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

NOVELL

| V. | CIVIL CASE NO. |
| :---: | :---: |
| JFM-04-1045 |  |

> Defendant
$\qquad$ /
(Motions Hearing)

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\text { Thursday, June 7, } 2012
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Baltimore, Maryland

Before: Honorable J. Frederick Motz, Judge

Appearances:
On Behalf of Plaintiff Novell:
Jeffrey M. Johnson, Esquire
John E. Schmidtlein, Esquire
Jim F. Lundberg, Esquire
Erin W. Burns, Esquire
On Behalf of Defendant Microsoft: David B. Tulchin, Esquire Steven L. Holley, Esquire James Jardine, Esquire Steven J. Aeschbacher, Esquire Sharon L. Nelles, Esquire

Reported by:
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(Proceedings at 10 a.m.)
THE COURT: Good morning, everybody. Isn't Salt Lake City beautiful this time of year? We're here in Microsoft's Rule 50 motion in Novell versus Microsoft. Mr. Tulchin.

MR. TULCHIN: Thank you, Your Honor. What I'd like to do, if I could, is to hand up a set of what might be called slides -- I have two copies for the Court, if that's okay -which we put together, Your Honor, in view of the fact that the material that was submitted to the Court on this motion is very lengthy and covers many, many issues. It's not surprising that it does, I think, Your Honor, in view of the fact that we had an eight-week trial in what at least I believe was an unusual case, in an unusual setting, and I'm not referring to Salt Lake City, I'm referring to the legal setting.

But if it pleases the Court, Your Honor, what I thought I'd do is to go through the pages that I've handed you in this binder. Some, of course, we'll go through quicker than others. And as always, Your Honor, I'm happy to answer any questions that the Court may have as we go through this.

THE COURT: Well, my first question is, why should I even bother to take this motion seriously? Why don't I have another eight-week trial, see what the jury does, and we'll be in the same posture later than I am now? I mean, in terms of the economics of them, I realize Microsoft would like to have these issues resolved. In a way, maybe the best thing to do is to
recognize that eight weeks is eight weeks, to go back and try it, see what a jury does with it, and every issue you have will be preserved.

MR. TULCHIN: Your Honor, I don't think that's a proper way of looking at this motion. And I'm not even sure that it leaves room for the purpose of Rule 50 of the Federal Rules of Civil Procedure.

Rule 50 is there for a reason, Your Honor. It's there because, even in a case where a plaintiff prevails, let alone our situation where we had no verdict, it is the responsibility of the Court to assess, on a Rule 50 motion, whether a reasonable jury had a legally sufficient basis to render a verdict.

I wasn't going to start here, Your Honor, but to answer your question, I'd like to talk about a case called Gibson against Old Town Trolley, which we referred to at Page 19 of the materials that I handed up to the Court.

This is Fourth Circuit case, Your Honor, a case where a jury found liability and awarded damages to a plaintiff. And the defendant, after trial, moved under Rule 50 for judgment as a matter of law. The district court denied the motion, Your Honor, on the ground that the jury had clearly rejected the testimony from the company, the defendant company, in reaching its verdict. In other words, the district court said, I'm not going to delve into fact issues. The jury has already come to a verdict on the issues that were presented to it.

On appeal, the Fourth Circuit reversed, remanded, with directions to enter judgment for the defendant. The opinion was written by Judge Wilkinson, who I believe was chief judge at the time. Mrs. Motz was on the panel, along with a district judge sitting by designation. This is 160 F.3d 177, Your Honor.

And the Court explained in that case that even where a plaintiff meets its burden of setting out a prima facie case, the inquiry for the district court is not over. It is not sufficient merely to say, Well, the plaintiff got that far, the plaintiff was able to get to a trial and show this was a discrimination case, the elements of its claim. The responsibility of the district judge is to assess whether a reasonable jury had a legally sufficient basis for finding for the plaintiff.

And to quote the opinion written by Judge Wilkinson: If the Court were simply to gloss over a Rule 50 motion, and now I'm quoting, that would, quote, "exempt even the weakest cases from judicial review." It goes on to say: "This would transform the prima facie case requirement from a channeling device into a free pass." I'll stop there, Your Honor. And I want to go back to the beginning, if I may.

THE COURT: I haven't read the case, but I understand. That probably has, it strikes me that must have to do with peculiarities of prima facie law employment discrimination cases. If, in fact, if, in fact, a plaintiff has presented sufficient evidence to get to the jury, that seems to me a Rule 50 issue. I
could be wrong. I haven't read the case. But it must be tied into the peculiarities in employment discrimination law.

Clearly, I mean, you can't judge credibility of witnesses on a Rule 50.

MR. TULCHIN: That's not correct, Your Honor. It's not quite correct. And let me just say a couple of things, if the Court would bear with me for a moment. You may remember, on November 18th and 21st we had an extended argument on Microsoft's Rule 50 motion, seeking to have --

THE COURT: You've answered my question. You've persuaded me I ought to take this seriously.

MR. TULCHIN: Your Honor, if $I$ just may finish this one thought. What the Court said on November 21 st is, we're almost there. We've got three more weeks of trial. Why don't I just find out what the jury is thinking? And I think the very words you used were similar to the words you've used this morning, that, as a practical matter, why don't we just find out what the verdict will be? We're sort of halfway down the mountain. Sorry to go back to Aspen Skiing and Christy Sports. But we're going downhill. We're at least halfway there. Why not just glide to the finish line?

And it's one thing in that circumstance to do that, Your Honor. I think it's a very different thing in this circumstance where, without a close examination of the legal issues, some of those are mixed questions of law and fact, but,
of course, it's not true, and we've said this repeatedly in our brief, that a plaintiff can avoid judgment under a Rule 50 motion merely by presenting a scintilla of evidence. Sort of the Adam Harral evidence about custom and practice in the industry when it comes to the fact that betas can change. It's not enough that there be merely a scintilla. And the Herrera against Lufkin case says that clearly.

So Your Honor, if I could, and I hope I don't take more time than the Court was anticipating, but I'd like to start at Page Two of the materials that we provided to you, Your Honor. And what I'm doing here is to try to set the background in which this case exists. And of course, at a trial, Your Honor, a court naturally, on a day-by-day basis, deals with many, often dozens, of issues that pop out at any trial. There are evidentiary issues. There are issues about trial management.

At this stage, it is worth doing, I submit, to stand back a few steps and to look for a minute just at the forest. I'm going to get to the individual trees and branches on them.

But I start with the proposition that there has never been a successful antitrust case such as this. No private plaintiff has ever recovered damages on a cross-market theory of harm to competition. We've said this before. Novell has never cited a case to the contrary. United States against Microsoft, of course, was a government enforcement action, seeking equitable relief, with a very different causation standard.

Secondly, Your Honor, and I'm turning to Page Three, I think it's important, because of the theory about middleware and Mr. Johnson's concession at the trial, that the Court would be directing a verdict for Microsoft if Novell were forced to adopt the third prong of the middleware theory, the one about middleware exposing sufficient API so that a full-fledged productivity application could be written.

THE COURT: One of the questions I have for Mr. Johnson, I'll tell him now, is, I don't see how it can be -- I understand Dr. Noll testified to the contrary. Doesn't make any sense to me. It seems to me the whole theory of the middleware is you've got to expose as many APIs as the operating system. But I'll ask Mr. Johnson that.

MR. TULCHIN: Thank you, Your Honor. My point here, and I won't dwell on this given the Court's comment of a moment ago, is that the tolling that Novell was able to obtain of the Statute of Limitations was obtained precisely because the complaint adopted the theory of the government case. The complaint says that itself in Paragraph 16.

It says the complaint alleges, this complaint alleges the same operating system's monopolization count as alleged and proved in the government's suit.

And, of course, Novell's brief says the same thing now.
It said --
THE COURT: Help me out. Again, I'm sort of
telegraphing questions I have for Mr. Johnson. There is a whole issue about whether I should be considering exhibits that were not introduced into evidence, that I didn't even get a chance to rule on.

As I understand it, Novell presented a theory to the government, which it didn't pursue.

MR. TULCHIN: Correct, Your Honor.
THE COURT: So how can, how can it possibly be -again, a question for Mr. Johnson -- how can it possibly be the same theory of the government case when the government chose not to advance the theory? Which I gather is reflected in the exhibits that weren't introduced in evidence.

MR. TULCHIN: Well, Your Honor, two things, if $I$ may, on that score. I think it's obvious to all of us in this room that, on a Rule 50 motion, the Court can consider only materials that are in evidence. The idea that one side can say, as Novell did in its brief, that we didn't offer certain exhibits into evidence for our own reasons. At one point they said it's because they were lawyer's letters.

THE COURT: I'll ask Mr. Johnson. It seems to me -- I don't understand. It almost makes me angry.

But assume for a moment that I can't consider them in Rule 50. I can consider them as to whether, as to the issue of whether or not this is the same theory. And if, in fact, Novell presented to the government a theory that the government chose

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not to pursue, I don't see how you can, frankly, consistent with Rule 11, say it's the same theory.

MR. TULCHIN: And my point on Page Three, Your Honor, is that Novell does not have the option here of deviating from the government case. They obtained tolling, Novell obtained tolling, by saying it's the same theory. If they've deviated -and I'll come to one other point in a minute that's very closely related -- then, of course, the claim was barred in the first instance. There's just a very, very narrow passageway through which Novell can navigate.

On Page Four we point out, Your Honor, that the findings of fact are binding, they're binding on both sides. Novell moved for collateral estoppel effect on certain findings. The Court granted that motion in large measure. And those findings now, of course, bind both sides. And I don't think there's any dispute about it. There certainly wasn't at trial, when Novell's lawyer told the jury that the findings are binding in the case.

Page Five, Your Honor, is the point that I know the Court has heard before, that the release that Novell provided to Microsoft in 2004 was very broad, it was quite general. There were three exceptions mentioned in the release, only one of which is conceivably relevant here.

The exception was for claims set forth in the draft WordPerfect complaint. It's never been disputed that the

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complaint, actually filed four days later, was exactly as the draft was. No deviations there.

So the release means that Novell is stuck with the allegations of the complaint and cannot go off into new theories, new allegations. And, of course, the one that's most important for this purpose, Your Honor, is deception. The complaint makes no claim for deception. The word "deceive" or "deception" is mentioned once, in an entirely different context. And I'll come back to that, Your Honor.

And on Page Six and the subsequent pages, I wanted to also make the point, Your Honor, that, in evaluating an antitrust case, which, of course, has to be --

THE COURT: Now, let me ask you this because I'm not sure that I -- you've addressed in the reply memorandum. They say you can't even raise this because you didn't raise it on the Rule 50 motion. And you say you did.

MR. TULCHIN: I'm sorry, Your Honor. I don't think they say --

THE COURT: I think they say, maybe it's the limitations issue. They say that you can't raise this in a post-trial Rule 50 motion because you did not raise it in the original Rule 50 motion. I thought --

MR. TULCHIN: This point we did raise, Your Honor.
THE COURT: The answer is you did. That's what your answer is.

MR. TULCHIN: Yes. This point we did raise in our Rule 50 motion at trial. I don't think that was Novell's argument. I think they were referring to some of the other arguments that we made at the very end of our --

THE COURT: So this is preserved unquestionably, in your judgment?

MR. TULCHIN: Yes. I don't think there's any dispute about that, Your Honor.

Going back to Page Six, if I may, Your Honor. The point that $I$ wanted to get to here, and again, I appreciate the Court's patience in hearing us out on this, is that in an antitrust case, of course, Your Honor, one of the key things that one most must always think about is the impact on competition in a given market, the relevant market. In considering whether the conduct here caused harm in the relevant market, it seems to me one has to think about what the market looked like before the conduct occurred.

There's no dispute that Microsoft had a monopoly long before 1995. And we point out on Page Seven, that Finding of Fact 35, which is one of the estopped findings, says -- and, of course, this was written in 1999 -- every year for the last decade Microsoft's share of the market has stood above 90\%. And there's no question about this. Professor Noll said the same thing. Microsoft long had the monopoly. There was never a claim at trial that the monopoly was obtained unlawfully, only
maintained.
So there's a lawful monopoly before this conduct takes place. And then, of course, there's not only no dispute, but Novell's witnesses all excitedly told the Court that Windows 95 was a great innovation, a breakthrough, an improvement, a superior product.

Mr. Johnson said the same thing on November 18th, at Page 2670 of the transcript. He said Windows 95 was, quote, "a great innovation", unquote.

So Item Three on Page Six. Not only did Microsoft have this high share and then come out with an even better product, but what Novell's witnesses all said is that they were excited about the product and wanted to marry their applications to it.

It's undisputed that Mr. Frankenberg and Professor Noll -- this didn't come from Microsoft, Your Honor -- both said that Microsoft's market share would have been even higher if Novell had come out on time with its products to the market. So now we have a situation where there's a superior product. And, of course, it's black letter antitrust law that the whole idea of antitrust law is to encourage companies to come out with superior products. And if you do, and have the monopoly as a result because you've obtained it or maintained it as a result of a superior product, that's not only lawful, that's what our system is designed to encourage.

And lastly on this point, Your Honor, of course, the
evidence is also clear. There's no dispute here. We don't need credibility findings from the Court on a Rule 50 motion for any of this because Professor Noll said there was no effective or viable alternative operating system when Windows 95 came out on the market.

THE COURT: If you look at the timing, it can't be November, December of '95. It's got to be a year or two thereafter. I mean, that's got to be the theory.

MR. TULCHIN: Yes, Your Honor. I don't disagree with that. I would point out this. And here I am with some of the background. And I think this is important.

Microsoft has more than 90\% before Windows 95 comes out. It comes out with a superior product. And the evidence is that its market share goes to about 95\%. Novell says, If our products had been timely -- and that's, of course, what they complained about in the case -- your market share would be above 95\%.

Now, under that situation, which is the but-for world, when there was no wrongful conduct because there was no withdrawal of support for the namespace extension APIs, there would have been virtually no room for any other competitor if Microsoft Windows has $95 \%$ of the market. And it would have been even higher had this conduct not occurred.

THE COURT: Yeah, but again, $I$ feel like an idiot to ask the question since I've lived with the case so long. As I
understand the theory, again, I have to ask Mr. Johnson, it's got to be not looking at that limited period of time, but for a reasonable period of time thereafter. As I understand Novell's theory, it is that either because of the popularity of WordPerfect, and maybe PerfectOffice, which gets a release issue, leave it at WordPerfect, Windows 95 would become irrelevant, or that because people started writing to it as middleware, then Windows 95 would become irrelevant and that, just as in the past, WordPerfect had been cross-platformed to other operating systems, so, too, it would have been cross-platformed within some reasonable period of time thereafter because there would have been a, maybe an affair or temporary marriage. That after, after the marrying, which they had to do because Windows 95 was being marketed so strongly and was such a technological breakthrough, that within some reasonable period of time thereafter, the operating system market actually would, you know, would have been affected because, by that time, the operating system would have been commoditized. It wouldn't have required all the bells and whistles that came with Windows 95 in the long term. And that, therefore, just as it had in the past, WordPerfect could be cross-platformed to UNIX or something else.

And that is where the effect on the operating system market was.

MR. TULCHIN: Your Honor, with all respect, that's a theory. And I will say that if you parse it out the way the

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Court just did, you find that what you're saying is based on loads and loads of speculation.

THE COURT: I'm inclined to agree with that.
MR. TULCHIN: It's a theory, Your Honor, the theory, perhaps, on which they were able to get to trial. But that's the point.

We all know, as lawyers and as the Court, the point of the trial is to do more than simply have a lawyer espouse a theory. The point of an eight-week trial is to have evidence. And there was simply no evidence from any witness, including Professor Noll, that any of the theory that the Court just articulated might have actually come to pass; that there was some alternative operating system, to use a metaphor that Mr. Johnson used often at trial, some alternative operating system that could have come through the gate and challenged Windows' high market share.

THE COURT: I think Mr. Johnson relies upon Finding 30 made by Judge Jackson, that other people would have been manufacturing operating systems. I think I've got the right finding of fact. I'm not sure.

MR. TULCHIN: But Your Honor, again, the point of a trial is to have evidence. There wasn't a marketing person from Novell or any expert. Mr. Frankenberg, the former CEO, didn't say any of this. Professor Noll only --

THE COURT: I understand the point. I'll ask Mr.

Johnson about that. Because it does seem to me to be somewhat speculative. I would have liked to have heard testimony, at least from Dr. Noll or somebody, that, yes, the same operating system to which we had been cross-platformed in the past, we would have been able, after people started writing to us as middleware, or it would become so popular that the same operating system that existed prior to the introduction of Windows 95 would have been in place, say, in 1996 or 1997. And I don't think there was any such testimony.

MR. TULCHIN: None.
THE COURT: Indeed, it could be that the answer is, as I say, all the bells and whistles in Windows 95 became irrelevant because nobody would be writing to the operating system any more. But I don't remember hearing any testimony about that.

MR. TULCHIN: And my recollection is the same as the Court's. There was none. Novell's brief contains none, at least as I recall that.

On Page Eight, Your Honor, we've set forth just some of the background facts. I referred in part to the very point that I made a moment ago. Christy Sports in the 10th Circuit, 2009, makes the same point, that it's the plaintiff's burden to show that a high market share was acquired or maintained as a consequence of something other than a superior product.

And when we think about the harm to competition here, and I hope to come to that a little bit later, Your Honor, when
we think about that, $I$ think it's highly important to keep in mind this very point. In our case, everyone, and I must say it was notable that the most enthusiasm for the product, I think, came from Novell's witnesses.

THE COURT: I remember being struck by that.
MR. TULCHIN: Everyone agreed that Windows 95 was a superior product, an innovation, a breakthrough. Everyone was excited about it. So in determining whether or not there is enough evidence for a reasonable jury to find harm to competition, $I$ think it should be kept in mind, again, that in this case there is no dispute that Microsoft came out with a superior product.

That distinguishes our case from the vast majority of other Section 2 cases, where the argument is that the monopoly was obtained or maintained because you did something wrong, not because your product was superior at all. There's no dispute about the latter point here.

Your Honor, when you asked Mr. Johnson about this on November 18th, he said -- your question was: Isn't it true that Novell's witnesses saw Windows 95 as a superior product that they wanted to be hitched to? Mr. Johnson said: Your Honor, you're not wrong about that. That's at 2674.

I'm going to skip Page Nine, which I think we've covered and the Court is familiar with.

Page 10, Your Honor, is a piece from Mr. Frankenberg.

I'll come back to this later. But --
THE COURT: Let me ask you about Nine.
MR. TULCHIN: Yes, sir.
THE COURT: And Microsoft has never made this argument and, for understandable reasons. But Mr. Johnson's going to stand up and say, as I think at least three times in the brief, Novell says that the fact that Microsoft was willing to have less short-term profits is a classic manifestation or characteristic of antitrust violation, because why would a monopolist ever do that rationally unless they saw in the long term benefits from the monopoly?

And I have said, and I do not expect you even now to accept this argument or to say anything about it, $I$ just want to make sure I'm not talking nonsense. I absolutely understand what academics said about that. I don't see where in this case there is any evidence of loss of short-term profits because, even if, theoretically, Microsoft might have been losing a little bit of revenue from selling less Windows 95 because people who were using WordPerfect or another operating systems, DOS, for example, which is a whole other issue which we'll come to later, that whatever decline there was in revenue on that side was more than made up for, under the plaintiff's own theory, by the increased sales of Microsoft's application products.

Now, as I say, you never made this argument. And I'm not asking you to make the argument. But, frankly, I just want
to make sure that I'm not talking nonsense.
It seems to me in terms of analyzing what the academics say, it makes no difference. Microsoft, I don't see any evidence of loss of short-term profits. Indeed, Novell's very theory is, and I remember, the other thing, I remember being struck by a lot, I remember being struck by Mr. Gibb being offended by the fact that when there was this great event out in Seattle, he wasn't even allowed in the tent, although Jay Leno was, because the marketing pitch was, Look, Windows 95 and Office go together.

Seems to me that that's exactly, if, in fact, there was bad thoughts going through Mr. Gates's head, and indeed I think it's, I think it's expressly referred to in the memorandum that Mr. Johnson submitted, it is, they were trying to, the Applications Group that Microsoft was behind, Lotus and maybe Novell, but they wanted to make money, whatever money, to get back to my question, whatever money they were going to lose by selling less operating systems to people who otherwise would have bought it to use WordPerfect, they were more than going to make up for by selling their own applications.

MR. TULCHIN: Your Honor, I agree with what you've
said. I want, if I could, if I could --
THE COURT: And, frankly, I think, I understand the academics' reasoning. I don't think the facts are that supportive in this case.

MR. TULCHIN: But, Your Honor, if I could ask you to
turn to Pages 47 to 50 of this presentation, because you're asking a question that $I$ was going to get to, but I want to get to it now because it's on your mind.

You are absolutely correct. There was no evidence at the trial --

THE COURT: According to them, and again I'm going to ask Mr. Johnson, who made me a little mad, that you admitted that on Pages 88 to 90 of your opening memorandum. I've read that. I don't see where you admitted a thing.

MR. TULCHIN: No. What we referred to is the CEO, Bob Frankenberg's, testimony, that he believed that if they had come out to market in a timely fashion, that Microsoft Windows' market share would have been even higher. And Professor Noll said, I agree with that.

There was no testimony from anyone at Microsoft about forgoing short-term profits. Of course, there was no evidence at all on the subject of whether any short-term profits were foregone. To get that evidence, one would have to do what the Court was just describing. One would have to see what extra sales there were of applications, and balance that off against the diminished sales of the operating system.

No one tried to do that. No expert, no fact witness was asked about that.

So we haven't argued that Microsoft decided to forgo short-term profits. And there's no evidence that we did.

THE COURT: And there's no evidence that you've admitted it.

MR. TULCHIN: But $I$ want to deal with this academic question because Novell says all the time, Well, this is a hallmark of anticompetitive behavior, and it's not. And I just want to take you through these four pages, if I could. I'll try to go quickly.

The case law that talks about forgoing short-term profits, including Aspen Skiing, only gets to the question of whether the company was forgoing short-term profits after deciding that there was no economic or business justification even articulated for the conduct. I mean, Aspen is the paradigm there because, of course, in Aspen, the defendant decided not to sell at full retail price lift tickets to a competitor, so the competitor could recycle them to the competitor's own customers. And, of course, the defendant there could not articulate a business or economic reason for that. It had to be only to try to put the competing ski area out of business.

It's only in that context that the courts reach this question of forgoing short-term profits.

And then on Page 48, Your Honor, what we've done is just set up the obvious point; that businesses decide to forgo short-term profits every day. If a company decides to retool an assembly line, to shut it down for a period of time so that it can install the latest, greatest machine tools from Germany that
will help it be more efficient in the future, you're forgoing short-term profits for a long-term gain. Same for a pharmaceutical company that does R\&D.

Even if you have the monopoly in a field, as, let's say, Lipitor once did, investing in $R \& D$ is not anticompetitive, though doing so means you're forgoing short-term profits.

And on 49 we've set forth some of the cases on this, one that happens to be from the District of Maryland in 1998. And interestingly, Your Honor, what we found, in looking at this question of short-term profits, was an article written in 2006 by a man who was then and is still now the Senior Economic Counsel at the Antitrust Division of the Department of Justice. His job is not to let antitrust offenders escape scot-free. Just the opposite.

But he makes the very points about short-term profits that we've been discussing. The article, and I have a copy here if the Court would like it, it's readily available from the Antitrust Law Journal, 73 Antitrust L.J. at 413, examines these very points, and makes the point that conduct should be viewed as exclusionary only if it makes no economic sense but for the tendency to lessen or eliminate competition.

And I won't try to explain all of what the article says, Your Honor. But it is spot on on this very point. As Mr. Werden says -- we've quoted this on Page 50 -- "much pro-competitive conduct entails the sacrifice of current profit."

Of course, to go back to the point the Court was making a few moments ago. It would be one thing if at trial there was some evidence about this. What Novell's lawyers have done is to try to twist Mr. Frankenberg's admission that there was no impact, adverse impact on competition in the operating system market, his testimony that Microsoft's share would have been even higher if the namespace extension APIs had continued to be supported, and if Novell could have come out on time with its product. They've tried to twist that into some sort of acknowledgment by Microsoft that Microsoft made this decision in order to forgo short-term profits.

I mean, if anything, the reading of PX-1 that Novell's lawyers have expressly given to Mr. Gates's memo of October 1994 is that what Mr. Gates was thinking -- this is not Mr. Gates's testimony, but this is the argument that Novell has made -- was that what he was thinking is that he wanted to advantage his own applications in competition with Novell.

THE COURT: So did Mr. Gibb, but that's a different question.

MR. TULCHIN: Yes, Your Honor.
THE COURT: Maybe I'm talking like a juror, not like a judge. I understand that.

MR. TULCHIN: I'm sorry, Your Honor?
THE COURT: I said I might be reflecting my views as a potential juror, not as a judge, in saying that. But it's

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perfectly clear to me that Gibb was very, very concerned about the fact that there was marketing of Windows 95 and the applications profit. That's exactly why he remembered so strongly the tent.

MR. TULCHIN: Your Honor, I've skipped over a couple of pages. I'm now up to Page 12. But in thinking about these background facts and what the market was like, I think it's also helpful to think about the opinion authored by Chief Justice Roberts three years ago in Pacific Bell against LinkLine. We've cited this in our brief.

But Justice Roberts points out, 555 U.S., and this is at Page 448, that the instances in which a dominant firm may incur antitrust liability for purely unilateral conduct are indeed rare. And in citing Aspen Skiing, he says, the circumstances are limited where a unilateral refusal to deal can give rise to antitrust liability.

And I'm going to get to the fact that we believe, as a matter of law, no credibility determinations are necessary. The Court need not find any facts. I'm about to get to the point. There is no antitrust claim here at all. But one more point before I get to that, Your Honor.

I don't mean to state this in a harsh way, but at Page 13 we've made the point that this case really is in a category of, let's say, an unusual or peculiar situation. If a company is harmed by a decision, a decision of this magnitude which Novell

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says cost it over a billion dollars that it asked to be trebled --

THE COURT: No. I understand the point. And I was upset about Novell's bad management. Your point is, it wasn't bad management because this was not really a contemporaneous concern.

MR. TULCHIN: Correct, Your Honor.
THE COURT: And, in fact, what the reality is, WordPerfect had a very commendable culture of thinking it was going to win by producing the best product, and it really didn't care about the 60 to 90 day window, even though it's now become so important in this litigation. In fact, it thought in the long run it was going to be able to win the battle by having the better product, whether it came out in February, March or June. That's why they won't worry about Quattro Pro. That's why they won't worry about that Frankenberg, never reached his desk. That's why they gave it to a middle manager to supervise the product. And then that's why they gave it to Adam "Bomb" to execute on.

MR. TULCHIN: Your Honor, it never even reached the desk of Ad Rietveld or Glen Mella or Mark Calkins. It never even got to Bruce Brereton, who was in charge of the Business Application Business Unit.

And one would, I mean, it's inconceivable -- the Court noted this at trial -- it's inconceivable that if the decision
made by Microsoft was about to be so devastating for Novell, that there wouldn't be a single internal e-mail or memo about this, raising it up to senior management, or even mid-level management, and saying, What can we do?

And the Court will remember, of course, Exhibit 155. This was the January 12th memo. And I think the timing is important, Your Honor. This is now three months after the decision to withdraw support for the namespace extensions. There's been plenty of time in three months. Remember, Novell is saying, We've got to get our product out around August, when Windows 95 will be released.

So three months have passed. And there's a formal memo, it's Exhibit 155, from Mark Calkins, to Rietveld, Moon, Mella and Frankenberg is copied, about the logo program, Microsoft's logo program, and the fact that Microsoft doesn't want Novell to use the logo.

And, of course, the Court will remember that there's mention made of this in the complaint; that at the summary judgment stage Novell claimed that this was misconduct that gave rise to a claim. That was abandoned before trial and at trial.

But the idea that there isn't a similar memo ever, as far as we know, internal at Novell, or some complaint to Microsoft, $I$ think is an indication that, indeed, Novell did not perceive this to be a problem at all at the time.

THE COURT: I understand that. And indeed, I am going
through my head to determine that the claim is a lawyer's contrivance and not based on reality. But Mr. Frankenberg would say that he just did not know what was going on, and it was only after he saw the discovery that he realized what had been done to him.

MR. TULCHIN: Well, what he said, Your Honor, was only after he saw PX-1, where Mr. Gates made mention of competition in the applications business between Microsoft and Novell. And that is what he said. But that doesn't detract from the point that if Novell thought that this decision was causing it harm because they weren't going to get their product out in time, and it was a life-or-death situation to get it out, if they waited for six month after Windows 95 came out, they say, we're dead, we're just, you know, our business is over.

And it's inconceivable that under those circumstances, no one would have noted that --

THE COURT: Mr. Harral called Premium Support.
MR. TULCHIN: Well, yes.
THE COURT: No. No. Mr. Struss's testimony is uncontradicted, or the e-mails.

MR. TULCHIN: Thank you, Your Honor.
THE COURT: His testimony and the e-mail is uncontradicted. That is absolutely clear. If somebody -- I clearly would have allowed rebuttal testimony on that.

MR. TULCHIN: Your Honor, what I propose to do now, I
think I've addressed some of the questions about the proper standard. We talked about the Herrera case and the Old Trolley case from the Fourth Circuit. But I would skip now to Page 23. And the point here, Your Honor, in this section, which goes on for a significant period, but I can cut through it, I think, easily, the point here is that there is no antitrust claim at all in this context. And given what we've seen is the evidence at trial, Novell had every opportunity to submit whatever it wanted, it's quite clear that there can't be an antitrust claim.

Again, there's no need, for this purpose, to delve into any facts in dispute. The facts upon which we rely are undisputed or come from Novell itself.

And on 23, Your Honor, we set forth the basic proposition that, as Novell's counsel said on November 18th, quote: "Microsoft doesn't have a duty to provide us with anything." Well, that's black letter law, of course, going back to Colgate. The Pacific Bell case from 2009 says the same thing. And the only exception to that point in the case law that the courts have recognized is the Aspen Skiing exception which, of course, the Trinko case says is at or near the outer boundary of Section 2 liability.

Deception is not an antitrust claim. I'll come back to that. And as I said earlier, Your Honor, deception cannot be the basis of the claim here because of the release. The release

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says, We release you in 2004 from all claims that Novell ever had against Microsoft, except those set forth in the draft complaint. That same complaint was filed four days later. It does not make any claim based on deception.

