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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION

NOVELL, INC. : CIVIL NO.:  
Plaintiff, : JFM-04-1045  
vs. :  
MICROSOFT, : Baltimore, Maryland  
Defendant. : September 29th, 2011

\* \* \* \* \*

The above-entitled case came on for motions hearing before  
the Honorable J. Frederick Motz, United States District Judge.

\* \* \* \* \*

A P P E A R A N C E S

For the Plaintiff:

Jeffrey M. Johnson, Esquire  
James Robertson Martin, Esquire  
John E. Schmidtlein, Esquire  
Miriam R. Vishio, Esquire

For the Defendant:

David B. Tulchin, Esquire  
Steven L. Holley, Esquire  
Adam S. Paris, Esquire  
James S. Jardine, Esquire  
Heidi B. Bradley, Esquire

Also Present: Steven J. Aeschbacher, Esquire  
Associate General Counsel for Microsoft

Christine T. Asif, RPR, CRR

Official Court Reporter

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P R O C E E D I N G S

THE COURT: Good morning everybody.

THE CLERK: The matter now pending before this Court is civil docket number JFM-04-1045, Novell versus Microsoft. This matter now comes before the Court for the purpose of a motions hearing. Counsel, will you please identify yourselves for the record beginning with plaintiff's counsel.

MR. JOHNSON: Jeff Johnson on behalf of Novell, Inc., joined by Jim Martin and John Schmidtlein.

MR. TULCHIN: David Tulchin from Sullivan and Cromwell for Defendant Microsoft.

MR. HOLLEY: Steven Holley from Sullivan and Cromwell for Defendant Microsoft.

MR. JARDINE: Jim Jardine from Ray Quinney and Nebeker for Defendant Microsoft.

MR. PARIS: Adam Paris, Sullivan and Cromwell for Defendant Microsoft.

MR. AESCHBACHER: Steve Aeschbacher for Microsoft.

THE COURT: Please be seated. I've realized I have to go get something, still in session.

(Pause in the proceedings.)

THE COURT: Before we get down to the fascinating subject of collateral estoppel, let me talk to you about a few preliminary things, which I'll probably forget if I don't mention them now. Mr. Jardine probably knows this, but in Utah

1     apparently the practice as to who's table is where is  
2     determined by first come first served. Here it's plaintiff  
3     gets to sit next to the jury, according to Ms. York in Utah  
4     it's sort of who comes first. I'll be guided by you all. The  
5     one thing I know I won't, knowing how competitive you all are,  
6     is not to follow the Utah procedure, otherwise, you'll have --  
7     you know, here it's usually the plaintiff sits next to the  
8     jury. If Microsoft doesn't care really, I just assume have it  
9     that way. Is that okay?

10           MR. TULCHIN: Your Honor, that's fine. We're  
11     competitive, but not that competitive.

12           THE COURT: Fine. Secondly, about scheduling. I  
13     think the last time you were here we -- I had said I was going  
14     to reserve next Thursday beginning at 10:30, is that right, in  
15     the morning?

16           MR. TULCHIN: You did say Thursday, Your Honor, I  
17     don't remember what time.

18           THE COURT: I think it's going to be 10:30 because  
19     I've got a sentencing. And then Friday I've been able to work  
20     it out, we were scheduled for the afternoon, I can sit  
21     beginning at 10:00 o'clock on the 7th.

22           MR. TULCHIN: Thank you, Your Honor.

23           THE COURT: The other change that has been made and  
24     when I made reservations, plane reservations I just didn't  
25     think I could -- unless you all feel -- I've made reservations,

1 I sort of made the decision. The week of Thanksgiving we'll  
2 only be sitting Monday and Tuesday, not Wednesday. It just is  
3 crazy for all of us to try to travel on Wednesday. And we  
4 won't be sitting that Friday, of course.

5 The other thing is I -- we can talk about this later,  
6 it's not key -- I think we're scheduled on October 13th to talk  
7 to the clerk about strikes for cause. That might not be the  
8 best day for me. I can't remember whether -- when everybody's  
9 getting the papers, I might want to move it to the 12th, but  
10 I'm perfectly willing to keep it on the 13th if necessary,  
11 because I know the whole procedure is in place. So we can talk  
12 about that next week.

13 Okay. How do you all want to proceed, finding by  
14 finding, general principle, you tell me?

15 MR. JOHNSON: Your Honor, Mr. Schmidtlein is going to  
16 address the collateral estoppel on behalf of Novell, so I'll  
17 let him be your guide.

18 THE COURT: That's dangerous. You're free to go,  
19 you're free to stay, Karen.

20 THE CLERK: Thank you.

21 THE COURT: Good, Mr. Schmidtlein.

22 MR. SCHMIDTLEIN: Good morning, Your Honor. Having  
23 now put my monk's robe on for at least a period of time here, I  
24 think I have a keen appreciation of what you were referring to  
25 in your earlier order where you took, I think, what appears to

1 have been kind of a preliminary crack at trying to identify  
2 some of the low hanging fruit. I don't -- I don't know that  
3 there's a very good way to do this other than to slog through  
4 finding by finding. I don't know necessarily whether you will  
5 find it enlightening for us to go back and forth, back and  
6 forth, finding by finding here today. Obviously, we'll be  
7 guided by sort of your preference.

8 I guess I do have some kind of overarching sort of  
9 issues that I'd like to address and then we're prepared to go  
10 through, slog through finding by finding if that suits Your  
11 Honor. We're also sort of prepared to respond to questions,  
12 because I know quite well that Your Honor has probably already  
13 spent a fair amount of time with these, sort of before and  
14 probably in advance of today.

15 You know, as Your Honor knows, sort of the two  
16 overarching issues here are, you know, are these critical and  
17 necessary --

18 THE COURT: I take it there really is no difference  
19 between 4th Circuit and 10th Circuit law.

20 MR. SCHMIDTLEIN: The 10th Circuit, I think,  
21 typically speaks in terms of necessary. I'm not sure whether  
22 you say critical, necessary, essential.

23 THE COURT: 4th Circuit used to, but then it changed,  
24 maybe it didn't.

25 MR. SCHMIDTLEIN: I can't sit here and sort of tell

1 Your Honor that I see some significant daylight sort of between  
2 the two. But I think what is clear, having read some of the  
3 cases from both, you know, I don't think there's a whole lot of  
4 guidance. It's one thing to sort of say it has to be critical  
5 or it has to be necessary. It's another thing to sort of say,  
6 okay, how am I actually going to take those words and provide  
7 meaning to those as I begin traversing through a long  
8 complicated opinion.

9 THE COURT: I guess the one thing I ought to make  
10 clear, which I'm sure you all agree with, is that today I am  
11 only focusing upon the collateral estoppel effects, which was  
12 not whether or not the fact as to which collateral estoppel is  
13 sought is material to these proceedings. I mean, I really  
14 think that that -- that is something which I probably ought to  
15 decide. And it's tied up in the whole issues, it's addressed  
16 by the instructions and everything else. So the fact that I  
17 may decide to give collateral estoppel effect to a fact, it is  
18 subject to it being shown to be material to the issues involved  
19 in this case. I think that probably takes away one level of  
20 analysis. And the same way it may always be a 403 issue too as  
21 well.

22 MR. SCHMIDTLEIN: I think that's right. I think the  
23 second sort of overarching issue is this sort of materiality  
24 relevance issue. And at least as to that, I think there are a  
25 couple of overarching issues that, at least from our

1 perspective -- or objections that Microsoft makes, that from  
2 our perspective --

3 THE COURT: I think it's probably better to save that  
4 until next week when we slog through the instructions and  
5 everything else, and motions in limine.

6 MR. SCHMIDTLEIN: Yeah, those are tied into some of  
7 the motions in limine as well. I mean -- and they're tied into  
8 objections to exhibits. I mean, this whole issue of, you know,  
9 sort of how do we deal with the conduct here.

10 THE COURT: Did I mean what I say when I said the  
11 injury had to be in the operating system market, for example, I  
12 may not have. I may have meant it then but I may have been  
13 wrong. That's something we can figure out next week.

14 MR. SCHMIDTLEIN: Okay. In terms of, you know, sort  
15 of in terms of guidance, as I said, I don't think that the 4th  
16 Circuit's opinion, at least in these proceedings, gives a whole  
17 lot of guidance in terms of how you apply critical and  
18 necessary in a case like this. In an antitrust case such as  
19 this one, a monopolization claim, for example, you know,  
20 typically you've got to establish relevant market, you've got  
21 to establish monopoly power in the relevant market, and then  
22 you have to establish some sort of anticompetitive conduct that  
23 impacted competition. And each of these inquiries, as Your  
24 Honor knows, is kind of a multifactor analysis.

25 And I think what we have largely done is trying to

1 identify findings of fact that deal with those individual  
2 factors. And to then sort of try and parse and say, well, you  
3 know, when you're looking at, for example, relevant market or  
4 monopoly power, you know, the antitrust guidelines provide a  
5 variety of factors that you analyze and you look at in making  
6 that determination. Nobody, whether it's the case law, and  
7 certainly the D.C. District Court in the D.C. Circuit, I don't  
8 think anybody approached writing an opinion and doing their  
9 analysis from the perspective of, is this one fact, if I pull  
10 this out would my conclusion be different? If this one factor  
11 gets pulled out would my conclusion be different?

12 And so at this point, sort of after the fact trying  
13 to determine, gee, was that critical, was that necessary? It  
14 certainly reads on a particular factor that's relevant to  
15 antitrust, anticompetitive effect. It reads on relevant market  
16 or monopoly power. Our position, I think, is, it is a factor  
17 that is appropriately considered, not sort of dicta or an  
18 extraneous factor or sort of an interesting tidbit. Certainly  
19 each of those factors is critical and necessary. And for  
20 example, in a number of these instances Microsoft presented an  
21 argument saying no, that factor doesn't apply here because of  
22 X. If the district court makes a finding that says, I disagree  
23 with that Microsoft argument, we think that obviously is  
24 critical and necessary, because if the district court had found  
25 for Microsoft on that fact, they may well have reached a



1 different legal conclusion.

2 THE COURT: Let me ask you, we can come back and do  
3 it, I mean -- and this is by no chance -- by no means  
4 exclusive. I mean, I've tried to figure out, and I frankly, am  
5 better on the first half of the findings than the second half  
6 of the findings. As I prepared for the hearing, I just ran out  
7 of time. I've been through everything once, but through about  
8 half of it twice.

9 It seems to me that there is a general issue about  
10 the additional indicia when Judge Jackson -- when really the  
11 tie for finding collateral estoppel was that somehow it comes  
12 under the rubric of additional indicia, which to me is a  
13 difficult question. There is, to me, an issue, and we can slog  
14 through it or have it further briefed or whatever, because I'm  
15 not sure it's -- microsoft has had a fair chance to respond,  
16 although it may be able to do so today or maybe it has, to the  
17 extent that something was necessary to the remedial opinion as  
18 opposed to the liability opinion in D.C.

19 Thirdly, from a point of view of -- the effect, if  
20 any, of a concession in Gordon that something was -- was  
21 necessary, although the only two I've found so far that that  
22 applies to is 17, which seems to me is to be totally innocuous,  
23 if in fact -- if that's the fact, you ought to stipulate  
24 regardless of collateral estoppel. The other one, I forget  
25 which one it is, it may be a little more important, 56 I think.

1           And then, again, this is just looking at it from the  
2 point of view of your witnesses and trial testimony you have to  
3 present, the whole issue of whether it was necessary that  
4 decision of findings made about IBM, Intel, Apple, as opposed  
5 to Netscape and Sun, which may have been necessary. It seems  
6 to me it's a little less clear that activities directed by  
7 Microsoft against these other competitors, it was necessary,  
8 and if so, that would have a real impact upon how you prepare  
9 for trial. So I'm sure there are more, but I sort of picked  
10 those out as things I need to have addressed. But you just  
11 address them as you go through.

12           MR. SCHMIDTLEIN: Okay. Well, again, I think as Your  
13 Honor sort of goes through, and as I said we're happy to go  
14 through these findings --

15           THE COURT: No, no, these are just things on my mind.  
16 As I say I don't know how we quite I'll rule, this is a mess.

17           MR. SCHMIDTLEIN: No, it is a mess. And I think  
18 that, again, from our perspective, there's a couple of, you  
19 know, sort of short cuts or things we think would help --

20           THE COURT: Oh, I guess the other general issue is  
21 Microsoft's -- Mr. Tulchin will take the position that it's  
22 only evidentiary value, but it seems to me we're talk about  
23 evidence. Evidentiary detail.

24           MR. SCHMIDTLEIN: Well, and again, when you're  
25 talking about is conduct anticompetitive, you know, what is the

1 ultimate impact on the market, you obviously make findings  
2 around, well, what exactly happened? You know, what were the  
3 terms of a license? What were the terms of the conduct that  
4 sort of actually formed the basis? I think what Microsoft's  
5 position is, and again, they are only because -- they've got  
6 materiality objections to basically all the conduct that formed  
7 the liability, or the anticompetitive conduct prong, so I'll  
8 sort of take the monopoly power ad relevant market. They  
9 essentially say, we will agree that sort of the conclusory  
10 types of paragraphs that say the relevant market is X with a  
11 few little details, or you know, the fact that we have monopoly  
12 power in a relevant market. And that's pretty much it. Those  
13 are sort of the only necessary and critical findings.

14 And I think at least on the relevant market and the  
15 monopoly power side we say, well, that's not quite enough. I  
16 mean, you can't just put the conclusion in there. We point to  
17 a number of the individual facts that the judge found, and,  
18 frankly, that Microsoft didn't contest in terms of on appeal,  
19 that these are the types of facts that support the legal  
20 conclusion. The legal conclusion that the relevant market is  
21 the Intel-compatible PC market. You look at demand side  
22 substitutability. You look at supply side substitutability.  
23 You look at the question of, has Microsoft engaged in conduct  
24 that reflects the ability to exercise monopoly power. These  
25 types of things we think are clearly necessary and critical,

1 because those are the facts that actually support the legal  
2 conclusion. I think we have, you know, less disputes around  
3 that area, the monopoly power and the --

4 THE COURT: Well, clearly, Microsoft would like to  
5 have the highest level of distraction as possible.  
6 Particularly when it gets to the middleware question on the  
7 other side.

8 MR. SCHMIDTLEIN: Correct. Now, on the issue of  
9 middleware, that is sort of, I think, one of the primary areas  
10 of objection with respect to relevant market and with respect  
11 to anticompetitive conduct. And Microsoft's position, again,  
12 they have a materiality objection, a significant materiality  
13 objection. But putting that to the side, in terms of critical  
14 and necessary, the Court's underlying discussion of what  
15 middleware was, the threats that middleware posed to the  
16 applications barrier to entry, and I think this is in the 66,  
17 67, sort of in that area. Those are from our perspective  
18 absolutely indispensable. That's what the Government case was  
19 about.

20 THE COURT: Even if I don't allow you to amend your  
21 complaint, that's what your case is about.

22 MR. SCHMIDTLEIN: That is in part what our case is  
23 about. And so the discussion of middleware, and the parallels  
24 between the government case and our case, are replete in  
25 Novell's complaint. So the notion that sort of middleware we

1 can do this quick little surgical monopoly power and relevant  
2 market and everything else sort of stays out, we just don't see  
3 how that works. I mean, middleware is a critical aspect of the  
4 government case. It's a critical aspect of our case.

5 The other issue, frankly, on a lot of these types of  
6 things, I understand at sort of the high legal level, the  
7 concern about, gee, you have to, you know, be careful about  
8 collateral estoppel, because a lot of these findings may not  
9 get appellate -- a really effective appellate review. The  
10 issue of whether middleware was in the relevant market, the  
11 issue of whether middleware posed a threat, a nascent threat to  
12 the operating system market, that was a substantial part of the  
13 dispute at trial in the government case, and it was a  
14 substantial part of the appeal in the government case.

15 So the notion that somehow these were sort of  
16 secondary or kind of collateral little findings here that  
17 really probably could have escaped appellate review in the D.C.  
18 Circuit we think is, you know, has no merit. These are facts  
19 that were absolutely -- it was absolutely head on what the  
20 government case was about. And so we think there's less to  
21 fight about in terms of relevant market, monopoly power and  
22 sort of the middleware component, but we think -- the facts  
23 there, we think are relatively simple for the Court. And,  
24 frankly, most of the challenges that Microsoft has to those  
25 really go to the critical and necessary, they don't go to

1 materiality.

2           When we get into sort of conduct directed at various  
3 of the actors, I think Your Honor has it right there are sort  
4 of two categories. There is conduct that is directed at Sun  
5 and Netscape, which is obviously the conduct that technically  
6 formed the bases for the liability findings in the government's  
7 case. And then there is conduct that was directed at Intel.  
8 Although there is conduct directed at Intel that does form the  
9 basis for some of the liability. But there's other conduct  
10 directed at Intel. There's conduct directed at IBM. Although,  
11 IBM is an OEM. And, you know, a lot of the conduct around  
12 IBM -- there is conduct around IBM that does relate to the  
13 liability finding. But there's conduct, as you know, the real  
14 networks and others.

15           And, you know, with respect to that conduct,  
16 obviously, we think one of the principal reasons that Judge  
17 Jackson heard evidence about that, one of the reasons he cited  
18 to that evidence, was he was looking at Microsoft's intent. So  
19 if we step back and say, well, what happened in the D.C.  
20 Circuit case? What's likely to happen in this case? In both  
21 of those instances Microsoft defended in part based on an  
22 argument that our conduct didn't harm competition. Our conduct  
23 was innocent. It was designed to enhance our products. These  
24 were technologically -- we had business justifications for all  
25 of our conduct.

1           That's what we're going to hear in this case.  
2           They're going to say the reason we held these eight -- we  
3           published then we withdraw APIs, we didn't give you access to  
4           the logo, we had business justifications. We weren't trying to  
5           hurt you Novell. We didn't think you were a threat to the  
6           operating system market at all. That's what they said in the  
7           government case with respect to Navigator and Java. They said,  
8           you all aren't operating systems. We're not worried about you  
9           all.

10           And what Judge Jackson found was, wait a minute, I  
11           see a pervasive course of conduct here. The internal Microsoft  
12           documents, the testimony indicates we did think these were all  
13           threats. These weren't all people who just by happenstance got  
14           sick, that's what Microsoft wants -- that's what Microsoft  
15           wants to say. They want to say, there were half a dozen people  
16           and they all, by coincidence, got sick at the same time, but  
17           there's no connection between the sickness that they -- or the  
18           disease they caught. And what Judge Jackson, I think, said  
19           with respect to the conduct directed at IBM and some of these  
20           others was, wait a minute, I see a corporate practice. I see  
21           acknowledgments within Microsoft documents --

22           THE COURT: Obviously you have to say that, because I  
23           assume if this comes in at all, it comes in under 404(b) --

24           MR. SCHMIDTLEIN: Intent.

25           THE COURT: Not intent, knowledge.

1 MR. SCHMIDTLEIN: Correct.

2 THE COURT: It's got to be, look, there were smart  
3 people at Microsoft, they saw exactly what this problem was and  
4 it's not because they -- it's not because they're bad people  
5 acting that way, it's because they saw it, they knew it and  
6 they -- relatively early stage for a relatively innocuous  
7 product, they want it.

8 MR. SCHMIDTLEIN: That's right. And it was -- it's  
9 not that this was some sort of accident that they took this  
10 conduct and there was this effect. Because they'll say, if we  
11 have a business justification then we win. Now, we don't  
12 technically agree, and we'll hear some argument on the  
13 instructions about that. But that's sort of their position.  
14 And our position is, wait a minute, this is going to be a  
15 credibility test. Do you have a business justification, or  
16 what was really going on here is a sort of pretextual  
17 justification, and conduct that was specifically designed to  
18 harm people in this middleware category or these applications.

19 And I think what Judge Jackson said, and which I  
20 think was appropriate, and it was a necessary part of his  
21 findings was, I'm looking at this conduct more broadly and I  
22 see an intent. I see a corporate practice. And I can look at  
23 that conduct because it does inform me, as I am sitting here  
24 balancing, is the business justification pretextual, is the  
25 conduct likely to harm competition. I am allowed to look at



1 Microsoft's intent. And the acts towards other people who are  
2 similarly situated -- and this was, I think, an argument that  
3 was raised to Your Honor at summary judgment, I think Microsoft  
4 argued this is very different conduct, you know, it's not the  
5 same. And I think Your Honor pointed out, I'm not quite sure  
6 this doesn't look like it's sort of the same type and nature --

7 THE COURT: Let me ask you this, because this does go  
8 to one of the general questions that I posed, this is looking  
9 at it from the point of view of trial on fairness. Number one,  
10 you're talking about offensive use of collateral estoppel. And  
11 that is perfectly legitimate, but it raises concerns of  
12 fairness. It would seem to me that in looking at this to draw  
13 the -- and recognizing it comes in intent and knowledge and one  
14 could argue about that, it seems to me that the cut that ought  
15 to be drawn is the things that clearly were the heart of Judge  
16 Jackson's decision, as affirmed by the D.C. Circuit, was  
17 Netscape and Sun. And that you may get collateral estoppel on.

18 On the others, if you want to produce evidence of  
19 related -- it's not -- it's clear that that was necessary to  
20 his decision. And that -- and you may even make the decision  
21 it's not worth bringing in, but at least in terms of  
22 cross-examination, if you do bring them in and Microsoft just  
23 wants to cross-examine some of these people and say, look, you  
24 know, to defend the same things that it tried to defend in  
25 D.C., isn't that the fairest way to proceed?

1 MR. SCHMIDTLEIN: Well, trying to, as you just  
2 pointed out, trying to come up with the correct demarcation  
3 line between --

4 THE COURT: Pretty easy, Sun, Netscape and everybody  
5 else.

6 MR. SCHMIDTLEIN: Our position is intent, measuring  
7 Microsoft's intent was a critical and necessary part of Judge  
8 Jackson's analysis.

9 THE COURT: I understand. I do. That's perfectly  
10 legitimate.

11 MR. SCHMIDTLEIN: In terms of sort of other  
12 categories of evidence, I think that leaves us, again, I mean,  
13 there's a dispute between the parties about -- although, I  
14 think a lot of it is based upon materiality with respect to  
15 exactly what conduct by Microsoft formed the bases for the Sun  
16 and the Netscape conduct. I mean, I -- I don't see how they  
17 can cabin -- I mean, they, of course, say none of its material,  
18 nothing with respect to Sun, nothing with respect to Navigator  
19 comes in at all because it's all irrelevant. Our position is,  
20 Judge, we've already crossed this bridge several times; in your  
21 summary judgment opinion, in the 4th Circuit's opinion with  
22 respect to liability. It couldn't be clearer that the impact  
23 of this conduct on the market as a whole, and looking at all  
24 ISVs, is obviously appropriate. So this has got to be  
25 material.

1           But we've tried to cabin, I think, pretty  
2 specifically, the conduct that formed the bases -- there's 400  
3 and some odd findings of fact. I think the findings of fact  
4 that we've targeted with respect to the Sun and the Netscape  
5 conduct are, you know, largely cited by the D.C. Circuit. And  
6 I think that's another, I think, sort of road mark or guide  
7 post for Your Honor. And I know we've include an appendix in  
8 at least one of our papers that sort of tries to X out sort of  
9 which were cited by the D.C. Circuit, you know, in affirmance,  
10 which were on the remand, things like that. I think we largely  
11 hang our hat on the D.C. Circuit's affirmance opinion. I know  
12 we do in some cases cite to the fact.

13           THE COURT: You largely do, but there are some  
14 findings that are made by Judge Jackson which he makes which  
15 really -- as I understand it, on the issue that he's affirmed  
16 on by the D.C. Circuit, even if they don't refer to a finding,  
17 if it's essential to his finding, in your view --

18           MR. SCHMIDTLEIN: Correct. Exactly. It doesn't have  
19 to be cited by the D.C. Circuit.

20           THE COURT: But if it is, then you win.

21           MR. SCHMIDTLEIN: But if it is, then I think  
22 that's -- that's a good place to sort of take some of those off  
23 the table and then we can move on to others.

24           THE COURT: I'm sure you all have, but what I have  
25 not analyzed is, suppose I cherry pick and some findings here

1 and some findings there, if I just rely on the D.C. Circuit you  
2 may have to produce a witness any way, because the finding  
3 itself isn't going to be enough. I just don't know. I'm sure  
4 you've looked at it from a trial preparation standpoint, I  
5 haven't.

6 MR. SCHMIDTLEIN: Well, I think, Your Honor, if we  
7 get the findings that we're look for, sort of that under --

8 THE COURT: If you can promise me if I grant your  
9 motion in all respects it will be a two week trial then you  
10 win.

