

24 THE COURT: Now look, in terms of these levels of
25 analysis as I call them, the first issue -- you all may have

1 briefed it before and I'm just plain missing it. I will
2 tell you that is the most radical issue in the case. If I
3 didn't decide it before, I should have, and I apologize. If
4 I end up ruling Microsoft's way, and I have no idea, it is
5 something I'm sorry I didn't do on summary judgment because
6 obviously if I resolve it one way, it's the end of the case.
7 I apologize for bringing you all out here. I probably ought
8 to apologize to the clients.

9 There are I think three issues which in my
10 judgment clearly are factual subject to hearing from
11 Microsoft, which is substantial legitimate justification,
12 and that's going to be a dispute. We have Mr. Alepin's
13 view. Mr. Alepin's view. We have -- we have Microsoft's
14 documents that are going to be argued that, you know, praise
15 the product originally and after the fact that they are
16 found to be wanting. On the other hand, Microsoft is going
17 to present evidence, I know, through cross-examination,
18 look, we had plenty of good reasons, including stability.
19 We were worried about the fact that they used Marvel. So
20 what I assume part of the argument is it's one thing -- if
21 there is a risk to have Microsoft accountable for it as
22 opposed to independent service vendors. I remember
23 Mr. Alepin's list that occurred to me, two of the things
24 using Microsoft's products. If I'm Microsoft, I might be
25 prepared to run the risk. Microsoft product come out. At

1 any rate, I expect it's going to be in dispute. But I
2 really think that's what the jury probably views the same
3 way with this delay issue, which we heard the testimony
4 about. We heard direct testimony and also through the
5 various experts.

6 As I analyze it, that pretty much clearly is a
7 jury issue. Damages I think is quintessentially a jury
8 issue.

9 The second issue I think as outlined, I think
10 there may be a legal component to it, and that I have to
11 decide upon the sufficiency of the evidence, but essentially
12 maybe a third, maybe substantial -- just business
13 justification enters into it, but under Aspen Ski, as I
14 understand it, it's only if they destroyed -- it is
15 important whether they destroyed a preexisting profitable
16 business relationship with Microsoft by what they did, or
17 they pulled the rug out from under them in terms of the
18 October 1994 decision to withdraw. I think there may be --
19 I think that's quintessentially a factual issue, but there
20 could be -- it could be Microsoft's going to take the
21 position, look, neither of those should go to the jury
22 because in terms of profitable business relationship, there
23 could be a lot of things. Microsoft's position, I assume,
24 is, look, WordPerfect still was going to run on Windows 95.
25 Novell's position is going to be, yes, it would, but it

1 wouldn't create the status quo ante because we had -- our
2 product was better. That's exactly why we -- it would be a
3 step backward. So I have to decide that.

4 Likewise, in terms of Mr. Gates' decision in
5 October 1994, as I understand it, I assume Microsoft is
6 going to say there is absolutely no evidence that there was
7 any deception because he didn't make the decision before
8 1994. Novell is going take the position, yes, it did, that
9 was made back at the -- what's the name of the fancy
10 canal -- root canal.

11 MR. JOHNSON: Gateway.

12 MR. TULCHIN: I hope it's not called root canal.

13 MR. SCHMIDTLEIN: Hood canal.

14 MR. JOHNSON: But it's also called the gateway.

15 THE COURT: Anyway, I think that that is -- just
16 to try -- my hand is a little cryptic. And the other thing
17 goes to what I've been trying to struggle with with the
18 whole case and it does relate to rulings and timing and
19 things of that nature, which is, look, it's a little bit of
20 a but for world, but, you know, is there any other
21 alternative that there was ever going to be a Windows 95
22 anyway. I want to review the exhibits. But that to me is
23 an issue and I'll take a look at it, but that is now
24 highlighted. There may be a thousand other issues.

25 One other thing, and I will be prepared to address

1 all of them, I've not meant to preempt the discussions, just
2 try language that I wanted to it helps a little bit to say
3 what I think is factual, if you all think it's not factual,
4 let me know. On the other hand, I need to hear you on the
5 motion under Rule 50 that delay was caused by internal
6 problems at Novell, if I understand the issue. But I think
7 the jury is going to have to determine that. But I'll be
8 glad to hear from Mr. Tulchin if he thinks that it isn't.

9 The other thing that occurred to me, and this is
10 assuming we're still here a month from now, really just
11 giving preliminary thoughts, I think the way this case ends
12 up being structured, it may be that we could make this case
13 a lot more sensible for the jury and do whatever needs to be
14 done in terms of you all analyzing the legal issues to
15 present specific factual issues to the jury. Obviously that
16 first issue I raised is clearly a matter of law. Microsoft
17 may not even pursue it. I don't even -- they may have
18 pursued it before and I missed it. They may not pursue it.
19 But that's clearly a question of law. There is nothing
20 there for the jury.

21 The other issues of substantial delay, cause of
22 delay, justification, damages, and maybe simply as a matter
23 of efficient litigation to give them an instruction did
24 Microsoft unlawfully maintain a monopoly in the operating
25 systems market, which may incorporate the last two. I

1 frankly don't remember. It seems to me we can basically --
2 we can argue about what should be there from a model
3 instruction on that. Maybe not. But simply focus the jury
4 on did they unlawfully maintain a monopoly. Having not
5 reached damages, depending upon how they answer the first
6 three questions, rather than give them complicated
7 instructions about liability under the antitrust laws, I'm
8 inclined -- as I now analyze this, and I could be wrong,
9 don't get me wrong, but we may be able to make it a lot more
10 sensible to them by giving them a relatively brief series of
11 instructions and specific questions for them to answer that
12 would satisfy your need for evaluating the case and make the
13 case a lot more sensible to them. I'm just throwing that
14 out as a concept.

15 But if we do get here a month from now, I would
16 like to help those 12 people out. And, frankly, I think we
17 would end up with a better result if we had -- with a better
18 result in terms of whatever decision is finally made by me
19 or the Tenth Circuit or the Supreme Court, or whatever, if
20 we had specific factual findings on some of these points as
21 opposed to trying to back into what the factual findings
22 were by answering -- by a general verdict about liability on
23 the antitrust laws. I'm certainly not insisting upon that,
24 but considering it.

25 I mean I think -- I mean I think you have a very

1 good group, but I think we could help them out by saying,
2 look, we want you to decide was there a legitimate
3 justification for the withdrawal of documentation of APIs
4 and namespace extensions, who caused the delay, did
5 Microsoft cause delay or would Quattro Pro not have been
6 ready by December of 95 anyway, which clearly is a dispute
7 in the evidence -- arguable dispute. As I understand it,
8 documents show one thing, the testimony is to the contrary.
9 So the question is do you believe the testimony.

10 So all I'm saying is think creatively. You don't
11 have to do it, but whether there's a way to make this easier
12 for the jury if we're here a month from now by having them
13 answer specific questions. I think there is a way to do it
14 and I think what seems to be, you know, a month ago, just a
15 morass, I think it's much more -- I understand it better.
16 And I think we can make it more understandable for the jury.
17 Just bear that in mind.

18 See you tomorrow at eight o'clock. If I leave, I
19 will call you.

20 Kate is usually here until 6:00, but the fact is
21 when I leave, I still pretend to think and try to think, but
22 I have stopped.

23 (Whereupon, the trial was continued to Friday,
24 November 18, 2011 at 8:00 a.m.)

25