To Page 24, Your Honor. Again, this is consistent with the Colgate doctrine and all the cases. There's no dispute about it. Here, a developer of a piece of complicated software that took up a substantial period of time to develop -- obviously, no one could argue this -- is entitled to design the product in the way that's best for the developer itself. It is not necessary to take into account the needs or desires or competitive position or advantage of some rival.

And Your Honor has made the same point in a different context in 2003. Even the DC Circuit, in the government case, pointed out that courts are very skeptical about claims that competition has been harmed by a design change.

Now, Novell cites the Multistate Legal Studies against Harcourt Brace case. It's in the 10th Circuit in 1995. They cite it for a proposition about burden shifting that's not there at all in the decision. But what the 10 th Circuit did say in Multistate, this is 63 F.3d 1540 at 1551, Your Honor, is that product improvements can be a defense to a Section 2 claim. If you've improved your product, that's what the antitrust laws ask of you.

In Multistate, the 10 th Circuit said, It's not
appropriate for courts, because the court's competency doesn't lie in this area, to inquire as to whether a product change truly is an improvement, unless the claimed improvement takes the form of a marketing change rather than some complex, technological integration of technical products. And --

THE COURT: Excuse me. My mind is wandering. So let me ask you a question.

I understand your position that, except as far as deception of third party people are concerned, which is a different issue, but $I$ understand the general principle, that deception is not a basis for an antitrust violation. But assume for me -- and I don't expect, I'm asking you to assume, not to agree -- but assume that, in the beta releases, Microsoft had made a, quote, "commitment", unquote, to Novell to continue to support the namespace, namespace extension APIs, that it made this commitment. I understand you said it hadn't. Assume that it had. And that at some point, in October 1994 -- and had previously made that commitment -- I don't know where the evidence of this is -- that it knows that Novell's relying upon this. And that it withdraws support because Mr. Gates thinks, Oh, my God, if we continue to support this, all of my people are telling me that they're worried about middleware, that WordPerfect is going to be a middleware, it's going to destroy us in the operating system business, it's going to commoditize the operating system.

And so having made the commitment and having deceived Novell into relying upon that, that it would support, all of a sudden it withdraws for a very anti-competitive reason, which is to protect its monopoly in the operating system in the long run. And that was the reason. And it does withdraw support. And the reason it withdrew the support, after having deceived Novell into believing that it was not going to withdraw the support and, therefore, buying time so that Novell can't finish its product in time, but the very purpose of the deception from the get-go was to, certainly at the time of withdrawal -- and that might be two different questions -- but certainly at the time of withdrawal, it reneges on its commitment for the very purpose of protecting its monopoly in the operating system market.

Now, I understand there are precedents out there that say deception doesn't count. Why isn't that an antitrust violation?

MR. TULCHIN: Well, with all respect, Your Honor, it may give rise to a cause of action. One might think of several, including causes of unfair competition under state law, and various business torts. Those causes of action, of course, Novell did not bring. They all would have been barred by the Statute of Limitations by the time Novell got around to believing, or maybe its lawyers got around to believing, that it had been damaged by this decision.

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I agree with the Court this is all counter-factual.
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There wasn't anything close to a commitment. In fact --
THE COURT: No. That's a whole different issue.
MR. TULCHIN: But, Your Honor, it's just not an
antitrust claim. And there were reasons for that, Your Honor, that go to the basic policy behind Section 2. That when two firms, or more than two, are locked in competition, that every instance where one doesn't behave well towards the other, those instances do not give rise to an antitrust claim. Otherwise, what the federal antitrust laws would be enforcing is some code of nice conduct, of gentlemanly conduct over tea in Greenwich.

I mean, by the very nature of business competition, one side will think, and, you know, years and years ago I had some sort of tangential involvement in a lawsuit with competition between Coke and Pepsi. It's a little bit off the point. But if ever there was rough and tumble competition, there we're only talking about a one or two point change year by year in market share, those two go after one another very, very vigorously.

And the antitrust laws just do not enforce this idea that misleading a competitor, some deception of a competitor, some bad conduct is actionable. There's never been a case where that has actually been adopted.

Now, it's one thing to get past the pleading stage. It's another thing to be where we are now.

THE COURT: It's a whole different question, which I'll ask Mr. Johnson about, is whether, and I, obviously, accepting

Novell's position on this, but recognizing the distinction for withdrawing a, something from a beta version, and withdrawing it for, because of what, what Mr. Harral said. He may be the only one who so testified. But some of the argument's always been from Novell, you can only withdraw for things that come up, bugs that develop during the beta process. I understand that distinction and I've ruled against Microsoft so far. That is a fair question.

Even if $I$ am right that, in certain circumstances, deception can amount to an antitrust violation, whether that is, quote, "sufficient deception", drawing that fine distinction, is sufficient deception to give rise to a cause of action. That, I don't know the answer to that. But $I$ do think it's a fair question.

I mean, even if I am, as my question suggests, that I am inclined to believe, that there may be factual circumstances in which, recognizing the generality of the principle, that deception can give rise to an antitrust violation, I'm not sure that what happened here is that kind of deception, since it was perfectly understood and the testimony could not be more clear, including that of Mr. Frankenberg, that it was understood in the industry.

The distinction between withdrawing something from a beta version because a bug develops or simply withdrawing it because it's your right, that is not borne out generally by the
testimony, including Mr. Frankenberg's.
MR. TULCHIN: Your Honor, we intend to come to that point. I think I can go through it very quickly when we do, because of the Court's comments. I know this has been covered at great length.

I want to go back just for a moment, though, to Page 25 and to Aspen. As I was describing earlier, Your Honor, if this case has an antitrust claim in it at all, it has to be the exception to the Colgate doctrine that's encompassed by Aspen Skiing. Of course, on 25 we point out that the 10 th Circuit has looked twice at the Aspen Skiing issues, once in Four Corners Nephrology against Mercy Medical Center, 2009, and another time in Christy Sports against Deer Valley, also 2009.

Those cases interpret Aspen Skiing exactly in the way that we propose it should be interpreted. In Four Corners, the 10th Circuit -- I'm now on Page 26.

THE COURT: Aspen Skiing is such a unique case. It's somebody taking advantage of something handed to them by mother nature, and abusing the situation to drive a competitor out of business. That clearly is different from here, where what's being complained about is Microsoft not sharing its own intellectual property that it invests, was the product of its own ingenuity and capital investment. Clearly, it's distinguishable.

MR. TULCHIN: Yes, Your Honor, I couldn't agree more.
And the thing about Christy Sports that's so interesting is that
there was a lease with a provision in it that Deer Valley did not enforce for 15 years, saying that this property at mid-mountain cannot be used to rent skis. Now, all of a sudden, one year, Deer Valley says, now we choose to enforce the provision, which necessarily put the plaintiff out of business.

And you will remember, Your Honor, that the complaint in this case makes it seem as if Novell couldn't, Novell's products couldn't run on Windows 95, that they were being put out of business because of the namespace extension APIs. Well, certainly, by now we all know that's not true.

And in Christy Sports, I would submit to the Court that that's a case much, much better the plaintiff than this one. If the 10th Circuit found that Christy Sports had no antitrust claim because, and I'm quoting 555 F.3d at 1196, because Deer Valley, quote, "revoked its permission and took over the ski rental business for itself." Then I don't see how there can be an antitrust claim when Microsoft withdrew support for 4 APIs out of 2500, continued to cooperate with Novell, tried to help Novell get its product to market on time, and, furthermore, had provided the beta under cover of the reviewer's guide that says there's no commitment.

THE COURT: Just help me out. I just don't remember. I know that somebody went out to Utah to be there. I'm not quarreling with you. But where's the evidence that they actually tried to help get the product to market on time?

MR. TULCHIN: It's right here, Your Honor, on Pages 30 on this presentation, on my outline, Pages 30 through 32, I believe. At least a piece of evidence. A great deal more of it is referred to in our brief.

What Novell does is to take Christy Sports and argue that, in our case, what Microsoft did was first invite an investment, and then disallow the use of the investment, because Microsoft supposedly evangelized the namespace extensions. I'll come to what Mr. Belfiore's presentation about that said in a moment.

But of course, in Christy Sports, Deer Valley invited the investment in a ski shop, allowed that business to continue for 15 years. And only when Deer Valley said to itself, we can have a monopoly mid-mountain by enforcing this old provision in the lease that we've never enforced before, was the competitor put out of business. So certainly, there was an investment that had been allowed and then disallowed.

And what Christy Sports turned on, according to the 10th Circuit, is that there, and I'm quoting at 1197, Deer Valley, quote, "had explicitly informed its competitor from the beginning that the relationship could change at any time." Unquote.

They make the distinction that in Aspen that wasn't so. But of course, here, Novell was informed from the beginning by the contracts, $D X-18$ and 19, by PX-388, the reviewers guide,
which says, we provide you with the M6 beta. This was in June of
'94. But it's not a commitment on our part.
So here we go with your question, Your Honor, starting at Page 30, about the question about cooperation.

The brief contains much more than this, Your Honor, but this is some of the highlights. Exhibit 172. Your Honor, everything that we refer to is in evidence.

THE COURT: No. Is Dave LeFevre the guy who, he worked at Novell, then he worked to Microsoft, and now works for the City of Seattle or something?

MR. TULCHIN: No. I'm sorry?
THE COURT: Somebody, somebody had gone from Novell to Microsoft.

MR. TULCHIN: Yes.
THE COURT: But then retired from Microsoft, and now is in a non-profit in Seattle.

MR. SCHMIDTLEIN: No, he currently works for Microsoft.
THE COURT: He currently works for Microsoft.
MR. TULCHIN: But that's not Mr. Nelson, who's the author --

THE COURT: No. No. I was looking a little further along.

MR. TULCHIN: I'm sorry, Your Honor. Exhibit 172 is in April 1995. And it goes to, among other people, Glen Mella. You will remember Mr. Frankenberg saying that Glen Mella, who was the

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Vice President of Marketing, was one of the four executives who he would have expected these sorts of issues to go to.

And this is from Scott Nelson. He's not the Microsoft person you're thinking of, Your Honor. And he says the cooperation between Microsoft and Novell has been very good.

Now, this is six months after the decision to withdraw support for the namespace extension APIs. If Novell were faced with some drastic emergency, we may be going out of business. Our applications business may be sunk because we can't get our product out by virtue of some change Microsoft made. It's inconceivable that Mr. Mella and Mr. Nelson would have been noting that the cooperation has been very good.

Mr. Harral actually said the same thing, Your Honor. Of course, he was complaining about the namespace extensions. But he said, other than that, cooperation from Microsoft had been very good. That's at 423 to 24 .

In fact, in Novell's own brief, they make a point along the way that Microsoft had long cooperated with Novell.

On page 31, Your Honor, we have the CEO himself. I don't know how Novell can consistently denigrate the testimony of the man who was CEO during the relevant period. They say, again and again, well, Mr. Frankenberg didn't know the facts about the situation. It's hard to understand. I think it cuts the other way, as we've discussed.

If he didn't know there was a problem and he believed
that cooperation was very good, that's the evidence, as opposed to the argument from Novell. What does that tell you about an Aspen Skiing case? This is the boss. If anyone should have an impression about whether Microsoft was cooperating, it would be him.

And now on 32, you're right about Mr. LeFevre. He worked at Novell and then went to Microsoft.

THE COURT: Who am I thinking about? Am I making this person up?

MR. AESCHBACHER: It was Brad Struss and --
THE COURT: Brad Struss.
MR. TULCHIN: Right. I think you were combining two people.

THE COURT: No. No. I remember, I remember -- thank you.

MR. TULCHIN: So as far as cooperation goes, Your Honor, what Novell says in its brief that was filed in March in opposition to this motion is that cooperation ceased with respect to the namespace extensions. And again, they go back to these calls to Premier Support that were never identified by date or person. And they say cooperation stopped on that one tiny little area as to --

THE COURT: Well, you've made the point before. And, obviously, if the decision is made to withdraw support, for Premier Support, that's not the people to call. They're under

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company direction not to share the namespace extensions. Call Brad Struss or Mella or somebody else.

MR. TULCHIN: Yes, Your Honor. There's no question that had there been a real problem, there would have been some evidence of something like that. And, in fact, Frankenberg met with Gates in January of '95. We had those very long, detailed single-spaced notes of the meeting that Mr. Miller of Novell took. And there's no reference in there, either, to anything about the namespace extension APIs.

Turning to 34, Your Honor. This is the point -- we will go through it quickly. I think I can because the Court has seen this before and it's in our brief.

Just as in Christy Sports, Novell was informed from the beginning that these APIs could change at any time, that the relationship with these APIs was temporary. Of course, the contract says that the product may be substantially modified. Mr. Frankenberg, as the Court pointed out just two or three minutes ago, acknowledged that, in the industry, he and others understood that betas might change.

Unlike Aspen, the decision here applied to all competitors, not just to one. Novell was not singled out. And, of course, the evidence is clear that Microsoft didn't know at the time that Novell's development was dependent on these APIs. That's Mr. Struss's memo. That's Exhibit Three, which Novell doesn't pay much attention to. That Novell had said it was okay
with the withdrawal of support.
And Exhibit 82, this is an e-mail just a month after Mr. Gates's decision, from Mr. Maritz, showing that other companies had found ways not to use them. So not only did Microsoft not withdraw support just for Novell, but -- oh, and I should say, Your Honor. In Novell's brief they point out that the M6 beta, they say, went to 20,000 different sites. That's their language. Well, of course, there's no evidence that any other company besides Novell found that this was some terrible issue that prevented them from developing their products. In fact, because of Quattro Pro, it wasn't an issue for Novell, either.

One might speculate that the reason there are no e-mails internal at Novell about this problem, saying, How can we get our products out in time without the namespace extensions, or there are no outside memos to Microsoft or calls to Brad Struss or Bill Gates, the reason for all that is that Quattro Pro was such a big problem, as we will get to.

They couldn't get their product out because of Quattro Pro. It didn't matter what Mr. Gibb and Mr. Harral were doing in their little corner of Novell's business.

THE COURT: But Mr. Gibb had a responsibility for Quattro Pro, too, didn't he? Isn't that the evidence?

MR. TULCHIN: No, Your Honor. He said --
THE COURT: I thought that he went out to Scotts Valley
once in a while.
MR. TULCHIN: He did say, he did say in his testimony that Quattro Pro wasn't the problem; that although all these documents say it was, they always came through in the end, and that their product was code complete, not ready to be released to manufacture, but code complete, before the end of '95.

But that falls in the category, Your Honor, of a scintilla, the scintilla that Herrera against Lufkin refers to.

THE COURT: It may be so, it may be not.
MR. TULCHIN: Well, Your Honor, I have a long section on that coming up.

THE COURT: I'd like, I'm perfectly open to hear from you, but $I$ think it's, that's a question.

MR. TULCHIN: I want to get into Exhibit 221 and 230. It's as clear as a bell, the court commented on this at trial, that the cause of the delay was Quattro Pro, that Quattro Pro was essential to the suite. The coupon thing was only mentioned facetiously.

THE COURT: Well, let me ask you. I struggle with this all the time because I happen to agree with you. But that's irrelevant. I mean, is this something really for a Rule 50 motion or, if the jury had returned a verdict, that I simply couldn't countenance with -- there's a different standard for granting a new trial, where $I$ frankly haven't read the case. I know traditionally there's a different standard between, you

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know, granting a new trial and a Rule 50 motion.
If, in fact, you can analyze Gibb's testimony, it was code complete, it was no longer critical path, it would have been all that was done to get the release to manufacture would have been done, if you credit that, isn't that really, as opposed to being a scintilla of evidence, isn't that a credibility question in which perhaps I can grant a new trial because I just so violently disagree with the factual finding, but it's not a Rule 50 issue?

MR. TULCHIN: No, I don't think so, Your Honor. I don't agree. It is the quintessential issue that is resolved on Rule 50, just as in the Old Town Trolley case that I referred to earlier in the Fourth Circuit, where the jury didn't believe the testimony from the defendant's witnesses about the reason that the employee, Gibson, had been, I think in that case, discharged. And the district court said, I can't touch that question of credibility. That was for the jury.

The Fourth Circuit on appeal said that goes too far, that reads out of the rules any role for the court to play.

THE COURT: Is there any 10th Circuit case on point? Because I assume 10th Circuit law governs, obviously.

MR. TULCHIN: Well, Your Honor, in the section of our briefs where we talk about the standard, we do refer to this 10 th Circuit standard about a scintilla of evidence. A mere scintila for Novell is not enough.

Mr. Gibb's testimony here is at most a scintilla. Look, for example, or take as an example Exhibit 221. And I'm a little bit out of order, but $I$ wonder if $I$ could hand this up to the Court. I know the Court is familiar with 230. Thank you, Your Honor.

Of course, we've set out in our briefs the extensive testimony from four or five witnesses who were on the ground, as it were, on the Quattro Pro issues, including Mr. Larsen, who right after Christmas '95, was sent out to Scotts Valley. Mr. Gibb wasn't there. But let me come back to that.

Let me just talk about 221 just for a moment. This is something that $I$ don't believe Novell, in its responsive brief, even dared to mention.

THE COURT: I think they just mentioned 230 in a footnote, as I recall.

MR. TULCHIN: That's right, Your Honor. That's right. But look at 221. This is from Mr. Brereton, who's not Mr. Gibb now. He's in charge of the Business Unit. And you'll remember our organization chart, Your Honor. It's PX-372. It came into evidence, I don't know, right at the beginning of the case.

Mr. Brereton's at the top, Vice President, Business Applications Business Unit. Mr. Gibb reported to him. So just to be clear about that, Brereton was his superior.

And he writes a memo in March, March 1st of '95, to business unit staff, business unit managers, with copies to the

Novell executives, Calkins, Mella, Todd Titensor. And 221, in March, now, again, Your Honor, this is five months after Mr. Gates made the decision to withdraw support for the namespace extension APIs. If that decision had caused Novell or threatened to cause Novell with so grievous injury, some delay, one might expect it in Mr. Brereton's memorandum. There is no reference to that. Here's what he says.

THE COURT: What is Storm? Is Storm PerfectOffice?
MR. TULCHIN: Yes, it is, Your Honor. It's
Perfectoffice for Windows 95. Correct. He says, and you're looking right at the right place, "Our current plan of record", which he puts in quotes, is that we would ship our Win 95 products as follows: WordPerfect, September 15th; Storm, November 30th. That was the plan up until now, March 1st. Even November 30 th is outside the time that Warren-Boulton says, I assume they would have had the products out.

But he goes on to say, next paragraph: After further discussion and analysis, we feel it much better to have WordPerfect, which then implies PerfectFit, etc., that's the stuff that Harral and Richardson were working on, on the same schedule as Storm, PerfectOffice for Windows 95. Also, the Quattro -- sorry -- Quattro Pro team have examined their product delivery timeframe and feel December 30 th is a more realistic date. Therefore, after reviewing this with Mark, and I would submit that's Mark Calkins, Glen, Glen Mella, and others, we have
moved the Storm RTM -- you remember Mr. Frankenberg said that's Release to Manufacturing -- date back by one month, to December 30th, and have put WordPerfect on the same timeline as Storm. So I know what Mr. Gibb said at the trial. What he said was, Don't worry about Quattro Pro. They always delivered. It doesn't matter that he said that. On March 1st, Bruce Brereton is proposing a plan to get the products out on December 30th. There's no mention of any delay caused by Microsoft. And he notes, under some additional comments, that they still have lots of problems in Scotts Valley. In fact, he says, some of you will be asked to travel to Scotts Valley for short trips and may work on Quattro Pro for some amount of time while here in Orem.

Your Honor, Exhibit 230 and Exhibit 221, and the testimony we've cited multiple times, we've set it forth in here in this presentation, Your Honor, around Pages 95 through 104, the testimony is absolutely overwhelming. It is not a case, Your Honor, where the Court is faced with a he says/she says situation; where one piece of testimony is the light was red, the other testimony was the light was green, and the Court would be asked to resolve the factual question. That would truly be a question for a jury. In this case a second jury. That's not what we have.

Your Honor, Mr. Gibb's testimony was entirely vague and general.

THE COURT: He really wasn't. He said it was code
complete by whenever he said it was code complete.
MR. TULCHIN: Your Honor, if you would look at Slide 103. This is a point that is in the presentation. You remember Exhibit 231. This was the exhibit --

THE COURT: Let me ask you one question before you get there. And I think the answer is no. No. No. I just -- there is nothing in the record to show where the work had to be done to go from code complete to release to manufacture. Was there? Is there any evidence in the record where that work had to be done? I think the answer is no.

MR. TULCHIN: I don't recall any, Your Honor.
THE COURT: So we don't know whether it was in Utah or in Scotts Valley?

MR. TULCHIN: I don't recall any evidence about that, Your Honor. Honestly, I don't. But 103 --

THE COURT: Scotts Valley, if it's in Scotts Valley, it's a whole different issue because Scotts Valley was in no position, it shows why, even if Gibb was right, he would have been smart, and this really was a priority item, he would have been good to have Quattro Pro ready. But that was no, that's not in the record.

MR. TULCHIN: Not as I recall it, Your Honor.
The point about Exhibit 231, at my Page 103, Your Honor, is this.

You will remember that Novell's lawyer, in the rebuttal
portion of his summation, used Exhibit 31, and masked a part of it. He showed the code complete column, showed --

THE COURT: I don't think he masked it. I think he just didn't show it.

MR. TULCHIN: Either way, Your Honor, it's reflected in the trial transcript of December 14 th. We've cited the pages. THE COURT: Either way, I wasn't very happy about it. MR. TULCHIN: I'm sorry, Your Honor?

THE COURT: Either way, I wasn't very happy about it.
MR. TULCHIN: Yes, Your Honor. And I am not citing it for that reason.

THE COURT: No. I understand.
MR. TULCHIN: This point goes exactly to the Court's question about Mr. Gibb. If a product is code complete, does that mean it's ready to go out to the market? Well, here's what Exhibit 231, which Mr. Johnson used in summation, tells you on that subject.

Quattro Pro Typhoon, code complete August 23rd, '95. That's, coincidentally, the date that Windows 95 was released. Beta start in December and RTM, release to manufacture, March 31, ' 96.

So even if Mr. Gibb is right, and there's no evidence other than his say-so, which is balanced against the testimony of Larsen, who went out there, Frankenberg, who looked at 230 -- and I want to say something about that in a moment -- and Mr.

Bushman, who was eloquent on this subject, even if Mr. Gibb is right, and I don't think you have to resolve that because it's just a scintilla, the evidence here in Exhibit 231 is that even if Quattro Pro was code complete in August, and we know it wasn't from Exhibit 230 and from Larson's testimony, Bushman, too, there was a period of seven months before it was going to be released to manufacture. That's Quattro Pro.

There is no -- no one has ever blamed Microsoft for anything that happened with Quattro Pro. The shared code group wasn't involved in writing code for Quattro Pro, only for the shared code that was to be underneath PerfectOffice.

Your Honor, if I could, on Exhibit 230. When the Court saw this document at trial, you reacted to it exactly the way Mr. Frankenberg did. The important thing about Exhibit 230 is not just what it says, but to whom it was addressed.

Exhibit 230 -- just looking for it. I may have it over here.

THE COURT: I'll remember. Is that the one that talks about the risks? No, it's not.

MR. TULCHIN: That's the one, Your Honor, of December 23rd, 1995.

THE COURT: Where's Mr. Paris? He just couldn't get in from Los Angeles? He's okay?

MR. TULCHIN: He couldn't be here, Your Honor. Sorry. Lots of other people who worked very hard in the case are here,
but he couldn't attend.
THE COURT: I just wanted to make sure he was okay.
MR. TULCHIN: You will remember, Your Honor, this is written by Bruce Brereton. Again, he was Mr. Gibb's boss. He was the head of the Business Applications Business Unit. It's December 23rd, ' 95.

Novell, $I$ believe, says in its brief, they certainly said this at trial, well, what did Mr. Frankenberg know about things like this? Big deal what Frankenberg said. Well, first of all, it was addressed to BFrank. And you will remember at trial, Mr. Frankenberg testified that that was his e-mail alias. He made a little joke out of BFrank. And it also went to Mr. Waxman, who replaced Mr. Rietveld as the president of the company. This was obviously an important piece of information, to go to the very top of the company. No wonder it didn't go to Mr. Gibb.

And Brereton says, Glen asked me to give you all an update on the situation in Scotts Valley and also report on what our plan of action is. He says, On this past Thursday/Friday, about 15 additional people submitted their resignations. This leaves us with just two people.

In Item Three, he says, we have now assigned a development manager and we are putting together a team.

Four. They will be working closely with whoever is left at Quattro Pro group, in quotes, "such that they can get
familiar with the product as fast as possible." Etc., etc.
Now, Mr. Bushman testified exactly about this. It's on our Page 97 in the presentation, Your Honor. He said it was a death blow. It was stunning. This wasn't because the product was ready. It was because it wasn't ready. Bushman said, Quattro Pro was always the boat anchor. We have that on 98. The boat anchor holding us back, keeping us in place.

Dave LeFevre testified to the same effect. Of course, Mr. Larsen. Mr. Larsen is a former Novell employee. We located him in Utah and served him with a subpoena. He has never worked for Microsoft. He has no prospect of working for Microsoft. He's employed very nicely in a software company in Utah now, I believe one of the genealogy companies. I forget the name of it.

Mr. Larsen came to trial --
THE COURT: Wasn't there evidence that he had filed claims or had litigation with Novell? Is that somebody else? I thought there was somebody who, part of the cross examination was, there was --

MR. TULCHIN: Yeah. That was Mr. Bushman.
THE COURT: Mr. Bushman.
MR. TULCHIN: That was Mr. Bushman, Your Honor, if I remember correctly. But you have a very good memory. But it was not Larsen.

And I want to turn to 102, Your Honor, because I think when you examine what the proper role of the court is in a
situation post-trial on a Rule 50 motion, it is not unimportant to look at the testimony of the chief executive officer of the company. And I showed Mr. Frankenberg Exhibit 230 during the cross examination of him on November 7th, relatively early on in the trial. And, of course, this memo was addressed to him at the time. He didn't remember it particularly in his testimony.

But I asked him, doesn't this tell you that Quattro Pro was not ready even then, in December of '95? And he says, Clearly, the product wasn't complete.

THE COURT: Of course, the question is, could it have been ready?

MR. TULCHIN: No, Your Honor, not for Quattro Pro. That's not the question.

THE COURT: No. No. If, in fact, I mean, analytically, if, in fact, it had been code complete in time, at least from Novell's point of view, it wasn't that it was ready, but that it could have been ready. But that nobody cared about it any more because of what, because of withdrawal of the documentation of the namespace extension APIs.

It wasn't ready. It clearly wasn't ready. As I understand Mr. Gibb's testimony, it was, well, it could have been ready. And because it was no longer critical path, we weren't paying any attention to it because as long as, because we knew we weren't going to be ready, anyway, because of the withdrawal of the support for the namespace extension.

MR. TULCHIN: But there's just the argument, Your Honor, from the counsel from Novell. That's not Mr. Gibb's testimony.

THE COURT: No. I think, maybe I'm wrong. I thought there was testimony -- again, I could go back -- about when it was code complete and how long it would take to be released to manufacture.

MR. TULCHIN: Mr. Gibb, Mr. Gibb did not say when it was code complete. But, Your Honor, this sort of --

THE COURT: But he did say it was, it had inferentially, it had to be that it made immaterial, it had been to be done in time that it made immaterial any concern about Quattro Pro being ready to be released it manufacture. That was the whole point about not being a critical path any more.

MR. TULCHIN: Well, yes, Your Honor, he did make a general statement along those lines. I remember that as well. I mean, with all respect, I don't think that Exhibit 230 could have been written the way it was if the facts bore that out. There is not a single --

THE COURT: I happen to agree with you. But that's not the issue.

MR. TULCHIN: It is the issue, Your Honor. There's not a single piece of paper which shows that Mr. Gibb's testimony has any mooring in what was happening at the time. The paper, such as 221, which I showed you earlier, showed that as far back as

March the company was saying, we can't get our product out until December because of Quattro Pro, not because of shared code or Microsoft's decision.

And then in December, I mean, imagine the memo that would be written to the CEO of the company if Quattro Pro didn't matter now. If critical path were really, if it were really shared code, Mr. Harral and Mr. Richardson, and they were still struggling more than a year later, they were struggling because of the namespace extensions? No one ever says that.

But would the memo to Frankenberg and the number two guy at the company, the president, Waxman, he was the guy who replaced Rietveld in around March or April of '95, would the memo be this memo? A sort of urgent memo two days before Christmas that everyone in Scotts Valley was quitting? Would the memo not say, you know, we can take our time in sending people out there like Larsen because until Harral and Richardson solve the problem of shared code, Quattro Pro doesn't matter. Critical path is actually this other problem, PerfectFit and the work of the shared code group.

Exhibit 230. When Frankenberg saw it, right on the witness stand, he said, clearly, the product wasn't complete. So even if one imagines, Your Honor, just to imagine, there's no evidence of this other than Mr. Gibb, but let's just say that shared code was still a problem in December '95. Of course, at any time they wanted to, they could have had a product out by
using the Windows common file open dialogue. But leaving that aside.

THE COURT: Or the beta version.
MR. TULCHIN: Correct. All they had to use were the namespace extensions. They were still there. They weren't withdrawn. Novell still had them. There was a risk to that. Query whether it was a bigger risk than the risk they took by getting no product out.

THE COURT: I'll ask Mr. Johnson about that, too. If this time period was critical, from a business standpoint why you don't take the short-term solution of using the beta, while you continued to work on a long-term solution, which is writing your own code. I frankly don't understand it. Which contributes to my view it wasn't, that's why I really think this has no business in reality, anyway. Tentatively, subject to hearing from Mr. Johnson.

MR. TULCHIN: I intend to come to that, or at least it's in my presentation, Your Honor. I know we've been going for a long time.

But I do want to come to that. It's so important because in an antitrust case where the plaintiff has several business options and chooses the one that works out poorly for him, the idea that it would blame Microsoft and claim that there's an antitrust violation because we prevented Novell from getting the products out in time, there was no such thing.

Everyone concedes it.
That's elsewhere in my presentation, Your Honor. THE COURT: All right.

MR. TULCHIN: But to stick with 230 just for a minute. And I just want to finish this. The evidence that you were hypothesizing, Your Honor, about what Mr. Gibb said, if there were any mooring in fact for any of that speculation about, about critical path that Mr. Gibb gave us, how could we see Exhibit 230 written the way it was? Or, for that matter, 221? Or 211, which you will remember, Your Honor, was that chart that shows the Quattro Pro was the number one risk?

There's a long list of items that were risky for
Novell.
THE COURT: I remember that.
MR. TULCHIN: I'm sorry, Your Honor?
THE COURT: I remember that.
MR. TULCHIN: We referred to it in our brief. I think we even copied a portion of it.