11 MR. SCHMIDTLEIN: Two weeks?

12 THE COURT: I'm only joking.

13 MR. SCHMIDTLEIN: I don't think they're going to --  
14 they're going to take longer than two weeks. No, but I think  
15 it will, all joking aside, I do think it will sort of  
16 streamline this, because let's face it, a lot of these facts  
17 are bases for expert testimony on both sides. I mean, it's not  
18 like I'm going to be calling in a ton of Novell witnesses who  
19 are going to speak for days and days on Microsoft's conduct on  
20 Java. Now --

21 THE COURT: It's going to be the balls on the  
22 Christmas tree, as Mr. Tulchin would say.

23 MR. SCHMIDTLEIN: It's a Christmas tree that they  
24 constructed so --

25 THE COURT: No, no, he wouldn't say that. He would

1 say it's a professional testifier.

2 MR. SCHMIDTLEIN: Well, they've got some professional  
3 testifiers too.

4 THE COURT: I'm sure.

5 MR. SCHMIDTLEIN: I'm sure you won't be surprised to  
6 learn. So any way, you've got these Sun findings of fact. We  
7 can slog through these, but I think findings of fact with  
8 respect to Sun and Navigator are largely referred to by the  
9 D.C. Circuit.

10 And then I think you've got the last category, if you  
11 will, of facts relates to, I think at the very end we have a  
12 number of facts where Judge Jackson talks about the effect of  
13 Microsoft's conduct on consumers. And again, this sort of goes  
14 to showing sort of harm to competition, impact on consumers, is  
15 a critical and necessary finding here. It is a -- it is a  
16 absolutely necessary part of establishing an antitrust  
17 violation. And so to say that those are somehow not material  
18 or they were not critical and necessary, again, from our  
19 perspective I think we've got findings of fact 409 through 412,  
20 you know, I think those are absolutely appropriate.

21 THE COURT: I haven't looked at the wording,  
22 depending upon how the wording, does that not raise a 403 issue  
23 because this is not a consumer case? Obviously, it's essential  
24 to the finding of, you know -- this is -- you know I don't want  
25 to prejudice the jury by you know saying, oh, we were screwed

1 by Microsoft as consumers, that's not what the case is about.

2 MR. SCHMIDTLEIN: No, but I think, though, the impact  
3 of the conduct -- I mean, as Your Honor well knows, conduct  
4 that simply harms a competitor, as opposed to harming  
5 competition, is not a violation of the antitrust laws. And one  
6 of the proxies for examining whether there's been harm to  
7 competition you can look at, you know, did it exclude a  
8 competitor from the competitive process, did it lower product  
9 quality. Here, I think these findings of fact talked about the  
10 fact that Microsoft's conduct resulted in products that were  
11 not necessarily what consumers wanted. It wasn't that sort  
12 of -- it wasn't directed at sort of consumers were overpaid or  
13 consumers were personally out money because of some harm. In a  
14 consumer case, like some of the cases you did have, where these  
15 *parens patriae* cases saying, you know, well, consumers who  
16 supposedly paid more for Windows computers because of all  
17 this.

18 THE COURT: Which they're long gone.

19 MR. SCHMIDTLEIN: Yes. But I think what is  
20 appropriate here is, sort of harm to the competitive process,  
21 one of the indicia of that is did it result in products that  
22 met consumer demand? And were these things what consumers  
23 wanted? And I think that is an appropriate -- none of these  
24 findings of fact say, consumers wound up spending \$10 --

25 THE COURT: I frankly have not looked at the findings

1 with that in mind.

2 MR. SCHMIDTLEIN: Sure.

3 THE COURT: It does seem to me that there is a  
4 potential 403 issue.

5 MR. SCHMIDTLEIN: So again, I think, Your Honor,  
6 those are sort of the broad brush issues that we're concerned  
7 about. I think it would be -- I understand Your Honor's  
8 inclination to postpone some of the materiality discussions,  
9 because you are absolutely right, they're wrapped up in jury  
10 instructions, they're wrapped up in motions in limine.

11 THE COURT: They're wrapped up in everything. I  
12 don't think it's fair for me to opine on all of that, and I'm  
13 not prepared to opine on that until I've seen all the briefing  
14 on the motions in limine.

15 MR. SCHMIDTLEIN: All right. Well, those are sort of  
16 the high-level issues. Again, if Microsoft wants to slug this  
17 out finding by finding.

18 THE COURT: Why don't we do that and then we'll  
19 decide whether to go finding by finding. Mr. Tulchin.

20 MR. TULCHIN: Good morning, Your Honor.

21 THE COURT: You going to thank us for getting the Sox  
22 out of the series or -- maybe you ought to -- the Rays have a  
23 much better chance of beating --

24 MR. TULCHIN: That's why I'm always neutral about the  
25 opponent. Who knows. I'm just happy the Yankees are there.

1 And I do want to thank Baltimore, because it was very exciting  
2 if nothing else, very exciting ending to the game.

3 THE COURT: The most exciting baseball we've had in  
4 about 20 years.

5 MR. TULCHIN: Well, apparently Buck Showalter said  
6 this authored good things for next year.

7 THE COURT: Would be nice. Although it was supposed  
8 to be this year with all this great new pitching, who's now  
9 hurt.

10 MR. TULCHIN: May it please the Court, Your Honor,  
11 David Tulchin for Microsoft. A couple of preliminary things,  
12 Your Honor, before I get into the points that I'd like to  
13 discuss. I do have a number of them to make, if I may. The  
14 first is that I think it's very revealing that what Novell's  
15 counsel just did is to attempt to bring the Court back to where  
16 you were in 2002, by arguing that particular findings, I'll  
17 just take 409 to 412 as an example, are relevant to our case,  
18 and therefore, collateral estoppel should apply. And, of  
19 course, that's not right, Your Honor. The findings have to be  
20 critical and necessary in the first case before one can even  
21 consider materiality in the second.

22 And on critical and necessary, Your Honor, it's very  
23 clear from the 4th Circuit's opinion in 2004, that what that  
24 standard means, and the 10th Circuit standard is no different,  
25 all agree, that the judgment in case --



1 THE COURT: We are agreed that I should apply 10th  
2 Circuit law?

3 MR. TULCHIN: Yes, Your Honor, in every respect.

4 THE COURT: I just wanted to --

5 MR. TULCHIN: In every respect, the case has been  
6 remanded to the district of Utah, 10th Circuit law applies.

7 THE COURT: So I can't go floating around the Federal  
8 Courts finding what I like best.

9 MR. TULCHIN: No, I don't think so, Your Honor.

10 MR. SCHMIDTLEIN: If it helps us you can.

11 MR. TULCHIN: To go back a step, Your Honor, what the  
12 4th Circuit said, I think everyone agrees 10th Circuit law is  
13 the same, 1st Circuit law is different, but 10th Circuit law is  
14 the same, is that the judgment would fall if the fact in  
15 question were removed. That's what essential, necessary, and  
16 critical mean, that the judgment in case No. 1 would fall.

17 And let me just give the Court a couple of examples  
18 of collateral estoppel. Analogies, Your Honor, are always  
19 flawed. There's no perfect analogy other than the facts of the  
20 particular case. But if Smith is a defendant in an automobile  
21 accident case, and the Court -- there's no jury -- the Court  
22 makes findings of fact that include that Smith -- by the way,  
23 the claim, of course, is that Smith was driving his car  
24 negligently or recklessly. And there's a finding that says  
25 that Smith was exceeding the speed limit. And a second finding

1 saying that he went through the stop sign just before the  
2 crash. In a second case there would be collateral estoppel on  
3 neither of those findings.

4 That's what the 4th Circuit said, using the Ritter  
5 case as an example, it's 355 F.3d 322 at 328, that if the  
6 judgment in the prior case is supported by either of two  
7 findings, neither finding can be found essential to the  
8 judgment. That was a quote, Your Honor, the sentence I read.  
9 That if the judgment is supported by ether of two findings  
10 neither can be essential.

11 Again, analogies are always imperfect. But if, in  
12 the Smith case, the automobile accident case, there was a  
13 finding of fact that Smith the driver, was wearing shoes stolen  
14 from Bergdorf Goodman, I'll use a New York store as an example.  
15 And the judgment rested on the negligent or reckless operation  
16 of the motor vehicle that caused the injuries in the crash. In  
17 the second case where the theft of those shoes might be not  
18 only relevant, the case might turn on it, it might be a case  
19 about the theft of the shoes. That finding would clearly not  
20 have been essential in the first case.

21 What Novell is doing is mixing and matching these  
22 findings. As to some of them they say this is like the shoes,  
23 conduct against IBM and Intel, all sorts of other competitors,  
24 conduct involving OEMs, they say it's relevant to their case,  
25 we say it is not. We say very clearly it is not. But the

1 Court need not reach that. Collateral estoppel can be applied  
2 even before you get to questions of fairness, only if the  
3 finding is essential, meaning the judgment would fall. The  
4 judgment would evaporate in the absence of that finding.

5 Now, Your Honor, I also, of course, need to note, I  
6 won't spend a lot of time on this, that Novell has changed its  
7 position from when it asked for collateral estoppel the last  
8 time. They have many, many, many more findings. They want  
9 collateral estoppel as to conduct against other companies, not  
10 Novell, in a different time period, and they have not been able  
11 to refute that, involving different products, other companies.

12 And so what's going on here, Your Honor, and this is  
13 the sort of overriding point on collateral estoppel, though  
14 there is some very other important points as well, is that what  
15 Novell is seeking is jury confusion, is to convey to the jury  
16 the very idea that because -- again, analogies are imperfect --  
17 because a company discriminated once in employment, let's say  
18 on the basis of gender, against one employee, in the time  
19 period 1997, that a second case involving employment  
20 discrimination in 1994, that in that second case one could get  
21 collateral estoppel that the defendant was a discriminator,  
22 that the defendant's justification for firing, for laying off  
23 the employee in the first case involving 1997, was pretextual.  
24 That's how the Court ruled in that bench trial. And in the  
25 second case, a jury case, we want all those findings about the

1 pretext, so that we can convince the jury, without reference to  
2 time period, that the defendant has pretextual justifications  
3 for its, we say, wrongful conduct.

4 THE COURT: Now, this really goes to the question of  
5 the materiality of the facts as to which they seek collateral  
6 estoppel. But I might as well know your position now, because  
7 it seems to me different from that. It seems to me that here  
8 there is a recognized exception of intent and knowledge. And  
9 the fact of the matter is, Microsoft had very smart people who  
10 knew exactly what was going on. And the fact that they later  
11 directed conduct against other people because of a perceived  
12 threat by middleware, that may very well be relevant even if it  
13 occurred later, to the fact that they knew exactly what the  
14 threat was. It's not simply a question of similar conduct, you  
15 were bad once it means you were bad again, which would be  
16 excluded by 404(b), but it goes to intent and knowledge.  
17 Tentatively I'm with Novell on that, but subject to hearing  
18 other arguments, because it seems to me to make sense.

19 MR. TULCHIN: Your Honor, that's completely wrong.  
20 It's not collateral estoppel. Again, if we're talking about  
21 intent, and that's what the Court was referring to, Microsoft's  
22 intent, there is no finding about intent in the government case  
23 that was essential, that was critical or necessary to the  
24 judgment. The case was not about intent. The Court of  
25 Appeals, in fact, for the D.C. Circuit made very clear that

1 intent alone is nothing. What was critical to the judgment was  
2 conduct directed at Netscape and Java.

3 And to say that intent is relevant here, we're back  
4 to the analogy I think that I made before, is missing the key  
5 point about collateral estoppel, Your Honor. You don't get to  
6 the question of whether this is relevant evidence about intent,  
7 a finding in a bench trial, when you are now about to try your  
8 jury case, unless you find that the criteria for application of  
9 collateral estoppel are met in the first instance.

10 And there is no finding about intent, Your Honor,  
11 that was necessary or critical to the judgment. What -- this  
12 case is very, very different, Your Honor --

13 THE COURT: Again, you all know the antitrust law  
14 issues better than I do. But, I mean, conduct obviously is  
15 what one finally looks to, but isn't intent to some extent  
16 important, if you're simply doing something to -- in an  
17 antitrust context, if you're simply trying to have a -- if you  
18 have your monopoly position because you have a better product,  
19 then your intent is to simply have a better product. If, in  
20 fact, you engage in conduct which is unrelated to the  
21 superiority of the product it seems to me -- I guess, what I'm  
22 saying is it seems to me that although the focus was on  
23 intent -- or conduct, intent necessarily was part of the  
24 government case.

25 MR. TULCHIN: Again, Your Honor, I'm not saying

1 intent is not relevant, that's a different question. If it's  
2 relevant and Novell needs to prove it, they should go ahead and  
3 prove it.

4 Your Honor, we're back to the analogy, if I could try  
5 again. There's an employment discrimination case against a --  
6 I'm sorry, brought by a woman, who alleges gender  
7 discrimination by Corporation X. And she says that she was  
8 fired in 1997. The corporation has some business justification  
9 for firing her. And in a bench trial there are findings that  
10 the justification was a pretext. A second case is brought  
11 years and years later because of some tolling statute, by a  
12 woman claiming that the same company discriminated against her.  
13 The company has a business justification. Maybe one very  
14 similar to the one offered in the first case about 1997.

15 Yes, in the second case the female former employee  
16 may need to offer proof similar to the proof that was offered  
17 in the first case about a later time period. That does not  
18 mean -- there has never been a case where collateral estoppel  
19 is applied in case No. 2 concerning case No. 1, for the very  
20 reason, Your Honor, that what the jury in the second case --  
21 and it's so important that the first case here was a bench  
22 trial and the second case a jury. I think Novell understands  
23 that its best chance of winning is confusion of the jury about  
24 the time period, about the products, about who the conduct was  
25 directed at.

1           And let me cite Your Honor to a couple of cases where  
2 the principle to which I'm referring was applied exactly in the  
3 way I'm describing. There's cases, Your Honor, two cases that  
4 were brought on the heels of a DOJ proceeding against cigarette  
5 companies. There was a case called United States against  
6 Phillip Morris, sort of similar to United States against  
7 Microsoft. That's 449 F.Supp.2d 1, from the District of  
8 Columbia in 2006. And the Department of Justice prevailed  
9 against Phillip Morris. The decision in the DOJ case, a bench  
10 trial, had thousands of findings of fact. And Your Honor here  
11 there are probably thousands too, there are 412 numbered  
12 paragraphs, but of course as the Court knows, many of these  
13 paragraphs have five sentences maybe more.

14           THE COURT: Where do those findings come from. Judge  
15 Jackson was either terribly conscientious or he signed off on  
16 findings of fact proposed by the parties. Do you know?

17           MR. TULCHIN: I don't exactly, Your Honor. But they  
18 are very, very long.

19           THE COURT: They're as long as a New Yorker article.

20           MR. TULCHIN: And they probably include thousands if  
21 you count them up separately. So to go back to *Grisham*, this  
22 is 670 F.Supp.2d 1014, a case from the Central District of  
23 California decided in 2009. Maybe it's important that it was  
24 after the 4th Circuit case, I'm not sure it was. And one of  
25 the things in the *Grisham* case that the District Court said was

1 that collateral estoppel issue preclusion was particularly  
2 inappropriate in this context where the first trial was a bench  
3 trial and the second trial was to be a jury trial. Precisely  
4 because of the danger of jury confusion.

5 There's a second case from the District of Maine,  
6 it's *In Re: Light Cigarettes*, 691 F.Supp.2d at 239. And that  
7 second case, decided in 2010, Your Honor, last year, that  
8 second case also relied on the same government case against the  
9 cigarette companies. In that case the plaintiff asked the  
10 Court to collaterally estop makers of cigarettes on something  
11 like a thousand findings. And the Court noted that some of  
12 them, quote, "Certain specific findings are arguably relevant  
13 to liability in the current case." But made the point of  
14 course, that it was up to the plaintiff, not the defendant or  
15 the Court, it was plaintiff's burden to establish, quote, "How  
16 these findings were central to the prior decision."

17 Judge Woodcock in Maine found that the plaintiffs had  
18 not shown that each finding, each one alone, was outcome  
19 determinative or essential for the prior judgment. Same point  
20 I made earlier. And then, finally, expressed his concern that  
21 the number and nature of the findings that plaintiffs had asked  
22 the Court to collaterally estop defendant on, would confuse the  
23 jury and not achieve the kind of efficiencies and savings of  
24 time at trial that the doctrine was intended to promote.

25 So we have a very similar situation here, Your Honor.



1 And I guess I agree with Mr. Schmidtlein that going through  
2 each of them, each finding as to which they now ask for  
3 collateral estoppel, might be tedious. I'm happy to do it if  
4 the Court wants. But just some examples that I thought would  
5 be helpful.

6 THE COURT: Before you turn to that, again, I'm just  
7 trying to envision the trial. I mean, I understand you have  
8 objections which may be appropriate to at least some of their  
9 experts. In terms of jury confusion, isn't -- I mean, I would  
10 assume that the real effect of these stipulations is going to  
11 be that expert cans rely upon them, experts will be testifying.  
12 I'm not saying that makes the inquiry any less, you know, any  
13 less rigorous. I mean, I think it's still an important point.  
14 But in terms of the jury confusion issue, isn't what really is  
15 going to be -- isn't what this is the way of streamlining what  
16 experts can base their opinions on, as a practical matter?

17 MR. TULCHIN: No, Your Honor, it's not -- what they  
18 want is not to allow their experts to rely on it. I'm  
19 anticipating, I'm not saying that I agree that he should be  
20 able to do it, but I'm anticipating that Professor Noel will  
21 try to make reference to the conduct in the government case in  
22 any event. What they want is the judicial imprimatur of Your  
23 Honor's instructions that the United States judicial system has  
24 already acted in a way that's highly relevant to the Novell  
25 case. And these findings are now binding on both sides. Of

1 course, if they're binding on both sides then they can't put in  
2 testimony from Professor Noel about --

3 THE COURT: That's one of the pending motions.

4 MR. TULCHIN: Right.

5 THE COURT: I mean, I agree with you, from a 403  
6 perspective I should not be putting undue weight on the federal  
7 judiciaries behind these, but it seemed to me, as a practical  
8 matter, that these would come in. I wouldn't instruct the jury  
9 on them, I mean, my God, they couldn't stand it. That they  
10 would be there for use -- appropriate use during the course of  
11 litigation, either in terms of argument or in terms of experts  
12 relying upon them. And, indeed, they would never be  
13 independently read to the jury. They would be there so they  
14 could be referred to. They would be in black and white. But  
15 they probably would be in evidence because they would be the  
16 substitute -- I don't know -- frankly, I don't know whether I  
17 would let it go back to the jury or not, that's a whole  
18 different question because they can't go back with testimony.  
19 But they would be in evidence for use.

20 MR. TULCHIN: Your Honor --

21 THE COURT: Again, I'm not -- this really goes on to  
22 the issue of jury confusion --

23 MR. TULCHIN: I understand.

24 THE COURT: -- you know, the Federal Court has found  
25 this, so this is all -- so Microsoft's --

1 MR. TULCHIN: Your Honor, just on that point, if I  
2 may, I hope I'm not wandering afield of your question, but just  
3 on that point, if there is a particular finding as to which  
4 there is collateral estoppel, and it's read to or given to the  
5 jury in some fashion, well, then clearly Novell's expert can't  
6 argue about what he thinks the conduct was about, or argue what  
7 intent lay behind it. Once there's collateral estoppel that  
8 means, presumably, that Microsoft's hands are tied on that  
9 fact. And, of course, it's completely contrary to the doctrine  
10 to then allow the plaintiff's hands to be untied. And to allow  
11 the plaintiff to do whatever it wishes to go beyond the literal  
12 words of the finding. And literally, I'm -- I don't believe  
13 there's ever been a case that permitted that.

14 But if I may also go back, Your Honor, this is very  
15 closely related. Many of the findings that are at issue on  
16 this motion, particularly the new ones that were added this  
17 year to what Novell was seeking, actually deal with issues that  
18 the D.C. Circuit reversed on or said there was no liability on.  
19 And Mr. Schmidlein said, if I understand this, well, those  
20 issues are relevant in the second case, in our case, because  
21 they go to intent.

22 THE COURT: He understands that they have to have  
23 been necessary to the D.C. -- to the D.C. finding, I didn't --

24 MR. TULCHIN: Well, just by way of example, findings  
25 of fact 90, 91 and 92, Novell says they should get collateral

1 estoppel on these findings about the meeting with Netscape.  
2 And the D.C. Circuit said in its opinion that these were  
3 examples of findings for which Judge Jackson did not ascribe  
4 any liability. There are a whole number of them; 93 to 95, 99  
5 to 102, 115, 116, 119 through 125 and 132. These were used by  
6 Judge Jackson. And the D.C. Circuit again said that those  
7 findings were not a basis for imposing liability. And we've  
8 cited the relevant pages of the opinion in our brief.

9           The whole course of conduct theory that Mr.  
10 Schmidlein was talking about, a number of findings that they  
11 now request were used by Judge Jackson in deciding that  
12 Microsoft had engaged in an illegal course of conduct. The  
13 D.C. Circuit said, it's in our briefs, Your Honor, I don't have  
14 the page number, that there was no liability -- Ms. Bradley is  
15 giving it to me, page 78. The course of conduct section of the  
16 District Court's opinion contains, with one exception, only  
17 broad summarizing conclusions. They talk about specific acts.  
18 And then it says we reverse the District Court's conclusion  
19 that Microsoft's course of conduct separately violates Section  
20 2 of the Sherman Act. Thank you. I couldn't find the page,  
21 but thankfully Ms. Bradley had it, page 78.

22           So I appreciate the argument that a number of these  
23 go to a course of conduct. I also appreciate the argument,  
24 although we have differences with Novell about this, that  
25 Novell can try to prevail in this case by pointing to conduct

1 in a different time period against different companies. We  
2 think that's wrong. But even if we're -- if we lose on that,  
3 Your Honor, even if Your Honor comes out differently, the fact  
4 that the course of conduct findings might be relevant to this  
5 case, doesn't mean that collateral estoppel can be applied.  
6 When at page 78 the district -- the D.C. Circuit said, we  
7 reverse Judge Jackson on the course of conduct conclusion that  
8 he made. So all those findings have to go. They weren't  
9 essential to the judgment as affirmed on appeal.

10 THE COURT: What was essential?

11 MR. TULCHIN: Your Honor, at the very most the  
12 findings at issue now, today in this motion, that are essential  
13 are the 16 findings that we identified; 2, 4, 6 to 10, 30, 31  
14 and 33 to 39. I should say, Your Honor, that the five findings  
15 to which the Court pointed in your opinion in 2008, December  
16 2008, the other five findings of the 21 that you then  
17 identified are out of the case. I don't think there's any  
18 dispute about this because they went to Count 6. The count  
19 about exclusion from the OEM channel of distribution.

20 Just -- I'll be done in just a few minutes, Your  
21 Honor. I appreciate your patience. I'm happy, of course, to  
22 go through any specific finding if the Court wants. But I do  
23 think there are some important overriding issues of principle  
24 that separate Novell and Microsoft on this point.

25 Your Honor, there was an implication in something

1 Novell said in one of its briefs, that what we were trying to  
2 do here was to get the right at trial to relitigate Judge  
3 Jackson's findings. Well, there are two things that have to be  
4 said about that, because that sort of hangs over some of what  
5 counsel said today, that somehow would be unfair for Microsoft  
6 to be allowed to relitigate.

7 First of all, Your Honor, that of course is not the  
8 collateral estoppel, it's up to the plaintiff to meet these  
9 criteria. And secondly, and very importantly here, we don't  
10 want to litigate at all the findings of fact dealing with Intel  
11 and IBM and Apple, and all the other findings that Novell wants  
12 to put in, precisely so that the jury can be led to believe  
13 that the three acts at issue in this case, Novell set them  
14 forth I believe on page 3 of their opening brief in August, a  
15 couple months ago, in this case, last month.

16 The three acts are: Withdrawing support for the name  
17 space extensions, that was in October '94; not including in the  
18 final version of Windows 95 a custom print processor, which  
19 Novell says would have been good for them to have in  
20 Microsoft's operating system. Obviously -- I'm sorry for the  
21 editorial comment, but that's an act we think Microsoft was  
22 entitled to choose as to what its operating system would look  
23 like. And there's no requirement that it has to make one  
24 that's good for a particular competitor.

25 THE COURT: -- maybe enjoin you and make you put it

1 in there.

2 MR. TULCHIN: I'm sorry, Your Honor.

3 THE COURT: I'm joking, I said maybe ought to enjoin  
4 you and make you put it in the operating system, then you have  
5 to appeal him.