THE COURT: There was a lot of examination about it.
MR. TULCHIN: I know there's a lot of material here, Your Honor. So we started down this path about delay and whether Gibb's testimony falls into the category of a scintilla. And with all respect, Your Honor, if it doesn't in this situation, then you could never have a post-verdict Rule 50 award for the defendant.

THE COURT: Yes, you could. If he didn't testify, this case would be over.

MR. TULCHIN: Well, with all respect, Your Honor, I think a proper judicial view here of the function of a district court after trial -- you sat and listened to eight weeks of evidence -- and a proper view is that you should not be refereeing the he said/she said, red light/green light issue. But where the evidence is absolutely overwhelming about the cause of the delay, where there's no document that backs up what Mr. Gibb is saying, where --

THE COURT: Mr. Gibb's a nice man. His nickname should be Mr. Glib, perhaps. But he's a nice man. And I think one of your witnesses, maybe the fellow LeFevre, testified he was a competent manager. He was somebody who attended regular meetings, either Ford or somebody.

MR. TULCHIN: Yes. I think it was Ford, Your Honor. I hope I'm right about that. It's been a while.

We don't deny any of that, Your Honor. And we agree that Mr. Gibb is a nice man. That doesn't mean his testimony can be used to somehow balance this overwhelming mass of evidence about the cause of the delay.

THE COURT: That's the issue.
MR. TULCHIN: Your Honor, we --
THE COURT: Unless I were to hold, which is, I'm not sure there's any support for it, to bring a trebled damage action
in an antitrust field, you've got to be ready to have your product ready to go. And whatever Gibb testified, it is undisputed that Quattro Pro was not ready to go.

Now, one could take the position, look, you want to recover three billion dollars from somebody, you better have your product ready to go. And it clearly wasn't ready to go. But I'm not sure there's any basis for me so holding.

MR. TULCHIN: Well, I think there is, Your Honor. Your thought was the kernel of what $I$ was about to say, in fact. I don't think there is any antitrust case that falls into the kind of category that the Court was just describing.

I mean, here it is, if Microsoft did something that caused the delay to Novell, that they could not get their products out, and that's what the complaint more or less said, as well as adopting the theory of the government case about middleware, which we all the know Mr. Johnson has conceded they want to depart from, though they can't, but in that case, Novell really would have to prove that its product, but for the decision by Mr. Gates, could have come out to market around August 23 rd, 1995. Warren-Boulton said it had to be within 30 to 60 days. I have that in here, too, Your Honor.

But it's the strangest situation in an antitrust case to be saying, well, no, we had other problems, Quattro Pro. We have March 1st, '95. They've already put things off until December 30th. So this is March 1st, '95, again, Your Honor, is
already five months from the time Mr. Gates made the decision. They've had plenty of time to consult with senior management, to figure out how best to get to market.

They're already delaying, because of Quattro Pro, to December 30th, '95. We know from other evidence that they weren't close to being ready then.

Mr. Gibb, standing alone, cannot outweigh all that. And as the Court said, there's a legal question of whether you can have an antitrust claim, that your anticompetitive decision delayed me, when the facts are that there were, even giving Mr. Gibb all the benefit of the doubt, there were many, many other reasons for delay, including Novell's own business choice, which turned out to be a poor one. And, in business matters, that can happen. Novell's business choice not to use the namespace extensions. Yes, they would have taken a risk that Microsoft down the line would have come out with a new operating system that didn't support them. But, of course, that could have been an interim decision.

You say to Mr. Richardson and Mr. Harral, keep working on shared code. Try to make the best super duper file-open dialogue, that our customers will love. Keep trying. You've been delayed a little bit. Just keep working on it. In the meantime, we can at least get a product out to market.

Now, that assumes Quattro Pro was ready. But if Mr. Gibb was right that Quattro Pro was basically code complete -- he
didn't say "code complete", he said "basically", whatever that means -- if he's right about that, then they had plenty of other ways to get their product out. They conceded option two, using the Windows file open dialogue.

THE COURT: Yeah. But they said it probably wouldn't have been as good as the product was before.

MR. TULCHIN: But it would have been on the market. And a few months later, if Mr. Harral and Mr. Richardson were doing a good job, they could have come out with the next iteration of their product, like PerfectOffice 3.1, or whatever they were going to call it. So those business choices, to lay those at Microsoft's feet --

THE COURT: Isn't that a little bit more like the coupon, which you all ridiculed?

MR. TULCHIN: But, Your Honor, this is a case in which they say, Microsoft basically killed us, they put us out of business. That's why we want the three billion. The difference between what we paid, the one billion difference between what we paid for these products and what we sold them for, times three.

And it just doesn't make any sense where they had these other options to get their products out. I mean, it's not, in Aspen Skiing, and again to go back to context, which is so important. Microsoft has a right not to share its own technology. Mr. Nakajima wrote the namespace extension APIs. Maybe it was a good piece of work. Maybe it wasn't. It doesn't
matter for this purpose. It was Microsoft's property.
Of course, as Mr. Johnson said, there's no obligation to share it, to give it to a competitor, so that Novell can improve a competing product. Of course that's true. He says, well, the difference is that we have deception here. And that's what I want to get to next, Your Honor.

THE COURT: Let's take a short break and then I'm ready. I'm ready as soon as anybody else is.
(Recess at 11:45 a.m.)
THE COURT: We will go until 1:00. I've got a meeting at one. I had scheduled this till four. We can go longer. Just bear in mind $I$ want fair time for each side.

MR. TULCHIN: Certainly, Your Honor. Before I go back to deception and a related point, I thought I should say this, Your Honor. It's at Page 106, right at the end of the presentation that I handed up to morning.

The only witness that Novell called about damages, of course, was Dr. Warren-Boulton. And his testimony was very clear that his but-for world was a world in which Novell's products would be on the market 30 to 60 days after the release of Windows 95. Novell says that that wasn't his testimony, but it's exactly what he said at Page 2418 of the transcript. He says, Within 30 or 60 days, that is my but-for world. And he says it again at 2421 and 2422, the end of September, the end of October.

And then he says somewhere around the beginning of

November, that was the assumption that lay behind his damages calculations, his damages models.

In light of the documents we saw earlier, Exhibit 221, Exhibit 230, and all the other evidence to which we've referred in our brief and in the presentation -- I passed over some of it, Your Honor, because I know time is limited -- Novell simply has no claim for damages. Warren-Boulton's but-for world, his assumption is entirely counter-factual.

Even Mr. Gibb, who said that Quattro Pro was basically code complete, doesn't say, did not testify that but for Microsoft's conduct, Novell could have had the super duper file open dialogue done and ready by 30 to 60 days after August 23rd, ' 95.

And, of course, you can't get damages in an antitrust case based on speculation or guesswork. I don't think there's any issue or dispute about all that. The dispute has centered on Novell's insistence that Dr. Warren-Boulton did not say what the transcript has him saying, 30 to 60 days.

So on that subject, Your Honor, and I will, right at the conclusion, which won't be too long from now, of my presentation, I do want to give you a list of issues where I don't think any facts have to be resolved or found. But on this one, I think, this is one of them on the list, there can't be any damages when the assumption that the only expert used is entirely is entirely disproven by the record at trial.

So I want to go back, Your Honor. I said just before our break that $I$ wanted to talk a little bit more about deception. We covered some of this earlier. We talked about the contract and the reviewer's guide, which informed Novell right at the beginning, just as in Christy Sports. Our beginning is four months from the decision, June to October of '94. Christy Sports was 15 years where the defendant allowed the plaintiff to continue to sell, to rent skis.

But the contract and the reviewer's guide say very clearly that the product may be substantially modified, and that providing the beta does not represent a commitment for providing or shipping the features and functionality that are present in the beta.

Novell's entire brief in opposition to our motion --
THE COURT: As I understand it, clearly, there's a business risk in not, in withdrawing arbitrarily, and that clearly was on Microsoft's mind. But that's not a legal issue.

MR. TULCHIN: I agree, Your Honor. Microsoft felt constraints about changing a beta.

THE COURT: But, clearly, it had business reasons to. MR. TULCHIN: Correct.

THE COURT: And there was a soft side and a hard side of Microsoft on that basis.

MR. TULCHIN: Of course. And the whole debate, which was covered in great detail at the trial, we heard from Mr.

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Muglia, Mr. Belfiore, a little bit on the subject from Mr. Nakajima, Mr. Gates, and I think others, the whole point of the debate was that Microsoft didn't want to change the beta for some frivolous or flip reason. The whole idea was that if we're going to make a change, let's think carefully about it and only do it if it's really important.

At the time Mr. Gates made the decision, there's absolutely no evidence that he knew that Novell planned to use the namespace extension APIs. That memo from Mr. Struss, I think it's Exhibit 17, says they weren't planning to use it. And just after the decision was made, Struss reports back, Novell appears to be okay.

But to go back to deception for just a moment. I just can't help but mention this. I didn't want to pass it over. At 56, Your Honor, Page 56, of the presentation I handed you this morning, we referred to Exhibit 612-A. This was this official-looking memo written on nice Novell stationery, of the Corporate Development Group. And coincidentally, it happens to be two weeks after Mr. Gates made the decision. So it's exactly at the period that's most relevant to our inquiry.

And Novell's memo itself, 612-A, says, you can remove the entire feature, that until the product is released, there are, quote, "significant uncertainties", unquote, in the entire process. The memo says as well, quote: "The product it features may still change dramatically during the beta phase as problems
are discovered."
And, of course, Novell had its own software which it sent out to beta testers. And just like Microsoft did in Exhibit 18 and 19, Novell only provided the beta pursuant to a license agreement, to a contract. That's very understandable. This was Novell's property, its own innovations, its own technology.

Novell's contract says the same thing that Mr.
Frankenberg acknowledged was the industry understanding. "Beta Products are of pre-release quality, have not been fully tested, and may contain errors and omissions. Novell does not guarantee that Beta Products will become generally available or that associate products will be released. The entire risk arising out of your use of Beta Products remains with you." That's Exhibit 618.

THE COURT: But isn't a fair reading of that, that it will be withdrawn because errors and omissions are discovered? I mean, the predicate, what you rely upon follows an explanatory clause.

MR. TULCHIN: No, I don't think it's a fair inference, Your Honor. It's the argument that we've heard from Novell over and over again, that you have to read these documents to imply that. They don't say that at all. 612-A doesn't say it, nor does 618.

The idea, if you wanted to write a license agreement, a contract that says that, of course you could. And Mr.

Frankenberg, when he testified about this, was very clear. The industry understanding is betas can change. He didn't say, nor do these documents say, they can only change if the developer of the software finds a problem that's reported to it by a beta tester. They don't say that you can only make minor changes.

By the way, let's keep in mind, Your Honor, if I may, we didn't strip out the namespace extensions at all. We left them in there. You remember Mr. Harral, I believe it was, right at the outset, saying that we were $80 \%$ finished using the namespace extensions, even by October. And they still had them. That's why Option One of the three options that Novell had was to just use them and take the chance. At least their product would have come out.

But to answer your question very, very clearly, Your Honor, I hope I'm being very clear in this.

THE COURT: No. No. It's like the Second Amendment. It would be a lot easier to construe the Second Amendment if it wasn't for the clause about the militia.

MR. TULCHIN: It is sort of a little like that. I think you're right. The argument that Novell has made, that what all these witnesses must have meant, what the contract should be interpreted to mean, what Novell's own corporate memo really means, what Frankenberg said as the CEO, all of that should be modified by this notion that changes can only be made in limited circumstances. And it just doesn't say that.

Mr. Alepin, this is Page 57, Your Honor, next page, did not say that. He was their expert about software, their technical expert. And leaving aside the extent of his education, he certainly has lots of years experience in the software business. And he didn't qualify his testimony. The testimony we quote here, Your Honor, is on cross.

He says the expectation is that the software is being worked on. That is correct. This is at Page 1555 and 56 of the transcript. And Alepin even said, yes, they use it at their only risk, at their own risk. They shouldn't run their business critical applications on this software and expect what the results will be.

And, of course, if Novell had thought it was important, they could have asked on redirect, Mr. Alepin, sir, when you gave this testimony that the expectation is that the software is being worked on, did you mean that changes could only be made if a beta tester reported back to the developer that there were problems?

THE COURT: They couldn't have asked that because you would have objected as leading.

MR. TULCHIN: Well, they might have asked --
THE COURT: They would have asked something. I take your point.

MR. TULCHIN: Thank you, Your Honor. And, of course, we have the testimony here from Mr. Larsen. That's at 58. Mr. LeFevre, that's at 59.

With all respect to Mr. Harral, who, like Mr. Gibb, I think we all agree, seems like a nice fellow. There are no, this is not a case, Your Honor, where there are accusations about perjury. We don't say that at all. But I think the testimony, again, has to be evaluated in context. And one has to see what it actually is.

Mr. Harral's only testimony that in any way stands in opposition is that the beta is to hammer out the problems, not at that point to do new features or change features. Well, of course, we didn't do new features. We didn't change the feature. The APIs remained just where they were. And everyone has acknowledged, including Harral, that they had a right to use them. We just said we're going to withdraw support because, in the future, new operating systems may come down the road and we may not have these APIs in those new systems.

But even looking at his testimony about the beta is to hammer out the problems, this doesn't say, doesn't make a distinction between how one would do that. For instance, in our case, there is just a ton of evidence that it's perfectly legitimate, Noll and Alepin both said this, for the developer of an operating system to make changes to insure that the system won't crash if a bad application was written using the namespace extension APIs. No one doubts that. No one disputes that.

Of course, Microsoft was entitled to try to make a system that wouldn't crash. If it made a system prone to
crashing because of what some third party developer did in the way that he, she, or it wrote some application entirely outside Microsoft's control, customers would legitimately be upset.

THE COURT: At Microsoft? At Microsoft?
MR. TULCHIN: Yes. Of course, Your Honor. If you have
a problem --
THE COURT: No. I understand.
MR. TULCHIN: If you have a problem, if your operating system crashes, you don't call the third party developer and say, Were you responsible for the crash? You call Microsoft.

If you want to talk about how one would erode the very strong market position that Microsoft had, even before '95, it would be to come out with a Windows 95 that crashed for everybody. That's one way to do it.

So Harral's testimony doesn't explain to us how one would make the judgment when he says the purpose of a beta is to hammer out the problems, not to do new features or change features. Well, we didn't do new features or change them. What we did was address a problem.

And in Aspen Skiing, Your Honor, this goes back to a point that's in an earlier section of the presentation that $I$ skipped over because we've covered it so many times. In Aspen Skiing, the key fact was, and the 10th Circuit noted this, or a key fact, among others, was that the defendant, the owner of three of the mountains, wouldn't sell lift tickets at full retail
price and was unable even to articulate a justification. I mean, what could you say? There's almost no marginal cost to a ski resort to have one more skier. Of course you want to sell your tickets.

In our case, we not only articulated business justifications, such as the problem that the system could crash, Novell's witnesses, and I've set it out here, a good portion of it, in this presentation, Novell's witnesses concede that that's a legitimate business justification.

THE COURT: This gets, Mr. Holley may be the one who may have to try to explain this to me, but I will ask you. I am not sure that I still understand the concept of rootedness. And that is something which becomes relevant because, my recollection is there's, they republish the APIs but the idea is a semantic -I may have this wrong -- but there has been a change made and it's now not running in process but running rooted. And I am not sure I understand that. Mr. Holley, I'm sure, does.

MR. TULCHIN: Your Honor, I'm glad we all recognize that Mr. Holley is much more expert on these technical subjects than I. I must say that I think I knew this at the time of the trial, but I don't recall what rootedness means, either.

THE COURT: Mr. Holley, can you help me with this? I don't mean to --

MR. HOLLEY: Sure. The change that was made, Your Honor, is that the Windows user interface was split into two
processes. And so the, what you'd see when you looked at the screen, which you normally think of as the user interface, was running in one process, and shell extensions were running in a separate process. So if one of them misbehaved, it would take down that process, but the thing wouldn't blue screen. You could continue to use your computer. So that it didn't eliminate the threat of a misbehaved shell extension, but it did contain the damage that it could do.

THE COURT: And the reason it becomes relevant is because that change had been made before Microsoft republished the namespace extension. Do I have that right?

MR. HOLLEY: I think that is correct, Your Honor. By the time the Microsoft Systems journal article appears in July of 1996, I believe, where they are republished, that change --

THE COURT: Had been made.
MR. HOLLEY: -- had been made.
THE COURT: Thank you. Excuse me. I did not mean to insult you, Mr. Tulchin.

MR. JOHNSON: If you'll allow me just to add a little bit on to that.

THE COURT: No. You will have plenty of time later. MR. JOHNSON: Okay. That occurred within 30 days of Mr. Gates's decision. The rooted and non-rooted.

THE COURT: Fine. I don't care if it's one day. Go ahead.

MR. TULCHIN: Your Honor, what $I$ want to turn to, if $I$ may, is Page 62. We were talking about deception. We were talking, at least it's my contention, that as a matter of law, there can be no deception, even if deception were the basis for an antitrust claim, and even if the complaint had made such a claim. But there can be no deception as a matter of law where the contract and the document with the $M 6$ beta warn that this can change.

But I also want to address the contention that Novell makes in the brief, that what Microsoft did was to induce Novell to rely on the namespace extensions. And they go back and point to Exhibit 113. That's the handout for Mr. Belfiore's presentation in December, '93 to ISV's about shell extensibility, including what later became the namespace extensions.

No one at, none of Novell's witnesses at trial testified that they attended the presentation. Mr. Harral said he didn't remember whether he attended it, but he got a copy of the slides that were handed out. And that is Exhibit 113.

The idea that this is what induced Novell to prepare to use the namespace extensions which were provided in June of '94 in the M6 beta is utterly preposterous. This, we're back to the question of whether a scintilla of evidence is enough or, in this case, the scintilla being pure argument in a lawyer's brief.

Exhibit 113, the very document to which Novell points, contains these warnings, not for most applications. And Mr.

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Belfiore testified about this; that not only did the presentation contain the warning, but that he said this as well in December '93. He said, word processing applications were not good candidates for using the namespace extension APIs. That was on December 5th at 4262 to 63. And Exhibit 113 indicates the same thing. Users should not, with the word "not" all in capital letters, edit documents with an Explorer extension.

So the whole point about deception is just pure argument, even if there were a claim for it. And, of course, we heard a lot about the Hood Canal theory. Mr. Johnson finally, in his summation on December 13th, put that one to rest. He said the plan didn't go forward. It's crystal clear from his summation at Page 5324 to 25 .

I frankly don't understand, maybe it's my limited ability to comprehend, but I don't understand how a claim of deception can be based on a plan at Hood Canal that was never implemented, it never went forward. Or on Exhibit 113, which contains these warnings, particularly where the M6 beta was provided to Novell exactly in accordance with industry custom, with the further warnings that the beta might be changed. It doesn't say might be changed only if we get feedback from beta testers that tell us we have to change it. It just says we might change it.

Now, what I'd like to do, Your Honor, is go on to the question of harm to competition. And given the amount of time
that I have taken so far, I would be happy to answer the Court's questions.

I hope this has been useful. I am not going to go through every page of this section of our presentation. It's Section 4, which begins at Page 65.

We set forth there a good deal of the evidence about the two theories, the franchise applications theory and the middleware theory. Before getting there, which I'll do very briefly, I do want to say something, though, about causation.

Novell seems to take the position in its brief that they don't have to prove causation at all. They quote from U.S. against Microsoft at 253 F.3d, at Page 80. And they say something which was quite different from what they've ever said before. We talked about the edentulous causation questions.

They quote from, at Page 80 of the DC Circuit's opinion, a statement by the DC Circuit that causation affords Microsoft no defense to liability for its unlawful actions undertaken to maintain its monopoly. That concluding sentence comes at the end of a long section about causation. It is entirely misleading for Novell now to say that it need not show cause, that it need not show that the conduct at issue caused harm to competition in the relevant market.

Prior to now, Novell always acknowledged it had the burden to prove causation, that the conduct caused harm in the market. The debate was which standard to use -- reasonably
capable, or the higher standard that we've always proposed.
If you look at 253 F.3d at 79, the prior page, it is quite clear, at least to me as a reader, that what the DC Circuit is referring to is causation in an equitable enforcement case brought by the Department of Justice. They start off at the left-hand column on Page 69 talking about Section 2 liability in an equitable enforcement action.

They say, in that context, it is not necessary for plaintiffs to, quote, "present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct." Unquote.

Your Honor, I know we've been through this a number of times. But this goes back to the long discussion that we had at trial, including about the jury charge, about the edentulous causation standard and about the government's right, one would say the responsibility, of the Department of Justice, to try to choke off nascent threats to competition.

I'm not saying whether the Department of Justice is right or wrong.

THE COURT: No. I understand. It did make me chuckle. But go ahead.

MR. TULCHIN: But that's the purpose of the Antitrust Division, or a purpose of the Antitrust Division, to be on the alert for, and to try to stop, nascent threats to competition.

There's no authority for the proposition Novell now
advances, that they can get damages at a trial without showing that the conduct at issue caused harm to competition. The proper debate should be which of the standards applies. For the purposes of this motion today, Your Honor, I contend that it doesn't matter for present purposes right now.

Clearly, Novell I think has acknowledged, that if our standard is adopted by the Court, the case has to be dismissed. But even if their standard, the weaker standard of reasonably capable, were to be adopted, under Rule 50 they haven't come close to that. And again, I turn the Court's attention back to the essential facts about the market, facts that are undisputed. Microsoft had a monopoly, Finding of Fact, I think it's 28, says the market share was always above $90 \%$. There's no claim that the monopoly was obtained unlawfully.

And then Microsoft comes out with this great new product, superior breakthrough product that everyone at Novell was excited about. Is it surprising, Your Honor, that the market share goes to 95\%? In those circumstances, wouldn't it be correct for a court to say that Novell's burden, of course, exists to show causation? And if there's not sufficient evidence for a reasonable jury to conclude that the conduct could have caused some adverse impact on competition, then the case is over under Rule 50.

But even more so here, the burden to show causation has to be understood in light of these undisputed facts. We did what
the antitrust laws encourage a company to do -- come out with a breakthrough innovation that everyone wants. That was Windows 95. Apple Computer Company -- I hope that's still the right name, they may have changed their name to just Apple -- has done it recently with the iPad.

And that's what the antitrust laws encourage, even if it means, particularly if it means that you get 95\%. Because as Chief Justice Roberts noted, that's the very point of innovation, to win as much of the market as you can. And if the law, the antitrust laws are applied in such a way that that innovation is discouraged, then, of course, consumers as a whole lose.

One other thing about causation. Novell contends, Your Honor, that it's not necessary, they say, citing something Professor Noll said, that we show that the applications barrier to entry would have been destroyed entirely if our products had been on the market earlier than they were. We don't have to show that. We can just show that there was a possibility that it might have been, the barrier, might have been eroded just a teeny bit. Now I'm paraphrasing. They don't use the "teeny bit" language, but that appears to be what they say.

The complaint stands in complete contradiction to that argument that Novell made in their brief that was submitted on this motion. Paragraph 45 -- 52 says exactly the same thing -says that WordPerfect and other Office Productivity applications posed a significant threat to the applications barrier to entry.

For reasons we've discussed, Novell can't deviate from the complaint. That's how they got tolling and that's also how they avoided the release.

What they say in the complaint is their products have to be a significant threat to the applications barrier to entry. And at Page 89 of their brief, they appear to want to run from the very standard that their complaint sets out.

Here, Your Honor, the undisputed facts, we have some of them beginning at Page 69, show that there just isn't anything to the notion that withdrawing support for 4 API's in October caused some adverse impact in the market. At Page 69 we have just some of the quotes from Novell's witnesses about Windows 95. They said it was a huge step forward or significant step forward or substantial step forward.

And again, obtaining a high market share, going from $90 \%$ plus to 95 under those circumstances, you have to ask yourself, is that attributable to the namespace extension decision? Could it be? Or has Novell met its burden of showing at trial, through evidence, not argument, that that increase in the market share, maintaining the monopoly, is attributable to anything but having a superior product?

Now, at 72, we point out, and 73, Your Honor, that the franchise applications theory, which I think Novell has come close to abandoning, not quite, but they don't focus on it much in their brief, the franchise application theory just can't
possibly make any sense when the market share of WordPerfect was $16 \%$ and Perfectoffice had a market share of $3.6 \%$. Even if you just look in early 95, PerfectOffice 3.0, that was the 16 bit version of PerfectOffice that was released in December '94, and according to Novell, they say this at Page 26 of their brief, in early '95, they had an $8 \%$ market share. They get that from Professor Noll, I believe.

I am fine with that, Your Honor. We accept that for present purposes. Whether it was $3.6 \%$ for the year as a whole, or $8 \%$ for the first part of the year, makes no difference for this purpose. The theory of the franchise applications -- sorry. I said that wrong.

The idea of the franchise applications theory has to depend on these products being very, very popular. Otherwise, it doesn't work to think that WordPerfect or PerfectOffice could have somehow impacted competition in operating systems. And, of course, the other part of this that just doesn't work is derived from the findings that are binding on Novell, 37 and others, and adopted by the complaint, by the way, in Paragraph 43, that it's the vast number of applications written to Windows that matters and that one, two, or three applications can't make a difference.

THE COURT: Let me ask you one question. I ask this hesitantly because it looks like I'm, because I ruled what I ruled and the Fourth Circuit reversed me. I want to get into the DR-DOS/MR-DOS issue.

So the record's clear, I originally didn't think that the Caldera release covered it. I changed my mind, in part of reading the Fourth Circuit decision. I thought I was right. But two practical issues occurred to me. Number one, I didn't want to go through an eight-week trial, only to have it reversed on the ground the claim had been released.

Secondly, I read the Fourth Circuit opinion as suggesting maybe the first appeal had been an interlocutory appeal, and sort of suggesting maybe I had been wrong in not certifying both questions.

Be that as it may, I ended up holding there was a release, and got reversed. So I am hesitant to ask this question because it looks like I'm trying to, out of pride, I want to re-instill my original ruling.

I don't think the law of the case applies any more if my concern is right, because the evidentiary record is different. I think, frankly, my instinct may have been right; that if you, this is an operating system market case, and since DR-DOS was in the operating systems market, inevitably there was to be overlap.

But be that as it may, the evidentiary record is different from a summary judgment.

As I understand it, and I will tell you I may have it wrong, but both the franchise theory and the ubiquity component of the middleware theory depends upon WordPerfect and PerfectOffice having been popular products.

As I understand Dr. Noll's testimony -- and again, I am asking this of you, although, finally, it's Mr. Johnson who maybe I'm asking it of -- as I understand Dr. Noll's testimony, both in terms of the franchise theory and the ubiquity component of the middleware theory, is that there was a large DOS-installed base. And I take it to mean, I could be wrong, that although it's DOS, people are, people are recognizing the technological breakthrough of Windows 95. So when they buy their next iteration of product, they're going to buy, they're going to leave DOS and they're going to go into Windows 95. So, essentially, Novell's going to be able to leverage its position in the DOS market to a higher percentage in the Windows 95 market.

If that is so, if $I$ have it right, and I may have it wrong, if that is so, I don't see how that is not indirectly related to DOS. And I don't see why this claim, and I frankly didn't understand it until reading the post-trial memoranda, I now have serious question whether that claim was released.

There's something, there's one aspect which I'm not sure I understand, which is the relationship between DR-DOS and MS-DOS, because I think the installed base is on the MS-DOS market.

I frankly am very concerned now that the, because the evidentiary record is different and has been supplemented, and because Dr. Noll, if I am right in reading his testimony, I could be wrong, essentially, both for the franchise theory, but let's
talk really about the middleware theory with the ubiquity component, is relying very much upon the installed base in the DOS market, I think that is an open question now whether or not, for the 10th Circuit to resolve, whether or not, on the new record, there was release under Caldera.

MR. TULCHIN: Well, of course, Your Honor --
THE COURT: Release under the agreement with Caldera.
MR. TULCHIN: Of course, we agree, Your Honor. I don't, I don't see how this isn't indirectly related to DOS. I also want to say something on a slightly different point.

THE COURT: Let me ask. I certainly will ask Mr.
Johnson. But am I right, that the difference is that this, the very theory depends upon the popularity upon the market share that Novell had, that WordPerfect had in the DOS market. And as I understand, the theory is that really goes to the time you next purchase software. And that everybody is agreed that DOS was becoming an antiquity. That Windows 95 was going to be the wave of the future. So that WordPerfect clients who had had, who were on the installed DOS base, when they purchased the new product, were going to buy, probably, PerfectOffice. But WordPerfect for Windows. And that the translation of the two makes the two claims related.

Am I right about that?
MR. TULCHIN: You are, Your Honor. You are.
THE COURT: Okay. So I now need to know the
relationship between MS-DOS and DR-DOS.
MR. TULCHIN: That's what Professor Noll said. By the way, to answer a question that $I$ think you posed along the way.

THE COURT: Go ahead.
MR. TULCHIN: DR-DOS was meant to be a clone of MS-DOS, Microsoft DOS. I think when Professor Noll talked about the DOS market, you have to include both DR-DOS and MS-DOS.

But one other thing I want to say. If this theory was right, Professor Noll's theory, that having a big installed base on some old-fashioned technology meant that your customers who had purchased your WordPerfect product to run on the old technology would necessarily be purchasing in droves WordPerfect on Windows. If there were anything to it, then WordPerfect's market share wouldn't have been at $20 \%$ by the time we get to 1994/95. So --

THE COURT: Help me on that. I thought that the good WordPerfect version for, maybe -- help me. I could be misrecollecting. I thought that the -- and I forget the name of it. I thought, I thought that --

MR. TULCHIN: You may be thinking of Perfectoffice, Your Honor.

THE COURT: That the Novell product that really worked well with Windows 95 did not come out until -- was it? Maybe I've got the year wrong. I didn't think -- what year did it come out? '93? '94?

MR. TULCHIN: Your Honor, let me see if this helps. I hope I understand the Court's question.

THE COURT: It was Mr. Frankenberg's first priority, as I remember.

MR. TULCHIN: Right. In '94, in late '94, Novell released versions of WordPerfect and Perfectoffice. PerfectOffice came out in December. You remember Mr. Frankenberg said, It was my Christmas present.

THE COURT: And that was December of '94?
MR. TULCHIN: Right. It was my Christmas present. Those versions of WordPerfect and PerfectOffice were written for Windows 3.1. Of course, Windows 95 wasn't out yet. They weren't written for DOS. They were written for Windows technology.

And the evidence is that Perfectoffice had a share of, at most, 8\% in early '95, and WordPerfect had 20\% and declining on the Windows platform. We're talking about sales now.

THE COURT: But doesn't that get confusing? Because, again -- and again, I'm not basing this upon recent review, but upon recollection. I thought that there was testimony, which seemed to make sense, that there was going to be less of the, of PerfectOffice, was it 3.1 or whatever it was, purchased in '95 because the market was awaiting Windows 95 coming into the market, so people really weren't buying anything.

MR. TULCHIN: Yes. That's right, Your Honor. That was the testimony. Of course, that doesn't mean your share would be
compressed, Novell's share. If the total volume goes down, if consumers still like PerfectOffice, their share should be whatever it would be if the market were higher. Yes, there was this compression in early '95 because the market was waiting for Windows 95.

But just as a matter of logic, that's no explanation for why PerfectOffice's share was in the single digits.

So I agree with what the Court said about the sale of the claims, that now we're talking about a claim that's indirectly related to DR-DOS. But I sort of jump to a second point, which is Professor Noll's theory that everyone's going to buy PerfectOffice or WordPerfect because they love the old technology on DOS, is just counter-factual when 3.1, Windows 3.1 was out. And consumers had a choice in late '94 and into '95.

Remember, Your Honor, the decision to withdraw support for the namespace extension APIs cannot have affected those products --

THE COURT: I understand.
MR. TULCHIN: -- in late '94. So Novell, WordPerfect, came to market at the end of 94 with whatever they wanted to come to market with. Microsoft did nothing to impede or interfere in any way.

They came out with WordPerfect and PerfectOffice 3.0.
I think the version of WordPerfect was 6.0, if I remember correctly. And they didn't sell.

THE COURT: That's right. And then there was a pretty quick improvement, if I recall.

MR. TULCHIN: Those products were well received in the trade press. And you remember there were a number of witnesses --

THE COURT: There was a problem with the first one, but they fixed it.

MR. TULCHIN: Correct. But even Novell, it's in Novell's brief at Page 26, acknowledges these market share numbers that I'm referring to, Your Honor. So, yes, we jump to the middleware theory.

THE COURT: So your point is the ubiquity requirement is not met, in any event?

MR. TULCHIN: Correct, Your Honor. Certainly, we would say that. And I think the facts are undisputed that you come nowhere close to ubiquity. That element, which was the second of the three, Professor Noll did say was required. It was the third one that he tried to --

THE COURT: The first was cross-platform. I thought ubiquity was first, and cross-platform was second. But it doesn't matter.

MR. TULCHIN: Yes. Cross-platform was first. And there, of course, the facts are undisputed that Novell never started work on a version of WordPerfect or Perfectoffice for any other platform.

THE COURT: Mr. Harral said they were going to.
MR. TULCHIN: Mr. Harral said some day in the future, if the sun kept shining, maybe we would. Something along those lines, Your Honor. But what the Court noted at the time, outside the presence of the jury, and technically, this, there's no answer to this for Novell, once Novell wanted the shared code group to utilize the namespace extensions -- that's the but-for world that they have to rely on -- shared code becomes tightly integrated to Microsoft technology. You can't put that on any other platform. You'd have to start from scratch with a different product, written differently.

In fact, Novell's brief -- I've lost my reference to what page it's on, maybe I'll find -it, Novell's brief itself says that Novell wanted to tightly integrate its applications to Windows 95.

So the cross-platform element can't be met here, either, Your Honor.

Let me just turn to the third one. Thank you for giving me so much time, Your Honor. There are just so many things.

THE COURT: No. No. We'll just have to go longer because I want to give Mr. Johnson equal time.

MR. TULCHIN: Of course, Your Honor. Mr.
Frankenberg -- I'm just going to talk about the third element. The third element, and the Court has noted before, logically this
has to be true, is that the middleware software exposed sufficient APIs so that full featured applications could write just to the middleware, the APIs exposed by the middleware, not to the underlying software. The findings of fact which are binding on Novell, we have this in our brief, they're in this presentation, make it absolutely clear that that is a requirement for middleware.

THE COURT: And that's in the finding of facts. And I'll ask Mr. Johnson. I don't see how it can be anything else, because the whole idea is ISV's can write to middleware.

MR. TULCHIN: Correct, Your Honor. Mr. Johnson said, you'll remember, when, I think when we were talking about the charge, that if the Court charged the jury to that effect, that would be, in effect, directing a verdict for Microsoft. He acknowledged that there was no proof, there could be no proof. There's no evidence at all about this, that PerfectOffice or WordPerfect would have or could have or ever did expose sufficient APIs for any full-featured application to be written to it.

Without that, you don't get the whole theory of middleware, as the Court said earlier, the idea that you commoditize the operating system. And you can switch over through this application, the middleware application, to any other system.

So, Your Honor, I want to conclude, and again, thank
you for your patience. I think, Your Honor, and we respectfully submit, that there are five grounds that are legal grounds, or fit within the 10 th Circuit standard of a scintilla is not enough, five grounds, on which the Court can and should grant the Rule 50 motion. Here's what they are, Your Honor.

The first, I think, is a pure issue of law, combined with the undisputed facts. There is no duty to deal. Novell's lawyers acknowledge that. No duty to cooperate. The Pacific Bell case is clear. And there is no claim made out under Aspen Skiing. There was no termination of a long-term relationship. We did not deny Novell access to information or technology that was available to all other ISV's.

And thirdly, Microsoft not only articulated a business justification. Of the three justifications, two were acknowledged by Novell's experts to be legitimate justifications.

The second point on which judgment can be entered and should be, because Novell has acknowledged that their only antitrust claim is based on deception, there is a pure issue of law. Can deception of a competitor form the basis of a Section 2 claim? It's never happened before, Your Honor.

And I might say in this context that the undisputed evidence about industry practice and understanding about the contracts at issue and PX-338, the beta reviewer's guide, the undisputed evidence showed that there was no deception.

Three. There is insufficient evidence for any
reasonable jury to find that Novell showed any harm to competition in the relevant market, operating system market, as a result of Microsoft's decision to withdraw support for the namespace extension APIs. This is shown, Your Honor, by the fact that Microsoft's market share was above $90 \%$. It came out with a superior product, all agree. And the market share went, as expected, up.

The franchise application theory is completely blown away by Finding of Fact 28 , which requires thousands of applications, and by the market share numbers.

The middleware theory, they didn't make a showing even close to allowing a reasonable jury to conclude that the middleware theory was viable on any of the three elements.

And one doesn't have to pick and choose who to believe on that subject. Mr. Johnson himself said it. It's directing a verdict to hold Novell to the theory of the complaint, the theory of the government case, which was the only basis on which it got tolling and the only basis on which it can avoid or evade the release it gave to Microsoft.

On the same point of no harm to competition, Your Honor, Frankenberg's testimony that Microsoft's market share would have been even higher if Novell's products had come out in time is a complete refutation, it refutes completely, 180 degrees, the point that there was harm to competition. If there had been harm to competition, then or on the horizon, Frankenberg
could not have acknowledged that Microsoft would have done even better. And on that point, as I said earlier, there's no logic to turning that into some short-term profit objective, as we've pointed out.

Fourth point, Your Honor. And this may be one where the Court has not, at least to this point, completely agreed with me. The fourth basis on which to grant judgment -- each of these, of course, is independent -- is that Novell failed completely to show sufficient evidence for a reasonable jury to find that the decision caused delay. Exhibits 221 and 230 completely contradict it. There's a scintilla of evidence, with no documents out there to support it, from Mr. Gibb. Just a scintilla. That isn't enough to defeat a Rule 50 motion.

And, in fact, when Frankenberg looked at 230 and said, clearly, the product wasn't complete even then, in December, that was the memo addressed to him, BFrank, when the CEO acknowledges that the product wasn't complete, I think that's the end of the game, particularly when combined with the fact that Novell itself, Harral and Richardson, said they had three options. Options One and Two were always available, to get the product out on time.

And the Court actually identified another option, which is, as a stopgap measure, to use the APIs, the namespace extensions, which were still there, and to come out with the new product as soon as it was ready.

And the fifth reason, Your Honor, for entering judgment under Rule 50, goes back to Warren-Boulton. There cannot be damages based on his testimony that his but-for world is that the product would have been out within 30 to 60 days. Even Mr. Gibb did not support that. And the March 1st memo, March 1st, '95, which never mentions Microsoft's decision, is clear as a bell. All along, Novell was planning to get the products out no earlier than December 30th, which is more than 120 days later.

THE COURT: When was Windows 95 released? October what?

MR. TULCHIN: August 23rd --
THE COURT: August 23rd.
MR. TULCHIN: August 23rd, 1995. Sixty days from that, Your Honor --

THE COURT: No. No. No. I had the date entirely wrong.

MR. TULCHIN: Your Honor, one very last word. And I say this only because I'm not sure what Novell's lawyer will say. In its brief, Novell made an argument that, based on comments that it understood from the jury --

THE COURT: You don't --
MR. TULCHIN: Thank you.
THE COURT: I need not hear from you on that. If something is said about that, you can say it in reply.

We'll break for lunch. Obviously, we've had
essentially three hours from Mr. Tulchin. We'll have three hours from Mr. Johnson, if he wants to take it. Then a little bit of time for rebuttal. Thank you very much.
(Recess at 12:58 p.m.)
THE COURT: Mr. Johnson.
MR. JOHNSON: Thank you, Your Honor. Good afternoon to you.

THE COURT: Good afternoon to you.
MR. JOHNSON: May it please the Court. We have a presentation, slide presentation, as is our wont. You've seen enough of these now that I'm sure it will come as no surprise to you. I've got a set of the slides for you and a set, of course, for Mr. Tulchin.

We have some additional sections we're going to have to get, which, if I hit them, we have some additional slides which I would also have stuff at the end of my presentation. This is the main presentation.

Mr. Tulchin gives an excellent closing argument, again, and he was his usual eloquent self. But one of the reasons we titled the first screen in front of you, we wanted to make it clear what we were here for, which is Microsoft's Rule 50 (b) motion. We're not here to decide who's going to win the case. We're here to decide whether a jury should decide who's going to win the case.

I was a little surprised by the frequent reference to a

Fourth Circuit case called Old Town Trolley case, because Microsoft filed over 200 pages of brief in this, in this, on this motion, and that case is nowhere to be found in any of those 200 pages. So I've been at a loss to address that case here today. But I would say that Your Honor's observation that it was not a 10th Circuit case was entirely appropriate. And I suspect that even the Fourth Circuit, if they really did say that you're entitled to make credibility determinations on a Rule 50 motion, probably can't overrule the Supreme Court with respect to that proposition. So we'll take a look at it. If we have anything else to say, we'll send a letter to you. But I was a little taken aback by that being a centerpiece of Mr. Tulchin's argument.

It's also interesting to note that we have 200 pages, over 200 pages of briefing here from Microsoft. And somehow they manage to fail to even mention, and that continued here today in oral argument, Mr. Raikes's e-mail to Warren Buffett, where he admitted that Microsoft widened the moat protecting its operating systems monopoly by controlling the Office Productivity applications sitting on top.

Now, that document is a direct admission from a high Microsoft executive, that killing WordPerfect served to increase the barriers to entry in the operating systems market.

The Fourth Circuit specifically called out that e-mail
as direct support for Novell's assertion that it was directly
targeted by Microsoft. Yet this evidence appears nowhere in Microsoft's 200-plus pages of brief and was heard not at all from Mr. Tulchin this morning.

This failure to address our evidence occurs time and time again in Microsoft's papers. One can only conclude, after listening to Mr. Tulchin, that he wants the Court to adopt a version of the facts which he supports, rather than the appropriate standard on the present motion, the Rule 50 standard, something I am sure Your Honor is very familiar with.

The Court is required to view all evidence in the light
most favorable to Novell. The Court is required to make all reasonable inferences in favor of Novell. The Court refrains from making credibility determinations or weighing the evidence. And such a motion can only be granted where the evidence would not allow reasonable jurors to arrive at a contrary conclusion. Now, this case plainly includes conflicting evidence with a lot of factual disputes. And during the course of this case and, indeed, this morning, Your Honor has commented upon some of those disputes. But today, of course, the Court does not sit as the fact-finder. Simply stated, a Rule 50 motion cannot be granted in the face of conflicting evidence.

As explained here by the Supreme Court, when faced with conflicting evidence on a particular issue, the Court must resolve all conflicts in favor of the non-moving party and disregard all evidence favorable to the moving party, except
evidence that is uncontradicted and unimpeached. And even that may be disregarded if it does not come from disinterested witnesses. That's the Supreme Court.

Now, Microsoft's brief, and Mr. Tulchin's argument this morning, took the exact opposite track, resolving conflicts in favor of Microsoft and disregarding evidence favorable to Novell. That is an approach that is quite reasonable for an oral argument, for a closing argument, but not on this motion.

Here are the elements that we are required to address here today. These are the elements of a Sherman Act Section 2, and these are the two overarching questions. First, did Microsoft's conduct violate Section 2 of the Sherman Act? And two, did that conduct cause antitrust injury to Novell?

The first question focuses on the effects of the challenged conduct on competition in the operating systems market. The second focuses on the effects of the conduct on the plaintiff. These two questions cannot be conflated.

With respect to the first question, violation of Sherman Act, Section 2, we have the question of monopoly power, we have the question of relevant market, and we have the question of anticompetitive conduct. In this case, monopoly power and relevant market have already been established as a matter of law. Thus, the only remaining question under Section 2 of the Sherman Act is whether Novell presented evidence from which a reasonable jury could find that Microsoft willfully maintained its monopoly
power in operating systems through anticompetitive conduct.
Conduct is deemed anticompetitive when it harms the competitive process and the monopolist cannot show that it acted with a legitimate business justification. In this case, Novell has presented evidence from which a reasonable jury could find that Microsoft wielded its power in the operating systems market to tighten its hold on that market.

In the l0th Circuit, which is the law governing this case, acts are anticompetitive if the conduct appears, quote, "reasonably capable of contributing significantly to creating or maintaining monopoly power."

Areeda and Hovenkamp agree that monopolistic conduct includes acts that are reasonably capable of creating, enlarging, or prolonging monopoly power.

Now, we have engaged in this case -- I feel like that movie Groundhog Day -- on the issue of appropriate causation standard in this case, whether it is conduct which is reasonably capable of contributing significantly to maintaining monopoly power, or simply contributed significantly, an arguably higher standing.

About the only thing I agreed with Mr. Tulchin on in his entire presentation this morning was that it doesn't matter, for purposes of this case, and from my point of view, because we meet the standard either way.

I would be remiss here if I didn't say that there is
overwhelming case support for the reasonably capable standard in private damages antitrust cases. We cited 16 such cases in Footnote 49 of our brief. Microsoft does not cite a single case in response, and it fails to distinguish the cases we have cited.

Microsoft argued in its brief that this monopoly causation standard was an issue that warranted a trip to the 10 th Circuit. I think that is specious argument before this Court. Let's talk about harm to competition. A plaintiff makes out a prima facie case of harm to competition by presenting evidence that the defendant's conduct would result in decreased output, higher prices, diminished quality, reduced innovation, or increased entry barriers. By definition, if conduct artificially extends barriers to entry, then it contributes to the monopolist's continued monopoly power, because monopoly power is defined in part by the existence of such entry barriers.

As the loth Circuit pointed out here in the Reazin v. Blue Cross/Blue Shield case, a monopolist can only maintain its market power by maintaining the barriers to entry.

On this harm to competition question, which is all that is left to show a violation of Section 2 of the Sherman Act, we have presented substantial evidence from which a reasonable jury could conclude that Microsoft's wrongful conduct operated to maintain its monopoly power in operating systems by increasing the barriers to entry to that market. I would like to look at some of that evidence now.

I start first with the e-mail that Microsoft wants so hard to avoid. In Plaintiff's Exhibit 360, Mr. Raikes admitted that Microsoft's ownership of the key franchise applications built on top of Windows dramatically widens the moat, protecting Microsoft's operating systems business.

In deposition testimony played for the jury, Mr. Raikes acknowledged that the key franchises he was talking about in that passage to Mr. Buffett referred to Microsoft Office, Microsoft Suite of Office Productivity applications.

The Fourth Circuit understood that the moat was the applications barrier to entry, protecting Microsoft's operating systems monopoly power. Thus, evidence from which a reasonable jury could infer that Microsoft's conduct resulted in increasing the applications barrier to entry in the operating systems market is sufficient to satisfy Novell's prima facie case.

The jury heard evidence that in 1994 Microsoft's market share for Windows' word processing software was around 65\%. WordPerfect's installed base for overall word processing in 1994 was virtually identical to Microsoft, with Microsoft having an aggregate $37 \%$ share, and Novell having an aggregate $36.4 \%$ share.

By 1997, however, after the events in question took place, with WordPerfect effectively cleared from the market, Microsoft's Office Productivity market share in Windows had risen to $90 \%$. That figure comes directory from Mr. Raikes's e-mail, Exhibit 360.

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During this same period, Microsoft's share of the operating systems market also increased from the high 80s to over 95\%, a virtual stranglehold on the market. This chart is from data presented by Dr. Murphy in the trial in Utah. Exactly as Mr. Raikes had articulated. By controlling the key franchise applications sitting on top of Windows, Microsoft has succeeded in widening the moat, protecting its operating systems monopoly. Now, in addition to the Raikes's e-mail and the market share data, the jury could also rely on the expert testimony of Professor Noll in concluding that Microsoft's conduct increased the application's barrier to entry in the operating systems market.

Here we have Professor Noll addressing the economic significance of Microsoft's $90 \%$ share in 1997. Professor Noll testified that every additional sale of Microsoft's productivity applications increased the applications barrier to entry, protecting Microsoft's monopoly power.

Professor Noll is here simply applying antitrust economic principles to validate Mr. Raikes's admission that Microsoft's ownership of the Office Productivity application sitting on top of Windows operates to widen the moat, protecting Microsoft's monopoly.

Now, in the but-for world, Novell, WordPerfect, Netscape, Sun, Lotus and Apple, and each of them, could have diminished the applications barrier to entry and, therefore,

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constrained Microsoft's market power. As Professor Noll explained in his testimony to the jury, while Microsoft might have been able to achieve the same market share had it not excluded WordPerfect and Navigator and Java, it would have had to do so by competing on the merits, by lowering prices or improving its product, rather than through anticompetitive conduct.

I am not going to go through all of Professor Noll's testimony today, but I think we can at least agree that Professor Noll was accepted as an expert in this case, and that he applied antitrust economic principles in concluding that Microsoft's conduct against Novell harmed competition in the operating systems market.

I often like to return to what you say about this case, Your Honor, because it is so instructive, when you said that a reasonable person may disagree with Dr. Noll, but the decision whether or not to do so is within the province of the jury.

Your Honor's observation is as true today as it was on summary judgment. And as Your Honor knows, the standards for summary judgment are virtually identical to what we are here today for.

So if we take the evidence we have shown, without more, and apply the proper standard, let's apply the standard, the evidence must be credited, including all favorable inferences that flow therefrom, we must reject any and all contrary evidence that Mr. Tulchin wants to raise. It certainly must be

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acknowledged that a reasonable jury could find in Novell's favor on the issue of harm to competition in the operating systems market.

We talked a bit this morning about the fact that Microsoft, in a classic display of monopolistic behavior, endured short-term losses in order to gain a larger market share going forward. This is really the economic sense test. There is actually a very good Antitrust Law Journal article on this test and the validity of the test.

Microsoft appears to argue that its conduct could not harm competition because Windows' market share would have been higher had Microsoft fully documented and published the namespace extension APIs. I certainly agree that it would have been higher had they published the namespace extension APIs and stuck by their promises to Novell, to Lotus, and all the other ISV's that wanted to use these extensions. But when a monopolist engages in conduct that makes no economic sense, apart from its harmful effect on competition, the fact is viewed as strong evidence of anticompetitive conduct, not the opposite.

THE COURT: Let me ask you the question I asked Mr. Tulchin. Where is the evidence that Microsoft, as an entity, had any loss of short-term profits?

MR. JOHNSON: We have the testimony of both Mr. Harral and Mr. Frankenberg, that that would have been the result. And it's not --

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THE COURT: No, no, no, no. No, no, no, no. What that testimony establishes is that more Windows 95 would have been sold because people would have bought Windows 95 to support. It says nothing about the application side.

And I've said this, I've said, this must be the sixth time I've said this, and Microsoft appropriately doesn't buy into the argument because it doesn't sound very good, but simply as a realistic matter, I see no evidence of loss of short-term profits.

It is clear to me that it is at least as likely that Microsoft, if it acted in a cynical way, said, Anything we lose on the Windows 95 side we pick up on the Office side.

MR. JOHNSON: Well, $I$ think it's a fair inference from the evidence, and I refer specifically to the fact that WordPerfect at the time had millions and millions of users, both on Windows 3.1 and on $\operatorname{DOS}$ at the time --

THE COURT: And we'll come back to that.
MR. JOHNSON: That were loyal, that were loyal WordPerfect users. I don't think there's any debate the evidence is very strong that we had a very loyal base of users for WordPerfect. And, in fact, I think Microsoft's own witnesses admitted that operating systems don't sell themselves.

THE COURT: You've got to prove something. You've got to prove something which actually is contrary to what your theory of the case is, is that they, whether you phrase it this way

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because, otherwise, you don't get tolling, is that you clearly, part of your case is that Gates acted as he did to protect Windows -- excuse me -- Microsoft applications, particularly Office. And absent evidence that the loss of income or revenue on the Windows 95 side is more than was gained on the Suite side, there is no basis whatsoever on the existing record to find that there was any loss of short-term profits.

Maybe there was in Windows 95, but Microsoft is Microsoft. And according to your own theory of the case, is that it was trying to increase its revenue on the Office side. I just don't, I don't get it.

MR. JOHNSON: Okay. Let me address that, let me go to that because this is a question that you raised --

THE COURT: I've raised it a lot.
MR. JOHNSON: -- during the course of the trial. This
is not new. As I said, I feel like it is Groundhog Day.
The simple answer to your --
THE COURT: Well, if it's Groundhog Day, but this question has never been answered.

MR. JOHNSON: Well, I think it has been answered. And I think Professor Noll provided an answer to you in testimony that was not heard by the jury, but in which you inquired about this precise --

THE COURT: Maybe I forgot it.
MR. JOHNSON: -- which you inquired about this precise
question.
The simple answer is that you cannot look to whatever profits Microsoft may have made in applications.

THE COURT: Why?
MR. JOHNSON: To offset the losses.
THE COURT: Now I do remember, but that doesn't make any sense.

MR. JOHNSON: Well, I'll tell you why.
THE COURT: I know he's a Stanford guy and very smart, but it doesn't make any sense.

MR. JOHNSON: As an initial matter, Your Honor, Novell has alleged harm to competition in the operating systems market. And so the Court's inquiry, as an initial matter, must focus on whether Microsoft's conduct affected competition in that market. If Microsoft's sacrifice of short-term profits in the operating systems market was intended to help it achieve a longer term anticompetitive end, to increase entry barriers or drive out competitors, then that conduct would have harmed competition in the operating systems market.

THE COURT: But why aren't you comparing apples and oranges? The question I'm asking goes to a general principle, which is an academic principle rooted, oddly for an academic principle, in common sense. That if, you know, of course, you're going to, it doesn't make any sense that you're going to sacrifice short-term profits, except for some other incentive.

If you're not, Microsoft is a monopolist. It's not Microsoft manufacture of Windows 95, it's Microsoft.

If it is making more money by selling Office and, you know, if its net, if the net of what it has gained by selling Office outweighs what it is losing by selling Windows 95, I don't see, there's no factual basis. And this dividing up of markets is totally artificial.

It is monopoly. It is Microsoft. There's no evidence that it lost a penny. Indeed, your theory of the case is that it made lots of money because it let Jay Leno, but not Gary Gibb, into the tent.

MR. JOHNSON: I don't think that was, in fairness, our argument, Your Honor, because he didn't let --

THE COURT: It is your theory of the case.
MR. JOHNSON: It is not.
THE COURT: Oh, no, no.
MR. JOHNSON: You said this was an academic question.
THE COURT: It's not an academic question. It's a question of inference. And the fact of the matter is it's got, there's no evidence of loss of short-term profit by Microsoft.

MR. JOHNSON: And I know, and to get there you say that we need to look at the fact that Microsoft gained a lot of money.

THE COURT: I don't know whether it did or not. I know there's no evidence that it didn't.

MR. JOHNSON: Office Productivity applications market
through the sales of office. And this question, you addressed this question directly to Dr. Noll. Could we turn to slide, is it 138?

THE COURT: That's up there.
MR. JOHNSON: Is it up there? I'm sorry. I am not looking. My screen has your seal on it.

The question you asked, which we didn't get to have enough room to put on your question, but your question was, quote: "If a monopolist sacrifices short-term profits for a gain, that could be an indication of anticompetitive intent." We agree with that, Your Honor. However, Your Honor asked Professor Noll if it, quote, "Complicates the issue if Microsoft or the company manufactures not only operating systems, where it may be sacrificing short-term profits, but also is manufacturing application products, and therefore, may be making up the profits it's losing on the operating-systems side on the applications side."

This is the answer provided to you by Professor Noll, an expert in antitrust economics in this case, that was approved by this Court. He said the answer is no. And the reason for it is that the increased profitability in market share of Microsoft Office also has to be decomposed into that part which is superior efficiency, and that part which is the result of anticompetitive conduct. And so the question that has to be asked is a simple one.

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And you got into, and you pointed out to him the so-called legal issue. And you said, Well, the legal issue is not what he's dealing with, but from an antitrust perspective, you have to say, did that anticompetitive, did the fact that they have more sales of Office result from the anticompetitive conduct? And, of course, it did.

If WordPerfect had been available in the next tent over at the time that Windows 95 launched, a lot of those sales of Office Productivity applications would have been WordPerfect sales and PerfectOffice sales. And so Microsoft would not have gained as much.

They didn't, they didn't produce those extra sales of Office simply by producing a superior product. They did it by wiping out Lotus and wiping out Novell, so that they weren't there at a time when consumers were buying Windows 95.

So the result of their greater profitability in that market was due precisely to the anticompetitive conduct which we explained. It's like saying two wrongs can't make a right. You can't say that you can ignore the anticompetitive conduct in the applications market and the effect that it had on that conduct -although that's not our claim here. But at the same time, if you're not going to look to that market --

THE COURT: You say it's not. I'm not sure it's not. That's a different question.

MR. JOHNSON: It is not. I believe that --

THE COURT: We'll come back to that.
MR. JOHNSON: -- that those counts were dismissed. In fact, if we can return to Slide 19.

The principle that we have been talking about is whether conduct makes business sense apart from any effect it has on excluding competition or harming competitors, is inscribed into the Model Jury Instructions in civil antitrust cases. This whole thing about short-term profits, long-term profits, that's just one indicia of anticompetitive conduct, Your Honor. It is not the be-all test.

So even if you --
THE COURT: I didn't raise it.
MR. JOHNSON: -- even if you think perhaps that we somehow haven't satisfied our burden with respect --

THE COURT: No. Saying that they admitted it by citing the testimony of Mr. Frankenberg, I don't get that. I mean, I thought, oh, my goodness, I missed something. They not only didn't buy my argument, they admitted it. I think the citations are Pages 88 to 90 of the memorandum. The only thing that's cited there is Frankenberg and maybe Harral's testimony.

MR. JOHNSON: Well, I apologize for that because that shouldn't be done. I will say this Microsoft, during the course of the case, trumpeted the fact that Mr. Frankenberg and Mr. Harral had testified that Windows 95 would have done better had they gone ahead and published and supported the namespace

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extensions. They trumpeted that over and over again. They thought that was really important.

THE COURT: And they did it today.
MR. JOHNSON: But to call it an admission, I think, would be a bit strong. I agree with that.

So what I'm saying here is that this, this question of whether something is anticompetitive or not is ingrained right into the jury instruction, the Model Jury Instruction in civil antitrust cases. And Your Honor, of course, gave this instruction in this case. And from this, the jury, who's supposed to be the fact-finder in this case, is going to make a determination, based on the facts presented, of whether the conduct that Microsoft engaged in made business sense, apart from any effect it had on excluding competition or harming competitors.

Antitrust law assumes the monopolist should act rationally and its short-term losses will be offset by long-term gains.

The cases upon which Microsoft relies for the contrary argument, which are the Christy Sports and Four Corners Nephrology arguments, involve situations in which the monopolist conduct produced short-term gains, not losses.

We presented evidence from which a reasonable jury could conclude that the conduct that Mr. Gates engaged in didn't make any business sense apart from the effect it had on harming

Novell, WordPerfect.
Christy Sports, the case upon which they rely, makes --
THE COURT: Suppose it made sense to protect -- in the short term we know that, in fact, the Microsoft Applications Division was, at least insofar as the products it competed with, WordPerfect and PerfectOffice, did not use the namespace extension APIs. Are we agreed on that?

MR. JOHNSON: We're agreed --
THE COURT: That in 1995, neither Office nor Word used the namespace extension APIs. That's correct, isn't it?

MR. JOHNSON: I would agree that there's evidence to that effect, Your Honor.

THE COURT: Including the testimony of your own expert?
MR. JOHNSON: Maybe. Maybe. I don't have it here in
front of me. But that --
THE COURT: Okay.
MR. JOHNSON: But that was limited only to the Office products, not to some of their other products, like --

THE COURT: Right.
MR. JOHNSON: Some of those other --
THE COURT: I'm only talking about the relevant products. So we start with that.

Let us suppose that what was in Gates's mind was -what I'm worried about is 1996, that I want to give time for the Applications Division of Microsoft to catch up, because right now

Novell and Lotus are ahead of us. And if I don't withdraw the namespace extension APIs, it's not, in 1996, by 1996 or maybe even in 1995, they're going to come out with better application programs, and people are going to buy their application programs and not our application programs.

Under the remaining theory in that case, is that actionable as an antitrust claim?

MR. JOHNSON: Yes. Absolutely. I mean, it goes right to, it goes right to the moat quote. It goes right to the fact that WordPerfect and PerfectOffice contain the middleware that Microsoft feared at the time. And we have reams of evidence with respect to --

THE COURT: No. No. Let's forget the middleware. This is simply an applications question. What was in Mr. Gates's mind was, our Applications Division is behind. Novell and Lotus are ahead of us. If I allow them to use the namespace extension APIs, they're going to have a better product than our Applications Division is going to come up with on the applications side. And to protect, and to prevent that from happening, I am going to withdraw support for the namespace extension APIs.

If that's all that's in the case, is that a viable claim here?

MR. JOHNSON: Yes.
THE COURT: Or in Salt Lake City?