6 MR. TULCHIN: Right. I'm not sure that was  
7 considered at the time.

8 THE COURT: No, I don't think it was envisioned.

9 MR. TULCHIN: And then the third, Your Honor, was not  
10 making an exception for Novell to the requirements of the logo  
11 program.

12 Now, Novell has been very specific that those are the  
13 three acts on which their claim here depends. They say that  
14 they had products, it's Word Perfect and Quattro Pro that they  
15 were developing to run on Windows 95. And they also say that  
16 it was important to get those products out on the market pretty  
17 soon after Windows 95 was released, which happened to be on  
18 August 24th of '95. They say it was important to their  
19 business to get those products out quickly so that they could  
20 take advantage of the excitement in the marketplace caused by  
21 the release of Windows 95.

22 And they say that the three acts that Microsoft  
23 committed, first in October '94 deciding to withdraw support  
24 for these APIs, name space extension APIs; second, not making  
25 exception for Novell to the requirements of the logo program;

1 and, third, not including the custom print processor. And  
2 those acts took place around the first half of '95, those  
3 latter two. They say that that caused the delay in the release  
4 of their products.

5 Now, there are many issues at trial -- there will be  
6 many issues at trial about what caused the delay. We have  
7 evidence about why there was a delay as well. Of course we  
8 also dispute, very vigorously, that any of those three acts  
9 were anticompetitive or wrongful in any way. Even if the claim  
10 is deception, which is not an antitrust claim. But the point  
11 that I'm coming to Your Honor, and I'm concluding with this  
12 because I think it's so important --

13 THE COURT: Mr. Schmidtlein can tell me if I'm wrong,  
14 I assume what their case is going to be, subject to this new  
15 theory they have which we'll discuss next week -- and maybe  
16 it's not a new theory, I don't want to characterize it, you say  
17 it's a new theory -- that essentially their position is going  
18 to be, yes, these things were directed by Microsoft against us.  
19 They did it, Microsoft did it, because they saw the potential  
20 middleware threat that these products and maybe other  
21 products -- I don't want to get into that now -- posed.

22 And again, I'll hear from Mr. Schmidtlein, as I now  
23 understand the case, I assume that what it's going to be, and  
24 this requires me to be contrary to what I previously ruled, but  
25 I could be right, that we -- that this was antitrust conduct,



1 clearly, because it was, as indicated by the subsequent conduct  
2 that was exposed in the government case. That Microsoft's  
3 people were very smart, they know exactly what was going on.  
4 They saw a middleware threat, which was going to commoditize  
5 operating systems. And they delayed us. And as a result we --  
6 our product did not get to market and we suffered X amount of  
7 damages in this period. And they actually suffered it probably  
8 in the Quattro Pro and Word Perfect markets, I mean, that's  
9 where I've got to revisit what I said before. But I assume  
10 that's what this case really is going to come down to.

11 MR. TULCHIN: Your Honor, let's say that's correct.  
12 We don't agree that they can do that, but let's say they want  
13 to do that and the Court permits them to. That, of course,  
14 doesn't entitle them to collateral estoppel about events that  
15 took place later directed at other products and other markets.  
16 And in some ways other -- certainly other companies, in some  
17 ways other markets.

18 So it may be, Your Honor -- again, we don't think  
19 Novell should be permitted to do this, but let's say they are  
20 permitted, just for the sake of discussion, it may be that  
21 conduct against Netscape and Sun would be relevant to that  
22 theory. Just as in my employment discrimination case, where  
23 there was a bench trial about gender discrimination in 1997,  
24 the second trial involving discrimination in 1995, the  
25 plaintiff in that second trial might, under some circumstances,

1 have her equivalent to Dr. Noel, an expert, testify about  
2 employment practices at the company. So in the second trial  
3 about the earlier time frame, maybe an expert could testify  
4 about employment practices, including the practices that the  
5 company engaged in in a later time period. That would not  
6 entitle the plaintiff to get collateral estoppel about findings  
7 in the first case. That has not ever occurred.

8 Part of the reason it hasn't occurred, Your Honor,  
9 that a court doesn't do that, particularly in my example, is  
10 because in a jury case the risk that the jury will run away  
11 with what it sees as the imprimatur of the federal judiciary on  
12 these earlier findings, and the risk of confusion. And on that  
13 point, Your Honor, Novell -- these findings that they want to  
14 be applied, none of them, almost none of them that Judge  
15 Jackson wrote, refer even to any time period about when things  
16 occurred. And I infer, I hope not unfairly, that what Novell  
17 wants is for the jury to think that the events overlapped,  
18 which they did not.

19 THE COURT: That clearly can be taken care of by  
20 instruction.

21 MR. TULCHIN: Yes, it can, Your Honor. It can. But,  
22 again, now we're dealing with the difference between relevance  
23 in the second case. In my employment discrimination example,  
24 it might be, I don't want to concede that it is or it isn't,  
25 but let's say it is relevant --

1 THE COURT: I've known you for a long time and I've  
2 never known you to concede anything.

3 MR. TULCHIN: I conceded the table this morning, Your  
4 Honor.

5 THE COURT: You did, excuse me. That proves the  
6 rule.

7 MR. TULCHIN: Although I hadn't consulted with my  
8 lawyers on that, so maybe --

9 THE COURT: You had to withstand your own impulse.

10 MR. TULCHIN: Maybe I'll get criticized later for the  
11 table decision, Your Honor.

12 But to go back, Your Honor, again, if these are the  
13 three acts that supposedly hurt their products and also harmed  
14 the PC operating system market, by definition, as the Court  
15 decided on the motion for summary judgment, those acts have to  
16 be measured at the time. Those were the words the Court used.  
17 Injury to competition in the market, here the PC operating  
18 system market, can't get confused and jumbled up with respect  
19 to the time period. For Novell to win they have to show that  
20 those three acts caused harm to their products and caused harm  
21 to the competitive process, here in this different market, this  
22 adjacent market, the operating system market. And the acts  
23 that took place later could not have been part of the harm to  
24 competition in 1994 and 1995.

25 THE COURT: Excuse me, let me just ask you this,

1 because I've -- I think I know the answer, but it's a whole new  
2 concept. Microsoft is not taking the position that it did not  
3 have a monopoly in the operating system market for the time  
4 period involved in this case. But did, as it concedes, it has  
5 to, in the time found by Judge Jackson. Again, I just want to  
6 make sure my head is clear, that it did have a monopoly in the  
7 operating system market in the time frame covered by this case,  
8 didn't it?

9 MR. TULCHIN: Yes, Your Honor, it's a monopoly that  
10 was lawfully obtained as even --

11 THE COURT: That's a different question.

12 MR. TULCHIN: Even Novell's expert has testified that  
13 it was lawfully obtained. The question was, was it maintained  
14 through anticompetitive actions.

15 THE COURT: During the time --

16 MR. TULCHIN: But you're correct, Your Honor --

17 THE COURT: I just want to make sure.

18 MR. TULCHIN: We have not disputed that.

19 THE COURT: I didn't think you have.

20 MR. TULCHIN: We have said quite proudly --

21 THE COURT: -- same page.

22 MR. TULCHIN: We would say, quite proudly, Your  
23 Honor, we got there by virtue of competition on the merits.

24 But, Your Honor, sorry, I hope this isn't repetitive,  
25 to go back just a step, one of the problems with collateral

1 estoppel here is that there's an enormous risk, I really  
2 believe it's enormous that the jury will be led to conclude or  
3 to even speculate that harm to competition in the PC operating  
4 system market can be made out as an element of Novell's claim.  
5 It clearly is. And I know there's going to be a discussion  
6 about the instructions shortly.

7 But the jury will be able to speculate that Novell  
8 can make it out, Microsoft's conduct harmed competition in the  
9 PC operating system market, the conduct directed at Netscape  
10 and Sun. Of course, that took place later, had to do with  
11 other companies, and the relevant inquiry is harm to  
12 competition that flowed from the conduct about which Novell  
13 complains. That sort of hornbook law going back to the  
14 *Brunswick* case. The harm has to -- to competition has to flow  
15 from the conduct about which Novell complains.

16 If the Court applies collateral estoppel here to all  
17 these findings, none of which were necessary, the judgment  
18 wouldn't fall if finding 90 or 115 or one other were taken  
19 away. But if the Court were to do that, the risk here is that  
20 the jury is going to be led to believe that the Federal Courts  
21 have already decided this key issue. Did withdrawal of the  
22 name space extensions and the print processor and the logo, did  
23 that conduct harm competition in some other market, the PC  
24 operating system market. That's what Novell wants. They want  
25 the jury to come to that conclusion based on the government

1 case. That would be wrong and it's certainly not a legitimate  
2 use of collateral estoppel. Again, Your Honor, none of these  
3 findings are even essential.

4 And the cigarette cases emphasize the point, and we  
5 found this in other cases cited in our briefs as well, Your  
6 Honor. That the Federal Courts have been very, very cautious,  
7 I think that's the word the 4th Circuit used, in applying  
8 collateral estoppel with respect to findings from a bench trial  
9 to a second case where there's a jury, for exactly these  
10 reasons, Your Honor. Thank you.

11 THE COURT: Thank you, Mr. Tulchin. Mr. Schmidtlein.

12 MR. SCHMIDTLEIN: If I can do a Buck Showalter like,  
13 short, crisp and to the point, I'm sure I will not be as good  
14 as Buck would be. But a couple of observations from Mr.  
15 Tulchin's remarks. I'm sort of interested and pleased that  
16 Microsoft is now proudly embracing its monopoly power. It  
17 spent months and months and months litigating whether it had a  
18 monopoly in the operating system in the government's case. So  
19 I'm glad to see they've come around on that.

20 THE COURT: Perspectives change with time.

21 MR. SCHMIDTLEIN: And in terms of -- to hear this  
22 argument, what I'm hearing is none of the facts were necessary  
23 and critical. Each of these is sort of independently  
24 interesting, but you could sort of pull any one of them and the  
25 house would still stand. So nothing -- the facts they concede

1 don't -- under their view of the world, wouldn't be necessary  
2 and critical.

3 That can't be the law, that basically you get to come  
4 in and say, in an antitrust case, where the Court is directed  
5 by law to look at various indicia, various elements of conduct,  
6 and then at the end we lose the case because the district court  
7 says you engaged in this conduct, you had this intent, you  
8 had -- it had this effect. You look at all of the things this  
9 law says, and then you step back and say, ha, ha, we win, none  
10 of it's collateral estoppel because technically we think,  
11 although, we'll never know because nobody posed the question to  
12 Judge Jackson, and nobody posed the question to the D.C.  
13 Circuit, if you pulled one of these out then would the judgment  
14 fall or not? Nobody knows the answer to that question as to  
15 how the Court would react. So I find that to be --

16 THE COURT: Well, let me ask you this -- and I mean,  
17 I agree generally with you, but -- and this is almost a 403  
18 problem and would require a lot of work. And maybe it does  
19 have something to do with the providence of the findings, if he  
20 simply signed off on the government's findings. And I don't  
21 know where they came from. But somebody could look through the  
22 history of the case and find out, I haven't.

23 I mean, I don't think that I buy -- I mean, when I  
24 saw the motion in limine I thought it meant that if I give you  
25 collateral estoppel on what was done in Netscape and Sun, you

1 can't bring in a witness from Netscape and Sun to testify about  
2 those very facts, which I'm inclined -- I'm sympathetic to that  
3 argument. I'm less sympathetic when an expert can't rely on  
4 that. And the evidentiary detail aspect of the -- on the paper  
5 at least, Microsoft's paper, I wasn't going to -- I'm not  
6 intuitively prepared to accept it.

7 But I guess my question is, it's a lot of deep  
8 background for the question, how much would your expert need to  
9 have to express his or their opinion, there may be more than  
10 one, in terms of more generalized findings, taking away some of  
11 the editorializing that may be in the findings of fact. I mean  
12 to some extent accepting -- I don't -- accepting some degree of  
13 abstraction, sort of the 19th century description of a sex  
14 scene as opposed to the 20th century description of a sex  
15 scene, that and then your -- it may not be possible. But  
16 instead of trying to work out all this collateral estoppel  
17 issue to say, look, we can agree on essentially this.

18 Now, Microsoft can object to it on other grounds, but  
19 essentially in terms of the significance of the government case  
20 is, in this period Microsoft identified middleware as a threat  
21 to its monopoly in the operating system market. That it took  
22 specific acts to -- which were so -- and were so found in the  
23 D.C. Circuit, in the government case, to dispel the or to  
24 counter the middleware threat. That really is what the case is  
25 all about. And that we can argue about whether it's relevant



1 or not in this case. I mean, I understand your position and  
2 I'm tentatively prepared to think you're right.

3 But there is a lot of -- to what extent could there  
4 be a level of abstraction in what happened in the government  
5 case that would be really all that you need as the -- as a  
6 premise for your expert's testimony.

7 MR. SCHMIDTLEIN: Well, I will --

8 THE COURT: I just -- it's not fair to ask you that  
9 because you don't know that. But it gets away with this point  
10 that Mr. Tulchin makes which may or may not have validity, I  
11 might have to go back and read the cases, if you take out one  
12 fact that the judgment wouldn't fall. But it would certainly  
13 do away with that, because we know that the D.C. Circuit found  
14 and what is critical in this case it found that middle -- that  
15 Microsoft spotted the middleware problem and took actions to  
16 try to overcome it. And that really is the significance of the  
17 government case here.

18 MR. SCHMIDTLEIN: Again, I think --

19 THE COURT: And I'm just wondering if there's some  
20 way, other than giving collateral estoppel effect to everything  
21 that was found, find the monopoly power, find this, find this  
22 and find that they did that.

23 MR. SCHMIDTLEIN: Your Honor, I think the problem --

24 THE COURT: And, again, I'm just trying to have a  
25 fair trial.

1 MR. SCHMIDTLEIN: The problem is, as you saw at  
2 summary judgment, and they're trying it here again today, and  
3 they're trying it in other motions, they want to set up a world  
4 where the jury will hear only about conduct directed at Novell.  
5 And then they want to go back to Dr. Noel's -- that back and  
6 forth with Dr. Noel where he said there was a question about  
7 well, if there was -- if you could sort of create this  
8 hypothetical market where Microsoft didn't do anything else  
9 wrong --

10 THE COURT: But that's a different issue.

11 MR. SCHMIDTLEIN: Well, I think that's the issue  
12 they're arguing about here today.

13 THE COURT: Maybe it is, but I think -- suppose I'm  
14 not prepared to let them do that, suppose I'm prepared to say,  
15 look, it's perfectly relevant to say even though it happened  
16 later, these were smart people and they saw exactly what the  
17 problem was, and they did these three things which have been  
18 highlighted in summary judgment. Because all of a sudden  
19 somebody woke up one morning and they said, my God, this is a  
20 real threat to our monopoly in the operating system market and  
21 we're going after it. And just like later they went after  
22 Netscape and Sun.

23 And to the extent you want to present testimony --  
24 there may be collateral estoppel, they went after IBM and  
25 things for the same reason. That they knew exactly what they

1 were doing, they saw exactly what the threat was, and that,  
2 although it was nascent at this time, and although probably  
3 turned out, my guess is, that it probably wasn't that much of a  
4 threat. In fact, I think maybe your expert concedes that, but  
5 I don't know that. That's my recollection of summary judgment.  
6 The point is that they took anticompetitive action to  
7 unlawfully preserve their monopoly. And they did it. And as a  
8 result you all were hurt, because your -- because your two  
9 software programs were not marketing in a time that would have  
10 brought you revenues during the relevant time frame.

11 MR. SCHMIDTLEIN: No, I think, again, the number of  
12 findings of fact that we're talking about here, at least as  
13 directed to -- if you focus just on Sun, Java, the acts, and  
14 the acts with respect to Netscape, I don't think they're as  
15 enormous as Mr. Tulchin suggested. I think you do need some  
16 amount of detail. You can't just say, they took some  
17 unidentified action and it violated the law.

18 THE COURT: No, you need a little meat on the bones.

19 MR. SCHMIDTLEIN: Because I think, again, what our  
20 expert, I think, is going to have to come in and rebut -- and  
21 again, they like to characterize this is all our fault because  
22 we want to mislead and confuse the jury. They want the jury to  
23 only hear about the conduct directed at Novell. And then  
24 they're going to step back and say this didn't harm  
25 competition. This by itself -- dr. Noel concedes this by

1     itself couldn't have done anything. And we say, well, wait a  
2     minute, the market at the time was infected.

3             And the timing issue is not correct. They bundled --  
4     they bundled Internet Explorer for the first time in Windows  
5     95. The exact same operating system that they harmed us on.  
6     They -- some of the acts were taken --

7             THE COURT: Yeah, I have not analyzed the time --

8             MR. SCHMIDTLEIN: So the notion, and given the D.C.  
9     Circuit's position on nascent threats and this time, it takes  
10    time for these things to develop. The timing issue is just a  
11    complete red herring. I'm sympathetic to what Your Honor is  
12    saying. I think we do need enough meat on the bones so that  
13    the jury can understand not only what the conduct was but how  
14    that conduct harmed competition, because it is going to be  
15    this -- the state of the market and the competition in the  
16    market that might have existed at the time but for their  
17    conduct, which is going to be an important part of finding, you  
18    know, was there -- was the harm directed at Novell, did it  
19    impact this sort of ecosystem, if you will, that also included  
20    anticompetitive conduct directed at others.

21            So I think it's a fair question. I will confess I  
22    haven't analyzed it specifically.

23            THE COURT: No, no, assuming it's a fair question,  
24    it's not fair to expect an answer.

25            MR. SCHMIDTLEIN: With respect to your point about

1 streamlining the expert's testimony, I think that's exactly  
2 what this is about. I mean, this conduct and these types of  
3 facts are largely, I think -- I mean, I'm sitting here trying  
4 to think through all the witnesses, that's largely what we're  
5 talking about. This is largely to avoid us having to dump in  
6 video deposition of Sun witnesses and Netscape witnesses and  
7 everything else, so that our experts -- and the notion that our  
8 experts can't rely on this, I think is absolutely wrong.

9 THE COURT: No, no, but as you know, I'm suspicious  
10 of experts running away with the courtroom.

11 MR. SCHMIDTLEIN: I understand, I have advised my  
12 co-counsel --

13 THE COURT: And I would not want them to -- somehow  
14 an expert to say -- I mean, I agree what is said is important,  
15 but I wouldn't want an expert to say, "As Judge Jackson found,"  
16 and sort of editorialize a portion of the finding as to which  
17 I've given collateral estoppel. I mean, that is a -- in terms  
18 of the way the trial's conducted, that's a fair concern.

19 MR. SCHMIDTLEIN: Yes. No, I absolutely agree. Just  
20 a couple of other small points. The -- Mr. Tulchin talked  
21 about sort of all these new facts. And he claims that there  
22 are a bunch of facts relating to OEMs that there was a reversal  
23 in the D.C. Circuit on -- I'm sorry, that Your Honor found that  
24 facts relating to OEMs only relate to Count 6, therefore, those  
25 facts have to come out. And anything having to do with --

1 footnote 16 of Your Honor's summary judgment opinion, where you  
2 rattled off the various acts that are sort of relevant and go  
3 to monopoly --

4 THE COURT: -- relevant to Section 2 violation.

5 MR. SCHMIDTLEIN: Correct. "It does necessarily  
6 follow that those agreements do not amount to anticompetitive  
7 conduct or at least evidence of anticompetitive motives under  
8 Section 2." So we obviously disagree with Mr. Tulchin's  
9 attempt to sort of cabin that evidence.

10 In terms of, he says all the conduct directed at  
11 Intel and IBM and others, this was sort of the course of  
12 conduct evidence that was reversed by the D.C. Circuit. Again,  
13 I don't read what Judge Jackson -- that this was the course of  
14 conduct evidence. The D.C. Circuit specifically said if course  
15 of conduct, Judge Jackson never really identified what that  
16 conduct was. And what Judge Jackson found was they had a  
17 corporate practice of engaging in this. This wasn't just I'm  
18 finding liability for kind of everything and the kitchen sink.  
19 He took a look at this conduct and said, wait a minute,  
20 Microsoft, I can't just so easily swallow all of your  
21 procompetitive justifications and your innocent explanations.  
22 You identified a whole slew of people and engaged in a course  
23 of conduct, a corporate practice to go after this conduct. So  
24 again, we disagree with that.

25 Your Honor's been very patient this morning listening

1 to us. I do think it would be --

2 THE COURT: At least you didn't say  
3 uncharacteristically.

4 MR. SCHMIDTLEIN: No, I did not. No, I think that --  
5 I think that getting the rulings on these will help us a great  
6 deal, because it will help us from the plaintiff's side  
7 streamline. If we're going to have to -- you know, we're not  
8 going to get collateral estoppel, for example, on the IBM or  
9 some of these actions --

10 THE COURT: Then you make a decision as to whether to  
11 call witnesses.

12 MR. SCHMIDTLEIN: Right. Exactly. Then we're  
13 obviously going to have decisions about what other types of  
14 evidence we may want to address.

15 THE COURT: I'm not saying you won't, I'm just saying  
16 that's a little more of a gray area.

17 MR. SCHMIDTLEIN: I agree with Your Honor. Thank  
18 you.

19 THE COURT: Thank you. Mr. Tulchin.

20 MR. TULCHIN: Your Honor, very quickly, if I may. I  
21 hope I'm not trying your patience.

22 THE COURT: You're not trying me. If you are, I'm  
23 mellow these days. Why are you laughing, Karen?

24 MR. TULCHIN: Three things, Your Honor, if I could.  
25 The first is this point about streamlining seems to be sort of

1 an idea that maybe we can induce the Court to give us what we  
2 want here by saying otherwise we'll take so much time at trial.  
3 There are only a couple of witnesses on their witness list, and  
4 they're witnesses they intend to call by deposition or prior  
5 testimony, there are only a couple who would conceivably be  
6 eliminated based on Your Honor's decision here. At least as I  
7 understand things. It's a very short amount of time.

8 Secondly --

9 THE COURT: What how can you say that? You're  
10 talking about relitigating things that were found in the  
11 government case, presumably there's going to be some  
12 cross-examination.

13 MR. TULCHIN: Your Honor, they submitted a witness  
14 list long ago, it has both witnesses they will call live and  
15 witnesses by deposition. As I understand it, there are only  
16 two witnesses, both that they would use by deposition, whose  
17 testimony goes to Microsoft's conduct -- I'm not counting  
18 Professor Noel, the expert -- Microsoft's conduct against Java  
19 or Netscape, any of the conduct that we're talking about here.  
20 So it really is a small amount. That's my understanding, based  
21 on their witness list.

22 THE COURT: Okay. Well, you know, I don't.

23 MR. TULCHIN: Secondly, Your Honor, again, Mr.  
24 Schmidtlein made the error of confusing relevance in case two  
25 with what's essential in case one. He said, well, maybe the



1 acts took place later, the unlawful acts. And we show in our  
2 brief, very painstakingly, that they all took place after March  
3 1st, '96. The importance of that date, of course, is that's  
4 the date that Novell sold Word Perfect and Quattro Pro to  
5 Corel. And all the unlawful acts took place after that. Those  
6 would be the only acts as to which they would be entitled to  
7 get collateral estoppel, if at all.

8 So if there is relevant evidence, if there's relevant  
9 evidence in this case, here's what Mr. Schmidtlein said, that  
10 we bundled, Microsoft bundled Internet Explorer into Windows,  
11 and that happened in '95, Judge Jackson said so. Well, if  
12 that's relevant to our case -- we would say it's not, not even  
13 close -- but if it is, and if the Court rules that it is,  
14 that's their job, they got to put in evidence about that.  
15 That's what the trial is for. You don't get collateral  
16 estoppel from a finding in case one because it's relevant to  
17 case two --

18 THE COURT: No, because it's relevant to case one.  
19 Mr. Schmidtlein understands that.

20 MR. TULCHIN: Yes, but my point, Your Honor, is that  
21 bundling Internet Explorer into Windows 95 was not critical and  
22 necessary to the judgment.

23 THE COURT: Well, that's a different question.  
24 Really all he really was saying -- he was really addressing  
25 your, as I understood the argument, but if that wasn't

1 necessary to the judgment, it wasn't necessary to the judgment,  
2 I thought you were addressing the fact there is some overlap --

3 MR. TULCHIN: That's my point, Your Honor. And we're  
4 mixing up these time periods. The acts for which liability was  
5 found all took place after Novell sold these products. That's  
6 the point that's important for collateral estoppel.

7 THE COURT: I understand that and Mr.  
8 Schmidlein understands that. I mean, we're all agreed upon  
9 that. There are two questions of materiality; materiality back  
10 then and materiality for the present case. That's as obvious  
11 as anything is.