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MR. JOHNSON: Yes. If, Your Honor, that action caused harm to competition in the operating systems market. Remember that intent is not really, you only look at intent in a Section 2 Sherman Act case. Intent can be instructive with respect to predatory or exclusionary conduct, can be instructive. But it's really irrelevant. A monopolist, whatever he does, he intended to do it. And it is the impact on competition that is the question that remains open.

It is much the same, frankly, Your Honor, about this whole, we're going to get into this, never been a claim for deception of a competitor or something like that. There is all kinds of case law which deals with the fact that there is no way to define what anticompetitive conduct is. It's too varied in its scope.

Here is, here is from United States v. Microsoft in the Court of Appeals, DC Court of Appeals. Quote: "Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern. The means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."

And that is why the model jury instruction which we use gives a general rule which says, if an action by a monopolist

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makes no business sense, apart from destroying a competitor, which is what Mr. Gates action did, then it is anti-competitive. THE COURT: He didn't destroy him. You're still here. MR. JOHNSON: They're still here but they're a shell of their former self and can't achieve the widespread use, which is one of the things they needed to achieve to effect the applications barrier to entry in operating systems.

So I know Your Honor is fond of talking about Mr. Gates and his intent, but that's really not the question in an antitrust case.

So the fact that there hasn't been a case -- by the way, in the same case, speaking of deception, one of the headings in the DC Circuit Court opinion is Deception of Java Developers. So for Microsoft to stand up here and tell you that deception can never be used as a claim for anticompetitive conduct -- now, I know Mr. Tulchin was very careful in the way he said it. He said nobody has actually collected damages in a case. However, I believe Microsoft paid out quite a bit to Sun to get rid of their Section 2 claim, which is virtually identical to the Section 2 claim which we bring here.

So, get back to the point. Business torts, as he likes to call them, in all their varieties, standing alone, do not create an antitrust violation. That is absolutely true. But when those business torts result in harm to competition in the applicable market that we're speaking of, it does rise to an
antitrust violation. And we are here properly under Section 2. THE COURT: What about the fact that deception's not mentioned in the complaint? And everything that's not in the complaint is released?

MR. JOHNSON: Well, that's getting, again, to the settlement agreement, which specifically said that nothing herein shall prevent Novell from raising any, from raising any facts in support of its, in support of its cause of action that it wishes to raise.

We're not required, in a pleading, we set forth a Sherman 2 cause of action against Microsoft in that complaint. We're not required in that complaint to set forth every bit of evidence that we intend to use to prove the Section 2 violation. And simply because we didn't say "deception" doesn't mean that we can't talk about, and educe the facts which show that Microsoft deceived us through this action.

Coming back to Christy Sports, which is a case that Microsoft seems to like a lot. I kind of like it myself because the Christy Sports court said, a change in resort operator's business model could give rise to an antitrust claim, for example, if by first inviting an investment and then disallowing the use of the investment, the resort imposed costs on a competitor that had the effect of injuring competition in a relevant market.

That last part is key. You got to have that last part,
which is harm to competition.
In this case, Microsoft invited, indeed, urged Novell to make an investment in the namespace extension technology in order to create a winning product for Windows 95. When Mr. Gates saw that Novell was about to do exactly that, he withdrew the technology for the express purpose, it's not implied, it's not an inference, for the express purpose of harming Novell and Lotus.

THE COURT: Where is the evidence that he knew that it was being used? Just give me a record citation.

MR. JOHNSON: I am not sure that there is a direct reference that he knew. I know there's a --

THE COURT: Isn't there evidence directly to the contrary?

MR. JOHNSON: No. Actually, there's evidence that, I think it was a day or two after his decision, Mr. Silverberg sent him an e-mail saying WordPerfect was using the extensions. I believe there is, obviously, evidence in the record that Microsoft went to Novell, went to Novell WordPerfect evangelizing these extensions, and that Novell WordPerfect told Microsoft what it was intending to do with the extensions and how excited it was about that. That was Mr. Cole. That went to Novell to do that.

Now, I don't have direct proof that that fact got back to Mr. Gates. I don't have that. But to suggest, after that long, lengthy memo came out about all the use of the namespace extensions by a dozen different companies, and what the plans
were for those, for Mr. Gates to say, Oh, I didn't know anybody was using it, because that study, that survey came out before the decision.

Now, I don't have proof because --
THE COURT: Okay.
MR. JOHNSON: -- Mr. Gates is not on the e-mail. But I can't prove it. But to say that he didn't know, frankly, lacks credibility. But, of course, we're not here to make credibility determinations today.

So this Christy Sports case, that's exactly what they say here.

THE COURT: What evidence is there that Microsoft knew, at least after the decision was made, that Novell had been relying upon it and, upon the namesake extensions, and was concerned with the withdrawal?

MR. JOHNSON: I guess I would, I would answer that question, what difference would it make either way? If you take -- once again, intent is really not relevant to the issues before us. It only informs us. If a monopolist takes action, and the law is that a monopolist intends his acts, the consequences thereof, and if he takes action which has the effect of harming competition in the relevant market, it doesn't matter what Mr. Gates knew or didn't know at the time.

THE COURT: Or subjectively intended. What his motive was.

MR. JOHNSON: I mean, if I had to point to some things, I would point to Mr. Creighton's statement that there was going to be hell to pay if they did this. I would point to the statements that Microsoft people said, that WordPerfect was using the extensions. I would point to the meeting with Mr. Cole, with Microsoft and Novell, when they were terribly excited about the extensions and told them all the great things they were going to do with them and their product.

THE COURT: What about the Struss e-mail?
MR. JOHNSON: The one where he said that they weren't using it?

THE COURT: I think you said it was okay with the withdrawal.

MR. JOHNSON: Yeah. I think it does say that. He's okay with it. Again, yes, there are, there's evidence on both sides.

THE COURT: No, no, no, no. That's the only evidence.
MR. JOHNSON: No. Mr. Silverberg's e-mail to Mr. Gates said WordPerfect was using it.

THE COURT: Well, I'll go back and read it. In terms of the timing, I think the one trumps the other.

MR. JOHNSON: I don't see how one piece of evidence, on
a Rule 50 motion, now, I'm talking about --
THE COURT: I know exactly where I am. I wish I
weren't here. If I could be a fact-finder in this court, you
would lose on delay.
MR. JOHNSON: I am painfully aware --
THE COURT: -- on the cause of delay. So don't remind me I'm here on a Rule 50. I am very well aware of that.

MR. JOHNSON: Let's take a look on the middleware side now, because we've looked at the evidence that will allow a reasonable jury to find harm to competition through the Raikes's e-mail and the data that was presented by Dr. Noll and the opinions of Dr. Noll at the time.

Novell raised a material issue of fact with respect to harm to competition in the operating systems market because of the middleware threat presented by the combination of WordPerfect Appware and OpenDoc.

Middleware was defined in the government case, in Paragraph 28, as software that relies on the interfaces provided by the underlying operating system, while simultaneously exposing its own APIs to developers. We've highlighted that above. The DC Circuit agreed with that, writing that middleware refers to software products that expose their own APIs.

Now, Microsoft continues to argue for a definition of "middleware" that cannot be satisfied, that is contrary to the government case and contrary to common sense. If middleware has to profitably run general purpose personal productivity applications based solely on their own APIs, or to say it another way, Your Honor, if middleware has to be a complete operating
system to impact competition in the operating systems market, then neither Netscape's Navigator, nor Sun's Java, have a Section 2 case against Microsoft. Neither of those products could do that.

That is an absurd conclusion and a conclusion rendered even more absurd by the hundreds of millions of dollars that Microsoft paid to settle the claims of Netscape --

THE COURT: A, where is that in the record? And B, how do you know?

MR. JOHNSON: It's publicly available, Your Honor. We have a chart, we have a chart.

THE COURT: Is that in the record?
MR. JOHNSON: I don't know if it's in the record.
THE COURT: No, it is not in the record. And we're here on a Rule 50 motion, as you've just reminded me.

MR. JOHNSON: Yes. And I am not suggesting that the jury knew that. What I am suggesting is --

THE COURT: And the question is $I$ can't consider it on a Rule 50 motion.

MR. JOHNSON: Well --
THE COURT: I can't. I don't know what the circumstances of the payment were. I don't know what was gained and lost. I can't consider it.

MR. JOHNSON: I think you could fairly consider that Netscape and Java have a claim.

THE COURT: I can't consider what they were paid.
MR. JOHNSON: No, I didn't say that. I stopped there.
I said I think you can fairly consider --
THE COURT: To the extent it's in the findings of fact, certainly. But let me ask you because I really don't understand this.

I don't understand how, consistent with the reducing the barriers to entry, which is the key here, if a middleware product does not expose sufficient APIs to write full-featured personal productivity applications, it's relevant to this case. Because this case depends upon reducing the barriers of entry to the operating system market.

And if a middleware product, whatever the definition is, if it does not expose enough APIs to allow ISV's to properly write full-featured personal productivity applications, I don't know, I'm confused. It's another way of asking how Dr. Noll's watered-down, to use Microsoft's term, interpretation of a third component of the middleware theory, makes any sense.

MR. JOHNSON: Well, I think Your Honor actually spoke absolutely correctly when you said, we're here today to talk about, you know, reducing the applications barrier to entry. The definition that Microsoft proposes the Court adopt would be sufficient to destroy the applications barrier to entry.

In other words, if people could profitably write full-service Office Productivity applications solely from
middleware without relying on any APIs of the operating system, you wouldn't need the operating system. Why would you even buy the operating system?

THE COURT: Because it wouldn't work without it.
MR. JOHNSON: Why wouldn't it? The definition says -THE COURT: No. No. I know. It's got to operate on something. I thought the whole theory of Dr. Noll's was, it lowers the price and turns it into a commodity because, and it really doesn't matter what the operating system is. But he still says there has to be an operating system.

MR. JOHNSON: What Dr. Noll, really not a theory, it's a theory but it's articulated in the government case, which, as more and more applications come to rely on middleware APIs, in whole or in part, which is what the government case says, that is going to reduce supporting costs to other operating systems and, therefore, as you just stated, reduce the applications barrier to entry.

What Microsoft continues to do is to confuse the question of reducing barriers to entry, to destroying the applications barrier to entry.

Now, I certainly agree, $I$ don't forget --
THE COURT: But the whole idea is ISV's aren't going to write -- an individual ISV is not going to write unless other ISV's are also writing. That's the whole -- I forget what it's called. It's two different terms. But you have to have enough

ISV's writing to the, either the operating system or the middleware, to encourage other ISV's to write to the same system.

MR. JOHNSON: I certainly think that is true that you have to build synergy and have people writing to the middleware APIs. In fact, the jury in this case heard evidence that that was going on with respect to WordPerfect's middleware. I am going to address that --

THE COURT: Okay. Go ahead.
MR. JOHNSON: -- shortly. When we were in trial, we were having this exact same debate. If we go to the next slide, please.

You came up with a definition of "middleware" that you actually provided to the jury. And you said one must be cross-platformed, that is run on multiple operating systems, and two, must expose sufficient APIs to encapsulate meaningful functionality, and threaten Microsoft's monopoly in the $P C$ operating systems market.

Now, we didn't agree with the instruction at the time. We didn't think that that was appropriate. But the evidence presented was more than sufficient to allow a reasonable jury to find for Novell based on this instruction. Novell's middleware was cross-platform. It did run on multiple operating systems. It had sufficient APIs to encapsulate meaningful functionality, and was a threat to Microsoft's operating systems monopoly power.

I'd like to look at that evidence now upon which our

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jury could reasonably rely.
The jury could start with Finding of Fact 68, which begins with the observation that middleware has the potential to weaken the applications barrier to entry. The more popular middleware became and the more APIs it exposed, the more the applications barrier to entry would dissipate.

Now, notice, it says "dissipate." It doesn't say "destroy." It is a lessening of entry barriers, not the elimination, that is being discussed in the government case.

The government case also found that, quote, "each type of middleware contributed to the threat posed by the entire category." From this, a reasonable jury could infer that Novell's middleware contributed to the threat posed by Netscape's and Java's middleware, from the government case.

As this Court recognized in its summary judgment opinion, the law will not permit monopolists to eliminate multiple small threats which, when combined, would pose a threat to its monopoly power even if each one would not do so independently. Thus, as you ruled on summary judgment, Your Honor, and the Fourth Circuit confirmed, the jury was entitled to take into account the weakened state of the market caused by Microsoft's anticompetitive conduct directed at Netscape, Java, and others.

For this reason, you concluded on summary judgment, that the harm-to-competition question was one within the province

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of the jury. It remains so today.
Now, again, from the government case. Netscape Navigator and Sun's Java technology had certain middleware attributes which caused the Court to conclude that they represented threats to Microsoft's monopoly because they had the potential to diminish the applications barrier to entry. Again, they didn't say destroy the applications barrier to entry, they said diminish it.

What this whole case is about, when you're talking about harm to competition, is reducing entry barriers. Did Microsoft's conduct serve to raise entry barriers or would have WordPerfect, PerfectOffice, and its middleware products and all the middleware products of Java, Netscape and others, have reduced those entry barriers?

What were these attributes? With respect to Navigator, it was a complement to Windows that had the potential to gain widespread use. It exposed a set, albeit a limited one, it says in the Finding 69, of APIs, which provided platform capabilities. And three, it was cross-platform.

Those three criteria are right out of Finding of Fact 69.

THE COURT: Remind me. I really just don't remember. What APIs did WordPerfect expose?

MR. JOHNSON: PerfectFit alone had over 1500 APIs it exposed.

THE COURT: And what, what would be, what would be written to it?

MR. JOHNSON: Applications.
THE COURT: What kind?
MR. JOHNSON: Any type. By ISV's, by corporate developers, by others in the industry.

THE COURT: Not who would write. What would they be?
MR. JOHNSON: What would they be? It's only bounded by the imagination of the developer, Your Honor. Obviously, they're not going to write an Office Productivity application to WordPerfect. They've got one. They don't need to write one on top of WordPerfect.

THE COURT: Again, just jog my memory. I can't remember, is this where there was testimony that the only type of, likes box scores? I just don't remember.

MR. JOHNSON: No, Your Honor. The evidence at trial was, and actually, I think I have a slide on this, there was a PerfectFit partners program that Novell had, in which they issued SDK's, software development kits, and the like for application developers, ISV's, corporate developers, and others, to write applications to the PerfectFit APIs. There were 1500 such partners with Novell at the time. And they were writing applications to that. But again --

THE COURT: I guess what I'm trying to find out is, box score sticks in my mind somewhere. Are these sub-categories of

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word processing and spreadsheets, or are they different kinds of applications?

MR. JOHNSON: They could be both. They could be either. PerfectFit provided a complete set of facilities for an application that could be related to word processing, could be related to spreadsheets, or it could be a completely independent application that had to do with something else.

THE COURT: Okay.
MR. JOHNSON: Let's go through that criteria and the evidence which the jury could use to decide that WordPerfect's middleware met the criteria that was set forth in the government case on the question of middleware.

First of all, I don't think anybody can argue that WordPerfect was, like Netscape, a complement to windows.

THE COURT: And we all agree that "complement" is misspelled.

MR. JOHNSON: Yes, we do, Your Honor.
THE COURT: Glad we can find an area of agreement. MR. JOHNSON: Oh, boy. Here we have the testimony of Professor Noll from which a reasonable jury could so conclude. It is also undisputed that, in 1994, WordPerfect still maintained a huge user base that was almost equal to Microsoft Word's user base. Now, from this fact, a reasonable jury could conclude that WordPerfect had a market opportunity to gain widespread use on Windows.

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THE COURT: Well, we might as well -- we're there, so I might as well, I might as well ask the question now. Why does that make the claim not indirectly related to DR-DOS?

MR. JOHNSON: Well, Your Honor --
THE COURT: Just, just go back to the previous slide. Go back to the previous slide. What's the exhibit? It's Plaintiff's Exhibit 599. Why does that, to the extent that the theory is that Novell is going to be able to use the 7,600 -seven million, whatever it is -- the column, $18.8 \%$ of market share, to leverage or to use in terms of increasing, of becoming a middleware threat, why does that not make this claim indirectly related to DOS?

MR. JOHNSON: Your Honor, let me answer it this way. The Court of Appeals said that that wasn't the right way to read the contract. The Court of Appeals said there was no limiting boundary that could be drawn with respect to Microsoft's interpretation of that contract. And the Court of Appeals said that that contract was limited by its terms to the 13 products that were identified in the, in the contract itself, and could not extend beyond that.

So, Your Honor, and this is one that you do come back to and do think I you have, you know, a personal stake in this because --

THE COURT: I object to that. I put on the record exactly what my thinking was. I came back to this when I read
the memoranda. And I realize that, I worried a little bit about Dr. Noll's testimony. I did not focus -- I have absolutely no personal stake in this. In fact, I ruled your way originally. That was my instinct. And I told you honestly I thought I was right. But I did it very much more or trial management reasons, the reasons I've ruled the way $I$ finally did.

I didn't want an eight-week trial, and then to be told that the claim had been released. And there had been something in a footnote, as I recall, which the Fourth Circuit, it could have been read as suggesting I should have granted an interlocutory appeal on both issues.

I have no personal stake in this. And it could well be that the answer is the way, the evidentiary record doesn't matter. But the fact of the matter is, it is now clear to me what my instinct was and why $I$ thought it was right. If this is in the operating systems, somehow it's going to leak over into the proof.

And the fact of the matter is, I think, I think Dr. Noll's testimony and the market shares show that. It is that, it is the very fact that Novell thought that it had loyal customers who, when they left the DOS market, which we all agree had become antiquated, and bought into the Windows market, they were going to substantially replace, that they were going to buy Novell products. And I don't see for the life of me how that's not related to a DOS finding.

Maybe the answer lies in the Fourth Circuit opinion, which I will reread.

MR. JOHNSON: I think so, Your Honor. And I didn't mean to be argumentative.

THE COURT: No, no. I just happen to take, this is not something I have a personal stake in, number one. Courts of Appeal have their jobs to do. I have my job to do. I don't care.

But, secondly, this is one where, frankly, my instinct was with you. But I have to keep thinking. Go ahead.

MR. JOHNSON: I like your initial instinct better, Your Honor.

THE COURT: That's fair enough.
MR. JOHNSON: Initial ones are usually right.
THE COURT: I'm not sure of that.
MR. JOHNSON: Going back to where we were and talking about the opportunities presenting themselves to WordPerfect during the relevant time period. If we could go back to Slide 29, please.

So, in addition to the market share information presented to the jury, marketing studies conducted in 1994 show that $94 \%$ (sic) of users had not yet made up their mind on which suite to purchase. Again, this reinforces for the jury that there was a market opportunity for WordPerfect to gain widespread use, which was present during this time period.

THE COURT: Does it matter that Perfectoffice is never mentioned in the complaint?

MR. JOHNSON: No, Your Honor.
THE COURT: Why not?
MR. JOHNSON: Because PerfectOffice is simply the combination of the products that are mentioned in the complaint. It doesn't add anything less or more.

THE COURT: Assuming there's true, Microsoft could make a business decision in deciding to pay money, which it did, I don't know, IBM was, $I$ understand it paid and got, in exchange, release claims. Why isn't it fair to say that it made a business decision, Look, the only remaining claims against us are for, it's not for a suite product. And I now know from the evidence, I think I knew before, but I certainly understand now, the suite market was significantly, substantially different; that it couldn't say, all right, one of the reasons we're willing to pay this money to get the release is nobody's ever going to be able to sue us for the loss of revenues coming from Perfectoffice.

MR. JOHNSON: PerfectOffice was simply a marketing name for a bundle of products, Your Honor. You pointed this out before. You said, in fact, you said, if it's only about the fact that, in other words, we're not creating a separate claim from PerfectOffice. We have a claim with respect to WordPerfect and Quattro Pro and Appware and OpenDoc. Those are the products we have made claims for.

The fact that all of those products were in PerfectOffice doesn't make it turn it into a claim for Perfectoffice.

THE COURT: It does if, in fact, they weren't going to sell separately. Which I now understand in a way I didn't before. And Mr. Frankenberg said that Microsoft was a marketing genius when it came up with the suite.

MR. JOHNSON: Well, it would be incorrect to say that they weren't going to sell separately. They continued to sell separately.

THE COURT: But Mr. Frankenberg, maybe I'm wrong, but I thought the testimony was pretty clear that the future lay in suites.

MR. JOHNSON: I think that the testimony was that that was probably going to be the long-term future, that people were more likely to go that way, since you could get, obviously, a deal by buying in a bundle. But WordPerfect and Word, for that matter, to this day, you can buy separately. And people do.

THE COURT: Yeah. But your damages expert didn't distinguish between the two.

MR. JOHNSON: No. Damages expert didn't distinguish. Because what we were talking about, what our complaint talks about, is harm for loss of sales of Office Productivity applications during the relevant period in this case.

THE COURT: That could be the answer. And Office

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Productivity application is not defined in the complaint, correct?

MR. JOHNSON: I don't know about that, Your Honor.
THE COURT: I think, if it is. It's --
MR. JOHNSON: It may have been defined in WordPerfect, Quattro Pro, and some others. You know, we had that argument when it was about GroupWise. And we had actually made a claim for GroupWise, of course, and Your Honor threw it out.

THE COURT: If, in fact, it is defined in the complaint, and I just glanced before the hearing this morning and didn't find it, although I have some recollection Microsoft takes the position -- don't tell me now, Mr. Tulchin, tell me later --

MR. TULCHIN: It's paragraph 24, Your Honor, in the complaint.

THE COURT: Tell me later. That if it's defined, if Office Productivity program is defined as Quattro Pro and WordPerfect, you know, the fact that it later, it says harm to productivity, whatever it is, refers back to definition, which is Quattro Pro and the fact that they're combined together, I mean, this just reminds me about how, how important $I$ think Dr. Noll, whoever it was, was testifying about this, how important the whole concept of 'suite' was becoming. And that may have been released. Despite the fact that I am perfectly willing, and again, this is something that $I$ have focused upon post-trial, the mere fact that they're combined into one, that may be true. But
it may have been released.
MR. JOHNSON: Well, Your Honor, the products, though, that are in the complaint, ran Perfectoffice. So it's not a different product.

THE COURT: Of course it's a different product. It's a whole different market.

MR. JOHNSON: It is simply a bundle. Actually, we did not plead a suites market. And nobody has suggested, frankly, that there is --

THE COURT: Somebody suggested it. This testimony is what reminded me of this. Because it was uncommitted, the suite market was the wave of the future, and that that was pretty open at this point.

MR. JOHNSON: Your Honor, as a matter of fact, I think Dr. Noll testified there was no separate suite market.

THE COURT: I don't know who testified. What I recall, and I can go back and check the transcript, was that whoever testified, somebody testified about the $74 \%$ figure. And that was one of the reasons that Novell said it had great hope that, although Microsoft had had the head start in the suite market, because they came up with the idea, the fact of the matter is, this was an open market, for that product, which was a distinct product. I'm pretty sure. Somebody can check the transcript, save me time.

Now I remember this clearly. And I thought it was Dr.

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Noll, but it may have been somebody else. That they talked about this very statistic is the reason that, despite the fact that whatever the installed base was, looking for the suites was the product of the future, and that, and that right now although Microsoft had a head start, it didn't have any dominance, or it didn't have overwhelming dominance.

Be that as it may, I could be wrong.
MR. JOHNSON: I would only say Your Honor has also observed that, given that WordPerfect and Quattro Pro were simply bundled into a marketing device called Perfectoffice, you said that that seemed like nothing to you.

THE COURT: And I might have been wrong. And that's what I'm saying. I'm saying is if there were claims, if it was only the claims asserted in the complaint which were preserved, and the complaint in Paragraph 24 defines "Office Productivity systems" as Quattro Pro and WordPerfect, there's a problem.

I'll have to decide. That's what I'm here for. But it certainly is, I may have been wrong.

MR. JOHNSON: Going back to, you know, the market opportunity that presented itself here for WordPerfect, Your Honor. It wasn't my intent today to go through the reams of evidence showing that, by 1994, WordPerfect was better than or at least equal to Word. We had lots of that.

THE COURT: There's certainly testimony that, I think it's 6.1.

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MR. JOHNSON: Certainly, it was sufficient for a reasonable jury to rely in coming to that conclusion.

You may recall, looking at the government finding, that Netscape only had limited set of APIs. PerfectFit didn't have a limited set of APIs. It had over 1500 APIs. You may remember, I think Mr. Tulchin spoke earlier that Windows only had 2500.

So we're over 1500 right here. We are not far behind. And we are only talking here about PerfectFit. We haven't even gotten to Appware and OpenDoc yet, which we're about to do.

It was evidence from which the jury could find, if we move to the next slide, the PerfectFit APIs and WordPerfect provided application developers common menus, icons, tool bars, common dialogues, common tools, a common scripting language, and common code. Here is just one of the exhibits, Plaintiff's Exhibit 395, describing the PerfectFit technology, upon which a reasonable jury could rely.

The jury also heard, I think I mentioned this a few moments earlier, Your Honor, about the PerfectFit Partners Program, showing that Novell's middleware was actually being used by hundreds of developers, creating, again, a reasonable inference that the program would have continued to expand in the but-for world, which, of course, we can only speculate about.

Appware, let's turn to Appware, because Novell's middleware story was not limited to PerfectFit. Here is evidence directly from Microsoft's files describing Appware as a common
cross-platform set of APIs. Microsoft recognizes here that Appware offered virtually all of the services of operating systems it was hosted upon, and with a brand new and different sets of APIs.

So, frankly, if the rule is that middleware has to be a complete operating system, I've got, I've got documents that say exactly that. If we look at --

THE COURT: I really ask this out of ignorance. You've used the phrase "an operating system." I don't know the difference. I am technologically a dinosaur. But I still always understood that middleware had to sit on top of an operating system of some kind. That it wasn't that middleware became an operating system, it became a threat to operating systems because it made the underlying operating system irrelevant.

MR. JOHNSON: Yeah, exactly. Well, it made it into a commodity. I think, as Microsoft described it, it would turn them into BIOS builders, which are just a chunk of code down there, that nobody cared about and certainly nobody would pay a lot of money for because they could have something simple down there.

Here we have the testimony, which the jury heard, from Mr. Silverberg, that Appware is an operating system that exposed -- so our jury, in reaching the conclusion that Appware exposed sufficient APIs with meaningful functionality that threatened Microsoft's monopoly power, it could rely on Mr.

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Silverberg's testimony.
He said, without ambiguity -- in 1994 he said this -Appware was an operating system that represented a threat to turn Windows into a commodity. For purposes of this motion, this admission by one of Microsoft's highest executives has to be fully credited, and any conflicting evidence ignored.

THE COURT: This doesn't change anything. I'm still a little confused about this. And tell me -- I realize it's not evidence. Is the reason he testified to this, because Microsoft was taking the position in the government case that it did not have a monopoly because middleware constituted the functional equivalent of operating systems and, therefore, he got locked into deposition testimony? Is that what happened?

MR. JOHNSON: Well, Your Honor --
THE COURT: Is that Microsoft is now being hoisted by its own petard? I just don't know.

MR. JOHNSON: I certainly wouldn't want to ascribe something to Mr. Silverberg that he would --

THE COURT: I understand that.
MR. JOHNSON: I don't think that would be appropriate. THE COURT: I am trying to understand how this all happened.

MR. JOHNSON: Certainly, this testimony was given in the context of the government case. I will say that much.

THE COURT: Okay. That's all.

MR. JOHNSON: Mr. Maritz, who testified about the same time period. Your next slide, Your Honor.

THE COURT: They look much younger than I recall.
MR. JOHNSON: He said much the same thing.
THE COURT: And less menacing than Mr. Maritz --
MR. JOHNSON: He testified explicitly that Appware was very much a competitive threat to Windows. Again, this testimony and all inferences therefrom must be credited for purposes of this motion.

THE COURT: No. That's fine.
MR. JOHNSON: We didn't spent a lot of time on OpenDoc. We spent some, not a lot. But there was substantial evidence in the case from which a reasonable jury could conclude that OpenDoc was also cross-platform middleware. This is just one of those exhibits. This one pointing out that OpenDoc was cross-platformed during the relevant period.

The next slide. That is a Microsoft document, from which our reasonable jury could conclude that Microsoft feared that Novell Suite would help Novell control the operating system and work group standards. They state, For Novell, the key goal will be to maximize penetration of their Suite to help them control operating system and work group standards. They want to quit letting us dictate the PC technical agenda. If they're successful in getting penetration -- in other words, if we're successful in getting widespread use -- they'll be in a position

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to introduce alternative standards, such as OpenDoc, that will give us a much harder time to drive the operating system and apps agenda.

And, finally, here we have Mr. Silverberg again acknowledging that OpenDoc was an essential operating system component which was intended to rid the world of Windows.

We also have abundant evidence from which a reasonable jury could conclude that WordPerfect, and the middleware which was packaged with it, was cross-platformed historically.

THE COURT: Let me ask you, because this I really don't know the answer to. There is no question that Mr. Harral, Mr. Richardson, everybody at Novell, was excited about, I think the term "marrying" may have been my word, not theirs, but wanted the, I'll use it again, "married" to Windows 95. They saw a technological breakthrough. They saw this was the way of the future. They saw, in order to be successful, they would have to be able to operate with Windows 95.

And again, $I$ just don't know the answer to this. Is the idea of the theory behind your case, that although Windows 95 was a technological breakthrough to the extent that, in the short term, the Novell products were married to it, they needed to be to survive the next year or two, was the idea that, thereafter, the technological breakthroughs that Windows 95 made as an operating system would become immaterial, and that the only operating systems necessary for the operation of middleware would
have been pre-Windows 95 technology? Essentially, simple, little machines that just ran -- or was there something in the new technology that middleware needed?

MR. JOHNSON: You said a lot there, Your Honor. Let me try --

THE COURT: Try to rephrase that. I may not have been as clear as I wanted to be.

MR. JOHNSON: Unravel a bit. I think what we said about Windows 95 is we saw it as a great opportunity, of course. I think "marrying" was your word. And I think we joked that they just wanted to date, they didn't want to get married.

THE COURT: I'm old-fashioned.
MR. JOHNSON: Mr. Gibb testified, actually, that the innovations in Windows 95 were not new. They were only new for Windows. Apple's operating system already had many of the features that we're talking about in Windows 95. And they were just bringing Windows into the modern age of DUI interfaces. In fact, I think there was even Microsoft testimony on that fact where we asked --

THE COURT: There is no WordPerfect for Apple, right? There is. Yes.

MR. JOHNSON: Yes. There was, I think it was Sinofsky. I am not sure what it was.