12 MR. TULCHIN: Okay, Your Honor, thank you. Maybe I  
13 didn't need to say that, I apologize.

14 THE COURT: No, no.

15 MR. TULCHIN: Last point, Your Honor. Counsel also  
16 said that the timing issue wasn't all that important, this same  
17 timing issue, because in the government case it was found that  
18 Microsoft moved against nascent threats, nascent meaning  
19 emerging, threats that hadn't actually materialized yet but  
20 they were nascent, in the process of being born.

21 And that raises another point, which I meant to  
22 address earlier. There is a completely different standard in  
23 case one as compared to case two for causation. In the first  
24 case the government, and the D.C. Circuit, went through all of  
25 this stuff that Your Honor will remember about the edentialist

1 test, the toothless test for causation, in the government case,  
2 which was an equitable enforcement case brought by the agency  
3 of the United States responsible for enforcing the antitrust  
4 laws. All that had to be proved was that Microsoft moved  
5 against a nascent threat.

6 In this case, of course, in a private antitrust case,  
7 and I don't think there can be any dispute about this, Novell  
8 has to prove that Microsoft's conduct, the three acts that we  
9 talked about, harmed its products and also harmed competition  
10 in the operating system market --

11 THE COURT: No, they do disagree with that.

12 MR. TULCHIN: Well, I don't see how they reasonably  
13 can, Your Honor.

14 THE COURT: Well, that's -- I'll decide that a couple  
15 weeks from now.

16 MR. TULCHIN: Otherwise I don't think we have an  
17 antitrust case. But my point is for collateral estoppel, Your  
18 Honor, for collateral estoppel courts have also been very  
19 cautious in applying collateral estoppel where the burden of  
20 proof or the standard in case one was more relaxed than it is  
21 in case two, which is clearly the case here as well. Thank  
22 you, Your Honor.

23 THE COURT: Thank you all. I'll -- with the extra  
24 time I have, I scheduled all day, I'll go back and read all  
25 this and try to figure it out. Thank you. I'll come down and

1 shake your hands.

2 (A recess was taken.)

3 THE COURT: Good morning. I'm sorry I forgot we were  
4 going to talk about instructions. I have not read every word  
5 that you have written, but I hope the discussion of the  
6 collateral estoppel reflects that I've read a lot that you've  
7 written. Yes, sir.

8 MR. MARTIN: Good morning, Your Honor, James Martin  
9 from Dixon Shapiro. Just as a procedural matter, it might be  
10 helpful to decide what we're going to do with the next hour  
11 that we have. Our proposal was that we only talk about  
12 instructions 13 through 17 of ours. And Microsoft --

13 THE COURT: Why don't you start with that. And if  
14 they agree with that, that seems to me to make sense, but  
15 they -- why don't you focus your attention on that first. And  
16 if Mr. Tulchin wants to expand it or somebody, Mr. Holley --

17 MR. TULCHIN: It will be Mr. Holley.

18 THE COURT: -- Mr. Holley, then in rebuttal you can  
19 address anything he has to say.

20 MR. MARTIN: Okay. So what I will do is I'm going to  
21 start off talking about the two overarching issues that I think  
22 cast a shadow over all of the instructions, and frankly, over  
23 the collateral estoppel argument, over the in limine motions,  
24 and right now everything that's involved in this case.

25 So I'm going to start with elements of a claim, which

1 is our proposed instruction 13. There are two items of  
2 confusion that are the source of really much of the  
3 disagreement between the parties.

4 THE COURT: Me and who else?

5 MR. MARTIN: And in some ways they're wording issues.  
6 And I boil them down to these two things: One is the  
7 differences between a claim and a violation. And there's a  
8 confusion between the term causation and causation. Let me  
9 talk about those.

10 A violation of Section 2 is a independent inquiry.  
11 That is whether or not conduct violated the law, the Sherman  
12 Act. *U.S. v. Microsoft* was about Section 2. That's a  
13 violation. And typically there are --

14 THE COURT: Excuse me, let me ask one thing, it's  
15 absolutely unrelated, it goes back to collateral estoppel  
16 finding. Is there any objection to 17? Is 17 accurate? Does  
17 anybody know. 17 is the one about when Netscape went on the  
18 market. You all talk about that.

19 MR. SCHMIDTLEIN: I don't think there's any  
20 factual --

21 THE COURT: I think that's something -- I think  
22 independent collateral estoppel you all can stipulate to that.  
23 Just talk about that. Excuse me. I'm sorry. I meant to ask  
24 you before and I forgot. Go ahead.

25 MR. MARTIN: Okay. So Sherman Act Section 2, is made

1 up of two elements primarily. This comes from *U.S. versus*  
2 *Grinnell*, and it's in many decisions. And the two elements are  
3 monopoly power and the unlawful maintenance or acquisition of  
4 monopoly power through anticompetitive conduct. Those are the  
5 only two parts of the Section 2 violation.

6 A monopolization claim includes those two elements  
7 but injects a third element. And that third element comes from  
8 Clayton Act Section 4. The Clayton Act Section 4 says that  
9 anyone who has suffered injury by reason of conduct that is  
10 forbidden by the antitrust laws has a right to seek treble  
11 damages. So Section 2 has nothing to do with who's the victim,  
12 who was harmed. That is the inquiry that was like in *U.S.*  
13 *versus Microsoft*.

14 Section 4 is the injury causation, that's your  
15 typical causation that you get in any case, you know, whether  
16 the plaintiff's injury was proximately caused by the violation.  
17 And courts often use these terms loosely. They will talk about  
18 the elements of a claim when they're really talking about the  
19 elements of a violation and vice versa. And much of what has  
20 happened so far in this case, and during the disputes, relates  
21 to that confusion, that there is a causation element, the  
22 Section 4 element that requires proximate cause, proof of  
23 material injury from the conduct. And tied into that is this  
24 confusion of the word causation. Like I said, in Section 4 of  
25 the Clayton Act, this third element, there's one, two, three

1 elements of a claim, the third element is whether the harm was  
2 proximately caused, or the plaintiff's injury was proximately  
3 caused by the anticompetitive conduct.

4           Within Section 2, though, there is also something  
5 that's referred to as causation. And that is what is discussed  
6 in *U.S. v. Microsoft*, again, when it talks about counsel for it  
7 to be edentulous causation test. That is -- arises under  
8 Section 2 requirement that conduct -- that the maintenance be  
9 unlawfully maintained by reason of anticompetitive conduct. It  
10 is a different inquiry. It is a totally different item to be  
11 considered. In Section 2 context, causation serves a certain  
12 purpose, to make sure that the conduct is the type of thing  
13 that the antitrust laws are designed to prevent. In the  
14 Section 4, the third element, the causation element is to  
15 ensure that this plaintiff is the right plaintiff; that it has  
16 an injury from the violation, it's not too remote; and that  
17 there are sufficient acts that have been proven to violate the  
18 Sherman Act to allow you to seek damages.

19           And once you've dis --

20           THE COURT: And one thing which is an issue in this  
21 case, it has to be antitrust injury. Your position is that the  
22 damages suffered by your applications program does constitute  
23 antitrust injury because it was caused by the anticompetitive  
24 activity of Microsoft in the operating system market.

25           MR. MARTIN: Exactly, Your Honor. You know, now

1 we're going back, this is deja vu all over again. Now we're in  
2 2007, whether or not Novell's injury arises from conduct that  
3 harmed competition. And there is standard framework for this  
4 analysis. Every jury instruction, we've submitted several sets  
5 of jury instruction, the model rules and the law has this  
6 standard framework. You establish a violation. Did it break  
7 the law? Was it anticompetitive, harm to competition? Then if  
8 a plaintiff wants to sue, can it prove its harm was materially  
9 caused by that violation. And has to establish what's called  
10 antitrust injury, which is an element of antitrust standing.

11 It's often said if you have -- to have standing you  
12 have to have antitrust injury. But if you have antitrust  
13 injury you don't necessarily have antitrust standing. Because  
14 antitrust standing is actually a five factor test, like the one  
15 the Court applied and the 4th Circuit applied. The first two  
16 elements of which are essentially antitrust injury. And the  
17 other three elements are designed to ensure that remote  
18 plaintiffs and direct plaintiffs aren't before the Court  
19 seeking treble damages. In many ways that is where -- not  
20 many, that is where the Court's concern about piggy backing is  
21 addressed. It's in that third element. It's a thing that the  
22 4th Circuit has already thought of and considered. And so has  
23 this Court.

24 So there is a desire, and Microsoft has tried to deal  
25 with its jury instructions to lump that piggy backing concern



1 into the Section 2 violation elements of proof. It doesn't  
2 belong there, because Section 2 doesn't care about piggy  
3 backing. It doesn't care about individual competitors. It  
4 cares about the competitive process. And then this third  
5 element is what exists and has always existed to make sure that  
6 a plaintiff has the right to seek damages.

7 So when we look at our proposed elements of a claim  
8 we have one, two, three. First, that Microsoft possessed  
9 monopoly power in the PC operating systems market, period. We  
10 took out the part that Microsoft proposes about the relevant  
11 time period being some other time period, because that's really  
12 an evidentiary issue, that's not an issue of law. Second, that  
13 Microsoft unlawfully maintained monopoly power in that market  
14 by engaging in anticompetitive conduct, those are your  
15 typically first two elements of a violation. Those are the  
16 elements that are used in all of the instructions we gave. And  
17 we gave you instructions from cases from many different  
18 jurisdictions; from Delaware, from Eastern District of  
19 Pennsylvania, from the Northern District of California. All of  
20 those instructions have the same elements of proof.

21 And, third, that Novell was injured in its business  
22 or property because of Microsoft's anticompetitive conduct.  
23 And, again, this follows the model rules, and the model rules  
24 is something that was drafted by a panel of ABA members,  
25 antitrust bar members. And I don't think anyone would accuse

1 the ABA antitrust group of being particularly plaintiff  
2 friendly. And these are the same three elements that were  
3 sanctioned by the 3rd Circuit in the *LePage's* case, which we  
4 also provided to you.

5 Now, this claim versus violation and causation,  
6 causation confusion, it's also responsible for the view that  
7 Microsoft keeps pushing that this is an unusual case. It's a  
8 strange case because you're not a competitor or consumer. It's  
9 unique. It's peculiar. Whatever adjective they choose to use  
10 at a time. From a Section 2 standpoint there's nothing unusual  
11 about this case at all. It's like every other antitrust case  
12 where there's a concern that a monopolist is unlawfully using  
13 its power to maintain or acquire that power. That's what *U.S.*  
14 *versus Microsoft* is about. On a Section 2 theory, it's the  
15 same theory for us, also many of the same types of conduct.

16 *Hynix v. Rambus*, that's a case where there were  
17 manufacturers of technology called DRAM, and they sued a patent  
18 holder, holder of patents for technology. Because that patent  
19 holder led them to believe it was going to create some sort of  
20 standard where it would be applicable and allow different  
21 companies to participate in this space that the patent holder  
22 held for technology markets. But then it misled them. And  
23 they actually created all of this technology and they agreed to  
24 standards that were proprietary to Hynix. So these companies,  
25 these manufacturers, which didn't compete in this technology

1 market, were harmed, and sought invalidation of patents in a  
2 jury trial. They didn't seek damages. But from a Section 2  
3 theory, it's not unusual. Again, they weren't in the market.  
4 They were just harmed because the monopolists knew that they  
5 could be used as a lever to keep its monopoly power.

6 We provided, on Tuesday, a case called *LePage's*  
7 *versus 3M* because we thought that was a case that was also  
8 similar. What Microsoft did when they submitted their  
9 opposition is they challenged that. They said, and this is  
10 from the first page of their opposition, "There has never been  
11 a jury trial in the 120 years since enactment of the Sherman  
12 Act, in which a private plaintiff seeks damages for conduct  
13 that allegedly harmed its products but where the purported  
14 harmed to competition took place in a market in which those  
15 products did not compete." So by using a jury trial and harm  
16 to plaintiff, they're taking both of those things together.

17 So we provided the Court with *LePage's*, which is a  
18 case where there was a market for transparent tape. But there  
19 was some markets, there were competitors in this private label  
20 discount kind of tape market. And then 3M was a monopolist in  
21 Scotch Tape. It was branded, label, they sell Scotch Tape.  
22 And the allegation is that 3M, the monopolist, took actions to  
23 harm these private label makers essentially to kill that market  
24 so we could own the branded market and people wouldn't have  
25 that choice in this other submarket. And we said, yes, that is

1 a case where it's the same market, because it's a broad market,  
2 but it's comparable because there are submarkets. And the  
3 plaintiffs in one submarket were hurt to get advantage in  
4 another submarket.

5 THE COURT: Is there any case where the harm -- the  
6 conduct in one market allegedly caused damage in an entirely  
7 different market? I mean, here operating systems as opposed to  
8 applications, which we all would agree are different markets.

9 MR. MARTIN: That is exactly what I was going to go  
10 to. Last night I'm reading, I'm reading a 10th circuit case  
11 called *Reazin versus Blue Cross* 899 F.2d 951, 10th Circuit  
12 1999. It's a case we cited in the antitrust standing contest  
13 back in 2006, 2007.

14 Now, in *Reazin versus Blue Cross* the defendant was  
15 Blue Cross, had medical insurance, private health care  
16 financing. And it was the biggest in the area, 60, 70 percent  
17 of the market. The plaintiff was a hospital, Reazin is -- I'm  
18 not going to get the exact name of the hospital, it was a  
19 hospital. And what happened is it was acquired by a company  
20 that also owned a competing medical insurance company. And  
21 Reazin was -- and I'm going to quote from the decision because  
22 it's really apropos, on the very first page of that decision,  
23 and by the way the decision notices the parties had attempted  
24 to make a case very complex, when the antitrust issues are  
25 relatively straight forward. Now, I submit that's really the

1 case here. I mean, there's an effort to try to jumble this,  
2 but it's really not that -- once you disentangle it, it's  
3 really kind of easy to resolve many of the disputes.

4 So the monopolist, Blue Cross, was quote, "alarmed by  
5 a perceived competitive threat." And it quote, unquote,  
6 "determined to hurt the hospital, Wesley, and thereby send a  
7 message to other hospitals not to do business with entities  
8 Blue Cross believed were competitors." So it didn't want this  
9 hospital to do business with its competitor, so it cut off  
10 benefits to that hospital. It said, if people come to your  
11 hospital we're not going to pay those benefits. And  
12 predictably, the hospital suffered. They lost patients. It  
13 lost profits. It filed a private treble damages action  
14 alleging conduct that was designed to maintain the monopoly,  
15 and that did maintain the monopoly in the market for private  
16 medical insurance, which harmed the hospital, which didn't  
17 participate in that market. Its injuries were completely  
18 outside the market. It is on all four squares with this case.

19 And this question was actually addressed by the 10th  
20 Circuit. Because like Microsoft, Blue Cross doesn't miss it,  
21 they say, well, this is a different at page 962 of that  
22 opinion. Blue Cross says that "None of the claimed injuries  
23 flowed from The exclusion of competition from the health care  
24 financing market or from increases in prices for consumer's  
25 health care insurance." And later at 962 it says the hospital

1 doesn't have standing because it wasn't in the relevant market  
2 selected by the Court, health care financing, either as a  
3 consumer or competitor. And the hospital said it was a  
4 perceived competitor by the monopolist, even though its  
5 injuries didn't arise from that.

6 And the 10th Circuit upheld standing. And it wrote:  
7 "It is not dispositive to us that Wesley was in the health care  
8 services market and not itself in the health care financing  
9 market. As plaintiffs argued, the district noted, Wesley, the  
10 hospital, was by virtue of its affiliation with HC and HCP --  
11 which are the other insurers -- a perceived competitor of Blue  
12 Cross." And it allowed standing and it upheld the jury verdict  
13 in favor of the hospital. And there's actually, if the Court  
14 wants to look at them after today, there are jury instructions  
15 that were challenged and were upheld by the 10th Circuit which  
16 go to some of these issues.

17 In fact one of the instructions says -- well, I won't  
18 get into it, because I don't want to get ahead of ourselves in  
19 the discussion of the instructions. But what this case is, is  
20 it answers Microsoft's challenge to find a case where a jury  
21 trial had a private plaintiff seeking damages for conduct that  
22 allegedly harmed its products, hospital services, but where the  
23 purported harm to competition took place in a market in which  
24 its products didn't compete, private medical insurance.

25 Theoretically it's the same case. All right. The

1 Section 2 and the Section 3 violations are separate. The  
2 elements of proof for that claim, where they would be here,  
3 although, they also had to dispute market power, but it was to  
4 prove your Section 2 violation monopoly power and unlawful  
5 maintenance of that power through anticompetitive conduct. And  
6 then prove your injury arose, was materially caused by that  
7 violation.

8 THE COURT: Seems to me that you were saying it's  
9 indirectly related to the antitrust claim in Count 1, but I  
10 guess that's not relevant anymore.

11 MR. MARTIN: I'm sorry?

12 THE COURT: I said it sounds to me like, as you  
13 phrase it, the claim for damages you're asserting is indirectly  
14 related to the antitrust claim asserted in Count 1, but I guess  
15 you would not accept that at this point.

16 MR. MARTIN: No, I -- to me this is the same case. I  
17 mean, it's -- and the thing I think is, again, the real big  
18 take away here is we have proposed instructions that are  
19 standard instructions.

20 THE COURT: Almost.

21 MR. MARTIN: You're right. And we have tried to  
22 identify, as best we can -- if we miss one there, it's my  
23 mistake -- but we have tried to identify where we have  
24 deviated, but I would say 95 percent of those instructions, but  
25 for the names of the plaintiffs and some, you know, that

1 typical sort of nonsubstantive thing, they're the model  
2 instructions. They're the same instructions that were approved  
3 in *Hynix*, in *Comez*, in *LePage's*, and similar to the  
4 instructions approved here, and the model rules.

5 Now, I would submit that the burden of proof is on  
6 Microsoft to show why we shouldn't be using those instructions.  
7 Because this is the same -- this is the way that civil  
8 antitrust cases, monopoly claims are typically resolved.

9 THE COURT: Let me ask you about one of your proposed  
10 changes, it looks -- to resolve an internal inconsistency in  
11 the model instruction, the only thing I can figure out is that  
12 the committee which prepared the instructions couldn't figure  
13 out what the answer was, so they gave with one hand and took  
14 away with the other, but I -- and you want me to take away the  
15 other.

16 MR. MARTIN: Well, I would phrase it slightly  
17 different.

18 THE COURT: I'm sure you would.

19 MR. MARTIN: I would say they made a mistake. All  
20 right. The very first paragraph they identify what  
21 anticompetitive conduct means. And that's consistent with the  
22 law. That's consistent with *U.S. versus Grinnell*. It's  
23 consistent with *U.S. versus Microsoft*. At the very end, after  
24 there's a list of examples, there's some language I think is  
25 wrong on the law. So what we did is we just took the language



1 that was in the first paragraph and said let's use it in this  
2 next to last paragraph. That seemed fair. Frankly, I'd be  
3 happy to take -- I might be happy to take that paragraph out  
4 entirely, but at the risk of modifying the rules without any  
5 obligation or any justifiable, you know, strong reason to do so  
6 I thought that was the fair resolution of that.

7 THE COURT: And my note next to this is "What's the  
8 big deal?" Don't you think you can prove the anticompetitive  
9 conduct represented conduct that has made it very difficult or  
10 impossible for competitors to compete, and it was not taken for  
11 a legitimate reason?

12 MR. MARTIN: I think you can have -- some mischief  
13 could be caused with the difference between the standard that's  
14 in the first paragraph and the standard that's in the last.  
15 Impossible to compete, I'm not sure that's true. The  
16 definition that's given in this model instruction, and which we  
17 used, is anticompetitive conduct is conduct other than  
18 competition on the merits, that has the effect of preventing or  
19 excluding competition or frustrating the efforts --

20 THE COURT: What's the greater mischief? If there's  
21 also mischief if I basically give, with slight modifications,  
22 the model instructions and then take that out, there's also the  
23 mischief that could happen and somebody would say I'm wrong. I  
24 mean, you have to weigh the risk that you -- that an appellate  
25 court would find if I took that out I committed error, as

1 opposed to the risk that you have of not being able to -- or  
2 the mischief to which you just referred.

3 MR. MARTIN: And that's a fair comment. And my  
4 response to that would be many of the instructions *ZF Meritor*,  
5 I believe, *LePage's*, actually don't have that section with the  
6 examples and the last paragraph, they cut off the instruction.

7 THE COURT: Just consider what I just said.

8 MR. MARTIN: Pardon me?

9 THE COURT: Just consider what I just said. If I'm  
10 inclined to give your version of the instructions just make --  
11 I'll have to make my own decision, but consider what you should  
12 propose to me.

13 MR. MARTIN: No, I understand. And I understand  
14 there's a great deal of comfort in sticking with the model  
15 rules and what has been used and approved in other cases. So  
16 that is -- that would be my view is that the burden of proof is  
17 really that you have to justify a change and we tried to do  
18 that.

19 For purposes of, just for proceeding today, I mean, I  
20 could go through all these instructions. What I might want to  
21 do and what you might want to do, is just to talk about the one  
22 instruction on the elements of proof, let defense counsel  
23 address those, and then we could talk about the ones that  
24 actually talk about, you know, for example, there's three  
25 elements that we propose. Monopoly power really isn't

1       disputed. The second one is unlawful maintenance of monopoly  
2       power. There's a separate instruction. We actually have  
3       several instructions, they have several instructions. There  
4       are disputes within that instruction. Then there's that third  
5       element which is the material causation, antitrust injury  
6       instruction. Again, we have disputes among us -- between us,  
7       relating to those specific instructions.

8               I'll be guided by the Court, but I don't want to  
9       spend forever talking about all those instructions at once.

10              THE COURT: Proceed as you see fit.

11              MR. MARTIN: Okay. Thank you. So looking, again,  
12       back to the elements of a claim. We've submitted -- we've  
13       provided the three elements that we think are appropriate, are  
14       the ones that are always used, and the ones that are sanctioned  
15       by courts. Microsoft actually proposes four. And arguably it  
16       proposed five, and I'll explain why. Their first one is  
17       similar to ours, but they say during the relevant period, '94  
18       to '96, that's the time period issue that was already discussed  
19       today, I won't belabor it.

20              The second one is similar to ours, unlawfully  
21       maintained monopoly power in that market by engaging in  
22       anticompetitive conduct. And then they say "directed at  
23       Novell." And that "directed at Novell" is not in the model,  
24       it's not in any other instruction. It is, in my view, an  
25       element of specific intent. And first of all, you have to show

1 who was Microsoft directing its conduct at. That's an element  
2 of specific intent. It's also irrelevant to a Section 2  
3 violation analysis. It doesn't matter who it was directed at  
4 to determine whether or not it violated the law. So we think  
5 the "directed at" addition is inappropriate.

6 And, finally, our third is was injured in its  
7 business or property because of Microsoft's anticompetitive  
8 conduct. There's some dispute on this particular instruction  
9 on the margin of that, but it's -- we're sort of the same.

10 And then they have a fourth. Conduct that caused  
11 injury to Word Perfect, caused -- and Quattro Pro, contributed  
12 significantly to Microsoft's maintenance of monopoly power.  
13 And then they have actually a fifth one, arguably, that's  
14 hidden in one of the damages instructions that includes the  
15 material causation issue.

16 THE COURT: You would agree that if that is an  
17 element, I should grant summary judgment to Microsoft, because  
18 your expert agrees it did not contribute significantly.

19 MR. MARTIN: I'm not sure I would agree with that,  
20 but I'm so sure that it's not an element that I don't even want  
21 to have to embrace that hypothetical.

22 There's no case, there's no jury instruction, there's  
23 no model rule, there's nothing anywhere that has this  
24 additional element, conduct that caused injury to Novell's  
25 business applications that contributed significantly to

1 Microsoft's maintenance of monopoly. That's just the same  
2 thing as a Section 2 inquiry. If the jury finds that Microsoft  
3 engaged in anticompetitive conduct, by definition  
4 anticompetitive conduct is conduct that harms competition.  
5 There's no need for a separate element to -- after you've  
6 already found, the jury's found the Section 2 violation, has  
7 found injury to -- antitrust injury materially caused by the  
8 antitrust violation, to circle back around to Section 2, to  
9 find that the conduct contributed significantly? This is that  
10 causation causation confusion that doesn't belong in this case.

11 The contributes significantly standard is -- that is  
12 an issue we address in the unlawful maintenance of monopoly  
13 specifically instruction. But it really is that first  
14 causation, edentulous causation language that counsel was  
15 talking about. It's not something you have to prove after you  
16 proved your right to relief. And I'll reserve argument on  
17 whether contribute significantly is the right word or  
18 reasonable capable. We actually don't use either, neither do  
19 the model rules. And the rest of the instructions we stick  
20 with the model rules.