THE COURT: In any event --
MR. JOHNSON: It was a Microsoft witness. When we

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asked him if Windows 95 was a paradigm shift, he said no. He said, Just being successful doesn't make you a paradigm shift.

Basically, what they were doing is bringing Windows up to speed with what Apple had already done. And Mr. Gibb testified to that.

So I think, and we talked about this on the argument the last time around on this motion. And I can certainly bring out all that testimony again. But my point is, this wasn't the greatest thing since sliced bread, but this was the loaf of bread we had to be on.

THE COURT: I understand that.
MR. JOHNSON: We absolutely had to be there. And in order to impact competition in the $P C$ operating systems market, it was actually essential that WordPerfect be successful on Windows.

THE COURT: I understand that.
MR. JOHNSON: Just as it was for Netscape and Sun.
THE COURT: Sure.
MR. JOHNSON: They had to be successful on Windows in order to advance what they were trying to do in the operating systems market.

THE COURT: So my question is, looking a year or two out, and you would agree with me that, as far as the evidence was concerned, there was no evidence that there was going to be immediate cross-platforming. The idea was going to be, look,
after we have had a short-term affair with Windows, which we have to have, I am not quarreling with that, to stay competitive, then we are going to cross-platform?

MR. JOHNSON: No. The fact of the matter is WordPerfect was cross-platformed all throughout that period and before that period on many different platforms.

THE COURT: That I know.
MR. JOHNSON: It is true with respect to PerfectOffice, that they didn't yet have a cross-platform version of PerfectOffice during the time period in question. They did have lots of versions of WordPerfect that were cross-platform during the events in question.

What the evidence showed is that WordPerfect historically had been committed to the cross-platform ideal or model. One of the reasons, therefore, as Mr. Frankenberg testified, was to provide some competition in the operating systems market.

So what we're looking at a couple of years down the road, and this is what Dr. Noll testified to, that those people that had bought WordPerfect, and had stuck with WordPerfect on Windows 95, would get to the point for their next purchase, their next computer, and they would say, should I pay hundreds of dollars for Windows 95 with my WordPerfect when I can get Linux for free? Or at least substantially --

THE COURT: So my question, maybe I found a better way
to phrase my question. MR. JOHNSON: Yes.

THE COURT: Did there have to be any technological improvements to the operating systems on which WordPerfect was already cross-platformed in 1994 for WordPerfect to be a successful middleware product in 1996? You use the fact that it had been cross-platformed in the past. I want to find out the relevance of that.

Does there have to be improvements to the operating system on which, as of 1994, to pick a date, there is evidence that WordPerfect is already cross-platformed? Does there have to be any improvement to that product by 1996, '97, in order to have WordPerfect operate as a viable middleware product? Was there anything in the technological breakthroughs or whatever, bring me up to date, whatever you want to call it, of Windows 95 that made, that would have been necessary to make in other operating systems, looking a year or two out, in order for there to be a successful cross-platform?

MR. JOHNSON: I am not sure how to answer that question from a technical sense, Your Honor. I will say that --

THE COURT: Frankly, it makes relevant the question, whether it's been cross-platformed in the past, so what? If, in fact, those operating systems had been rendered obsolete by Windows 95, then there, if there's going to be successful cross-platforming; then $I$ don't just look at the past, I have to

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look at what the market would have been in 1996.
Frankly, that is important to me because then I
probably am looking for expert testimony, because I want to know where it is that anybody would want to manufacture a commoditized product for which they would have to invest $R \& D$ in order to be successful. If, in fact, it's just the old product, I understand. But if, in fact, the operating systems that had existed in 1994 weren't going to be good enough to be cross-platformed, too, in 1996, I want evidence not only that there's been cross-platforming in the past, I want some evidence of what that product would have looked like in the but-for world and that they would have existed.

And frankly, I am not prepared to assume that they would have existed because, A, they would have taken capital investment to make the improvements. And secondly, according to Dr. Noll himself, the prices would have been coming down for the operating system.

I'm trying to explain why it is that I am asking the question. And I don't know the answer.

MR. JOHNSON: Perhaps Dr. Murphy provided an answer for you in his own testimony. If we can bring up Slide 45. This is Dr. Murphy's testimony. We didn't actually have a picture from him at trial, so we had to grab this one off of a web site for him. So he did not wear the hat at trial.

But here, Dr. Murphy is talking about the fact that, by

1998, Linux had five to ten million users.
THE COURT: Murphy and I have met before in the Sun case. Hadn't we? He was here on it. I assumed he liked me more the second time than the first time.

MR. JOHNSON: You weren't too complimentary the first time, as I recall. And here, he is acknowledging that by the latter half of the 1990's, Linux became increasingly competitive with Windows, with Microsoft Windows. He acknowledges that as an admission. In fact, he acknowledges that by 1998, Linux was an operating systems that was comparable in size, capability, and complexity to Microsoft's Windows 98 and Windows NT operating systems, yes.

So if the answer, if the answer you were looking for, was there something down the road that was going to be the equal of Windows 95 Windows, yes, that is the answer and the direct admission from their own expert.

Turning back to Slide 39 if we could. We were talking about the fact that WordPerfect historically had been cross-platform. And I agree with Your Honor that that fact may not be terribly relevant, but it showed our commitment to the cross platform model --

THE COURT: That's certainly right.
MR. JOHNSON: -- as an historical matter. The next slide, which is Defendant's Exhibit 379, which was actually an SEC filing, we note that during the relevant time period, this is
in June 1994, S4 Amendment filed with the SEC, that WordPerfect was available in 23 languages and on all of the most widely-used computing platforms and operating systems. And I say including DOS, MS Windows, UNIX, Apple Macintosh, DEC's VAX, VMS, etc. In fact, there were 12 or 13 during the relevant time period that WordPerfect had already been ported to.

Once again, this is evidence upon which a reasonable jury could rely in concluding that WordPerfect was, in fact, cross-platform.

Then we have, of course, as I said earlier, during the relevant time period, PerfectOffice itself was not cross platform yet. But Mr. Harral testified that they planned to do that. And all the prior evidence was to provide the inference to the jury that we weren't going to stop because that was our model. Our model was to be cross-platform. Our model was to provide our customers with the ability to use WordPerfect across different platforms.

As the next slide goes on to state, Mr. Frankenberg testified that they did this in order to satisfy their customers, of course, what they'd always done, and to provide some real competition in the operating systems market. That was their intent, to provide a key franchise application on different operating systems so that everybody didn't have to rely on Windows.

Again, this is evidence from which a reasonable jury

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could conclude that eliminating WordPerfect increased barriers to entry in the operating systems market.

For purposes of the motion, of course, all this evidence we've just looked at needs to be accepted as true and the reasonable inferences that flow therefrom.

Microsoft's own documents reveal that Microsoft recognized that one of WordPerfect's strengths was its cross-platform capabilities, and they acknowledge that a consistent use of the cross-platform positioning could neutralize's Word's Windows leadership. They knew it was coming. They feared it.

The next slide. Here is a competitive product analysis from Microsoft, Plaintiff's Exhibit 378. In assessing the competitive situation presented by WordPerfect for Windows 6.0, Microsoft noted that no other competitor had the same breadth of cross-platforms for word processors.

The next slide, I think we already looked at. That was Dr. Murphy again, with respect to Linux and its progress during that period of time. And in fact, we went on, I went on in my testimony with Dr. Murphy to pose to him the fact that now Linux was available for free. Wouldn't it be reasonable for a consumer to choose perhaps less features in a WordPerfect version ported to Linux in order to have a free operating system, correct, sir? Yes, he agreed.

So there was a reasonable basis for our jury, sitting

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as the fact-finder, to conclude that in the but-for world, we could have provided some real competition.

THE COURT: That's not enough. I mean, I've got to have, for an individual consumer, I've got to have some expert talk about market share. I mean, there may be an individual consumer who is willing to take less features for a cheaper price. But the question is, I need some, a jury needs more than that to draw the inference you want.

MR. TULCHIN: In fact, Your Honor, he was speaking -THE COURT: No, don't speak to it. You all get a chance.

MR. JOHNSON: Your Honor, I think, actually, that that's not correct. And I think Your Honor said it yourself, and I am going to get to that, in your own opinion. Because what you're talking about now is the but-for world, of course.

THE COURT: I am just suggesting that this is very much anecdotal, and that, in fact -- nobody could deny that. There may be a very sophisticated or a very unsophisticated consumer who chooses less features for a much lesser price. The question is, does that have any market significance? And determining market significance, I need more than this, I think. Maybe not.

MR. JOHNSON: I don't know, Your Honor. I don't think that consumer is necessarily not making a smart move.

THE COURT: I'm not saying that they're not.
MR. JOHNSON: If the person that stays at the Marriott

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rather than the Grand America is probably getting less features, they're probably getting a better value. And the fact that Marriott is there is providing some competition in the hotel market. Now, that's, of course, a different market than what we're talking about here.

THE COURT: No. The Monaco is the only place to stay. MR. JOHNSON: Well, we think so, Your Honor. They're different.

THE COURT: And you'd like to be there again.
MR. JOHNSON: I certainly hope so, Your Honor. So we're talking about whether Novell is well positioned to threaten Microsoft's monopoly power. And not only does the jury get to rely upon the evidence that we presented affirmatively, but they could look to Microsoft said itself in their own documents about us.

We presented reams of evidence from which a reasonable jury could find that Microsoft was concerned about the middleware threat which Novell represented, both before the purchase of WordPerfect and Quattro Pro and after. And the reason that's significant, Your Honor, is Appware was developed by Novell before the purchase of WordPerfect.

This one, Plaintiff's Exhibit 32, according to former Microsoft executive, Jim Allchin, Novell was well positioned to threaten Microsoft's monopoly power even before Novell had acquired WordPerfect because, quote, "they have an installed

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base, they have a channel, they have marketing power, they have good products, and they want our position. They want to control the APIs, middleware, and as many desktops as they can, in addition to the server market they already own."

Next slide. After Novell purchased WordPerfect in 1994, Microsoft acknowledged that Perfectoffice was an emerging application platform. Here Cameron Myhrvold writes in 1994 that Microsoft is in a platform war with Office, just as we are with Windows, because Lotus and Novell WordPerfect are building competing application platforms, which is precisely what we were doing with Appware and PerfectFit.

Microsoft was particularly concerned about Novell providing PerfectFit technology and WordPerfect SDK's. You remember the SDK's, Your Honor, the software developer kits that were used by developers to write to operating systems. WordPerfect had software developer kits for developers to write to their middleware that they were issuing. WordPerfect Windows open API, including visual app builder. A visual app builder is a reference to Appware. That is what it was called at the time.

Again, a reasonable jury could rely on this evidence in concluding that, in a but-for world, WordPerfect would have had a competing application platform which would operate to reduce the application's barrier to entry.

Microsoft also understood that Appware was a threat. Here, Microsoft sets forth why Appware was dangerous, stating
that Appware might be the first viable platform for commercial cross-platform development and could, in the long run, blur the operating system API line and squeeze us into the camp of BIOS builders. Again, direct evidence from which our jury could infer that Novell's middleware presented a threat to Microsoft's monopoly power in operating systems.

That recognition that Appware was such a threat goes to the highest levels within Microsoft. Here we have Steve Sinofsky telling Bill Gates, Brad Silverberg, Jim Allchin, Paul Maritz, and others, that Appware was scary because it is a windowing API, and a fairly complete one. This is direct competition to Windows, he writes. So our jury could reasonably infer that in the but-for world, Appware would include a fairly complete windowing API in millions of copies of Perfectoffice, in direct competition with Windows.

THE COURT: I mean, I assume the answer to this question is yes. But an awful lot of your evidence is based upon what Microsoft is writing about perceived threat. Aside from the point that I think you probably are entitled to have it both ways, to some extent you're saying Gates's subjective intent is not relevant, here you say it is, and I am prepared to accept you're right on that, but the broader question is, is what a competitor writes about another competitor's potential sufficient evidence to establish that the threat that they described is real?

What $I$ mean by that is, we all know from Raikes's famous memorandum, e-mail to Warren Buffett, that this is a highly competitive, dynamic market. And I would assume that people at Microsoft are paid and on alert to look out for every potential competitive threat. The fact that they perceive the threat and communicate it to their superiors, does that establish that the threat is real?

I mean, because I think it's relevant. Don't get me wrong. I'm not saying that all of these e-mails get thrown out. But an awful lot of your case is based upon what it was that Microsoft perceived, not what the, not necessarily what the reality in the marketplace was.

Now, these are sophisticated people and I don't think they're making stuff up. I am not suggesting that. But it does seem to me that there's a difference of perspective between looking at one's competitors and being, you know, it's like analyzing the Yankees and saying, you know, we're up against it, as opposed to playing the game on the field.

MR. JOHNSON: Well, we --
THE COURT: Or the Nationals.
MR. JOHNSON: Isn't it fun this year, Your Honor?
THE COURT: That's why it's a fair comparison. In fact, I think, my guess is the Nationals are probably in a much better place now in the standings than the Yankees, but I don't know. Be that as it may.

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MR. JOHNSON: I guess the proof, I'm not sure exactly what that means. We presented --

THE COURT: As I read it -- I hear you. And I certainly don't think that this evidence should be excluded. But an awful lot of your case, you know, reading your memo, an awful lot of your case is based upon e-mails and internal memoranda of Microsoft that described the perceived threat of Novell and, frankly, others, but mainly Novell. And it occurred to me, reading it -- maybe this question is unanswerable and, certainly, we're in a Rule 50 proceeding, maybe it's unanswerable -- how much, should it be discounted a little bit because a competitor is always going to look for the potential threat as opposed to the reality, to what really is true in the market? Because it's always looking forward, just like Raikes said.

MR. JOHNSON: Your Honor, perhaps so. But I mean --
THE COURT: But that doesn't create and antitrust violation. That's the nature of competition.

MR. JOHNSON: In my mind, that's a jury question. Maybe they should discount it a little. Maybe they don't. What I'm presenting is evidence from which a reasonable jury could conclude certain things with respect to our middleware, that we did represent a threat. And $I$ think it is sufficient for a jury to so conclude.

I don't think it would be in the Court's bailiwick on this motion to decide that a reasonable jury couldn't conclude
from this evidence that we did represent a threat. And we did present more than just evidence of Microsoft fearing us. We obviously presented evidence of what we were doing and the PerfectFit program, and our 1500 developers, and what our APIs could do and what Appware could do. So it wasn't just looking at Microsoft's --

THE COURT: That's fair. And probably the question, and the reason I refer to Raikes is somewhere the word "paranoia" came into this case. It may have come into the case through Raikes's memorandum. I can't remember.

Let's take a short break.
(Recess at 3:47 p.m.)
THE COURT: Please be seated. Mr. Johnson, I know I've gotten you off track. Go ahead.

MR. JOHNSON: Thank you, Your Honor. Assuming for purpose of argument that quantitative proof of some kind was required, Professor Noll testified that if WordPerfect had simply maintained the market share it had on Windows in 1994, seven million more copies of WordPerfect and, therefore, by extension, Netscape Navigator, which was distributed on WordPerfect, were eliminated in the market. As a matter of law, elimination of WordPerfect, then, unquestionably caused more harm in the competitive process than at least some of the acts directed against Navigator and Java that were found to have harmed competition in the government case.

For example, the DC Circuit found that Microsoft's conduct preventing the distribution of Navigator on some five million McIntosh computers harmed competition in the PC operating systems market. By comparison here, simply if we had maintained our market share, that would have resulted in at least seven million fewer WordPerfect licenses being sold, together with Netscape's Navigator.

So if quantitative proof were required, I think that provides it as a matter of law.

The jury could also rely, the next slide, please, also on evidence from which it could conclude that the more that the applications were relying on middleware APIs, the easier it would be to port those applications to a different operating systems, much as WordPerfect used shared code middleware to support itself to many different operating systems.

As found in the government case, this is from Finding of Fact 74, the closer Sun got to its goal of write once, run anywhere, the more the applications barrier to entry would erode. Again, from this, a reasonable jury could conclude that Novell substantial middleware would also help to erode the applications barrier to entry.

The same logical connection which supported the judgment in the government case was provided to the jury by Professor Noll. Here he talks about the fact that it is not a matter of turning into an operating system and running personal

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productivity applications. He testified that middleware can begin to have an effect on competition in the operating system market if it starts to be used because it's reducing porting costs and, therefore, increasing the number of applications that are cross platform, and thereby reducing the applications barrier to entry.

It's a continuous process or a continuum, rather than an either/or, as Dr. Noll testified here. Dr. Noll was not alone in so testifying. Dr. Murphy acknowledged, on cross examination, that it really is more of a continuum. The more and more applications that are written in whole or in part to the middleware, the applications barrier to entry is reduced. Yes, he acknowledges, that's true. Question: I was speaking of a simple antitrust economic theory. It's not necessary to destroy the applications barrier to entry to engender more competition, right? It's only necessary to reduce the applications barrier to entry, right? Answer: Yeah, you have to reduce it to some extent, but it's going to effect competition. I mean, that's true.

So in reality, Dr. Noll and Mr. Murphy are not so far apart with respect to the fact that it is the reduction in the application barriers to entry which engenders competition within the market. It is not required that we destroy it.

Getting back to the point $I$ think we were talking about just before the break, Your Honor. And we were talking about,

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you know, what sort of proof was required or what the significance was of all that Microsoft documents which obviously corroborate the evidence that we put on with respect to the threat to Microsoft's operating systems monopoly.

But I want to remind you of what you told us before we tried this case, which is that plaintiffs need not present direct proof that defendant's continuing monopoly power is precisely attributable to its anticompetitive conduct. And you go on to talk about that such a proof requirement would be antithetical to the antitrust laws. When a firm has engaged in anticompetitive conduct, courts should be reluctant to demand too much certainty in proving that such conduct caused anticompetitive harm.

We took it that you meant what you said, Your Honor.
THE COURT: I absolutely have no quarrel with that. The question is how much do you have to prove.

MR. JOHNSON: There is certainly a question about that. But what we would say to you is that we have provided sufficient evidence for which a jury could conclude in our favor. And certainly, if we look at the results of the jury, and I know that they have no legal effect on anything we do here, but one would have to say that at least so far as you were thinking that we had at least a reasonable jury there, that most of them concluded in our favor on this question.

THE COURT: I once thought so.
MR. JOHNSON: Your Honor's observation that direct
proof is not required is not an isolated one. Obviously, much of this language came out of the U.S. v. Microsoft case, which Your Honor put into the decision in Novell. But if we look at the 10th Circuit case law, and particularly I would like to talk just a minute about Multistate Legal Studies, which is a 10 th Circuit case, 1995, the plaintiff brought an attempted monopolization claim in a market for the workshops that are intended to prepare law students for the multistate bar exam, something I think we're probably all familiar with here, although it's a distant memory for most of us.

The claim was based upon an allegation of deliberate scheduling conflicts between the defendant's BAR/BRI courses and plaintiff's workshops. The district court, on summary judgment, had held that where the plaintiff's workshops ran from nine a.m. to four p.m. and the defendant's classes ran from six p.m. to nine p.m., no reasonable jury could find that any schedule conflicts existed. In other words, he granted summary judgment on the no reasonable juror basis.

The 10th Circuit reversed. The District Court had placed too high a burden on the plaintiff, that the scheduling conflicts had to make it impossible, rather than just inconvenient, for BAR/BRI students who take plaintiff's workshop. The 10th Circuit, adopting the reasonably capable standard, held that the plaintiff had presented enough evidence to create a triable issue of fact as to whether the same day scheduling could

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significantly discourage BAR/BRI students from taking the plaintiff's workshops.

What is also interesting about this case, Your Honor, is that the defendants argued, just as Microsoft does here, that the case had to be analyzed as a monopolist's refusal to cooperate with a competitor under Aspen Skiing, adopting the very same logic Your Honor used on summary judgment. The 10th Circuit pointed out that the principles governing refusals to deal did not control. For plaintiff had presented circumstantial evidence that defendants had deliberately created the scheduling conflicts to harm the plaintiffs, Aspen Skiing did not control and judgment as a matter of law was inappropriate.

This analysis of the 10 th Circuit mirrors your own, Your Honor. Your Honor ruled on summary judgment that principles governing refusals to deal did not necessarily control, where Novell had presented evidence of Microsoft's deliberate deception to Novell with regard to the namespace extensions. And I say that was an appropriate ruling under 10 th Circuit precedent, as shown in the analysis done in Multistate Legal Systems.

Having proved or having satisfied the requirement that we had enough evidence so that a reasonable jury could conclude that Microsoft's action caused some harm in the operating system market, Microsoft has the burden, then, of coming forward to prove a non-pretextual business justification.

Your Honor, I think whether Microsoft has done so or
not is plainly a factual issue for the jury to decide. And I am not going to go into that in detail here today, unless you think that the legitimacy of Microsoft's alleged justifications could be decided as a matter of law.

THE COURT: I am not going to bind myself one way or the other on that.

MR. JOHNSON: All right, Your Honor. Once we have established or have sufficient evidence for the jury to rule on a question referring to competition, then all we have to do is satisfy --

THE COURT: Wait a second. You skipped over something that's important. Maybe it's going to come up. Where is the deception?

MR. JOHNSON: Where is deception? We presented evidence of three forms of deception that Microsoft engaged in in this case. First, we have the Hood Canal retreat facts, which showed that Bill Gates in particular adopted a plan or put forward a plan, embraced a plan would probably be the proper word, to deny ISV's the extensions in Windows 95 in order to make the competitors' products look old, and to advance Office.

If we look at what he actually did, it is, in fact, directly comparable --

THE COURT: But you agree, as you said in closing, that that plan never came to fruition?

MR. JOHNSON: That plan, the radical, extreme plan, as
set forth at the time, did not come into fruition. But what it shows is an inference that Mr. Gates intended all along to deny to WordPerfect and the other ISV's these extensions, and that he acted on that intent in the end.

And we do have plenty of evidence that Mr. Gates was well aware that the namespace extensions had been published and were being used at the time.

THE COURT: Do you agree that if, under the beta agreement, the industry understanding, and the evidence, as reflected in the evidence in the case, that Microsoft was entitled to withdraw support for the namespace extension APIs, there was no anticompetitive conduct? No deception and no anticompetitive conduct?

MR. JOHNSON: NO.
THE COURT: Why not?
MR. JOHNSON: I don't agree with that. I think, in dealing with the beta agreement, and, of course, Your Honor gave an instruction to the jury about this, and said if they engaged in anticompetitive conduct, any conduct that harmed competition in the operating systems market, that those contracts do not protect them from that. And Your Honor so instructed the jury entirely appropriately.

We have never suggested that Microsoft does not have the ability to change its betas if it's for legitimate business reasons. What we say to Your Honor, is the evidence in this

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case, is they did it for an illegitimate reason, they did it for an anticompetitive purpose, which caused harm to competition in the operating systems market.

THE COURT: So if you act lawfully, but a jury finds, can find that you acted for an illegitimate business purpose, that's a violation of the antitrust laws?

MR. JOHNSON: No, you cannot -- much the same way as you can't use your IP as a club. You can't, in other words, you can't do something in order to hurt a competitor without a legitimate business reason, if you're a monopolist when that action causes harm to competition in the relevant market.

THE COURT: Even if what you did was lawful in accordance with industry standards?

MR. JOHNSON: Absolutely. Absolutely. If you do it, if you do it and it causes harm to competition in the relevant market, and you did it for an anticompetitive purpose, and we have proof from which a jury could so find. I mean, I haven't brought, I haven't even brought out PX-1. But the fact of the matter, Mr. Gates said that he was doing this in order to, in order to harm WordPerfect, Novell and Lotus, and to keep them from having this technology, so that he could get an advantage for Office, and thereby take over the Office market, and according to Mr. Raikes, widen the moat, protecting his operating systems monopoly.

THE COURT: So to understand your position, and I just

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am trying to understand your position, Microsoft committed an antitrust violation, assuming -- your position is that it violated the antitrust laws, even if acted entirely lawfully, but did so with, lawfully but for its anticompetitive intent, and the anticompetitive intent related to something different than the, than the antitrust violation that it committed. What I mean by that is, if you've got evidence of the anticompetitive intent, but it's to help Windows, to help Office.

Let's suppose I change my mind and decide that there was absolutely nothing wrong, but for a potential violation of the antitrust laws, for it to withdraw the namespace extensions, that it was perfectly within its rights to do so. Your position is that if there is evidence of anticompetitive intent, even if that intent is to maintain a monopoly in a market other than the one involved in this case, then it is actionable here?

MR. JOHNSON: I think, I think you put too much into that, Your Honor.

THE COURT: Then I'm --
MR. JOHNSON: You said legal and lawful actions.
Obviously --
THE COURT: Suppose, suppose, suppose -- let me finish.
Suppose I were to find that, based upon the evidence in this case, everybody in the industry understood from the get-go that Microsoft could withdraw support for the namespace extension APIs for any reason to wanted to -- and I'm sure you would disagree
with that finding.
MR. JOHNSON: Yes.
THE COURT: But suppose what I suppose -- fine. You would say that they nevertheless committed an antitrust violation if it acted with an anticompetitive intent, even if the only evidence of the anticompetitive intent was to hurt products in the applications market?

MR. JOHNSON: Your Honor, I'm not even sure it requires anticompetitive intent. The fact of the matter is, if it is a violation of Section 2, it is anticompetitive.

THE COURT: You mean to tell me once I got a monopoly, I can't operate, because the antitrust laws are out there, I can't do lawful things?

MR. JOHNSON: Certainly, there is testimony from which one could say that industry standards would say that changes can be made. There is certainly debate as to what kind of changes can be made --

THE COURT: That's a different issue.
MR. JOHNSON: -- to betas. So there are conflicting facts on that issue. But with respect to what Microsoft did here, they acted with an anticompetitive purpose, and we have proof of that, which, again, the intent, the showing of the intent gives us guidance to whether this action was exclusionary or predatory. And because this act caused harm to competition in the operating system market, it is therefore a violation of

Section 2 of the Sherman Act.
THE COURT: So to establish a violation, I've been wrong all along in saying you had to prove either deception or termination of a preexisting profitable relationship. Your position is that that was an unnecessary analysis.

MR. JOHNSON: It certainly leads credence to the exclusionary or predatory nature of the actions, when you prove deception on top of what they did. But a monopolist is presumed to intend the effect of their actions. A monopolist is held to a higher standard.

But in this case, of course, we're not dealing with a hypothetical that they did this of pure motive. We have evidence that they did not do it of pure motive. And we have evidence that this action caused harm to competition in the operating system market. That is all the antitrust laws require.

If it had been, if it had been a simple act that merely harm us as a competitor, that wouldn't be an antitrust violation. It must be something which causes harm to competition within a definable market, in this case the operating systems market. We must add that to whatever it is that they did.

THE COURT: So, again, I really haven't understood your
case this way and it's probably my failing. But as I now understand it, what you're telling me is that you violate the antitrust laws if you are a monopolist, if you commit an act which is otherwise lawful, but you do so with a motive to hurt
competition in a market other than that which is relevant for your antitrust claim?

MR. JOHNSON: I don't think it matters whether it was -- and you're, of course, subscribing to Gates, an intent to only advance the applications market. And what we're saying to you, there is lots of evidence from which a jury could infer that he acted, also, to protect his Windows monopoly.

THE COURT: I understand.
MR. JOHNSON: So I don't think you can graft that on to what I am saying.

THE COURT: I understand. So otherwise, you would agree that you commit an antitrust violation if you commit an act which is otherwise lawful, if you do so with an anticompetitive intent?

MR. JOHNSON: And you harm competition.
THE COURT: And you harm competition.
MR. JOHNSON: Which is in our case. Harm to the competition. You don't have harm to the competition, the antitrust laws protect competition. They don't protect competitors.

THE COURT: No. I understand. That's a good issue. Okay.

MR. JOHNSON: Your Honor, we are talking about --
THE COURT: And the answer to that question is yes?
MR. JOHNSON: We are talking about deception. I didn't

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want to --

THE COURT: No. No. But is the answer to that question yes? Let me rephrase it one more time.

You commit, a monopolist violates the antitrust laws if it commits an act which, but for the antitrust laws would be lawful, and it does so with an anticompetitive intent, and the effect of its conduct is to hurt competition in the relevant market?

MR. JOHNSON: Yes.

THE COURT: Okay.

MR. JOHNSON: Before we go away from deception, there are two other ways we demonstrated deception in the case, Your Honor. One was we demonstrated deception through Mr. Muglia's testimony, when he came in and told us that apparently they were fighting like cats and dogs about these extensions from day one, long before they were evangelized of the entire ISV community and, quote, unquote, "that these extensions were dog meat." And yet they still, the $D R G$ is out there selling these things to ISV's and how great they were and how they should use them. And at the same time, apparently, these guys back at Microsoft are fighting like cats and dogs.

So they deceived us by not telling the true state of affairs with respect to these extensions.

THE COURT: And your next argument, next concealment, too. What's the next concealment? That they didn't tell you

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something else? Excuse me.
MR. JOHNSON: The next concealment is that they lied to us about the reasons that they were de-documenting the namespace extensions, which feeds into, by the way, what Mr. Tulchin keeps harping and harping and harping upon, about there being no evidence of some massive complaint going up the flag pole and reaching out and hammering Microsoft.

We didn't know that they were lying to us about the reasons for de-documenting the namespace extensions. As you may have observed, the people that took the stand from Novell, these people are rule followers and they are people that accept explanations offered in good faith.

Microsoft told us that these APIs were going away. They told us that there was a dead-end road to go down that path and use these APIs. They told us that their products were no longer going to use these APIs. They told us that it was a shipping problem. Shipping problem. These APIs had been done for months. And Mr. Gates himself said they were a very fine piece of work and there was nothing wrong with these APIs.

So yes, they deceived us. They deceived us for the reasons for what they did. And the reason Frankenberg didn't stand up and scream bloody murder is he didn't know. And he didn't know until, in the government case, the facts finally came out and Mr. Gates's e-mail presented itself to him. What? He did this? Those reasons were all BS? That is deception. And

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that is the third deception which we proved in this case.
Having established harm to competition, or at least enough facts from which a reasonable jury could so find, the only remaining question is antitrust injury under Clayton Act Section 4.

Now, in this case -- if we could have the Slide 62, please -- in 2007, the Fourth Circuit, of course, ruled that our allegations were sufficient to establish antitrust standing, which is a doctrine that includes proximate causation and antitrust injury and prudential principles that ensure that Novell should be permitted to bring a private damages claim for the challenges conduct.

Proving Novell suffered injury in fact does not require Novell to prove the exact dollar value of its injury. It only requires that we prove that there was some injury as a result of the antitrust violation.