21 THE COURT: I assume -- your position, obviously is,  
22 the bottom line is part of the pattern of anticompetitive  
23 conduct, even if you cannot prove that you all posed a real  
24 credible threat to the operating system market, but Microsoft  
25 thought that you did and took action against you consistent

1 with the pattern. You don't have to prove that, in fact, you  
2 all would have been a real player in the operating system.

3 MR. MARTIN: We fully embrace that aspect of your  
4 decision where you find that Novell did not present direct  
5 proof that Microsoft --

6 THE COURT: But that's a big difference between you  
7 two and that's an issue.

8 MR. MARTIN: That is a difference, at least for  
9 purposes of this instruction I want to make sure we're  
10 discussing it in the Section 2 context and not in the claim --

11 THE COURT: I understand what you're saying.

12 MR. MARTIN: That's where, once you disentangle it, I  
13 think it becomes much easier to resolve.

14 THE COURT: This isn't a fair question, and you don't  
15 have to answer it, but to sort of understand what this  
16 litigation is all about, what kind of damages do you all say  
17 happened and how much and what was it?

18 MR. MARTIN: I think the easy answer is they paid  
19 more than a billion dollars for these products when they  
20 acquired it, they sold it for a fraction of that. I forget the  
21 exact number, 200 million, 300 million. The difference in  
22 value is attributable to the harm that was inflicted on those  
23 office productivity applications.

24 THE COURT: I see.

25 MR. MARTIN: I have now reduced a 68-page report to a

1 paragraph.

2 THE COURT: But that is what I should expect, that  
3 the damages are the difference between what you all paid, what  
4 you all sold it for, and plus interest.

5 MR. MARTIN: It's the difference in asset value. You  
6 can do it as a lost profits analysis as a back up. But at its  
7 core, yes, it's a loss of asset value. And asset value really  
8 is just lost profits any way.

9 Anyway, so I think that for this instruction, our  
10 proposed instruction No. 14, which correlates to Microsoft's  
11 proposed instruction, I forget which one, 20 I think, 27, I  
12 think let's just discuss that and then we can get into the  
13 separate ones after that, if that's okay with the Court.

14 THE COURT: Okay. Let me hear from Mr. Holley.

15 MR. HOLLEY: Good afternoon, Your Honor. Well, I  
16 guess the battle lines are drawn, because I could not disagree  
17 more fundamentally with what Mr. Martin just said. It cannot  
18 be the case that all Novell has to show is that Microsoft  
19 engaged in a pattern of anticompetitive conduct directed  
20 against other companies and other products in later periods of  
21 time, and they were somehow hit by the shrapnel, and they can  
22 recover billions of dollars of damages post-trebling, that  
23 cannot be what the jury gets told.

24 THE COURT: Sounds like piggy backing, doesn't it?

25 MR. HOLLEY: It certainly does, Your Honor. It

1 sounds exactly like piggy backing. The jury instructions have  
2 to tell the jury that the allegedly anticompetitive conduct  
3 that harmed Word Perfect and Quattro Pro; that's the name space  
4 extension APIs, the custom print processing and the logo  
5 licensing program; the three things Your Honor identified in  
6 denying Microsoft's motion for summary judgment, harmed Word  
7 Perfect and Quattro Pro, and harmed competition in the PC  
8 operating system market. Otherwise, we have this completely  
9 amorphous disconnected inquiry.

10 And that's exactly what the Court said back last year  
11 in the summary judgment decision. And it said, quote, "Novell  
12 must prove that the specific Microsoft conduct which caused  
13 injury to Novell's applications also caused competitive harm in  
14 the PC operating system market." It is not acceptable to tell  
15 the jury in this case that all it needs to do is determine  
16 whether Microsoft engaged in some utterly unspecified  
17 anticompetitive conduct, which is what Novell proposes, and  
18 then ask whether that conduct somehow harmed Novell.

19 The proof that Novell has to be wrong here is to  
20 engage in the following thought experiment: Under Novell's  
21 approach, the jury could conclude that withdrawal of support  
22 for the name space extension APIs was not anticompetitive. The  
23 jury could conclude that refusing to grant Novell an exception  
24 to the logo licensing program was not anticompetitive. The  
25 jury could conclude that not including custom print processing



1 software in Windows 95 was not anticompetitive and Novell could  
2 win. How can that possibly be right?

3 THE COURT: Well, why -- how could Novell win?

4 MR. HOLLEY: Well, because Novell is saying that all  
5 it has to show is that Microsoft engaged in anticompetitive  
6 conduct directed at somebody, presumably Sun Microsystems and  
7 Netscape, and that it suffered some harm as a consequence of  
8 that. And that's not what Your Honor has already said. Maybe  
9 I misunderstood what Mr. Martin said, but that's what I heard  
10 him say. And that's what I read Novell's papers to say.

11 Now --

12 THE COURT: So you're adding the specific intent  
13 element, and Mr. Tulchin says it's general intent --

14 MR. HOLLEY: No, no, it's not an intent question,  
15 Your Honor, it's a causal connection element, which I think is  
16 inherent. This comes from a case of the Supreme Court called  
17 *Brunswick against Pueblo Bowl-o-mat*. And what the Supreme  
18 Court said in that case was that you can only recover under  
19 Section 2 for conduct that is the consequence -- you can only  
20 recover for conduct which is in itself anticompetitive. And  
21 the conduct that Novell is alleging here can only be  
22 anticompetitive, unless it's barred by the statute of  
23 limitations, because it harmed competition in the PC operating  
24 system market. So they have to show -- and I don't understand  
25 this dichotomy that Mr. Martin was trying to draw between

1 Section 2 of the Sherman Act and Section 4 of the Clayton Act,  
2 the cases certainly don't embrace that distinction, but  
3 certainly not in this respect.

4 What the Supreme Court said in the *Brunswick* case,  
5 and it's never been altered, is that you have to show this  
6 linkage between the things that you said were done to your  
7 products and the harm to competition that gives you a right to  
8 claim under the antitrust laws. Otherwise, what we have is  
9 some sort of business tort case, you know, you hurt my product.  
10 Well, there is no federal law of unfair competition. Judge  
11 Kolar-Kotelly said this on the remand in the government case,  
12 you cannot just come in and say Microsoft did bad things to me  
13 and not connect that up to some injury to competition in the  
14 only market that's left in this case, which is the market for  
15 PC operating systems.

16 Now, Novell wants to keep it entirely vague about  
17 what it is that they say Microsoft did and how that conduct  
18 harmed competition in the PC operating system market. But the  
19 jury needs to be told what it is that Microsoft did that is  
20 allegedly anticompetitive, and also how that conduct harmed  
21 competition in the PC operating system market.

22 Now, one of the issues here is timing. I guess Mr.  
23 Martin said he would talk about that later, but I'd like to  
24 talk about it now. After Novell sold --

25 THE COURT: Just so I understand the scope of the

1 disagreement between you, and there -- I don't really expect  
2 you to disagree -- to agree with what I'm asking, but suppose  
3 the instruction was such that what the concept, which frankly I  
4 had missed, which you've put in better context for me, that  
5 Novell could prove that you all took anticompetitive action  
6 against it because of your concern about the middleware  
7 potential of Quattro Pro and Word Perfect. And that -- and  
8 this is where it gets a little iffy, I understand that, because  
9 it wasn't really that much of a threat according to you, and  
10 maybe according to their own expert.

11 But that it was part of a pattern of conduct later  
12 revealed to go after middleware that posed a threat to  
13 operating systems, because it would commoditize operating  
14 systems. That they prove that -- and to that extent I now hear  
15 it's got to be directed at Novell. And that the result of  
16 that -- and it did hurt, potentially it hurt competition. And  
17 there was an unlawful maintenance of the monopoly, which hurt  
18 competition. Because although it wasn't a major player, it was  
19 a pattern of conduct that later revealed -- that did include  
20 major players.

21 And I don't expect you to accept that, because that's  
22 a point of disagreement. And that that conduct caused damage  
23 to Novell in a different market. It's not that its product was  
24 ever going to succeed as a middleware -- as a substitute for an  
25 operating system, but that that conduct that was directed at

1 that, that's what Microsoft's motivation was, that that conduct  
2 caused Novell damage in the applications market.

3           Again, just help me out. I mean, again it may not be  
4 a fair question. And you can say, look, that's -- what's wrong  
5 with that is it couldn't have possibly hurt middleware in any  
6 substantial way. It wasn't unlawful because it was such a  
7 nascent, you know, speculative threat at that point. But  
8 suppose -- I mean, I really want to understand what your  
9 relative positions are. And, frankly, it would seem to me that  
10 if they could prove that. Then the fact that they suffered the  
11 damage, it's not simply a business tort, it's anticompetitive  
12 activity in a relevant market that caused them -- actually,  
13 that's not where they suffered the damage. Because it really  
14 wasn't ever going to be -- this middleware was not the issue,  
15 the fact is it hurt the applications.

16           MR. HOLLEY: Yeah, that's part of the -- I hesitate  
17 to say it, but it's part of why the Court said this was such a  
18 unique claim. I didn't make that up, that's what the Court  
19 said.

20           THE COURT: Of course, it's a unique claim because of  
21 the way the complaint is drawn, it took advantage of the  
22 tolling --

23           MR. HOLLEY: So I guess I would have to make a whole  
24 series of assumptions to answer the Court's question. First, I  
25 would have to assume that the conduct directed at Word Perfect

1 and Quattro Pro was anticompetitive within the limited  
2 exception provided by *Aspen Skiing*. And for reasons I will  
3 explain, they can never show that. Then I would have to assume  
4 that the relevant causation standard is not that they were an  
5 actual threat, but that Microsoft perceived them to be a  
6 threat, which is not the standard in this case.

7 I mean, I'm reminded of a comment that Chief Judge  
8 Edwards made during one of the arguments in *U.S. v. Microsoft*.  
9 He said it's sort of like this Microsoft is this paranoid with  
10 a gun next to its bed. And every night it wakes up and just,  
11 you know, blasts the room with bullets, and you know, kills  
12 everything in sight. Well, maybe that's a basis for going  
13 after Microsoft if you're the Department of Justice, and you  
14 have some authority under the statute to go after nay -- you  
15 know, attacks on nascent threats on competition. But a private  
16 plaintiff seeking punitive treble damages has to show more than  
17 that somebody was, you know, a paranoid, they have to show that  
18 they were a real threat.

19 And then you do get to the very strange situation  
20 here where the damages claimed have nothing to do with the  
21 market in which the competitive harm allegedly occurred, it has  
22 to do with the difference in value between, you know, what they  
23 paid for Word Perfect and Quattro Pro, and what they sold them  
24 to Corel for. That jarring disconnect is just another  
25 indication of how strange this claim is.

1           So I don't quite know how to --I'm sorry, if I didn't  
2 answer the question, Your Honor. But I don't quite know how to  
3 answer the question, because it assumes they can prove things I  
4 don't think they can ever prove.

5           THE COURT: All right. That's a fair answer.

6           MR. HOLLEY: Okay. So on the time frame question,  
7 Your Honor, I think that even Novell's own damages expert, Mr.  
8 Warren Bolten says that the relevant time frame is the time  
9 period during which they owned these applications. It's beyond  
10 me to understand how Novell can be harmed by things that  
11 happened when it no longer owned the products.

12           Now, it may be true -- and we would go back to this  
13 edentulous, toothless, causation standard applied by the D.C.  
14 Circuit in *U.S. v. Microsoft* -- it may be if I'm the assistant  
15 Attorney General in charge of the Antitrust Division, I'm  
16 interested in market effects into the future --

17           THE COURT: But I assume they're not trying to  
18 introduce the evidence to prove that they were harmed by  
19 conduct that occurred afterwards, but by what happened  
20 afterwards shed light upon what happened during the relevant  
21 time period.

22           MR. MARTIN: That's correct, Your Honor.

23           MR. HOLLEY: Well, that's not what the instruction  
24 says, Your Honor. The instruction says that the jury can  
25 conclude that Novell was harmed by things that occurred when

1 Novell no longer owned the products. I appreciate the  
2 clarification, but then they need to change the instruction.

3 And Microsoft also believes that the jury needs to be  
4 told very, very clearly, as I said at the outset of this part  
5 of my argument, that we have to have this connection. You  
6 can't have this notion, very vague notion, which is going to  
7 confuse the jury and almost inevitably lead them into some sort  
8 of erroneous analysis, that they can look at things that  
9 Microsoft did to Netscape and Sun, years, in some cases, after  
10 the alleged decisions in this case, and infer somehow that that  
11 provides the connection between what Microsoft did in 1994 and  
12 1995 to Word Perfect and Quattro Pro, because someone says that  
13 they're middleware.

14 Now, you know, we'll obviously prove at trial that  
15 they have no such qualities, but even as a matter of logic that  
16 doesn't make any sense. It sort of reverses the order of the  
17 inquiry. Novell must prove that harm was caused to its  
18 products, to Word Perfect and Quattro Pro, and that that very  
19 same harm also harmed competition in the PC operating system  
20 market.

21 Now, the other problem -- well, there are many  
22 problems, but another fundamental problem with Novell's  
23 proposed jury instructions is they don't tell the jury how to  
24 figure out what's anticompetitive under Section 2. And this is  
25 another one of those, you know, great questions for the ages.

1 I hate to tell war stories, but there's a poor guy  
2 named Jeff Minear, who at time was the Chief Assistant  
3 Solicitor General of the United States, who was asked in *U.S.*  
4 *v. Microsoft* to define what is anticompetitive under Section 2  
5 of the Sherman Act, you know, in front of C-Span and his mother  
6 and father. And he gave a completely rambling and  
7 incomprehensible answer. And Chief Judge Edwards said to him,  
8 Mr. Minear, if you know the answer say so. And if you don't,  
9 say that. And if you're hopelessly confused, which is what it  
10 seems to the Court, say that. And, of course, you know, it's  
11 unfair because nobody -- you know, that is a very difficult  
12 question. But luckily here we have a lot of guidance about  
13 what anticompetitive --

14 THE COURT: Aren't you all so happy that you have  
15 such a mellow judge?

16 MR. HOLLEY: That was one of the meanest things I've  
17 ever heard from the bench, Your Honor. But here we know --

18 THE COURT: He is a man with a sharp tongue.

19 MR. HOLLEY: He's a very nice man, but sometimes --

20 THE COURT: Very nice man with a very sharp tongue.

21 MR. HOLLEY: But here we know, Your Honor, that the  
22 reason that Novell escaped summary judgment was because its  
23 claims fell within the exception of *Aspen skiing*. And that is  
24 a quite precise doctrine. *Aspen Skiing* basically provides an  
25 exception to the normal rule that monopolists don't -- no



1 business, but monopolists too, have no obligation to cooperate  
2 with their competitors. And that is a very narrow exception as  
3 the Supreme Court said in *Trinko*, because of the dangers of  
4 what the Supreme Court called "forced sharing." You just don't  
5 know what you might do if you require people to help their  
6 competitors. And that's why Justice Scalia said in *Trinko* that  
7 *Aspen Skiing* is at or near the boundary of Section 2 liability.

8 Now, there are two requirements to come within *Aspen*  
9 *Skiing* that are nowhere in Novell's proposed jury instructions.  
10 The first thing you have to show is that the allegedly  
11 anticompetitive act constituted the termination of a  
12 pre-existing and profitable business relationship. And the  
13 second thing you have to show is that Microsoft had no business  
14 justification for the challenged conduct. And if you don't  
15 tell the jury those two things that Novell has to prove, then  
16 the jury might conclude that it's anticompetitive for Microsoft  
17 to help Novell in some respects develop applications for  
18 Windows 95, but not do all of the things that Novell now says  
19 Microsoft should have done. So we believe that the elements of  
20 an *Aspen Skiing* exception have to be included in the jury  
21 instructions.

22 Now, Novell, I think, ceded this problem, which is  
23 why they've tried to import a rule of reason test from Section  
24 1 into this Section 2 case. And they want the jury to engage  
25 in quite a remarkable exercise. They're going to ask the jury

1 as to each of the three bad acts, whether the procompetitive  
2 benefit of that act outweighs the alleged competitive harm that  
3 the act caused. And, secondly, to determine whether  
4 Microsoft's business objective could have been achieved by some  
5 alternative means that would be less harmful to competition.

6 Now, not only is this virtually impossible for a jury  
7 to carry out, but there's no authority for such a burden  
8 shifting approach in the 10th Circuit. In fact, the 10th  
9 Circuit has held in a case called *Multistate Legal Studies*  
10 *against Harcourt Brace Jovanovich*, that a defendant may avoid  
11 liability by showing a legitimate business justification for  
12 the conduct, period. And courts and commentators have said  
13 that the jury is not allowed to waive the sufficiency of that  
14 legitimate business justification against the anticompetitive  
15 effects of a monopolist's refusal to deal with a competitor.

16 You can't balance these two things. First of all,  
17 they're completely apples and oranges. And no one has ever  
18 provided any metrics by which the jury can, you know, figure  
19 out how much benefit is provided on this side against how much  
20 harm its provided on that side. So you're asking a jury to  
21 engage in this exercise which was basically impossible. And so  
22 the Courts say don't do it.

23 Now, I know that Mr. Martin's going to stand up and  
24 say this is just what the D.C. Circuit said it was doing in  
25 *U.S. v. Microsoft*. And that is true. That is what the D.C.

1 Circuit said. I would suggest that if you read the D.C.  
2 Circuit opinion it all sounds very nice, it isn't exactly what  
3 they did. And they certainly never explained how it is that  
4 one is supposed to measure benefits on the one hand and harm on  
5 the other and balance them. It's sort of like, you know, they  
6 got through this process and they would announce the result,  
7 very much like the obscenity test, I know it when I see it.  
8 But there's no explanation in that decision of how they did  
9 this --

10 THE COURT: Well, the bottom line is that you -- I  
11 mean, that's all true, assuming that distinction. But your  
12 position would be it's judges saying in the context of an  
13 equitable enforcement action not a jury in a monetary damages  
14 action, assuming it can be done at all.

15 MR. HOLLEY: That's correct, Your Honor. And also I  
16 would say whatever the D.C. Circuit said, the 10th Circuit has  
17 not said anything like that, including in two very recent  
18 cases. In a case called *Christy Sports* the 10th Circuit said,  
19 "The antitrust laws" -- I'm quoting now, quote, "The antitrust  
20 laws should not be allowed to stifle a business's ability to  
21 experiment in how it operates, nor forbid it to change course  
22 upon discovering a preferable path," close quote. And that  
23 reflects a policy judgment that this least restrictive  
24 alternatives test, and this notion that you have to balance  
25 harms against benefits, actually stifles people from making

1 changes in their business because they're never quite sure how  
2 someone might look retrospectively at what they did and decide  
3 how it all balances out.

4 So Microsoft believes that this burden shifting  
5 approach is unjustified, it's certainly not in the model  
6 instructions, and it should not be adopted.

7 Now, I guess I don't want to go beyond the scope of  
8 what Mr. Martin did. And I don't want to burden the Court with  
9 too much argument, but this causation difference is very, very  
10 important. I mean, the Court said in the summary judgment  
11 decision that it was Novell's burden to show that the  
12 anticompetitive harm to Word Perfect and Quattro Pro  
13 contributed substantially to the maintenance of Microsoft's  
14 monopoly in the PC operating system market. And that's exactly  
15 right. There isn't anything in that decision that says  
16 reasonably capable of --

17 THE COURT: That does raise a question. If I gave  
18 your instructions I ought to grant you summary judgment.

19 MR. HOLLEY: I would agree with that, Your Honor.

20 THE COURT: So the instructions don't really move the  
21 ball forward very much. I mean, I was right or I was wrong,  
22 maybe I should sua sponte reverse -- Microsoft's position is I  
23 was wrong in the summary judgement. And rather than give their  
24 instructions, I should say, sorry, I was wrong and grant  
25 summary judgement.

1 MR. JOHNSON: Let's not do that again, Your Honor.

2 THE COURT: Beg your pardon? No, no, no, but  
3 instructions for me are helpful in the posture of the case as  
4 it presently exists, which is post summary judgment. I could  
5 be wrong, I'm not --

6 MR. SCHMIDTLEIN: The 4th Circuit didn't think you  
7 were.

8 THE COURT: The 4th Circuit said I was right. But  
9 the 10th Circuit might, after a full trial, and the Supreme  
10 Court -- I guess the 10th Circuit sets the law on the case  
11 about the relief, somebody's going to take look at this case  
12 after all this argument, and you tell me how this is not -- how  
13 the claim is not indirectly related is beyond me. But so maybe  
14 the Supreme Court sometime is going to -- so --

15 MR. HOLLEY: -- both wrong about that one, Your  
16 Honor.

17 THE COURT: -- whoever evaluates the posture of this  
18 case better realize that although that's been ruled upon, it is  
19 a live issue.

20 MR. HOLLEY: Your Honor, I think maybe I misspoke  
21 earlier when I answered your question that if you were right in  
22 your summary judgment decision you should now grant summary  
23 judgment. The reason that I said that is, based on what Mr.  
24 Martin said this morning, I think you should grant summary  
25 judgment. Because what you said in the summary judgment

1 decision is, if Novell can show that Microsoft's allegedly  
2 anticompetitive acts harmed Word Perfect and Quattro Pro, and  
3 it can show, on some theory, middleware presumably, that that  
4 same conduct also harmed competition in the PC operating system  
5 market, then they can prevail. And they can also, I think in  
6 fairness, Your Honor said, they can take into account the  
7 market as it then existed, which has to do with things that  
8 Microsoft may have done to other people, although presumably,  
9 at or before the relevant time.

10 My strong sense is, based upon Novell's proposed jury  
11 instructions, that they are doing everything humanly possible  
12 to avoid having to prove those two things. They do not want to  
13 talk about the three allegedly anticompetitive acts directed at  
14 Word Perfect and Quattro Pro. They do not want to talk about  
15 how it is that a word processor and a spreadsheet came within a  
16 country mile of constituting middleware, they don't want to  
17 talk about those things. And they don't want to tell the jury  
18 what it needs to think about in order to make those  
19 determinations. And if that is their position then, yes, the  
20 Court should grant summary judgment. If they cannot prove the  
21 two things that they were required to prove in the summary  
22 judgment decision, we shouldn't be standing here today.

23 Now, the reasonably capable standard, I mean, a lot  
24 of ink had been spilled about this in the last week, and I  
25 won't bore the Court with all of it. But that really is, as

1 the D.C. Circuit said, a special test that only applies in  
2 equitable cases, not in private treble damages cases. And it's  
3 because you can look at things that might happen and try to nip  
4 them in the bud. You can do that if you're the government. If  
5 you're a private plaintiff, two thirds of the damages you're  
6 seeking in a Section 2 case are punitive. And so you have to  
7 have a strong showing of causation. You can't be basing your  
8 causation test on some inference about what might have happened  
9 if something had materialized.

10 I mean, it's actually remarkable if you look at  
11 Novell's instruction, they use the word "nascent" in quotation  
12 marks and then they put the phrase "comma, or unproven, comma,  
13 threat." Wow, if it's unproven then it certainly is not a  
14 justification for awarding damages, certainly not hundreds of  
15 millions of dollars in damages. So they're going to have to  
16 show, somehow, that Word Perfect and Quattro Pro were  
17 middleware threats to Windows, not that they might be, but that  
18 they were, such that action directed against those two products  
19 would also harm competition in the PC operating system market.

20 Now, there are two theories --

21 THE COURT: You would simply disagree with the  
22 proposition that if Microsoft perceived them to be a potential  
23 threat, that is not a enough --

24 MR. HOLLEY: No, Your Honor, it's not enough.

25 Perception does not give rise to antitrust violations. They

1 have to show that harm to those two products caused harm in the  
2 market. And that's what I was going to turn to right now, Your  
3 Honor. They have two theories in the complaint for why that  
4 might be true. The first one is that these two technologies,  
5 which you know, we intend to prove at trial are vaporware, one  
6 called Appware, one called Opendoc, in combination with Word  
7 Perfect somehow provided enough APIs that people could write  
8 general purpose applications to Word Perfect Appware and  
9 Opendoc.

10 THE COURT: That was never pled.

11 MR. HOLLEY: No, that one is pled.

12 THE COURT: The other one --

13 MR. HOLLEY: The other one was not pled. The fact  
14 that Perfect Office is or might somehow magically become middle  
15 ware --

16 THE COURT: I'm sorry, Perfect Office.

17 MR. HOLLEY: Yeah, that ones not in the complaint.

18 The second theory in the complaint is that Word Perfect and  
19 Quattro Pro were so popular somehow, that their availability on  
20 operating systems other than Windows might cause people to  
21 migrate to those other operating systems.