In this case, the question is whether Microsoft's conduct caused any lost sales. Novell plainly provided sufficient evidence for a reasonable jury to decide that Novell WordPerfect lost sales when it could not timely release its product for Windows 95.

Novell is not required to prove that the antitrust violation was the sole cause of its injury, nor must Novell eliminate all possible causes of injury. Nor is Novell required to show the defendant's acts were a greater cause of injury than
other factors. Novell only needs to show that, to some degree, they were injured as a result of defendant's Sherman Section 2 violation.

Whether Microsoft's conduct was a material fact in causing the delay is certainly a question of fact. It is not an appropriate basis for granting judgment as a matter of law.

In that regard, $I$ think we should at least spend a minute on Quattro Pro. If we could turn to Slide 65.

I'm aware, obviously, Your Honor has expressed certain views on this issue. But, again, we don't sit as a fact finder, and you don't sit as a fact finder today. The only relevant question is whether the jury accepting our evidence as true, and ignoring conflicting evidence, could reasonably conclude that Quattro Pro did not --

THE COURT: That is generally true. But if the evidence is overwhelming to the contrary, this is a real issue. I mean, as I said, I carry, I mean, Mr. Gibb seemed like a perfectly nice person to me. But he had every reason to have his view skewed as to where things stood. And the evidence is absolutely overwhelming, including internal documents from Novell, that Quattro Pro wasn't ready, wasn't ready in, you've got a memo, I now focus upon, I need to ask you about, to his boss written back in the spring sometime, which says Quattro Pro's not going to be ready until December, which is after the 90-day period that Mr. Tulchin says is the outermost limit of the

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damages testimony of Mr., with the guy with the hyphenated name, Warren-Boulton. That's a different issue.

I've got a real problem with this. I understand that I'm not the fact finder. But the only way which you survive the claim, that it was your Novell's own delay in not getting Quattro Pro ready in time, is the testimony of Mr. Gibb that it was not critical path when every piece of evidence other than his testimony, including internal Novell documentation, shows that Quattro Pro wasn't ready.

I mean, that's a fact. Unless I've got my facts wrong. That's the only testimony that it was basically code complete, according to, and no longer critical path. I am not going to sit here and say I think Mr. Gibb's a bad person. I do, I do think he had every reason to remember things differently, because he had been responsible for this project and it went away, and it fell apart. But Quattro Pro wasn't ready.

MR. JOHNSON: Your Honor, as a factual matter, I think that that is not true. And the memo which you talk about, which is dated in March 1995, is long after we have figured out we have a very serious problem with PerfectFit. If you may recall, the testimony was that had Microsoft not de-documented the namespace extensions, we would have had PerfectFit. We were $80 \%$ done at the time that happened in October. That we would have been done with the share code component of this product by December of 1994.

There is nothing in the world that would have prevented Novell from getting its product out to market, including Quattro Pro, during the remaining 8 or 9 months, 10 months, 11 months, that would have been available, during a reasonably close period from the launch of Windows 95.

The change in date, which the memo that Mr. Tulchin used, is dated in March. You may remember the testimony. That they first tried using the namespace extensions for the first couple months. It became clear to them, by December of 1994, that Microsoft wasn't going to allow them to use the extensions, that they wouldn't even talk to them about anything involving the shell.

They then switched to trying to recreate the functionality of the namespace extension in the custom file open dialogue.

There was also testimony, unrebutted testimony from both Mr. Harral and Mr. Richardson, that they couldn't use the common file dialogue because, quote-unquote, "they wouldn't have even had a product had they done that." That it would have been so bad, so far behind what they had produced before on DOS, that wouldn't have even been a product.

So, again, this is not to argue that that state of affairs is necessarily true or not, it's merely to say to you there was plenty of evidence for which a jury could believe that Quattro Pro was not the problem. And if --

THE COURT: Where is the evidence that Quattro Pro didn't -- other than Mr. Gibb's testimony -- where is there a single piece of evidence that Quattro Pro would have been ready by August 23 of 1995?

MR. JOHNSON: There is lots of Mr. Gibb's testimony. There is the testimony of all the other witnesses. If we turn to Slide 69, please. I know this is a document that Mr. Tulchin wants to make arguments about with respect to other dates. But these dates are perfectly consistent with what Mr. Gibbs said and what happened with respect to Quattro Pro.

This document says that Quattro Pro was code complete on August 23rd, 1995. There's been no evidence refuting that fact. It was Mr. Gibb's testimony that it had been ready, code complete, months earlier. Here is the document establishing that it was, in fact, code complete by August of 1995.

THE COURT: And when was it ready to be released to manufacture?

MR. JOHNSON: It didn't get, it didn't become released to manufacturing until everything was complete, including the shared code piece that was -- this document was written in January of 1995. So that figure of that, whatever release to manufacturing, that's a projection.

Your Honor answered this question when you said, Isn't the question whether what would have happened with respect to Quattro Pro if you hadn't de-documented the namespace extensions?

Isn't that the question that has to be answered here? And so what I'm saying, Your Honor, the jury had evidence from which they could have concluded, and there wasn't any rebutting evidence to it -THE COURT: To this? MR. JOHNSON: No. THE COURT: Don't go there. MR. JOHNSON: I'm talking about the fact that shared code would have been done in December of 1994. Here we have evidence from which a jury can conclude that Quattro Pro was code complete by August of 1995.

Now, Mr. Tulchin likes to point to the 12/8/95 beta start, but that's also entirely consistent with Mr. Gibb's testimony. He testified that Novell planned to move to a beta testing phase of Storm with place holder for the custom file open dialogue because of the difficulties Novell faced in completing --

THE COURT: Which line are we looking at?
MR. JOHNSON: To the beta start, which is the fifth column there.

THE COURT: What product are we talking about?
MR. JOHNSON: This is Quattro Pro Typhoon, which was the Quattro Pro for Storm.

THE COURT: What does shared code have to do with ready to release the manufacturing date for Quattro Pro, as opposed to

Perfectoffice?
MR. JOHNSON: All of the applications had to have the shared code complete underneath them in order to be released for manufacturing. Okay? This was a projection of a release to manufacturing on 3/31/6, which, frankly, is entirely consistent with what we knew was occurring with the shared code and the problems we were having.

Quattro Pro, which was code complete on 8/23/95, was, as Mr. Gibb testified, virtually done.

THE COURT: Why didn't somebody, if this was so important, why assign it to Mr. Gibb, who's a middle manager? Why assign it to two programmers, who were like two associates who go off and research forever without management, without the watchful eye of in-house counsel, to say nothing of partners? And why is there never anything, not only written to Mr . Frankenberg about it, but to none of his vice presidents?

It just astounds the imagination that -- I know I went off about how badly managed the company was. It was badly managed if, in fact, this was critical. I think where my mistake was, it wasn't necessarily bad management, because this simply was not focused, this was not critical.

MR. JOHNSON: Your Honor --
THE COURT: I mean, there's some things that you have to sit back and look at the forest for the trees. And it's absolutely inexplicable if this date of 60 to 90 days was as
important as you now say it was, if this was so important to them they would have said something to Microsoft about it, not through Premier Support. Somebody would have got on the phone and said, Brad, you're killing us. Don't you know what you're doing? Or Glenn. I just don't --

MR. JOHNSON: Your Honor, in fairness, Brad lied to us.
Brad told us there were legitimate business reasons for doing what they did. We were --

THE COURT: But you didn't know that then.
MR. JOHNSON: Exactly. We thought Microsoft was being honest with us and there really wasn't --

THE COURT: But the question is, why isn't there some evidence that you called somebody at Microsoft and said, you're killing us by withdrawing this? Why, in the meeting where Mr. Miller took the notes, isn't there evidence that Mr. Frankenberg told that to Mr. Gates? Why isn't there a memo to Mr. Frankenberg, just as there is about the logo? Why was it assigned to a middle manager? Why was a middle manager allowed to proceed, despite the fact that other middle managers are saying, you're crazy, you ought to either take one or the other two options?

Why didn't Mr. Gibbs insist, if this was so important, let's get Quattro Pro ready, you know. Maybe there's not Mr. -tell me there's a difference. There's a difference between the Mormons and the surfers. And let's get, and let's get this thing

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done because who knows what's going to happen out in Silicon Valley.

It all makes perfect sense if, in fact, it wasn't urgent.

MR. JOHNSON: Your Honor, you may recall, Your Honor, you may recall that LeFevre's testimony was that, in fact, three out of four managers, it wasn't one manager, three out of four managers felt that the way to go was the custom file open dialogue, and rejected his recommendation to try to use the common. So it's really not fair for you to state that Gibbs was --

THE COURT: Maybe I'm wrong. I recall the testimony of LeFevre, somebody else who attended one of those meetings. I don't know, I forget who it was. Maybe my recollection is wrong.

I thought that there were concerns being expressed along the way. Maybe it was just LeFevre. Maybe others agree. But in any event, that's one aspect of the things I talked about.

There is no evidence that this was of any contemporaneous business urgency to Novell. There's not one iota. And unless you assume that it's the worst managed company in the world, which I'm not prepared to accept, the answer is because it wasn't urgent.

MR. JOHNSON: Well, Your Honor, in fairness, again, and
I know this evidence wasn't before you.
THE COURT: And this isn't fact-finding. This is
looking at all the facts together.
MR. JOHNSON: The testimony was it was important to us.
The testimony was it was killing us. There were letters --
THE COURT: To whom?
MR. JOHNSON: There were documents to the DOJ that --
THE COURT: And those are, they're in evidence?
MR. JOHNSON: No, they're not, Your Honor.
THE COURT: And we are here on a what?
MR. JOHNSON: But when you say that nobody cared, we sitting in this courtroom --

THE COURT: That's a whole another limitations issue. If you wrote to DOJ and said, pursue this theory, and they didn't pursue the theory, how do you get tolling?

MR. JOHNSON: Actually, we did not write to the DOJ. DOJ came to us.

THE COURT: Well, DOJ comes to you, you say, pursue this theory, and they say, no, we're not going to pursue the theory, why isn't your claim time barred?

MR. JOHNSON: Because, Your Honor, the DOJ did not pursue lots of evidence against Microsoft for lots of different problems.

THE COURT: But you're the person who's trying to rely upon tolling based upon the DOJ suit.

MR. JOHNSON: That's a case of prosecutorial discretion as to which claims to actually bring, as Your Honor is certainly
aware.
THE COURT: So why -- but I've got to decide, I mean, this, if, in fact, you want me to look at those letters, $I$ have to then decide, I may have to do it sometime, anyway, the 10 th Circuit may have to, look, we asked DOJ to pursue this theory. They didn't.

For the life of me, I have not studied the ins and outs of tolling law. But how you get tolling on the basis of a claim that you presented to DOJ, which you well knew DOJ didn't pursue -- again, I'm not prepared to rule on this because I haven't focused enough upon what tolling law is. But that seems to me to be counter-intuitive.

MR. JOHNSON: Your Honor, the rule for tolling, and I don't want to get into this, but the rule for tolling is we simply have to, in whole or part, adopt the theory of the government case with respect to our case. It's in whole or part.

And we certainly adopted the theory of government case in our action. It doesn't, frankly, it's irrelevant whether or not the DOJ pursued our claim or didn't pursue our claim. The question for tolling is whether we should await the conclusion of the government case because that theory was the same theory we're pursuing here.

THE COURT: That could be. As I said, I have not studied tolling law in advance. But be that as it may, there still is no evidence before me on the Rule 50 record that there

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was any contemporaneous complaint. There is no evidence that this was ever mentioned to Frankenberg or to any of the four vice presidents, that it was assigned to one or more middle managers to work on, that they, in turn, delegated responsibility to two kids who, I mean, I'm prepared to say they're very hardworking and ingenious, nice, I'm not here to demean them in any way. But they work 80 hours a day and into the night. But, as I say, it's like the people in the Clinton White House eating pizza and going crazy. And we all know what I mentioned before, what his nickname was, and for a reason that was explained to me.

It makes perfect sense if it wasn't urgent. It makes perfect sense if, consistent with its long culture, it decided, look, we want to turn out, we're straight shooters, we think we're going to win by turning out the best product. Yes, we're going to miss whatever benefit there is from coming out immediately afterwards but, you know, but in the long run we're going to win. We're going to have a product which we really love, which our clients are really going to love. They're going to convert to a DOS base, which is its own issue. The next time they buy a product, they're going to buy WordPerfect or PerfectOffice for Windows. It doesn't matter whether it comes out in March of '96 or in October of '95. It's going to come out. And it really isn't that urgent. Then everything makes sense. But it doesn't make a whit of sense otherwise. I mean, how could the Chief Executive Officer of the
company not know and not get reports, or at least one of his vice presidents, that, boy, this aspect of the company is on the line? And unless we do something about it, we're going to lose WordPerfect.

Now, it could be that Frankenberg didn't really care about WordPerfect. That's a whole another issue, that he used Perfect on the servers. But I don't want to, and again, my recollection could be wrong. I think there was something in the testimony about that.

But clearly, somebody -- I don't understand it. I just don't understand it. And there is an absolute, one for which I frankly commend Novell, which is, we're going to win on the merits in the long run because we're going to have a better product, which may have been a bad business decision. But it doesn't make any sense.

But what makes a lot of sense is that Frankenberg looks at it afterwards, he does get angry that Gates deceived, and decided to pursue a suit. And then, all of a sudden, this window becomes very, very important, of the 60 to 90 days after release of Windows 95. And then, all of a sudden, everybody is saying, aha, you know, we were lied to and this is -- and, as I say, maybe that's sufficient. But it seems to me that an antitrust claim ought to be based in business reality and business reality is what $I$ think $I$ just stated.

And I am not trying to be pejorative. I really am,
this is why I have, this is why I got upset, which I thought was bad management, which it wasn't. It's wonderful. It's wonderful for lawyers and antitrust lawyers and specialists to say this is wonderful. This makes a perfect claim now. It's a little bit on the edge, as the Supreme Court has said. It's good theory. But an antitrust claim ought to have an underlying business reality.

And if, in fact, this was not important -- there would have been some evidence of urgency.

And I don't know. You chose not to put in those letters. I don't know, frankly, I haven't read them. I don't know what they say. And, frankly, I don't care because this is here on a Rule 50. But this is the problem I have. And maybe I'm wrong. If I'm wrong, tell me why I'm wrong.

MR. JOHNSON: Your Honor, there was substantial evidence that it was very important to us to get a product out in a timely fashion.

THE COURT: Which was?
MR. JOHNSON: There are three or four exhibits, I don't have them on the tip of my tongue, which said our absolute priority was to get this out within the window, and to be timed to meet the time to market.

THE COURT: And what were those exhibits? Because that --

MR. JOHNSON: We'll get those for you, Your Honor. To meet the time of market in a timely fashion. In fact, Your

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Honor, you may recall, we joined the First Wave Program. In the First Wave Program, we made a commitment to have our product within 90 days of the release of Windows 95. And that was a big reason for having the First Wave Program.

So a jury could see that we did have a commitment, that it was important. And in fairness to the people that are working on this, obviously, you start from the proposition, okay, they're telling us they're not going to use these, they're no good, they're taking them out, we can't have them. We'll do it ourselves. You start from the proposition that we can do it.

So it is only the realization over time that you, that you come to realize, we're not going to make it. This is too hard. This is too difficult. We're working day and night here, as Mr. Harral and Mr. Richardson testified, and it's not happening.

And Mr. Gibb was all over them at the time.
THE COURT: Why don't you put other, if you're Mr. Gibb, why don't you put other -- well, there was testimony why. Too many chickens spoil the broth.

MR. JOHNSON: Too many cooks don't necessarily make a good stew, Your Honor. And there was testimony about that.

But just to finish off with Mr. Gibb. If we could turn to Slide 70, Your Honor. Again, I am skipping over all the testimony of Mr. Gibb, about the fact that he monitored the stuff, that he was on top of it, that Quattro Pro was not the
problem.
But I just want to reflect, because you've commented about, you may have some motivations to somehow skew the facts with respect to Quattro Pro. You've said that. Now --

THE COURT: All I meant by, that again, that sounds harsh. I think I did say that. I meant that his recollection might be blurred because he wants it to have occurred this way.

MR. JOHNSON: Well, you know, perhaps. But aren't you, in fairness, making a credibility determination? I mean, for purposes of this motion, at least, for the purpose of this motion --

THE COURT: I think that is a very real issue. MR. JOHNSON: Okay.

THE COURT: What I'm not sure is a credibility determination is for me to say the whole thing is made up, that really it doesn't add up. This becomes, his testimony becomes so small in light of the fact that there was no contemporaneous complaint. Indeed, there is the uncontradicted evidence from the Struss e-mail that WordPerfect says it's okay with them. There is, we have the Miller notes of the meeting with, between Frankenberg and Gates. No complaint.

We have the fact that there is no memo. If this is so critical to the success of WordPerfect, that we are really in trouble, there's no memo to Frankenberg, I think it's four vice presidents, including Rietveld.

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There is assignment of the project to a middle manager. There is the delegation by the middle manager to two programmers.

That, to me -- there is no urgency on the Quattro Pro side. There's no urgency in getting that product ready.

That all adds up to me with, this whole thing, this whole claim, and I, I am not faulting anybody for it, but it seems to me it becomes a lawyer's contrived claim, as opposed to a claim based upon the business reality.

MR. JOHNSON: I'm sorry you feel that way, Your Honor. I don't think the record reflects that.

THE COURT: Well, that's a question. Why isn't that, why isn't that the inference to be made from the record?

MR. JOHNSON: I think a jury could fairly decide that, by the time you're in the middle of 1995, and Quattro Pro is code complete according to the evidence that we have in front of us, that Mr. Gibb said it was not a problem, that the fact that they didn't rush to get Quattro Pro done at that time is perfectly consistent with the fact that they didn't have shared code. And without shared code, none of this is going to happen.

So the fact that they continued to work on bugs and things with respect to Quattro Pro, as was the evidence, and Mr. Gibb said, after the December disaster, when all the developers resigned, that they were fixing bugs and things, but under no circumstances, he said, would they have held up the release of PerfectOffice for Quattro Pro, because Quattro Pro was code
complete. They would have put it in there. It might not have been in every language that they wanted to at the time. But it would have gone out the door. A jury is entitled to believe that.

And in that regard, every single witness -- and I have a slide in front of you -- every single witness, including three that were called by Microsoft, every one of them testified that Mr. Gibb was in the best position to know whether or not Quattro Pro was the problem. And not one of these gentlemen had a bad word to say about Mr. Gibb. As a matter of fact, I believe Mr. LeFevre said he was a fine manager.

I don't think it's fair for the Court to say that no reasonable jury could believe Mr. Gibb and the testimony he gave, given the corroboration from the exhibit that provides the code complete date.

And again, in fairness, again, at least from the reports we got, 12 jurors were prepared to agree with us. Again, that has no legal impact. Absolutely none. I don't even suggest it.

THE COURT: How many jurors?
MR. JOHNSON: 12. The first guy agreed with the causation questions, which were one, two, and three on your form.

THE COURT: You're right.
MR. JOHNSON: Okay. So I don't think they were all unreasonable.

Moving on to Aspen Ski. Slide 72, please. In this Court's summary judgment decision, the Court, I think correctly, recognized that Microsoft's affirmative anticompetitive conduct took the case out of the unilateral refusal-to-deal paradigm, much as the 10th Circuit had done in Multistate Legal Studies. But the Court held further, assuming arguendo that the case presented only a unilateral refusal to deal with Novell's claims, should still go to the jury. I don't think that conclusion should be disturbed today.

THE COURT: Where is there in evidence that they, that they terminated a voluntary and profitable relationship? What you're going to say is, I guess, that they knew that the -- is there even evidence that they knew that the, that their own, that its own, Microsoft's own common open file dialogue would not be sufficient for WordPerfect's customers? Is there any evidence of that?

MR. JOHNSON: Yes, lots of evidence of that.
THE COURT: Where?
MR. JOHNSON: Provided by Mr. Richardson, by Mr. Harral.

THE COURT: They told Microsoft that?
MR. JOHNSON: I'm sorry. I misunderstood.
THE COURT: Where is the evidence that Microsoft knew that?

MR. JOHNSON: Knew what?

THE COURT: Knew that the common open file dialogue would not be sufficient?

MR. JOHNSON: There isn't any. There isn't any. But I don't understand what -- what difference would that make?

THE COURT: If there was no complaint made to Microsoft, it had provided -- forget the first option, which I still don't understand on the urgency thing. If it really was that urgent, I still don't understand why they didn't use the documentation which they had to finish the $100 \%$. And then if they were worried about the future, to write their own code, which they could have done. They could have had their cake and eaten it, too.

MR. JOHNSON: That wasn't the testimony, Your Honor.
THE COURT: Beg your pardon?
MR. JOHNSON: That was not the testimony. The testimony was they couldn't use the namespace extension APIs. They tried to for several months. But Premier Support would not talk to them about how to use them and, in fact, stopped talking to them about the entire shell.

THE COURT: Well, I understand that. But if the evidence is that they tried and couldn't use it, that's the answer to what $I$ am saying.

MR. JOHNSON: That's right, Your Honor. And with respect to the common file open dialogue, the evidence is that they concluded, and three managers out of four agreed, that to

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build to the common file dialogue would have meant they would have had no product at all.

THE COURT: But there's no evidence that they ever told Microsoft.

MR. JOHNSON: Now, that may have been dumb -- no, there is no evidence they ever told Microsoft.

THE COURT: So how can Microsoft, then, under this formulation, be charged with having terminated a voluntary and profitable relationship?

MR. JOHNSON: Because they did terminate a voluntary and profitable relationship.

THE COURT: But they didn't know what they were doing.
MR. JOHNSON: They had come to us. They had evangelized these namespace extensions. They had visited our facilities, had sold us on these. We had told them what we were going to do with them. We were working on them. We were $80 \%$ complete. We had invested in this technology. And then they yanked it. And then they yanked it from us.

They don't get a pass just because we didn't come to them and describe the difficulties we were having.

Mr. Gates did something that was predatory, absolutely unmitigated predatory. And he admits it right in PX-1. He doesn't get a pass for that because we didn't raise our hand and say -- although we didn't know, of course, that's what he had done -- we didn't raise our hand and say, hey, you're killing us
here, fellows. He had killed us and he's not allowed to later claim, Well, you should have told me. That's not, that's not an excuse for an antitrust violation.

Your Honor, of course, gave the appropriate Aspen Skiing jury instruction, which is on Slide 73, that under certain circumstances this can't constitute a claim. We think that the facts in the case do prove the necessary prerequisites for an Aspen Ski analysis, even though we agree with Your Honor, it'S not necessary here given the nature of the, what was done. And Multistate Legal Systems would support us in concluding that refusal to view analysis doesn't even come into play when you have a predatory conduct up front, like we do here.

Despite this fact, Microsoft continues to argue that Trinko somehow applies. Trinko would only apply if Novell sought to impose liability on Microsoft for simply declining requests to give us the namespace extension APIs. Then Trinko might be pertinent. But that's not what happened here.

Here we had a preexisting evangelism and sale of this technology to us, providing us this technology. And then after we were $80 \%$ down the road completing it, they pulled it.

THE COURT: Well, let me ask a question before that. Suppose they had never included, suppose they were smarter than you say they were and Gates, Gates had realized from the get-go that to support the namespace extension APIs would give a competitive advantage on the application side to Novell and Lotus
and maybe others. So that they never issue as part of the beta version the namespace extension APIs. Antitrust violation? And the result of this is to effect -- and they do it with a predatory intent, because they realize that they're going to benefit competitors. And it does end up having an effect in the operating system market. Antitrust violation or not?

MR. JOHNSON: Nope.
THE COURT: Why not?
MR. JOHNSON: They have the right to do it. They don't have to give it to us. That is their right. They don't have to give it to us.

THE COURT: So how is that qualitatively different from what I asked you before? Suppose they had did it, but had a right to withdraw?

MR. JOHNSON: Why is that qualitatively different than what they did? They came in and sold us on this. They gave it to us. They created a voluntary relationship, which was going to be mutually profitable. They wanted us to produce an application that was going to be -- we were part of the first wave that was going to be available on Windows 95 within that 90 -day window. They sold us a bill of goods with respect to this technology. They asked us to invest in this technology.

THE COURT: That is, they were deceptive?
MR. JOHNSON: Yes.
THE COURT: And that is what makes it unlawful?

MR. JOHNSON: It isn't, this isn't just withholding something from us. If they had never -- if they had done the radical extreme, if they had followed that plan, which was simply not to provide any ISV's with any extensibility to Windows 95, would have been dumb, I think, but it would have been perfectly lawful. They don't have to give. They can decide that they wouldn't.

But what you can't do is give it to us, sell us on it, have us invest in it, and then yank it for a predatory motive.

THE COURT: Okay. That's fair.
MR. JOHNSON: And if, you know, there's certainly no doubt that the predatory motive was apparent. And we actually have it in Slide 74, my one and only reference to $\mathrm{PX}-1$, where Mr . Gates makes it unmistakably clear what his intent was -- to exclude competition.

Now, there is also substantial evidence about the long-existing cooperative --

THE COURT: So again, so I understand. And you could be right. I mean, I think you've answered this question. I just want to make sure. This has to do with the cross-market nature of this.

The predatory motive that you say Gates had was to benefit Office. I think that's what the screen just said. Would you put on the prior screen?

MR. JOHNSON: I don't know what --

THE COURT: I asked because that's what I read.
MR. JOHNSON: Yes. Sure. PX-1? He says it's going to make, going to give Office a real advantage. No question about it. But that doesn't exclude from his consideration all the many, many documents he received.

THE COURT: I misunderstood you. I thought you said this encapsulated what his predatory intent was.

MR. JOHNSON: No. I said this shows predatory intent. THE COURT: Okay.

MR. JOHNSON: That's what it does, Your Honor. It shows that the reasons that he gave, that Microsoft gave later were pretextual. They weren't the real reasons.

Remember Mr. Nakajima, who came in and testified and said, Well, you want to know the real reason why he did it, or the made-up one? And he told us the real reason, which was a matter of politics, had nothing to do with anything being wrong with these extensions.

THE COURT: And your view is that they should have revealed that to you? I think that was part of the perception. There was an internal debate. That's the silliest thing I ever heard. You have to tell the competitor that there's internal debate about what to do? Now, the other points I understand. But that is virtually frivolous, to say that you've got to tell your competitors what your internal debates are.

In Mr. Nakajima's case, it was a fight between, I

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think, Muglia or MT and somebody else. Be that as it may.
MR. JOHNSON: Your Honor, obviously, we did present substantial evidence of the pre-existing voluntary relationship. I thought Mr. Cameron Myhrvold's testimony was particularly compelling because what he says here is essentially, we don't even sell operating systems. The only way you can sell operating systems is to have compelling applications that go on them. It is virtually wholly driven by what the applications do, not what the operating systems do.

THE COURT: Absolutely.
MR. JOHNSON: And that is the reason that they encouraged WordPerfect and wanted WordPerfect on their operating systems.

Unfortunately, after establishing their own word processing and gaining monopoly power in the operating systems market, Microsoft's incentives changed because it no longer needed competing key franchise applications sitting on top of Windows. And, in fact, according to Mr. Raikes, by seizing those and owning those key franchise applications sitting on top, it operated to widen the moat, protecting Microsoft's operating systems monopoly.

THE COURT: That's been very helpful. It's improved my understanding of your case, even after all the time I've been living with it.

MR. JOHNSON: Thank you, you Your Honor. Christy

Sports states that the critical fact in Aspen Skiing was that there was no valid business reason for the refusal. There is abundant evidence in the record that Microsoft's decision to de-document these extensions was done without a business reason.

Now, Microsoft spent a lot of time discussing its version of the facts in their briefs. But none of those purported business justifications can be found at PX-1. But again, I don't think we need to dwell on those because those are certainly factual disputes, and plainly within the province of the jury.

There is a claim, I guess, that because they didn't entirely terminate the relationship with us, that somehow it doesn't fit within the confines of Aspen Skiing. Nothing in the law says that complete termination of a relationship is necessary to make out a claim under Aspen Skiing.

Here's a couple cases just to make that point. Nobody In Particular Presents v. Clear Channel Communications. The defendant had argued that there had been no denial of essential facilities because it still permitted the plaintiff to purchase advertising time, and provided some promotional support for its concerts. The Court disagreed, pointing out the allegations that the defendant had significantly raised those prices and avoided giving promotional support for pretextual reasons fell directly into the refusal-to-deal paradigm of Aspen Skiing. They still dealt with them, but not on a fair basis.

The next case, Creative Copier Services v. Xerox. Here, they clearly state that making it difficult for CCS to deal with Xerox was sufficient to state a complaint of anticompetitive conduct.

So it is not necessary that there be a total termination of a relationship to make a claim out under Aspen Skiing.

Microsoft finally tries another gambit based on an attempt to distort a passage from the Four Corners Nephrology case. Now, Four Corners Nephrology involved a single doctor trying to force an unprofitable relationship on a hospital that was trying to develop a successful practice in Durango, Colorado. The case wasn't even close.

The Court found no showing of harm to competition in any cognizable market. As to the Aspen Ski analysis, the court repeated the teaching of Christy Sports; said that the key fact for admitting liability in Aspen Skiing was that the defendant terminated a profitable relationship without any economic justification, other than an anticompetitive one. Just as it was in Christy Sports, and in Trinko, the plaintiff doctor was unable to show evidence of the voluntary termination of a profitable relationship.

Now, on Page 93 of its opening brief, Microsoft distorts this passage. They take the phrase "key fact" that is shown here twice on this screen and they link it to a later

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sentence in another paragraph, and claim that the key fact is that, in Aspen Skiing, they denied the rival the retail prices available to all other consumers. This is just a blatant misquotation of this case. That was a fact in Aspen Skiing. They did deny a rival the retail prices available to all other consumers, but it was not the key fact referred to in Christy or in Four Corners Nephrology.

And when I saw that and I looked at the case, I couldn't believe it. But that's what they did.

And why in logic would they? Can a monopolist engage in anticompetitive conduct with impunity if it acts to hurt everybody rather than just a few? Of course not.

THE COURT: I'm sorry. It shows it's late in the day, so my mind's tired. Where is the evidence here that Microsoft was motivated by anything other than a desire to make more money for itself?

MR. JOHNSON: Mr. Gates's e-mail, Your Honor. He was motivated by a desire to hurt us.

THE COURT: No, it's not. So I can make money out of Office. Taking everything, credibility, absolutely your way, what he wanted to do was to make money on the application side and was worried that Lotus and Novell were ahead of him. And he wanted to make money for himself. And that's what his motivation was. But you say it's predatory.