22 Now, and I won't go into why that's a crazy argument.  
23 It's actually -- it's completely antithetical, that argument,  
24 to the argument we made for Microsoft in *U.S. v. Microsoft* that  
25 there couldn't be an applications barrier to entry because



1 there were 2,500 OS2 apps and 4,000 Mac apps. Now, I don't  
2 understand how two apps can suddenly become more powerful than  
3 2,500 and 4,000, but we can talk about that some other time.  
4 The important part for today is, the jury needs to be told, not  
5 allowed to just speculate, about what is this linkage between  
6 harm to Word Perfect and Quattro Pro and harm to competition in  
7 the PC operating system market. Novell wants to leave it very,  
8 very ill-defined. And I think that's just a recipe for  
9 disaster. The jury has to have some understanding of what the  
10 theory of Novell's case is.

11 I won't talk about preliminary instruction No. 1.  
12 Our papers make clear that it's generally way too complicated  
13 and way too confusing. And it incorporates all of the things  
14 I've just talked about what, which we believe are erroneous. I  
15 will say, though, one thing, which is that the effort to amend  
16 the complaint in the jury instructions is not proper. The  
17 complaint does not say that Perfect Office or a suite of office  
18 productivity applications is a middleware threat to Windows, it  
19 doesn't say that. And in the same way that the 4th Circuit  
20 affirmed the Court's dismissal of the Groupwise claims, because  
21 they're not in the complaint, the same fate should befall this  
22 theory that Perfect Office is a middleware threat. We don't  
23 accept it as a factual matter, but we shouldn't even be talking  
24 about it. Novell should be bound by what it said in the  
25 complaint which Novell has never sought to amend.

1 I have some points I'd like to make on damages, but I  
2 think then I'm really going beyond what Mr. Martin said.

3 THE COURT: Go ahead. The more I know about this  
4 case the better.

5 MR. HOLLEY: Pardon, Your Honor?

6 THE COURT: Go ahead. The more I know about this  
7 case the better.

8 MR. HOLLEY: Well, all right, he'll obviously have  
9 his own points in response to mine. But on damages, Your  
10 Honor, I think Novell has taken quite the minimalist approach  
11 to damages. It is correct, as Mr. Martin said, that we want  
12 the jury to be instructed that the anticompetitive conduct has  
13 to be a material cause of Novell's alleged injury. And there's  
14 a sentence in the ABA model instruction that says exactly that  
15 which Novell admitted -- which omitted, which I don't  
16 understand. It says quote, "If you find that plaintiff has  
17 failed to carry its burden of providing a reasonable basis for  
18 determining damages, then your verdict must be for defendant."  
19 If they haven't made out a case that they were damaged, then  
20 you have to come back with a zero verdict. The jury needs to  
21 be told that.

22 THE COURT: Well, what is your theory -- again, you  
23 don't have to answer this -- but why the value of the property  
24 of their applications decreased so dramatically from the time  
25 they purchased to the time they sold it?

1 MR. HOLLEY: They made a disastrously bad mistake in  
2 buying a company that was in steep decline. And we did nothing  
3 to accelerate that decline. They paid \$1.4 billion for Word  
4 Perfect and Quattro Pro. They sold it 22 months later for \$140  
5 million. Mr. Frankenberg, the CEO, has testified that a fairly  
6 substantial block of the difference is attributed to -- is  
7 attributable to the value of Groupwise, which they kept. But  
8 it's our position that the entire balance of that difference is  
9 attributable to the fact that Word Perfect was a failing  
10 company, and that Novell only accelerated its demise. And we  
11 are perfectly prepared to prove that at trial, Your Honor.

12 The other points on damages. There's no concept of  
13 disaggregation in Novell's instructions on damages. But that's  
14 really important here, precisely because of what I just said.  
15 The jury has to be told that if they -- that they need to  
16 separate out the effect of any Microsoft anticompetitive  
17 conduct that harmed Word Perfect and Quattro Pro, and also  
18 harmed competition in the PC operating system market, from  
19 perfectly lawful competition from Microsoft, and the impact of  
20 any other factors such as bad mistakes that Novell made, or  
21 changes in the marketplace. And that concept is totally gone  
22 from their instructions.

23 As to the government case, Your Honor, I think it  
24 depends, this is another topic, in addition to damages. We  
25 think it's very important for the jury to be given some context

1 about the government case, especially if the Court is going to  
2 give collateral estoppel effect to numerous findings of fact.  
3 They need to be told what was at issue in the government case.  
4 What is the time frame of the government case. Otherwise, the  
5 risk that they'll just sort of squint and say, well, Microsoft  
6 was bad in the government case, therefore, they must have hurt  
7 Novell, is very high. And it's not the same case, it's a very  
8 different case. So even if Novell is entitled to some  
9 collateral estoppel effect, Your Honor, it's Microsoft's  
10 position that the risk of jury confusion and a run away jury,  
11 in terms of attributing way too much significance to the  
12 government case, requires some instructions.

13 Thank you very much, Your Honor.

14 THE COURT: Thank you, Mr. Holley. Mr. Martin?

15 MR. MARTIN: Let's start with Mr. Holley's it cannot  
16 be the case. It cannot be the case that some bystander hit by  
17 shrapnel could come in and seek treble damages. Of course,  
18 it's not the case. It's not this case. The law, the Courts,  
19 every jury instruction, the model rules, have a set up  
20 framework to make sure that doesn't happen. There's two ways  
21 to make sure that happens. We're already past the first.  
22 There's the antitrust standing filter, which has already been  
23 challenged. Not a consumer, not a competitor. The AGC  
24 factors, the 4th Circuit and Your Honor went through and looked  
25 at conduct, including particularly the conduct that was

1 directed at Novell, and found that that was a sufficient  
2 linkage to give Novell a right to seek treble damages. If we  
3 were some shrapnel victim, the 4th Circuit or you would have  
4 told us to go home. We're already past that. All right.

5 So now, the question for the jury to make sure they  
6 don't get caught in, you know, having already made it through  
7 this filter, the jury gets instructed, and this is the Section  
8 2, Section 4 thing again, in the injury and causation  
9 instruction we have proposed, No. 17, you only get there if we  
10 have proved a Sherman Act violation. A violation that  
11 Microsoft engaged in conduct that harmed competition. The jury  
12 is then instructed, under our instruction and the model rules,  
13 Novell is entitled to recover damages if it can establish by a  
14 preponderance of the evidence three elements of injury and  
15 causation.

16 No. 1, Novell was in fact injured as a result of  
17 Microsoft's anticompetitive conduct. Not just any conduct.  
18 Second, Microsoft's anticompetitive conduct was a material  
19 cause of Novell's injury. And the instruction explains  
20 further, "Novell must offer evidence that establishes a matter  
21 of fact, and with a fair degree of certainty, that Microsoft's  
22 illegal conduct was a material cause of Novell's injuries."  
23 This means that Novell must prove that it suffered some damage  
24 as a result of Microsoft's antitrust violation.

25 THE COURT: It's editing, wouldn't that -- what would

1 be wrong with putting in that portion of the instruction  
2 "directed at Novell."

3 MR. MARTIN: It's implicit in that instruction. And  
4 I don't think that --

5 THE COURT: No, no, as opposed to the earlier part.  
6 Mr. Holley's point, look, they really could find against --  
7 there's a risk that they could find against Novell on all the  
8 three things which are alleged to have happened. Is a  
9 potential way to get that concept across putting the words,  
10 "and directed at" -- consistent with your general position, put  
11 in that portion of the instructions, "anticompetitive conduct  
12 directed at Novell."

13 MR. MARTIN: I think there's two issues. The first  
14 is that it waivers, again, into a specific intent and confusion  
15 issue. The second is the one that the Court mentioned earlier,  
16 which is now you're adding to an instruction that's already  
17 been used and approved.

18 THE COURT: But you've changed it.

19 MR. MARTIN: Well, with that one exception.

20 THE COURT: Okay. Well, with a couple of exceptions,  
21 unlawfully and willfully.

22 MR. MARTIN: You're right. You're right. I don't  
23 want --

24 THE COURT: No, I understand. I know your confusion  
25 point is --

1 MR. MARTIN: And that instruction actually continues,  
2 "If you find that Novell's injuries were caused primarily by  
3 something other than the alleged antitrust violation, then you  
4 must find that Novell has failed to prove that it is entitled  
5 to recover damages from Microsoft." And the third element is  
6 that Novell's injury is an injury of the type that the  
7 antitrust laws were intended to prevent.

8 And that is explained as antitrust injury in the  
9 instruction. And it says, "If Novell's injuries were caused by  
10 a reduction in competition, acts that would lead to a reduction  
11 in competition, or acts that otherwise would harm consumers,  
12 then Novell's injuries are antitrust injuries. On the other  
13 hand -- the instruction says -- if Novell's injuries were  
14 caused by heightened competition, the competitive process  
15 itself or by acts that would benefit consumers, then Novell's  
16 injuries are not antitrust injuries, and Novell may not recover  
17 damages for those injuries under the antitrust laws."

18 This is the way that juries and courts have always  
19 ensured that there is a sufficient linkage between the  
20 antitrust violation and the plaintiff's injuries. And there  
21 are no fewer than five Supreme Court cases that have gone  
22 through this. *Brunswick*, *Blue Shield versus McCready*, *AGC*,  
23 *Carlo*, *ARCO*. And it's interesting that Mr. Holley stood up  
24 here and talked about the linkage and cited *Brunswick*, which is  
25 a Section 4 case. It talks about injury and the material

1 causation, not about a Section 2 violation.

2           The comments directed at our desire to be vague, I  
3 think is -- should be contrasted with Microsoft's desire to use  
4 the instructions as a vehicle for argument. What we have tried  
5 to do is follow the model instructions. And where it is  
6 something that would fall into the area of argument, we left it  
7 out, whether it's for us or for them. The specifics tend to  
8 fall into advocacy. And advocacy is for argument; it's for  
9 closing argument, it's for opening argument, it's not for the  
10 instructions. We've tried to avoid that. Whether or not it's  
11 three elements, it's four elements, in some ways it's premature  
12 because there are in limine motions, there are things for the  
13 Court to consider.

14           One of my partners likes to say, first, let's figure  
15 out what the law is. And that is what this is, what is the  
16 law? Is it three elements? Is it four? Is it five? I didn't  
17 hear Mr. Holley actually say there should be four. Presumably,  
18 he's going to stand by his pleading. But I haven't had an  
19 explanation why anybody should deviate from the model rules.

20           There's also implicit in Mr. Holley's argument the  
21 shrapnel victim was just some innocent bystander. But the  
22 Courts, the 4th Circuit, you've already seen that there's  
23 evidence that Microsoft was targeting Novell. Certainly, we're  
24 not going to be shying away from putting up Bill Gates's e-mail  
25 for the jury. There's no reason to try and avoid the evidence



1 there is that Microsoft intended to harm Novell. And intent is  
2 relevant, it's not a required element, but it is relevant to  
3 show harm to competition.

4 THE COURT: Balance against that all of his  
5 chAreedable contributions they're going to be allowed to share.

6 MR. MARTIN: We'll see.

7 THE COURT: Yeah, we'll see. I'm not even sure that  
8 one's going to merit a response.

9 MR. MARTIN: Mr. Holley then says that we don't give  
10 an instruction on what's anticompetitive conduct. We've given  
11 three. There's the instruction 14, which describes what  
12 anticompetitive conduct is. There's instruction 15, which  
13 explains what evidence of a valid business purpose is. There's  
14 instruction 16, which is the balancing of the competitive  
15 effects. None of those, by the way, use the word "reasonably  
16 capable" or "contributed significantly to." So that whole  
17 issue is a red herring, doesn't need to be in there, it's never  
18 been used. The juries are always instructed on -- well, I  
19 shouldn't say always, but in the cases we found or the  
20 instructions we found, they're always instructed that you  
21 should look at the conduct, find out whether it harmed  
22 competition.

23 And the Court, as we actually proposed that addition,  
24 that you don't have to present direct proof that Microsoft's  
25 continued monopoly power is precisely attributable to it's

1 anticompetitive conduct. That's not just from your ruling,  
2 that's from the *U.S. versus Microsoft*.

3 That brings us to the causation element of a Section  
4 2 violation. Microsoft wants to distance its from what the  
5 D.C. Circuit said, predictably. And we think the D.C. Circuit  
6 was right. If you look at the decision, the D.C. Circuit  
7 decision, it actually says this is right for a Section 2  
8 violation. Microsoft's real beef is, what's the remedy?  
9 Should it be some structural relief or should it just be  
10 injunctive relief? That's not a Section 2 question. That's a  
11 remedy question.

12 Analogously, that's a question that should be  
13 addressed in antitrust standing. The 4th Circuit could have  
14 said, I don't think this is appropriate for treble damages.  
15 But whether or not the standards are for Section 2 are the  
16 standards for Section 2, regardless of what the relief sought  
17 is. That's a different question. And that's what the *U.S. v.*  
18 *Microsoft* court did.

19 Microsoft actually cites some cases, because it  
20 doesn't have any cases to support its view, that whoever the  
21 plaintiff is modifies the Section 2 analysis. So what they do  
22 is they cite Professor Areeda from a treatise, I think it's  
23 657, this is paragraph. And if you look at that paragraph,  
24 it's about injury and causation, it's not about Section 2.  
25 It's about the causation that we've been talking about as

1 proximate causation. And Areeda actually says if courts are  
2 really vigilant about enforcing antitrust standing, you don't  
3 have to worry about this issue that someone might be seeking  
4 treble damages for conduct that might be on the margins, where  
5 a monopolist might have thought its conduct was legal. This  
6 isn't that case. This is egregious conduct. This isn't on the  
7 margins conduct.

8 I think Mr. Holley's big beef with our instructions  
9 is not that they're the model instructions. And by the way,  
10 the balancing instruction, it is out of the model rules. It's  
11 out of the Rule of Reason section. And there are more than one  
12 case, it's a Rule --

13 THE COURT: Why should I give a Rule of Reason  
14 instruction here?

15 MR. MARTIN: Because that is typically what is done  
16 in balancing. I mean, it's the same test whether it's Rule of  
17 Reason or whether it's a Section 2, it's balancing the  
18 competitive benefits --

19 THE COURT: How can a jury balance that? I don't  
20 understand that.

21 MR. MARTIN: They do it all the time in Rule of  
22 Reason cases. I mean, you instruct them. You give them an  
23 instruction that says if you find that Microsoft's -- there's  
24 three actually, the first burden is on us to show that there's  
25 no -- that the conduct was anticompetitive, it harmed

1 competition. The burden then shifts to them, can they come up  
2 with a legitimate procompetitive, nonpretextual justification.  
3 If they can do that then you get into the balancing. As  
4 practical matter, you probably don't reach it very often. But  
5 that's --

6 THE COURT: Why is this a Rule of Reason case?

7 MR. MARTIN: Rule of Reason is often used by analogy,  
8 *U.S. v. Microsoft* recognizes that at pages 61 through 67,  
9 *Mid-Texas Communication Systems* --

10 THE COURT: But I -- it seems to me that if the  
11 jury's focus here should be, assuming it's an antitrust  
12 violation, it's found to be an antitrust violation, Microsoft's  
13 conduct caused the damages which it claimed. I don't see why  
14 we get into balancing and pro -- at that stage it seems to me  
15 that the argument should be focused upon, look, they made a bad  
16 business deal, that what we did really didn't affect the value  
17 of Word Perfect and Quattro Pro. It just seems to me that  
18 giving an instruction that takes the focus away from that is  
19 not helpful.

20 MR. MARTIN: Well, I want to be careful again,  
21 because we are starting to mix and match --

22 THE COURT: We are mixing and matching.

23 MR. MARTIN: So for determining whether that conduct  
24 was anticompetitive, the jury needs to be instructed, just like  
25 the *U.S. v. Microsoft* analysis, that -- what the standards are.

1 Was there any harm in competition? Did Microsoft come up with  
2 a legitimate business justification? If they find that, then  
3 they know the conduct is anticompetitive. And they can use  
4 that to decide whether there's a connection to the injury when  
5 they get to the next question about injury and causation.

6 THE COURT: That's --

7 MR. MARTIN: Okay. And I understand the question.  
8 Rule of Reason instructions aren't always given. Sometimes  
9 they are given. *ZF Meritor* they were given. At the end of the  
10 day it's really kind of the same inquiry. It's can we prove  
11 that there was no -- can we prove there was harm to competition  
12 by that conduct. Can they come up with a nonpretextual  
13 business justification for it. And then the jury decides.

14 A quick note about Perfect Office, because it keeps  
15 popping up. I don't want to get into whether or not things  
16 were pleaded in the complaint, I'm here prepared to talk about  
17 jury instructions. If the Court finds that things weren't  
18 pleaded and should be excluded, it's an evidentiary issue. I  
19 do believe Perfect Office was mentioned in the court's opinion.  
20 I think it's mentioned in the complaint. Perfect Office is a  
21 distribution vehicle for Word Perfect and Quattro Pro it's a  
22 suite. It's got these two things. And many of the conduct  
23 that affected the injuries --

24 THE COURT: I'll focus upon that on another day. But  
25 I don't think it's part of the case, but you all may be able to

1 persuade me to the contrary.

2 MR. MARTIN: Mr. Holley said that it's whether  
3 Microsoft perceived the threat is relevant. Again, for the  
4 Section 2 analysis, of course, it's not relevant. That is just  
5 like intent, it's relevant as to whether or not that conduct  
6 could harm competition. It's relevant to evaluating the  
7 effects and he likely effects of that conduct.

8 Mr. Holley would like to -- Microsoft in general, say  
9 that this is a unilateral refusal to deal case. It's just this  
10 little narrow case, with a couple narrow facts, it is not. It  
11 is a case that involves conduct. A number of different acts  
12 that the jury should evaluate together. We've provided many  
13 cases about the conduct should be viewed as a whole. It's like  
14 *LePage's*. It's like other cases, *ZF*, *Meritor* where there is  
15 conduct. It's not a unilateral refusal to deal, it's a lot  
16 more than that.

17 It is easy for Microsoft to try and pigeon hole us  
18 into that, because it's a lot easier for them to take advantage  
19 of *Trinko*-type decisions, but that's not our case. Our case is  
20 broader than that. That's why the jury should be instructed,  
21 look at the conduct, do what juries always do, which is  
22 evaluate whether that conduct harmed competition. And I think  
23 *LePage's*, and we've also cited cases in our brief,  
24 anticompetitive conduct comes in many forms, it's not just one  
25 form.

1           By the way, just as an aside the reasonably capable  
2 phrase that counsel says isn't in your opinion, it is in your  
3 opinion. When you say contributed significantly, you cite to  
4 *U.S. v. Microsoft* and *Data General* in the parentheses, it  
5 says reasonably capable. And the cases that *U.S. v. Microsoft*  
6 cites *Barry Wright*, *Multistate Legal Studies* says reasonably  
7 capable. Again, I don't think it's a distinction that matters,  
8 because our proposed instructions don't use that word --  
9 phrase.

10           One more note on the balancing, counsel's view was  
11 that a jury should never be allowed to consider the validity  
12 and the sufficiency of a proposed procompetitive justification.  
13 Again, I don't think that's the law. There's a Supreme Court  
14 case *Kodak*, where the decision was based on whether the jury --  
15 it refers to summary judgment decision on the grounds the jury  
16 should decide whether the proffered justifications were valid  
17 and sufficient and not pretextual.

18           THE COURT: Again, maybe I'm getting tired because  
19 it's almost lunchtime.

20           MR. MARTIN: I understand.

21           THE COURT: But Microsoft -- I have not heard it say  
22 that it is procompetitive to attack middleware. I'm not even  
23 sure where the procompetitive aspect comes into this case at  
24 all. Microsoft has a lot to say about, look, it really wasn't  
25 middleware, we didn't perceive it as middleware. The reason we

1 did what we did had nothing to do with, you know,  
2 procompetition. We withdrew -- we didn't add these things, the  
3 three, you know, we withdrew the whatever, because we thought  
4 there was justification to do that. I don't -- the whole  
5 discussion of procompetitive I realize it's an element of  
6 Section 2, but I don't quite understand how in terms of  
7 Microsoft's position it comes into the case.

8 MR. SCHMIDTLEIN: It is in the case. And Your Honor  
9 need look no -- we can provide you with a newspaper article  
10 from the Salt Lake City newspaper where their counsel is quoted  
11 in there saying that this wasn't some anticompetitive act, this  
12 was just Mr. Gates mediating a dispute amongst his --

13 THE COURT: But you want me to exclude newspaper  
14 articles?

15 MR. SCHMIDTLEIN: No, I'm just telling you, they're  
16 previewing their defense in the newspaper articles. And their  
17 defense is we did have a business justification.

18 THE COURT: A business justification, yes, but I  
19 don't see -- the whole idea -- there's a lot of differences  
20 about the middleware thing. I've never heard Microsoft say  
21 that it is procompetitive to attack middleware in order to  
22 preserve our monopoly in the operating system market.

23 MR. JOHNSON: Your Honor, they're going to offer  
24 reasons why supposedly they did this, after the fact, that are  
25 contrary to what Bill Gates said. They're going to say, oh,



1 this is was a real problem because it wouldn't run on NT, and  
2 we weren't going down that path. And lots of other reasons  
3 that you don't find anywhere in Mr. Gates' decision. So yes,  
4 they're going to offer all kinds of after the fact reasons for  
5 what they did -- what they did, that aren't in Mr. Gates'  
6 e-mail. And we're going to show that those are pretextual.  
7 And it's going to be a big issue in the case.

8 THE COURT: I understand.

9 MR. TULCHIN: Your Honor, excuse me for a minute, Mr.  
10 Holley is dealing with the jury instructions. I just can't  
11 help myself, I hope it's okay and Mr. Holley isn't upset with  
12 me. I mean, this pure argument about what Mr. Gates said and  
13 whether it's pretextual and whether there was evidence at the  
14 time, that is what our trial is for.

15 But I just want to say, of course, the decision about  
16 what functionality is included in Windows 95, our operating  
17 system, Microsoft hired software engineers to make it, to write  
18 the software code, to design Windows 95. That was released to  
19 the market in August of '95. And what's missing here, which I  
20 think is disturbing, because otherwise this trial is going to  
21 get off way into the wrong territory, is that Microsoft is  
22 entitled, and everyone should understand this as a matter of  
23 law, to make a product that's best for Microsoft, not a product  
24 that Novell thinks is best for its applications.

25 So I didn't want to argue the merits of Mr. Gates'

1 e-mail. They think that that's going to be big for them at the  
2 trial. We'll see what the jury thinks. And I'm just going the  
3 leave it there. But this is about *Aspen Skiing*. It's exactly  
4 the only exception to the rule. We make our product. We make  
5 it the one we want to. They say you withdrew support in  
6 October '94, that's ten months before the product was released,  
7 to these four APIs. There were 2,500 APIs in Windows 95, you  
8 withdrew support for them. All that means is, we said to  
9 Novell and all others, if you use them, use them at your own  
10 risk, because they may not be available in future versions of  
11 the operating system.

12 And that argument, if there's a claim there at all, I  
13 don't think there is under the antitrust laws, but if there is  
14 at all, it's what Your Honor said in your decision on summary  
15 judgment, it's a claim under *Aspen Skiing*. The very narrowest  
16 exception to the rule that any company, monopolist or not, any  
17 company is free to deal with or not deal with competitors. So  
18 for them to prevail here, they have to show that there was no  
19 business justification. This idea that there's a Section 1  
20 case and you can weigh the justification against the  
21 anticompetitive effect, *Aspen Skiing* and *Trinko* --

22 THE COURT: I understand. I understand. I  
23 appreciate it. I started all this, because I still don't --  
24 and I know I started it, and I started it without quite knowing  
25 what I'm talking about, but every business justification I've

1 heard from Microsoft is not that there was, quote -- maybe it  
2 is, in a way it is procompetitive because it wants a good  
3 product.

4 MR. TULCHIN: Of course. Of course that's --

5 THE COURT: But it hasn't -- it's not weighing  
6 conduct against pro -- you did what you did allegedly, because  
7 you thought, for the reasons you've expressed, which is not to  
8 further competition.

9 MR. TULCHIN: Yes, it was --

10 THE COURT: It was to put a good product on the  
11 market.

12 MR. TULCHIN: Yes, that's what we're supposed to do  
13 under antitrust laws, make the best Windows 95 we can.

14 THE COURT: Okay. I understand.

15 MR. TULCHIN: That is procompetitive.

16 THE COURT: And that is procompetitive, but to be  
17 talking about procompetitive in the instructions, I think, may  
18 be confusing, but I understand.

19 MR. TULCHIN: Sorry, I reacted to this and I  
20 apologize.

21 THE COURT: No, I expected you to, you've been very  
22 well-behaved.

23 MR. MARTIN: And, of course, what they're not  
24 supposed to do is exclude companies that might come in and  
25 compete.

1 I would suggest to the Court, I've heard this  
2 argument before, I've read this argument, Caldera versus  
3 Microsoft is also an instructive case where there was a series  
4 of acts that were considered. We've heard some of the same  
5 arguments about this. It's just unilateral refusal to deal,  
6 you need to consider it that way. For purposes of jury  
7 instructions, I have not heard any reason to deviate from the  
8 model jury instructions.

9 I am, by the way, if the Court is interested,  
10 prepared to provide authorities on the use of Rule of Reason  
11 analysis.

12 THE COURT: Well, we can revisit the instruction  
13 issues next week if necessary.

14 MR. MARTIN: Right. If you'd like that, we can do  
15 that.

16 THE COURT: You can provide them if you want. I  
17 don't think I'm going to give them, but you can -- I'm going to  
18 keep this case as tight as it can possibly be.

19 MR. MARTIN: Understood.

20 THE COURT: And I don't think a Rule of Reason  
21 instruction is going to keep it tight.

22 MR. MARTIN: And I think I have to be candid to say  
23 that we don't agree entirely with the analysis the Court used  
24 in its summary judgment opinion, we said that in our --

25 THE COURT: No, I understand.

1 MR. MARTIN: Okay. With regard to damages, it's  
2 interesting, they said that they were relying on the model rule  
3 for their material cause, the aspect of that instruction. We  
4 don't dispute that the material cause instruction is right, it  
5 just belongs in the injury causation instruction where it  
6 always is, not in the damages instruction. It's hidden so you  
7 can't realize that's what the proximate cause analysis really  
8 is and why it should be dealt with separately. You don't get  
9 to damages unless the jury decide there was the some injury  
10 proximately caused by the anticompetitive conduct.

11 On the issue of disaggregation, it's not an issue in  
12 cases where there's more than one act involved. *LePage's* will  
13 tell you that. Disaggregation is unnecessary, and probably  
14 impossible, in cases where there's a series of acts and the  
15 jury's asked to decide whether the conduct harmed competition,  
16 and whether that conduct injured the plaintiff.

17 And I direct the Court to the *LePage's* decision, and  
18 also the jury verdict form that's in *LePage's*. It's a very  
19 simple, one, two, three verdict form. Did the defendant have  
20 monopoly power? Did the defendant unlawfully maintain its  
21 monopoly power? Did that anticompetitive conduct materially  
22 cause harm to the plaintiff? And if so, what are the damages?  
23 So the disaggregation issue, and we can revisit this, because I  
24 had hoped we would limit ourselves to the big overarching  
25 issues that really affect all of the other things. But the

1 disaggregation is a red herring, it doesn't belong here.

2 The same with the government findings. That's a  
3 collateral estoppel issue. I think we can craft an appropriate  
4 instruction once we know what the Court wants to do. I don't  
5 think we need to argue about that now.

6 If the Court has any questions, I'm happy to address  
7 them. If the Court would prefer to address them when we next  
8 meet --

9 THE COURT: If I have them I'll think about what you  
10 said, if I have questions I'll ask them next time we're  
11 together.

12 MR. MARTIN: Thank you, Your Honor.

13 MR. HOLLEY: Your Honor, can I? I know we're --

14 THE COURT: No, no, that's fine. As I said, I  
15 scheduled the whole day and --

16 MR. HOLLEY: Well, Your Honor, I would say this we  
17 thought -- and Mr. Paris flew here from Los Angeles to talk  
18 about evidentiary issues as well.

19 THE COURT: We can do those. I thought the motions  
20 in limine, have they been responded to?

21 MR. HOLLEY: No, that we cannot do, Your Honor.

22 THE COURT: Oh, you wanted to do the foundation  
23 issues?

24 MR. HOLLEY: Yeah, just because, and the only  
25 reason -- I don't mean to impose, Your Honor, because I know we

1 are getting very close to trial --

2 THE COURT: No, no, we can break for lunch and do the  
3 foundation issues after lunch.

4 MR. HOLLEY: Okay. Thank you.

5 THE COURT: I'm sorry.

6 MR. HOLLEY: Well, my senior partner stole some of my  
7 thunder, so I won't repeat what Mr. Tulchin burst up to say.  
8 But the -- this balancing test, which I think Your Honor is  
9 skeptical about, really is a Section 1 concept and doesn't  
10 belong in Section 2. It's really not appropriate for juries to  
11 try to be balancing valid business justifications on the one  
12 hand --

13 THE COURT: If I had not allowed your senior partner  
14 to steal your thunder, I'm afraid he might have had a heart  
15 attack.

16 MR. TULCHIN: I'm very close, Your Honor.

17 MR. HOLLEY: The one point that Mr. Martin made,  
18 which I think is just -- I was sort of taken back by, is the  
19 notion that this is not a unilateral refusal to deal case, and  
20 that what Novell said in opposing Microsoft's summary judgment  
21 motion is not controlling. Rule 56 requires a party faced with  
22 a summary judgment motion to lay bare its proof, that's what  
23 the Supreme Court has said, you can't hold anything back, when  
24 somebody moves for summary judgment against you, you have to  
25 say what your case is that you say gets you to trial. And

1 Novell did that.

2           And the three things they talked about were all  
3 unilateral refusal to deal issues. One was that Microsoft  
4 allegedly told them it could use the name space extension APIs  
5 in the Windows 95 beta, and later said don't do that. That is  
6 a unilateral refusal to provide technical information to a  
7 competitor. The second one was that Microsoft told Novell they  
8 couldn't use their trademarked Windows 95 logo on Word Perfect  
9 and Quattro Pro unless they met certain requirements. That  
10 logo is trademarked intellectual property, and the allegation  
11 is that Microsoft refused to provide that IP to Novell. And  
12 the third one is that Microsoft refused to include, or just  
13 didn't, include certain custom print processing functionality  
14 in its brand new operating system that it was trying to get out  
15 the door.

16           Those are the only three acts that were alleged at  
17 the time that they were opposing the summary judgment motion.  
18 And those are the acts that the Court, in the summary judgment  
19 decision denying our motion, said should be tried. And the  
20 Court said that they should be tried based on the *Aspen Skiing*  
21 exception to the doctrine that Mr. Tulchin so articulately  
22 stated. We can't change the case now. That's the case. That  
23 is their case. Otherwise, we ought to go back and argue the  
24 summary judgment motion again.

25           So I know they don't like being bound by what they



1 said in the complaint. They don't like being bound by what  
2 they said in their summary judgment papers. But at some point  
3 we, and the Court, need to know what case it is we are trying.  
4 And people cannot be allowed to continually switch horses and  
5 switch horses and switch horses whenever it becomes convenient  
6 because there's some obstacle to the way the case was being  
7 argued before then.

8 So we want -- we agree with the Court that the case  
9 should be as tight as possible, that the jury should be told as  
10 clearly as possible what it is that Novell alleges that  
11 Microsoft did that harmed Word Perfect and Quattro Pro, and how  
12 that very same harm to those two applications also harmed  
13 competition in the PC operating system market. We cannot have  
14 this loose, unbounded inquiry. The jury will have no idea how  
15 to resolve this case. Thank you, Your Honor.

16 THE COURT: Yes, sir.

17 MR. MARTIN: It's the same horse. And I'm going read  
18 from page 746 of your opinion. "As an initial matter, it's not  
19 entirely clear that Microsoft's conduct was merely a refusal to  
20 cooperate. Novell has presented evidence that Microsoft  
21 affirmatively misled Novell about Windows 95 and entered into  
22 anticompetitive agreements with OEMs." That is the analysis.  
23 Even assuming this stricter standard, Microsoft still loses.  
24 We've been on the same horse all along.

25 THE COURT: Thank you. See you all. Why don't -- I

1 have not read the -- I've read the instruction papers, I have  
2 not read the papers about the next issue to be discussed. So  
3 would you mind coming back at 2:30, it will give me time to  
4 read them.

5 (A recess was taken.)

6 THE COURT: Please be seated. Again, I apologize for  
7 not being as prepared as I should be. Who goes next?

8 MR. JOHNSON: Your Honor, I actually have a couple of  
9 preliminary matters that I think I'd like to address now before  
10 we get too bogged down.

11 THE COURT: That's fine.

12 MR. JOHNSON: Just think they're kind of important to  
13 the preparation for my opening and my witnesses. In this case  
14 we've taken various depositions of Microsoft executives. Some  
15 of which qualify as managing agents within the meaning of  
16 Federal Rule of Civil Procedure 32(a)(3), those include Mr.  
17 Gates, Mr. Muglia and Mr. Belfiore. And then we've also taken,  
18 of course, a number of other Microsoft witnesses who would not  
19 qualify under that rule, but regardless of -- and under that  
20 rule, of course, since they're managing agents, the rule says  
21 we can use the deposition for any purpose. And we clearly  
22 intend to play designated portions of those depositions to the  
23 jury.

24 The problem comes is that Microsoft has taken the  
25 position that we can't show these depositions because these

1 witnesses apparently are scheduled to appear live in their  
2 case. And I just need a little guidance to make sure that I do  
3 understand the import of Federal Rule of Procedure 32, number  
4 1, and as to those that don't, that wouldn't meet the  
5 requirements of Federal Rule of Civil Procedure 32, that I  
6 still have the right to play the depositions. I don't have to  
7 call their witnesses in my case in order to proceed.

8 THE COURT: Who wants to be heard on Microsoft's side  
9 on that?

10 MR. TULCHIN: Your Honor, thank you. Couple things,  
11 I'm surprised to hear this come up now, I wasn't given any  
12 notice that Mr. Johnson was going to raise it. It hasn't been  
13 briefed by either party. And although we were here all day  
14 today together, he didn't tell me that this was coming.  
15 Secondly, he's not surprised that these witnesses are going to  
16 be called live in our case. We've had them on our witness list  
17 for at least a month. So they are coming, they will be called  
18 live. And there are circumstances when a deposition can be  
19 used in the plaintiff's case, the deposition of a party. But I  
20 don't think any of these qualify under the rule.

21 I mean, clearly the witnesses are not unavailable.  
22 That much I think everybody agrees on. And here we have the  
23 situation where although we haven't been briefing yet, the  
24 deposition designations that each side has made of depositions,  
25 this isn't a case, if my memory serves me, where Novell wants

1 to put in just a few questions or answers from these deponents,  
2 for instance on something that might qualify as an admission  
3 for the party, Microsoft.

4 There are wholesale designations from the depositions  
5 of many of these witnesses. Mr. Johnson just conceded that a  
6 number of them are not managing agents for the corporation.  
7 Those clearly can't come in. But any of these questions can be  
8 used -- the questions can be used in cross-examination when the  
9 witness is there live. The transcript of the deposition or the  
10 videotape might be used for purposes of impeachment. But to  
11 waste a tremendous amount of the jury's time by playing  
12 deposition designations seems counterproductive here.

13 In this connection, Your Honor, I think, if my memory  
14 is correct, that Novell designated 32 hours of deposition  
15 testimony from the depositions that were taken in this case,  
16 that doesn't include our cross designation of testimony from  
17 the same depositions. So, again, I wish I had known this issue  
18 was coming up. But I don't think it makes sense, I hope if it  
19 happens the jury holds it against the party responsible and not  
20 both sides, but I don't think it makes sense to have four or  
21 five days of deposition testimony from a number of witnesses  
22 who are going to be there any way.

23 THE COURT: I'm sorry, I'm confused I thought if they  
24 lived a hundred miles or more from Salt Lake City they could be  
25 called under Rule 32, whether they're a managing agent or not,

1 maybe I'm --

2 MR. JOHNSON: Not on the list --

3 THE COURT: It seems to me so obvious, I'm worried.

4 MR. JOHNSON: None of these people live within a  
5 hundred miles of Utah.

6 THE COURT: Why can't they be used under Rule  
7 32(a) --

8 MR. JOHNSON: (3).

9 THE COURT: (3).

10 MR. JOHNSON: Yes, of course.

11 THE COURT: I'm sorry, I don't get it.

12 MR. TULCHIN: I'm sorry, Your Honor?

13 THE COURT: Why can't the depositions of these people  
14 be used under 32(a)(3)?

15 MR. TULCHIN: Well, for one thing, Your Honor, a  
16 number of these people are not within the definition of the  
17 party's officer, director, managing agent.

18 THE COURT: But (a)(3) says the deposition of a  
19 witness, whether or not a party, may be used by any party for  
20 any purpose if, among other things, the witness is at a greater  
21 distance than a hundred miles of the place or hearing.

22 MR. JOHNSON: Yeah, that's (4), Your Honor,  
23 unavailable witnesses, and that's right. That would apply for  
24 all of them.

25 MR. TULCHIN: That's (4), Your Honor, unavailable

1 witnesses, none of these people are unavailable. They will be  
2 at trial.

3 THE COURT: So what? If they live more than a  
4 hundred miles from Salt Lake City --

5 MR. TULCHIN: Well, that's not my understanding of  
6 (4), Your Honor. The unavailability means they're unavailable  
7 at trial, they will be available at trial.

8 MR. JOHNSON: I can't subpoena them, Your Honor.  
9 Some of these people don't even work for Microsoft anymore.  
10 You know, they say they're bringing them. They're bringing  
11 them for their case, not for my case. I went out and took the  
12 depositions of these people to present to the jury at trial.

13 THE COURT: Seems to me you can use them, I don't  
14 know why not.

15 MR. JOHNSON: Thank you, Your Honor. That's all I  
16 needed to know with respect to that subject.

17 THE COURT: But if they're cross designations you  
18 ought to work it out.

19 MR. JOHNSON: Yes. Speaking of objections, Microsoft  
20 has filed 120 pages of objections to our designations. So we  
21 have a little work to do there, to say the least, when we're  
22 talking about objections a little later, Your Honor.

23 MR. TULCHIN: Well, when we're talking about  
24 objections, Your Honor, I do think the Court had set a  
25 procedure of what we were intending to discuss here today.

1 And, you know, Mr. Johnson has some other subject that he  
2 wanted to discuss, these deposition transcripts, normally it  
3 would be courteous for counsel to tell the opposing party.

4 THE COURT: Okay. I appreciate that. And I'm just  
5 telling you, you all can talk about this later, I don't see why  
6 this rule doesn't govern that.

7 MR. JOHNSON: Thank you, Your Honor. And just to say  
8 that this is some sort of unexpected thing, Mr. Tulchin should  
9 read my letters, I know they go to Mr. Holley but I feel  
10 certain he sees them. When I said in the last letter, and the  
11 letter before that, that this issue would have to go to the  
12 Court if they didn't change their mind.

13 THE COURT: If something changes let me know. It  
14 seems to me you're absolutely right.

15 MR. JOHNSON: Okay. Thank you, Your Honor. The  
16 second issue I need to raise, Your Honor, is that on Tuesday,  
17 late Tuesday, Microsoft filed a spoliation motion with this  
18 Court. This appears to be nothing more than a trial tactic.  
19 It was raised for the very first time in a meet and confer  
20 between the parties, in which they threatened it if we didn't  
21 drop our objections to certain exhibits.

22 Now, discovery in this case was completed years and  
23 years ago. If there was some legitimate problem with the  
24 evidence, and there was some spoliation issue, it should have  
25 been raised years ago. Now, fortunately in this jurisdiction,

1 in particular, Magistrate Judge Grimm has the definitive case,  
2 the Goodman case, on unacceptable delay in bringing spoliation  
3 motions. And I've taken a look at that case, and Microsoft  
4 doesn't meet any of the criteria to allow it to bring a  
5 spoliation motion at this point in time in this case.

6 So what my proposal is, Your Honor, because  
7 spoliation, I mean, this goes back years and years, involves a  
8 lot of evidence, a lot of work, and a lot of time, which I  
9 don't have right now, I would like to propose that you allow me  
10 to file a motion to strike the spoliation motion on the basis  
11 of Magistrate Grimm's decision and the criteria specified  
12 therein. And if I don't meet that hurdle, then I'll have to  
13 respond to that motion on the merits. But I just -- I mean,  
14 this is just such a trial tactic. And it is totally messing up  
15 my preparation for trial in a couple of weeks. So I'd like to  
16 be able to at least address the timeliness issue first before  
17 getting into the merits, which is just a morass.

18 MR. TULCHIN: Your Honor, Mr. Paris is going to in  
19 effect cover some of this when talking about the objections  
20 that Novell has made to documents that we designated as trial  
21 exhibits that come from Novell's own files. Many of which are  
22 objections that they don't know who the author of the document  
23 is. But although Mr. Johnson is quick with the accusations, he  
24 calls this a trial tactic, I suppose one could easily say just  
25 as well that the tactic here is to avoid responding to the



1 spoliation motion, and instead talking about whether it's  
2 timely or not. It seems to me that if Mr. Johnson wants to  
3 respond to our motion by saying it isn't timely, that should be  
4 part of his response.

5 But there is a 10th Circuit case, I don't have it at  
6 my fingertips that dealt with spoliation motion at trial as  
7 well. In any event, it is very serious, substantial motion. I  
8 don't know if the Court's had a chance the look at it yet.  
9 Obviously, there's been no response from Novell. But we think  
10 it should be heard at the first available opportunity. And if  
11 Novell opposes partly on the ground that they say it isn't  
12 timely, well, that's what they do.

13 MR. JOHNSON: And that's your problem, Your Honor,  
14 we're heading into trial. Spoliation issues involve events  
15 that occurred years ago, involve a lot of technical matters.

16 THE COURT: No, you can file your motion to strike as  
17 untimely.

18 MR. JOHNSON: Thank you, Your Honor.

19 THE COURT: And if I decide it's timely, then you can  
20 file a response. We'll argue that -- we'll argue the  
21 timeliness next week.

22 MR. JOHNSON: Thank you, Your Honor, very good.

23 MR. TULCHIN: Could I ask Your Honor when this motion  
24 will be filed --

25 THE COURT: When can you have it filed?

1 MR. TULCHIN: -- chance to respond to it.

2 THE COURT: No, that's fine. That's a good question.  
3 What's today, Thursday? Monday?

4 MR. JOHNSON: Oh, opposition to motions in limine are  
5 due Monday, can we make it Tuesday?

6 THE COURT: Make it Tuesday, and we'll argue it  
7 Friday.

8 MR. JOHNSON: I'm sorry, Tuesday is the opposition to  
9 motions in limine, so I guess by noon Wednesday?

10 THE COURT: Tuesday.

11 MR. JOHNSON: Tuesday, okay. Close of business  
12 Tuesday?

13 THE COURT: Close of business Tuesday.

14 MR. JOHNSON: Thank you.

15 MR. TULCHIN: Which gives us one day to respond, Your  
16 Honor.

17 THE COURT: But you guys can do that.

18 MR. TULCHIN: Which I guess we'll do.

19 THE COURT: But we won't argue till Friday. I'll  
20 hear you fully on Friday.

21 MR. JOHNSON: Thank you, Your Honor.

22 THE COURT: I don't quite understand the position why  
23 they have to have a sponsoring witness for your exhibits?

24 MR. JOHNSON: Here's --

25 THE COURT: I mean, for your documents. I've never

1 heard of such a thing. They're your documents. If you want to  
2 explain them, if you think that they need explanation, you have  
3 somebody to say it doesn't mean what it says.

4 MR. JOHNSON: Well, of course, they're not all our  
5 documents.

6 THE COURT: The ones that are your documents.

7 MR. JOHNSON: Some of them are Microsoft documents.  
8 The problem we have is this: Microsoft has designated a large  
9 number of documents, a large number which are from our files,  
10 and which we concede are business records. But these exhibits  
11 were never used throughout the discovery process. No witness  
12 has even said that they know anything about it. And we don't  
13 think that it is appropriate, at least in my experience --

14 THE COURT: No, I'm sorry, I do. As far as I'm  
15 concerned they're your documents, if you want to explain them  
16 away, you explain them away. So maybe that will move to  
17 spoliation, I don't know, but we'll see. Okay. So that  
18 objection is overruled.

19 Okay. Mr. Paris.

20 MR. PARIS: Thank you, Your Honor.

21 THE COURT: Oh, excuse me. Anything else,  
22 preliminary?

23 MR. JOHNSON: Well, actually, we have all of ours to  
24 go through, but if you'd like to hear --

25 THE COURT: I'll hear from him first.

1 MR. JOHNSON: -- hear from him first that would be  
2 fine.

3 MR. PARIS: Thank you very much, Your Honor. Adam  
4 Paris of Sullivan and Cromwell for defendant Microsoft. I  
5 think Your Honor has actually resolved right away a good  
6 portion of what we need to speak about this afternoon,  
7 Microsoft's objection to their -- to the trial exhibits that  
8 are at issue principally on two overarching bases, one of which  
9 you dealt with which is foundation. And we agree. So I won't  
10 speak to that anymore.

11 THE COURT: How about as to your own documents?

12 MR. PARIS: As to our own documents it's slightly  
13 different issue and it's a much smaller number. We've agreed,  
14 the parties agreed to several things. There's an authenticity  
15 stipulation, there's a business records stipulation that  
16 everybody's documents come in under 803(6), under the 803(6)  
17 exception to the rule against hearsay. There are only a couple  
18 requirements to bring documents into evidence, as Your Honor  
19 has recognized; authenticity, nonhearsay, or if it's hearsay an  
20 appropriate exception to the rule against hearsay, relevance,  
21 if there's a 403 objection Your Honor would have to decide  
22 that, but that's it. There's no independent requirement that  
23 goes above or beyond any of those things.

24 In this case I think it's conceded, and Mr. Johnson  
25 appears to agree, that we have an authenticity stipulation, we

1 have a business records stipulation. What the effect of those  
2 stipulations are is to say that everybody's documents  
3 presumptively, assuming they're relevant, assuming there's no  
4 undue prejudice, will come into evidence. What we built into  
5 our stipulations was essentially a burden shifting mechanism,  
6 that everybody agrees that these presumptively come in, subject  
7 to some further showing that they aren't, for example, business  
8 records.

9 And that's a showing that we're prepared to make in  
10 the event of individual objections, specified as, you know,  
11 nongeneralized specific objections as to Microsoft's documents,  
12 for example. They have not done that as to any of ours. They  
13 haven't spent any time or any energy, produced any evidence to  
14 indicate that, for example, on ours, these are not business  
15 records that were generated in the ordinary course.

16 I'm giving you sort of the 30,000 foot view of this,  
17 Your Honor. But that's the essence of the dispute when it  
18 comes to the foundations objections that they've leveled or  
19 interposed to Microsoft documents. Other than to just throw  
20 them out there without any explanation, they've not provided  
21 any information that would satisfy their burden to rebut the  
22 presumption that's agreed that these are admissible business  
23 records under 803(6).

24 THE COURT: Mr. Johnson?

25 MR. JOHNSON: Yes, when the business authenticity

1 stipulation was first proposed by Microsoft, they wanted  
2 additional language in the stipulation. They requested  
3 essentially a stipulation under Rule 602 of the Federal Rules  
4 of Evidence that there couldn't be no objection on the basis  
5 that the author of the document lacked personal knowledge of  
6 the factual statements made therein. And we declined that  
7 proposal. And so we have these documents, as to which were not  
8 used in any deposition, as to which no one has even said they  
9 know anything about. And so we're reserving a foundation  
10 objection with respect to how they use those documents.

11 Now, it may be that they will have somebody that has  
12 the personal knowledge to testify with respect to some of their  
13 own records. But I certainly need to reserve my objection with  
14 respect to that personal knowledge and those documents.

15 THE COURT: -- the business records exception to  
16 hearsay.

17 MR. JOHNSON: It's an exception to the Hearsay Rule,  
18 but it's not exception to having personal knowledge with  
19 respect to a document. In other words, I don't think that one  
20 of their witnesses can take a document, some Microsoft document  
21 that they had nothing to do with, that they don't know anything  
22 about, and start quoting chapter and verse from it because they  
23 happen to be on the stand for Microsoft. I think that that's  
24 not an appropriate use of that document.

25 THE COURT: You worry about a Microsoft employee

1 witness or an expert?

2 MR. JOHNSON: Not an expert -- an expert, that's not  
3 a question of admissibility if the expert can reasonably rely.

4 THE COURT: No, I'm just curious --

5 MR. JOHNSON: If an expert witness can reasonably  
6 rely on a document --

7 THE COURT: So you're worried about a Microsoft  
8 person.

9 MR. JOHNSON: Yes, exactly. And I'm reserving  
10 objection, depending how it's used at trial. That's all.

11 MR. PARIS: Your Honor, if I may, this doesn't go to  
12 the fundamental admissibility of these documents and this  
13 information, as you've noted. What that goes to is what Mr.  
14 Johnson's cross will be of our witnesses. If he thinks a  
15 witness --

16 THE COURT: It is a business record, subject to an  
17 appropriate objection being made to the way the document's  
18 being used, and that's being preserved.