MR. JOHNSON: He wanted to exclude us. He wanted to
exclude us.
THE COURT: Clearly, here they want to exclude the doctor. Okay. Maybe not. I'll reread it. As I said, it's late in the day, but all of a sudden, it just struck me.

If you look at $P$ Exhibit One, what that shows is Mr. Gates was motivated by a desire to make more money for himself, or for Microsoft. That's exactly what motivated him. I could be wrong. I mean, that could be a violation of antitrust law. But I'm not sure how this advances the ball, how this analysis. That's clearly what motivated him.

MR. JOHNSON: Your Honor, I think we touched upon this earlier, Slide 80, which is the Microsoft can't contract its way out of a Section 2 violation. This is the instruction you gave to the jury in this case and it was absolutely appropriate.

The Sherman Act exists to protect the public interest. It's well settled that monopolists may not avoid liability by relying on contractual provisions purporting to waive or disclaim future liability. And there's what Microsoft is attempting to do here.

THE COURT: At least in the reply. Forget, Microsoft says that, not trying to, trying to immunize it from antitrust liability, just the contract gave it the right to do what it did. Just like Novell's contract with its, the people it gave beta versions to allowed it to withdraw.

MR. JOHNSON: Yeah. But not in the manner that it did
here. Not for no legitimate business reason.
THE COURT: How about stabilization?
MR. JOHNSON: I'm sorry, Your Honor. What?
THE COURT: What about stabilization? The concerns about the stability of the product.

MR. JOHNSON: You mean robustness?
THE COURT: Robustness. Excuse me.
MR. JOHNSON: There were substantial evidence from which the jury could find that that was pretextual.

THE COURT: It was --
MR. JOHNSON: There was evidence that, in fact, within 30 days or less, had to be less, actually, of Mr. Gates's decision, they had already done the rooted versus unrooted extensions, and that it was no longer a problem. The fact that they continued to use these namespace extensions in their own products, in fact, we published them, two ISV's later on down the road, also goes to show that they had solved any concerns with respect to robustness.

It is also a fact that Mr. Nakajima said that wasn't the real reason, that it was all politics. So from that, again, a reasonable jury could decide -- I'm not saying that this is not a factual dispute, Your Honor, I'm saying there was substantial evidence from which a reasonable jury could decide that the robustness concern --

THE COURT: Even if it was to resolve an internal
dispute, that certainly was a legitimate business reason. MR. JOHNSON: But we said, we proved it was pretextual, Your Honor. At least we provided sufficient evidence to the jury.

THE COURT: No. No. No. You've got to prove its knowledge given the business. Even if you accept Mr. Nakajima's reason, that it was to solve an internal political problem, that is a legitimate business reason. There's no evidence that that wasn't legitimate. Is there?

MR. JOHNSON: I don't quite understand what you're saying.

THE COURT: Simply as a matter of corporate management, to resolve a dispute, keep everybody happy --

MR. JOHNSON: That wasn't what they said.
THE COURT: -- that's a legitimate business reason.
MR. JOHNSON: But that isn't what they said.
THE COURT: You don't have to tell people, hey, we were having a fight and this is the reason we withdrew. That doesn't make it pretextual.

MR. JOHNSON: I didn't say that was pretextual. I said there was a robustness thing, which is what they told us, which is pretextual. And we provided sufficient evidence to the jury that they could find it was pretextual. Therefore, it's not a legitimate business reason. If they'd like to now come in and argue about it was all politics and nothing more --

THE COURT: You don't expect Microsoft to have told the ISV's that we've been having a big dispute here and we, and we --

MR. JOHNSON: Actually, they told us a pack of lies, is what they told us.

THE COURT: All right.
MR. JOHNSON: Could we have Slide 81? I wasn't intending to go into these unless Your Honor really wants to, because all of these were not raised in the original Rule 50 (a) motion.

THE COURT: No. You've heard me. Address them or don't address them at your own risk. You've heard me.

MR. JOHNSON: I understand that, Your Honor, and I think we've already discussed this. I think you should look at the opinion with respect to that because I think that is instructive with respect to the reasons the Court so held.

The prior network settlement agreement. Again, that wasn't raised. We discussed that, the fact that this settlement agreement says we can raise any facts in support of our claims that we want to.

The PerfectOffice --
THE COURT: But you can't assert any claims that aren't asserted.

MR. JOHNSON: That's why we lost GroupWise, Your Honor.
THE COURT: And that may be why you lose network.
Excuse me. That may be why you lose --

MR. JOHNSON: PerfectOffice.
THE COURT: -- PerfectOffice.
MR. JOHNSON: But we're not making a claim for PerfectOffice, Your Honor.

THE COURT: You're not making a claim for Perfectoffice?

MR. JOHNSON: A marketing device, a bundle of products. It is WordPerfect --

THE COURT: You're not making a claim for PerfectOffice, despite the abundant evidence that Mr. Frankenberg, the CEO, felt it was a new market that was created and Microsoft had, was genius in figuring that out? You're not making -- nothing in the Warren-Boulton calculations are related to PerfectOffice?

MR. JOHNSON: The calculations are related to Office Productivity applications.

THE COURT: And the question is, and I have to look at Paragraph 24 of the complaint --

MR. JOHNSON: PerfectOffice is not an Office Productivity application. WordPerfect and Quattro Pro are. And, of course, we further named Appware and OpenDoc in the complaint.

So, in our view, none of these can be decided on a Rule 50 motion as a matter of the fact that they weren't raised in the original $50(a)$ motion and should not be a part of the case.

THE COURT: I think Paragraph 24 says there are three,
defines relevant markets. Word processing and spreadsheet applications are sometimes referred to as Office Productivity applications. The word processing and spreadsheet markets are sometimes referred herein as the Office Productivity application markets. And the only claims asserted are for damages, as I understand it, to Office Productivity applications.

MR. JOHNSON: Yes.
THE COURT: Okay.
MR. JOHNSON: Yes. Absolutely.
THE COURT: And so I've read this complaint and gave money in return for the right, for the release it gave you? MR. JOHNSON: For what, Your Honor?

THE COURT: I assume that there must have been money that exchanged hands. That they, Microsoft released -- excuse me. Novell released everything except what's in this complaint?

MR. JOHNSON: Well --
THE COURT: Every claim.
MR. JOHNSON: Every claim.
THE COURT: And the only claim asserted is for damage to WordPerfect and Quattro Pro.

MR. JOHNSON: Well, we think Office Productivity applications is a little broader than that.

THE COURT: But they've got lawyers. They're reading this, and they're paying you money.

MR. JOHNSON: Yes.

THE COURT: And they can't, and they can say, we'll pay you this much money, whatever it is, and I don't want to know what it was. But one of the things we're buying is that we're buying comfort from the assertion of any claim for damages to Perfectoffice.

MR. JOHNSON: I don't think that that's a reasonable interpretation of that document, Your Honor. I think we were entitled to bring the claims in that complaint. The fact that WordPerfect and Quattro Pro, which we are making claims for, were a part of PerfectOffice, means we get to make a claim for the loss, the lost sales of WordPerfect and Quattro Pro within that bundle.

It's not a separate market. Nobody's ever suggested it was a separate market. In fact, Dr. Noll, they laughed when Dr. Noll testified that it wasn't a separate market.

THE COURT: I'm sorry. It really is time. I thought there was a lot of evidence that there was a separate market.

MR. JOHNSON: No. There was a lot of evidence from Microsoft, who attacked our ability and whether we relate to Suites. And so --

THE COURT: Maybe I'm wrong. I probably am tired. I mean, I thought you had withdrawn your proffer, and I'm not sure you did. Although you did, but I said, no, no, no, and I don't quite know why I said no, no, no. I should have said yes, yes, yes. But you didn't make the proffer that you included in your
papers. But that's another issue.
MR. JOHNSON: Your Honor, I wanted to touch upon, I don't know what Mr. Tulchin was talking about when he said somehow that we don't think there is a causation requirement. Of course there's a causation requirement.

The passage he talked about from the DC Circuit case was pointing out that the heightened causation requirement for the remedy divestiture, which Judge Colleen Kollar-Kotelly ruled upon, was in place only for the remedy phase. And what the court of Appeals said, that causation, that higher causation standard afforded no relief to Microsoft with respect to liability, and that liability was already established. And that it was only in the context of the remedy phase that a higher causation requirement was made.

And we think that the causation requirement for liability, which is set forth in U.S. v. Microsoft, is the right causation standard for this case as well.

So I was not suggesting in the least that there was no causation requirement for a Section 2 case. That would be ridiculous.

I would like to, we talked a bit, Your Honor, about this notion that Microsoft, they engaged in patently harmful conduct, as long as that conduct can be characterized as an ordinary business practice. At trial, Microsoft asked for such an instruction, and Your Honor denied it. And that was a correct
rejection.
Microsoft had proposed that Your Honor provide an instruction that if Microsoft's decision was not inconsistent with software industry practice or that there was at least one legitimate business reason for Microsoft's decision, that you cannot find that its decision was anticompetitive. And you rejected that. What you gave -- can we have Slide 109 -- what you gave was the appropriate model jury instruction for anticompetitive conduct to the jury.

Microsoft tried to revive this industry practice argument, relying on the Telex v. IBM case, but in so doing, Microsoft ignored the 10th Circuit's clarifying decision in Instructional Systems Development v. Aetna Casualty Insurance Company, which is found at 817 F.2d 639.

As the 10th Circuit explained there, Telex only held that ordinary business practices do not become anticompetitive merely because they are undertaken by a monopolist. In other words, not every act taken by a monopolist is anticompetitive. But Telex did not hold that conduct that is anticompetitive, meaning conduct that harms the competitive process, is somehow immune from antitrust scrutiny because it's common in the industry to engage in that conduct.

In addition, in Instructional Systems, Your Honor, the Court adopted the reasonably capable standards, and used it, which is the standard in the 10th.

THE COURT: I'm tired now. Let me hear if Mr. Tulchin has anything to say in rebuttal. Mr. Tulchin.

MR. JOHNSON: Thank you, Your Honor.
THE COURT: Thank you. It's been helpful.
MR. TULCHIN: Your Honor, thank you. Again, may it please the Court, $I$ know it's late in the day. I will try to go through these points.

THE COURT: A lot easier to sit here than it is to stand there.

MR. TULCHIN: I've been sitting for a long time. But a few points that I think are important, Your Honor, and that I should make in this portion of the day.

Novell's lawyer, Mr. Johnson, made some very, very confused and confusing statements about the antitrust laws, but also some statements that are actually very helpful, I think, in coming to a resolution of this case.

He said for the first time that Perfectoffice, he agrees, is not an Office Productivity application as defined in Paragraph 24. He then made this argument that, in effect, if $I$ give you a release for everything other than claims pertaining to an engine and a drive shaft, that $I$ can still sue you and collect damages for the entire car.

And here, Warren-Boulton's calculations, and his damages by his three methods of roughly a billion dollars, are each mostly dependent on the loss of sales of WordPerfect. Now,

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of course -- sorry -- of PerfectOffice, of course. Perfectoffice includes the technology of WordPerfect and Quattro Pro. It may include other things as well.

But it is sort of similar to the car analogy I provided. And, of course, Your Honor is correct. If Microsoft gets a release for all claims others than those set forth in the complaint, and Paragraph 24 says it's just WordPerfect and Quattro Pro, which, for the first time in all these years, Mr. Johnson just acknowledged, the claims for Perfectoffice are out of the case, that in itself requires --

THE COURT: Help me out. I'll have to go back and read the transcript.

Maybe you did criticize Dr. Noll for saying there was a separate market for Suites. I really came away from the trial, as opposed to summary judgment, with the understanding that, in fact, the suite market was something different. And, in fact, Microsoft had created the suite market by selling Office, and that Frankenberg recognized that this was a sign of marketing genius.

Again, I could be, my recollection could be wrong.
MR. TULCHIN: No. Your recollection is correct. I think Professor Noll was the only one who said that suites are not a separate market, that it should be looked at as its components. I suppose you could do the same thing with a Toyota.

But more importantly, Your Honor --

THE COURT: But $I$ thought it had to do with, and again, the only thing I remember is that $74 \%$ figure. I have some recollection, and I thought it was Noll, somebody, in terms of projecting the potential growth in share of the work that Novell could obtain, relied upon the fact that, I think it's 74\% of the suite market was still unaccounted for. And so, yes, in terms of installed base, Microsoft had a slight advantage over Novell. But where the action was going to be was in the suite market. MR. TULCHIN: That's correct, Your Honor. That was the Novell theory.

THE COURT: And there is evidence to that effect?
MR. TULCHIN: Yes, Your Honor.
THE COURT: Does anybody remember who testified about that?

MR. TULCHIN: The document that Mr. Johnson showed you today about the $74 \%$ says exactly that.

THE COURT: Do you remember who testified? Was it Noll?

MR. TULCHIN: I wish I could. Mr. Frankenberg, I'm told by my colleague.

THE COURT: Okay. Fine.
MR. TULCHIN: And, of course, Hubbard and Murphy did, too. But Frankenberg's at Page 1011, and surrounding pages. 1009 .

THE COURT: And the testimony I remember, because he
was the one that acknowledged that Microsoft had been ahead of the curve. But then he said, I drew comfort from the fact that although it had been the first one out of the barn, there was still a lot the pasture.

MR. TULCHIN: Yes, Your Honor. But on that point alone, Your Honor, since the damage calculations depend upon lost sales of Perfectoffice, and Mr. Johnson now for the first time says you can't count those, those are not Office Productivity applications, the case is over for that reason alone.

It's also over, Your Honor, I think, because, for the first time, Novell has said clearly -- and I wrote it down, I hope my quote is correct -- "Microsoft can change betas for legitimate reasons." Unquote.

In other words, Your Honor, we're not back to this point that you can only change them if a beta tester gives you feedback. The concession is that they can be changed for legitimate reasons.

In this case, Alepin and Noll both testified, their two experts, that it's a legitimate reason to change for robustness concerns. And I think we set forth in our brief as well the testimony about compatibility. Professor Noll said this, to my recollection; that it would be legitimate for an operating system developer to withdraw support --

THE COURT: Why is it not a factual question, whether that was the real reason? Why couldn't a jury take a look at

Plaintiff's Exhibit Number One and say the reason to withdraw had nothing to do with robustness, it had nothing to do with anything, it had to do with the fact that Mr. Gates was concerned about the fact that Lotus and Novell were ahead of his applications group?

MR. TULCHIN: The testimony of five or six witnesses is to the contrary. But the very most --

THE COURT: But that makes it a factual issue.
MR. TULCHIN: No, Your Honor. But in contradiction to that, at the very most you have an inference that might be drawn from PX-1. I'm with you there. One could draw an inference from PX-1, although compatibility is mentioned in that memo. So is the third reason, that Mr . Gates didn't think they were any big deal, the namespace extensions, and it wasn't worth continuing to support them because of the compatibility problems down the road?

But even if one balances that against an inference that could be drawn from PX-1, the Court hit this nail on the head earlier today. The only inference that can be drawn is about competition in the applications market; that the reference to the advantage that might be given to Office was a reason, as opposed to the other reasons offered later. But that, of course, has nothing to do with Novell's case.

It doesn't have a claim for monopolization of the applications market. It just defies logic to imagine that you could have some predatory intent, to use Mr. Johnson's phrase,
that applies to one market, but use that somehow to develop a claim about an entirely separate market.

THE COURT: I hear you. But Mr. Johnson's made me think. I really thought coming in here that, and based upon really reading the Rule 50 memorandum, that a genuine flaw in Novell's position was that its operating system claim is so intimately tied to its applications claim, and the applications claim is time barred, that the operating system claim necessarily falls.

Mr. Johnson's made me think. And I don't think I'm going to find any answer in the case law. That in addition to this whole question of where the action is taken and where the harm is caused, which is a slightly separate question, I mean, his position, as I understand it, is pretty straightforward. You take an action that is predatory, to use his words, anticompetitive in one market, that is sufficient if the action has an anticompetitive effect.

Now, I understood clearly the distinction, because it's been drawn in a lot of the briefing before about, this is a somewhat unusual case in that the action is taken in the applications market but it's deemed to have an effect in the operating system market. This is a closely related, but somewhat different, issue.

As I now understand the plaintiff's case, and a little late for me to, I must admit it's a little late for me to
understand it, but it's basically that the predatory intent might have been in a different market even, but that that rendered unlawful the conduct because it had an effect on competition in the operating system market. I don't think there's any law on that.

MR. TULCHIN: The reason, I think you just said, that it may be late in the day for you to be understanding this, is that the theory changes every time we talk about it. In the past, the theory was that there was deception. And it was stated very clearly by Novell's lawyer on November 18 th that the basis of his claim was deception. And, of course, we dealt with that.

We've talked about the release and the complaint governs. This isn't about evidentiary detail. It's about the basis of the claim. There was no claim for deception in the complaint.

So today, I think, perhaps recognizing that there's no way out on deception, and there was no deception, I want to come to that in a moment, the three things he gave today for deception are entirely different from what he said at trial and in his brief, which was the deception was that we induced them to use the namespace extensions.

That is a traditional deception claim. You induce me to use it, then you pulled it away from me when I relied on it. Now he says the real, the deception is you didn't tell me the real reasons. That can't have harmed Novell. If it was induced
to use it and wanted to use the namespace extensions, the fact that he says Brad Struss didn't come out with the real reason, this is a bootstrap argument because he says the real reason is this predatory reason, and the evidence doesn't support that, but that has nothing to do with deception to hurt Novell.

The deception to hurt Novell, if there's any deception logically, has to be deception to make them rely on it in those four months, to get hooked into it, to write $80 \%$ of the code necessary, using the namespace extensions, and then to get all bolloxed up when support is withdrawn. That's the only way they could have been hurt.

So the deception claim has vanished magically. And now the claim is, you can change the betas for any legitimate reason, and, of course, the case law that we talked about earlier is that it's not the province of the courts to inquire about design decisions of products.

THE COURT: Just give me a two minute recess.
MR. TULCHIN: Of course, Your Honor.
(Recess.)
MR. TULCHIN: I will try to be as quick as I can, Your Honor. Thank you. So to go back one step, Your Honor.

Now we're told Microsoft can change betas for any legitimate reason. And there's good case law out there. We cited it in our brief, that it's not the province of the courts to try to weigh these business justifications. If the designer

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of a product, in making product design decisions, comes up with a business justification, as long as it isn't obvious pretext, that's the end of it. The jury doesn't get to weigh whether the robustness reason or the compatibility reason or Mr. Gates's third reason, which was these things were disappointing to him, they didn't come up with the functionality he had expected, they don't get to weigh whether somehow that's outweighed by a lawyer's argument years later, that the real reason was to give an advantage to Office in some other market.

And the courts are -- I cited some of these decisions early this morning, Your Honor -- the courts are very skeptical of and wary about weighing into product design decisions, as opposed to pure marketing decisions, which are in a different category.

Next, Your Honor, I was really surprised to hear reference to this idea that the 12 jurors were in Novell's favor. I mean, this is way outside what we should be discussing on a Rule 50 motion. But we talked to seven of the jury members --

THE COURT: I am not, as far as I'm concerned, that was done for your guidance. It was not, you know, I know what the jury told me. I've been told what they told you. I've got my own job to do, anyway.

The fact of the matter is I have no idea what they would have done. Assuming they would have found in favor of liability, it's absolutely, absolutely speculative as to whether
they would have given a dollar, a billion dollars, or $\$ 500,000$. I just don't know. And I don't think they know, either, because they never got there.

MR. TULCHIN: It's on Footnote Four on Page Four. But I won't dwell on that, Your Honor.

Mr. Johnson said at one point --
THE COURT: There were two jurors who were very angry at the guy who held out. There was a holdout and there were a lot of people who saw a lot of weaknesses in Novell's case. It could have very well been a compromise verdict. That's the reality. And I'm not even going to speculate as to what they would have done.

And I do know I've got a job to do. And the mere fact that the jurors found one way, it is perfectly clear under the law that, so what? I could take the case away from the jury if I didn't think, and should take the case away from the jury, even if a unanimous jury returned a verdict in favor of a party. So that's not relevant.

MR. TULCHIN: Interestingly, Your Honor, at about 2:30 or 3 today, Mr. Johnson said to the Court, here today, that intent doesn't matter in a Section 2 case, that what matters is proof about the effect on competition. That's what is important. He also said in his argument, there is no obligation to share. And it was okay not to give the technology to Novell in the first place.

Later on he said, intent is everything. Microsoft was entitled to make changes to the beta for any legitimate reason, unless they had bad intent.

There is a lot of confusion that's being sown here, Your Honor. It is still the case, despite this argument, that in order to prevail in this Section 2 case, in this context, Novell has to find a way to surmount the Colgate doctrine. They've tried in two different ways. They've tried with Aspen Skiing. It doesn't come close to working. The relationship was never terminated. And there isn't an answer to that.

We didn't deny Novell access to information that all others received. And we, unlike the owner of the mountain in Aspen Skiing, did have a justification.

THE COURT: No, the two mountains, I think.
MR. TULCHIN: Sorry, Your Honor?
THE COURT: I think the owner of two mountains. But I could be wrong.

MR. TULCHIN: Three.
THE COURT: I thought, were there four altogether? Three mountains?

MR. TULCHIN: Yes. So Aspen Skiing is gone. Deception doesn't work. You still have to, in order to get a Section 2 claim that's based on our facts, Microsoft owned this technology, developed it internally, was considering what to do with it, it issued it in a beta with warning, saying, this can change,
consistent and in conformity with industry practice.
For Novell to come up with a claim, it can't just sort of wiggle on one side and waggle on the other and say, sure, you know, you can make legitimate changes to a beta, but on the other hand, intent's important. If you're predatory, well, boy, we have a claim. And then earlier say, intent doesn't matter. It's the effect on competition. And then talk about the effect on competition in the applications market and, say, that gives me some reason to have a claim in the operating systems market.

THE COURT: That's not what $I$ understood Mr. Johnson to say. I understood him to say that if you have bad intent, if you have predatory intent in the applications market, then if you have an objective anticompetitive effect in the operation, in the operating system market, that's an antitrust violation.

MR. TULCHIN: Well, Your Honor, it can't be under Section 2 because of the case law we've discussed earlier. There isn't a duty to deal and that it's very, very rare. This is Chief Justice Roberts in Pacific Bell against LinkLine, that it's very rare that, for unilateral conduct, even a monopolist is adjudged to have violated Section 2, because here all we're talking about is the terms under which Microsoft would be compelled to share.

Mr. Johnson says you don't have to share with us in the first instance but, once you give it to us, you can't withdraw support for it. Now, that, of course, gets you right back into
the heart of the question about industry custom and practice. And as you said, Your Honor, earlier today, if it's lawful to withdraw support or not to provide support in the first instance, it is very difficult to see how it can be unlawful to think bad thoughts when you do that. That is not what constitutes an antitrust violation.

THE COURT: But writing e-mails, recording of bad thoughts, makes it all the more problematic.

MR. TULCHIN: But, Your Honor, in a Section 2 case, it is always true that the company with the high market share is taking steps to, and they intend this to be the case, to get even higher market share. Making a better product. Retooling your factory floor. Coming up with a new marketing slogan.

Every step that a successful company takes in its business has the intent of depriving others of market share. That's exactly why the Supreme Court says -- we have to be very careful not to chill innovation and punish people for success when the antitrust laws are meant to encourage innovation and success. And if the consequence of success is all of the market, that's good.

THE COURT: I agree. I think, I have to research. I don't think research is going to get it for me doctrinally, as they say.

As I understand it, and Mr. Johnson could not have been more forthright about it, there never had to be any sharing in

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the first instance, even if it was for an anticompetitive intent, and even if it would have had an adverse affect upon some market. But once you, once you disseminate it, you have to, you can't draw it back, even if it's not otherwise unlawful for you to do so, if you do so with an intent to hurt one market and -- well, if you have an effect, an anticompetitive effect. That, to me, is a, that is what I understand Novell's position to be. And I've got to think about it.

MR. TULCHIN: And having an intent, Your Honor, to win the market is not predatory. It's not unlawful. It's what every company is supposed to do. It doesn't change because your market share is 80 , 90 , or even a higher percentage. Intending to win the market is perfectly normal business behavior.

Just a couple of other points, Your Honor. I notice that Mr. Johnson was quite insistent about some criticism he made of Page 93 of our brief, some quote from Four Corners Nephrology. Maybe it's not a big point. But what he did today with Christy Sports is really quite stunning.

He put up, on Slide 21, the sentence which says: An antitrust claim can be made out, for example, if by first inviting an investment, and then disallowing the use of the investment, the resort imposed costs on the competitor.

Well, he cropped that sentence because the first part of the sentence -- and the whole paragraph is really key here -the first part of the sentence says, quote: "We would not even
preclude the theoretical possibility that such a change", change in the relationship, "could give rise to an antitrust claim." And then it goes on, if, for example.

So the 10th Circuit there discussed or maybe commented on a theoretical possibility. It didn't say that that could give rise to a claim. It was contrasting that situation with the facts in Christy Sports.

And I just have to say one more time, Your Honor, that the facts in Christy Sports were so much better for the plaintiff there than for Novell here. It was 15 years where this lease existed, and Deer Valley never said you can't rent skis in competition with our company. All of a sudden, they pulled the rug out from under them, and that clearly put the plaintiff, Christy Sports, out of business. They're out of the mid-mountain ski rental market. Completely out. There's no other possibility of staying in.

The 10th Circuit thought that was not enough under Christy Sports, in part because, and this same paragraph on Page 1196 of 555 F.3d says it, in part because it couldn't have been a surprise to the plaintiff, in view of a covenant in the lease that had never been enforced, that this was a temporary relationship.

Similarly, it could not have been a surprise to Novell that the betas could be changed. As Frankenberg said, everyone knows that's what happened in the industry.

In addition, Your Honor, there were several quotes from Professor Murphy where, and there's slides 45, 46 and 54. Three quotes from Professor Murphy. And, of course, I have the pages of the transcript from which the quotes are reproduced. And instead of giving Professor Murphy's full answer, what Mr. Johnson did is to write the word "yes" or "yeah."

In one case, for example, Professor Murphy said exactly what the Court said, what matters is who's buying it, not that this is a potential substitute. This was about Linux and you could get it for free and isn't that a good thing. And Professor Murphy said, Yes. That's the only part of the answer quoted.

THE COURT: I think he probably said "yeah", but I don't know.

MR. TULCHIN: I think he did say "yeah." But there are three slides there. I won't go into all the details of these, let's say, unintentional misquotations. But the full answers are the answers that are important here, not the cropping of them. Just a couple of other points, Your Honor.

If looks as if, despite the fact that at trial Novell said our case is about the deception, very clearly on November 18th, Mr. Johnson said that, then the deception was supposedly to induce Novell to use these APIs. Now he says there's three things, and none of them are that.

The Hood Canal thing can't be deception if Novell, Novell never knew about it. And deception has to be that you
misrepresented something to the plaintiff, the plaintiff relied on the misrepresentation to his detriment. Well, they never knew about the Hood Canal plan, which never went forward, anyway. So that's not deception, that we didn't tell them about it. They couldn't rely on something they didn't know about. THE COURT: I think he says it reflected a bad frame of mind. That, in fact, when they evangelized, they did get people to rely, and they never intended to let them keep the namespace extension.

MR. TULCHIN: But there isn't any piece of evidence of that, Your Honor, that they never intended to let them keep it. There isn't a single piece of evidence. Nothing.

And the idea that Mr. Struss, it's interesting that this argument wasn't made to the jury. Never. But Mr. Johnson today said, Well, Mr. Struss lied about the reasons. When he told us the reasons for withdrawing support, he lied. He didn't tell us that Mr . Gates really wanted to give an advantage to Office.

Well, other than for the theatrics, I don't know where that gets them. Again, that, if that's deception, if there was a lie there, which, of course, we think there was not, the real reasons were given, and that's consistent with the e-mail the day after Mr. Gates made the decision from Mr. -- I'm blanking on this. Muglia.

THE COURT: Who?

MR. TULCHIN: Mr. Muglia on October 5th, saying, I'm glad Mr. Gates made this decision, because of these compatibility concerns. That's in evidence. I forget the number of the document.

THE COURT: He was a tough guy.
MR. TULCHIN: 24. 24. But this deception of not giving the real reasons, they were the real reasons. All the evidence shows that.

THE COURT: There is no way in the world Microsoft is going to tell ISV's that the reasons were because they wanted to give an advantage to Office.

MR. TULCHIN: Of course, Your Honor. But even -- it wasn't the reason. But even if that were so --

THE COURT: They certainly were never going to tell them that.

MR. TULCHIN: But even if that were so, how does that give rise to a claim that we were deceived? They had started working on this --

THE COURT: I think we're beyond deception. I think where we were, you were predatory.

MR. TULCHIN: Okay. Last point, Your Honor, last point. And I know it's been a very long day and we all appreciate your time and your patience. And I know you'll give --

THE COURT: If you appreciate my patience, you're
making things up, I think. Go ahead.
(Laughter.)
MR. TULCHIN: No, no. I try not to do that, Your Honor.

Mr. Johnson made a very impassioned plea to the Court, that no one on his side of the case had ever acknowledged that Windows 95 was such a great thing. I mean, he said, we never said it was better than sliced bread, and it just may have been catching up with Apple. I mean, there's a point at which you have to say the evidence is the evidence.

One of the pages on the presentation I gave you today summarizes testimony from five Novell witnesses about a huge step forward and a significant step forward. Those witnesses didn't say, Well, it was just a teeny step forward because they were catching up to Apple.

And Mr. Johnson, I mean, after all, this is Novell's lawyer, he said it on November 18th, it's at Page 2670, Lines 22 to 23: Of course, Windows 95 was a great innovation.

There are other things in the presentation today that aren't supported by the evidence. There are other statements that Mr. Johnson made today that are contradicted by what was said earlier.

Of course, Windows 95 was a great innovation. And in our case, when we're talking about maintaining a monopoly, the concession that this product, which drove the market share from
$90 \%$ to 95 , an incremental gain of $5 \%$ was a great innovation, cuts directly against the contention, implausible as it is, that withdrawing support for 4 API's out of 2,500 somehow affected in some significant, substantial way competition in the operating system market. It cuts against it, Your Honor. It makes the whole case as implausible, and shall we say, artificial, as the fact that Novell never said it was harmed.

It didn't need to know what the reasons were for Microsoft's decision. If there had been some delay caused by the decision, someone would have said it.

Thank you, Your Honor.
THE COURT: Thank you. I'll come down and shake your hands, and go to my meeting.
(Conclusion of Proceedings at 6:00 p.m.)
It didn't need to know what the reasons were for
Microsoft's decision. If there had been some delay caused by the

Mary M. Zajac,
Official Court Reporter


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