19 MR. JOHNSON: Thank you, Your Honor.

20 MR. PARIS: Thank you.

21 THE COURT: I think we're probably now --

22 MR. JOHNSON: Your Honor --

23 THE COURT: -- your objections.

24 MR. JOHNSON: Yeah. We -- if you remember the last  
25 time we were here, we were going to pick out some

1 representative samples for you to take a look at. And some of  
2 these we'll be able to skip over because of what you've already  
3 said. So as we go through here, I think we can skip over  
4 Exhibit A, and this is our -- Novell's memorandum regarding  
5 Novell's and Microsoft's objections to the opposing party's  
6 trial exhibits. I think we can skip over B. C, is not  
7 relevant now. Okay. Exhibit D, which is DX-1, Your Honor,  
8 it's Exhibit D to our motion.

9 THE COURT: This is the Ryan Richards one?

10 MR. JOHNSON: Yes, Your Honor, it is. We were truly,  
11 I'd say, amazed to see that they were going to try to use this  
12 document. This is a. --

13 THE COURT: Let me find out, what do you want to use  
14 this for?

15 MR. JOHNSON: This is a Groupwise document. If they  
16 want to open the door.

17 THE COURT: Let me ask Mr. Paris what you want to use  
18 the Ryan Richards document for, DX-1?

19 MR. PARIS: Okay. Yes, Your Honor. Sorry, up and  
20 down.

21 THE COURT: No, no.

22 MR. PARIS: No worries.

23 THE COURT: So I have some idea what you want to use  
24 it for.

25 MR. PARIS: What this demonstrates, Your Honor, it's



1 relevant, it shows that Mr. Richards, in the course of his job,  
2 conducted an investigation as to whether -- you know, a  
3 retrospective investigation as to whether or not there had been  
4 anything -- let's just, to avoid being argumentative --  
5 anything untoward had gone on in the past several years before.  
6 Now, granted that a principal part of what he was looking at  
7 appears to have been Groupwise. But the scope of his inquiry  
8 was not limited to Groupwise. And his statements are not  
9 limited to Groupwise.

10 That's why this document is relevant. Because at the  
11 end of, you know, at the end of whatever inquiry it was that he  
12 conducted, he concluded nothing untoward happened. We think  
13 that's -- you know, it's admissible. All we're here talking  
14 about is admissibility. It's admissible on any number of  
15 bases, the 803(6) exception to the rule on hearsay, it's also,  
16 frankly, an admission of a party opponent in this instance. So  
17 we would want to use it for that as well. And that's why it's  
18 relevant. It's relevant because at the end of the day, at the  
19 end of this broad inquiry that he conducted, he concluded  
20 nothing untoward happened.

21 THE COURT: I'll read -- we'll take that up next  
22 week.

23 MR. JOHNSON: Your Honor, if I may, because this is  
24 just so ridiculous. At the time of this document we have  
25 already sold the products. So for two Groupwise guys --

1 because we kept Groupwise, you may remember, for two Groupwise  
2 to say no big issues that are harming our products, well, Word  
3 Perfect, Quattro Pro and Perfect Office were already sold, they  
4 were no longer our products. So what relevance or probative  
5 value is that? It's just ridiculous.

6 THE COURT: I hear you. We can talk about that next  
7 week.

8 MR. JOHNSON: All right. Your Honor. Let's go to  
9 the next one. I think actually DX-100 is resolved by what you  
10 concluded. So skip over that one.

11 Okay. This DX-109, Your Honor, Exhibit F. And this  
12 is a Novell document, Your Honor, so I understand we wouldn't  
13 have a foundation objection to this one. But this is a report  
14 of somebody at Novell about a talk given by a third party with  
15 respect to certain Microsoft activities in Windows 95. So the  
16 whole thing is a report of embedded hearsay from some guy who  
17 purports to be a Microsoft expert, but who is not a Microsoft  
18 employee, this Jeff Richter. And this is a summary of  
19 apparently what Jeff Richter said at this thing. So this is an  
20 embedded hearsay problem. And I just don't see -- I don't have  
21 any way to cross-examine Mr. Richter or to see whether any of  
22 his opinions with respect to Microsoft are valid or invalid.  
23 So I don't see how this comes in.

24 MR. PARIS: Thank you, Your Honor. We haven't had  
25 the chance yet to speak with opposing counsel about this

1 document or their objections, just simply because we got this  
2 brief last night with respect to the embedded hearsay objection  
3 of this particular document. However, what the underlying  
4 document shows is, it shows that Microsoft, at the time, had  
5 given notice to the world, at this conference, about things at  
6 issue in this case, for example, the logo, for example, the  
7 availability of name space extension APIs. Those types of  
8 things were reported and they made their way back to Novell. I  
9 mean, that's why this particular document is of moment,  
10 frankly. At the end of the day it's almost not precisely for  
11 the truth of the matter, it's more of a notice document.

12 THE COURT: Okay. Why don't you all talk about that.  
13 And to the extent issues remain I'll take them up next time.

14 MR. JOHNSON: Your Honor, the next one is DX-338,  
15 which is on tab H. I got to say this one really annoyed me.  
16 This is a long series of memos and reports with respect to the  
17 salaries of our employees. And it concerned apparently some  
18 overpayments that had been made that had to be collected --

19 THE COURT: Yeah, let me find out from Mr. Paris what  
20 they want the use it for.

21 MR. PARIS: Sure, Your Honor. I mean, this isn't  
22 designed to embarrass, right, Novell. We're not going to  
23 suggest at trial that somehow they were ripping off the  
24 employees or anything like that. What this is evidence of,  
25 though, is part of a large series of -- a large number of

1 documents and a large amount of evidence that Your Honor is  
2 going to hear in this case, about the problems and the mishaps  
3 that Novell had when it was -- after it acquired Word Perfect,  
4 when it was attempting to integrate it. Part of the problem  
5 they had is that they mispaid a whole bunch of people. Part of  
6 the problem they had, frankly, is they cut and fired a lot of  
7 people. Part of the problem they had is they cut the rest of  
8 their salaries.

9 This is highly relevant evidence to what Your Honor's  
10 going to hear in this case, which is, you know, the real  
11 problem -- there were problems inherent in Novell following its  
12 acquisition of Word Perfect that had nothing -- that caused it  
13 to be late, that caused Word Perfect for Windows 95 to be late  
14 and Quattro Pro --

15 THE COURT: Well, it sounds to me like I ought to  
16 defer ruling on this. What this is really is a Rule 403 issue.

17 MR. PARIS: I think that's the principal objection.

18 MR. JOHNSON: It's even worse, this doesn't have  
19 anything to do with the layoffs and --

20 THE COURT: No, no, but I'll know more when I've  
21 heard the evidence. Microsoft's position is you all were  
22 messing up your business. And this may be relevant to that.  
23 On the other hand, they may have 403 overlays, which I'm not  
24 going to let it in. So let me just -- I'll defer it.

25 MR. PARIS: Thank you.

1 MR. JOHNSON: Now, we have a couple documents here,  
2 Your Honor, that frankly, I need to use in my opening, which  
3 are our exhibits. And we can't understand the basis of the  
4 objections starting with PX --

5 THE COURT: No foundation?

6 MR. JOHNSON: Well, we weren't the only one to make  
7 foundation objections, Your Honor. So and I assume what's good  
8 for the goose is good for the gander here. And their  
9 foundation objections also fall.

10 THE COURT: Unless there's something different.

11 MR. JOHNSON: Exactly. Thank you, Your Honor. This  
12 is PX-316 at tab I. This is a -- documents collected by Mr.  
13 Jensen, who is going to be a witness at trial, is on our "may  
14 call" list, concerning the events surrounding Microsoft's  
15 promises repeatedly, repeatedly, repeatedly to give us the APIs  
16 that were actually in the Windows 95, but they didn't turn them  
17 on for the printing functionality of which we complied. This  
18 is not, as Microsoft tries to suggest, that they just didn't  
19 get time to get something done. The APIs were already in  
20 there. They just didn't turn them on. And they didn't inform  
21 us of that fact after we relied on their promises for about the  
22 course of a year, that two weeks before the product was  
23 released they said, sorry, we're not going to give those to  
24 you.

25 So these are documents that were business records put

1 together at the time by Mr. Jensen explaining this problem.  
2 And it's a very important part of our printer functionality  
3 story.

4 MR. PARIS: This is a good example, Your Honor,  
5 actually, and I'm glad they highlighted it in their brief, or  
6 objection here -- a couple points, our objection was not  
7 foundation, first of all. The foundation objections we put in  
8 place, or we interposed in this case were very few. They were,  
9 I think, by my count 37 that we interposed in total, contrasted  
10 with the 300 plus that we got from Novell. We were really  
11 limited in our foundation objections. That's one.

12 The objections we put in here, Your Honor, to this  
13 particular document, PX-316, hearsay, improper opinion, and  
14 irrelevant 403. This is a lawyer document. This was a  
15 document that was created in response, and on its face the  
16 subject line is "DOJ inquiry." This was something Mr. Jensen  
17 did. He conducted and produced this document to go to the DOJ  
18 with information to try to get it to take some action against  
19 Microsoft. It's hearsay of the worst sort. It's not subject  
20 to the 803(6) exception to the rule against hearsay. It  
21 contains all sorts of improper legal opinions in it, quite  
22 frankly. And we have two cases that we almost by happenstance  
23 cited in our brief that deal with situations where a party is  
24 producing information, producing documents that are, you know,  
25 contain hearsay statements in response to a government inquiry

1 or in response to a legal threat.

2 One of those cases is, I'm going to get the name  
3 wrong but the *Blechman* case that we cited, the 10th Circuit  
4 case from 2006 that's in our brief, 465 F.3d 1133. In that  
5 case, it was a criminal case, the DEA attempted to introduce as  
6 a business record a response to the DEA subpoena that was sent  
7 to Western Union. And Western Union sent a response to the DEA  
8 that the DEA attempted to use against a criminal defendant,  
9 right, because it contained a bunch of the defendant's  
10 financial transactions and other information. And the Court  
11 said no, no, no, if Western Union is responding to a DEA  
12 subpoena that's not a business record that comes in under the  
13 803(6) rule -- exception to the rule against hearsay.

14 It's the same thing here, quite frankly, Your Honor.  
15 This is something that Jensen did to go to the DOJ. This is  
16 not an ordinary course business document. This is something  
17 that was manufactured essentially, whether you want to call it  
18 in anticipation of litigation or in an attempt to get the DOJ  
19 to commence litigation, however, you characterize it. It's  
20 totally unreliable as a piece of evidence and that's why we  
21 object.

22 MR. JOHNSON: Your Honor, I'm pretty surprised to  
23 hear him say that this is not a business record. He told you,  
24 not more than five minutes ago, that DX-1 was a business  
25 record. He says it was subject to 803(6). That's what he told

1 you. At the top of DX-1, it says "re: DOJ investigation of  
2 MS." Mr. Jensen's thing is "DOJ inquiry." How are those  
3 different? These are both business records. Novell has a  
4 governmental affairs unit. This was in a response to a  
5 government request to provide them information.

6 But, and this is important, only the cover memo on  
7 this exhibit was done with respect to the DOJ inquiry. The  
8 attachments which are the important part for purposes of our  
9 case, are not -- were not prepared for DOJ inquiry. The  
10 underlying attachments, the letter to Adam, which is Adam Hero,  
11 and the chart were documents that were created in the ordinary  
12 course of Mr. Jensen's business at Novell. And he was simply  
13 putting these -- giving them, forwarding them with respect to  
14 the DOJ inquiry with this cover. So this is not -- these  
15 documents are not created specially for the DOJ, even if that  
16 isn't a business record for Novell.

17 MR. PARIS: Couple of points, Your Honor. No. 1, I  
18 heard Mr. Johnson say what he believes the foundation is for  
19 the underlying attached document, and I don't believe there's  
20 any evidence in the record that speaks to it. No. 2, it's one  
21 thing if Microsoft discovers, from Novell's own documents,  
22 admissions that it makes in the course of soliciting the  
23 government to get the government to take action. We can use  
24 those. We're allowed to use those. Those are admissions of a  
25 party opponent. Conversely, Novell can't use its own



1 statements, its own hearsay statements, self-serving, prepared  
2 in order to elicit, you know, a government investigation of  
3 Microsoft, ten years later against Microsoft, as having some  
4 indicia of reliability or truthfulness. That's just not how  
5 the world works or how the rules work.

6 MR. JOHNSON: Again, Your Honor, the underlying docs  
7 were not prepared for a DOJ inquiry.

8 THE COURT: I'll read it and consider it next week.  
9 Sounds like it could be hearsay, but I could be wrong.

10 MR. PARIS: Very well, Your Honor.

11 MR. JOHNSON: Your Honor, the next exhibit is 324.  
12 It's under tab J. I don't think they claim this one's not a  
13 business record. This is a e-mail chain involving top  
14 Microsoft executives discussing many things that are directly  
15 relevant to their having pulled the name space extensions.  
16 What happens here -- what happened here is that Mr. Henson, who  
17 was a member of the developer relations group, discovers to his  
18 horror, at about the time of release of Windows 95, that one of  
19 Microsoft's application products, called Athena, was using the  
20 name space extensions in order to integrate into the Windows  
21 explorer the exact functionality that Microsoft had taken away  
22 from the ISVs and told them that they should not and could not  
23 use.

24 And, furthermore, Mr. Henson had been telling the  
25 ISVs, like Novell, and the other ISVs that would depend on

1 these that the reason that we told you not to use those was  
2 that we weren't going to support them on NT, Windows NT, which  
3 is a business operating system. Here he throws Athena on  
4 Windows NT, it works just fine. Because the truth of the  
5 matter was that the entire Chicago, meaning Windows 95 code  
6 base, had been placed on Windows NT, at the orders of Mr.  
7 Gates, prior to his decision to take away this technology from  
8 ISVs. Mr. Henson says, this is awful, trust, we lose  
9 everything with the ISVs when we do something like this. We  
10 have to publish these extensions right away. Our ISVs are  
11 months behind.

12 But it's in August of 1995, it's too late. They've  
13 already ensured that we would not have a product available for  
14 the release of Windows 95. And Mr. Henson is horrified by this  
15 and writes to his superiors about it. And you see the further  
16 discussion amongst the superiors about this situation. And in  
17 fact, Mr. Silverberg, who is the head of the Chicago  
18 development, says, "The decision to not expose the shell  
19 extension APIs was based on a set of considerations which are  
20 no longer operable. The Win 95 shell will be on Win NT. And  
21 the shell extensions will run fine there."

22 This exposes the hypocrisy, the lie that Microsoft  
23 told the ISVs regarding the reasons, which of course are not in  
24 Mr. Gates' e-mail making the decision, but the pretextual  
25 reasons given to the ISVs for pulling these extensions. This

1 exposes the lie. And this is probably one of the most  
2 important exhibits in this matter. And they make a  
3 prejudice -- a 403 objection to this? I understand it's  
4 prejudicial, but it is right on point.

5 MR. PARIS: Your Honor, if I will, our objection here  
6 is foundation and 403. The principal reason is in respect to  
7 the Silverberg response at the top, he was wrong. His reaction  
8 was wrong. He later came to realize it was wrong. That's the  
9 real -- that's the nub of the problem here. Again, this is the  
10 type of thing that had I, you know, gotten this brief earlier  
11 than 10:30 last night I would have had evidence with me in  
12 court today to show you why the foundation for this is  
13 basically misleading, and why the 803(6) presumption should be  
14 rebutted in this instance. And if we take this up next week,  
15 I'll --

16 MR. JOHNSON: Your Honor, I need this for my opening.  
17 This document --

18 THE COURT: I'll decide next week. Get anything in  
19 you want, just like I think the other one doesn't come in, I  
20 think this does come.

21 MR. JOHNSON: And, Your Honor --

22 THE COURT: Subject to hearing from you.

23 MR. JOHNSON: -- by the way, Silverberg, if he got it  
24 wrong, why isn't he coming to trial?

25 THE COURT: That's what -- I would think that this is

1 a document that if they want to explain it they ought to  
2 explain it.

3 MR. JOHNSON: Exactly. Thank you.

4 THE COURT: That's my instinct. But if Mr. Paris  
5 wants to get something in between now and next week for me to  
6 review, I'll review it.

7 MR. PARIS: Thank you.

8 MR. JOHNSON: The next document, Your Honor, I'd like  
9 to address is Exhibit M, which is PX-346.

10 THE COURT: 346.

11 MR. JOHNSON: Yeah, 346. This is a statement  
12 prepared by the governmental affairs unit of Novell, given to  
13 the FTC on December 1st, 1995, so it's a public document on  
14 record with the FTC. It explains why we've made the decision  
15 to divest ourselves --

16 THE COURT: That's not going to come in. If you want  
17 that person to explain it, have them there subject to  
18 cross-examination.

19 MR. JOHNSON: Well, they will be there to explain it.

20 THE COURT: Good. And if you want to mark this for  
21 identification, fine. But it's not going to come in otherwise.

22 MR. PARIS: Thank you, Your Honor.

23 MR. JOHNSON: The last document this is Exhibit N,  
24 Your Honor, of PX-361. I was really surprised to see an  
25 objection to this one. This is the Rakes e-mail quoted by the

1 4th Circuit in its opinion as to the reasons why we made out a  
2 case and had standing in this matter. Mr. Rakes is trying to  
3 convince Mr. Buffet to invest in Microsoft. And Mr. Rakes  
4 tells him that if we own the key franchises -- and Mr. Rakes  
5 has agreed that what he meant was the office productivity  
6 applications -- he says if we control the key franchises  
7 sitting atop Windows, we widen the moat protecting our  
8 operating systems monopoly. He goes on to say we hope to make  
9 a lot of money off of those key franchises, but they also  
10 protect our Windows royalty per PC.

11 This is apart from the middleware, and we've talked a  
12 lot about middleware this morning, Your Honor. This is the  
13 second, and perhaps even more substantial reason why Microsoft  
14 took the actions it did. By owning the key franchises, by  
15 controlling the business applications sitting on top of the  
16 Windows, Mr. Rakes acknowledged, a top Microsoft executive,  
17 that they widen the moat protecting the Windows operating  
18 system. This document was cited in the 4th Circuit as direct  
19 evidence of our claim. And while we had -- and why there was  
20 antitrust injury. It's obviously a business record.

21 MR. PARIS: I'll start there. It's obviously not a  
22 business record, Your Honor. This is Mr. Rakes' e-mail. Mr.  
23 Buffet was a friend of his. He wasn't speaking, Mr. Rakes when  
24 he was e-mailing him, he wasn't speaking on behalf of  
25 Microsoft. He wasn't staking out a Microsoft position or

1 explaining, frankly, a Microsoft strategy. These were his  
2 personal observations and musings and thoughts in, I believe  
3 it's August 1997. So we're talking about, just so we're clear,  
4 you know, anywhere between two and four and a half years after  
5 the events that are actually at issue in this case.

6 It's not an 803(6) business record that's, you know,  
7 an exception to the rule against hearsay. Because we know from  
8 Mr. Rakes' deposition, at pages 166 to 174 -- I was actually  
9 able to arm myself on this one, Your Honor -- 166 to 174 he  
10 explains that this was something that he just did. He was sort  
11 of chewing the fat, if you will, and e-mailing Mr. Buffett, who  
12 was a friend of his. That's what these statements are.

13 That's why they're hearsay and they're not chargeable  
14 to Microsoft, notwithstanding the fact that Mr. Rakes was, in  
15 fact, an executive at Microsoft. We don't dispute that. But  
16 not everything that every executive at Microsoft has ever said,  
17 to every friend of his or hers, and every statement they've  
18 made in their diary, or wherever, is chargeable to the company  
19 and comes in as a business record. We would think we can rebut  
20 this under the presumptions that we've put in place.

21 MR. JOHNSON: Your Honor, this exhibit was the  
22 subject of examination at Mr. Rakes' deposition. It's not  
23 hearsay, he talks about it. He explains exactly what it means  
24 and what he was talking about here. And he's trying to sell  
25 Mr. Buffett on investing in Microsoft. I don't -- Mr. Rakes,

1 that was part of his job. I don't understand how this is not a  
2 business record.

3 MR. PARIS: Mr. Rakes wasn't engaged in any  
4 job-related activity when he was writing to Warren Buffet four  
5 years after the events at issue in this case about his thoughts  
6 about Microsoft's strategy. That's not what's happening here.  
7 I would ask Your Honor to read the full document and you'll see  
8 that. Moreover, it's still hearsay, even if he was examined --

9 THE COURT: I'll read it and decide. It sounds to me  
10 like it was a stupid e-mail he shouldn't have sent but it comes  
11 in. This is after -- this is written after the events in  
12 question?

13 MR. PARIS: This was written in August 1997, if I've  
14 got the date correct.

15 MR. JOHNSON: Your Honor, but the point is it reveals  
16 how Microsoft can widen the moat, in other words, maintain  
17 their monopoly in the operating systems by owning the key  
18 franchises that sit on top. And the 4th Circuit said --  
19 accepted our theory that that was a showing of antitrust  
20 injury. And they said -- and this is not speculation --

21 THE COURT: Well, the fact that the 4th Circuit  
22 relied upon it does not make it admissible.

23 MR. JOHNSON: No, I understand it doesn't make it  
24 admissible. But it's the theory of the case accepted by the  
25 4th Circuit. So to say it lacks relevance, simply because it's

1 in another year, is not true. Bill Gates going back in time  
2 has said similar things, although not so clearly and pointedly  
3 as Mr. Rakes, that by owning the key franchises we control and  
4 we widen the moat protecting our operating system's monopoly.

5 THE COURT: I'll take a look at it. It's obviously a  
6 dynamite document and I don't want to make a -- I want to  
7 consider it, but I understand your positions.

8 MR. JOHNSON: Thank you, Your Honor.

9 THE COURT: And do you know is Rakes -- are you going  
10 to introduce Rakes' deposition.

11 MR. JOHNSON: Yes.

12 THE COURT: And this is discussed during his  
13 deposition?

14 MR. JOHNSON: Yes.

15 THE COURT: I think that's the answer. I mean, so  
16 whatever he says in defense is right there any way.

17 MR. JOHNSON: Yes.

18 MR. SCHMIDTLEIN: It's not an out-of-court statement  
19 sort of out of the blue, I mean, he was examined --

20 THE COURT: If you're going the introduce this, I'll  
21 take a look at it, it seems to me it comes in.

22 MR. JOHNSON: I thought so, Your Honor, that's why I  
23 was surprised to see the objection.

24 THE COURT: I think it would be more of a problem if  
25 it just comes in as a business record without any sponsor. But



1 here we have a sponsoring party.

2 MR. JOHNSON: Yes, Your Honor.

3 MR. PARIS: But the fundamental point, Your Honor,  
4 that I'm trying to get at is the simple fact he was asked about  
5 it at his deposition and spoke about it in his deposition to  
6 explain what went on here, demonstrates that there's no  
7 foundation, if you will, to establish it as a business record  
8 under 803(6). That's the core of the objection here and to  
9 sort of pretend otherwise --

10 THE COURT: I'll reserve this until I hear the  
11 deposition. It may come in as an exhibit because it's part of  
12 the deposition. I don't know whether -- I can mark it for  
13 identification during the course --

14 MR. JOHNSON: It's an admission as well. It's an  
15 admission if we own the key franchises we widen the moat.

16 THE COURT: I won't -- I'll decide this in the  
17 context of when I hear the deposition. I understand you want  
18 to keep it --

19 MR. PARIS: Again, it's not just that, Your Honor,  
20 it's not an admission of a party opponent, every single thing  
21 that every Microsoft person may ever say to their friends, it  
22 doesn't qualify --

23 MR. JOHNSON: He's not just saying this to a friend,  
24 he's saying this to Warren Buffett, who he wants him to invest  
25 in Microsoft. Mr. Rakes is one of the top executives within

1 Microsoft. He was looking and Mr. Buffet is an investor in  
2 business. This is not casual conversation among friends.

3 MR. PARIS: Your Honor, I can't help if Mr. Rakes is  
4 friends with Mr. Buffett and they're both from Nebraska.

5 THE COURT: I was going to say, they're both Husker  
6 fans.

7 MR. PARIS: That's, in fact, what the e-mail is  
8 about.

9 MR. JOHNSON: Mr. Buffett is also one of Mr. Gates'  
10 best friends.

11 THE COURT: I know that. I also know Nebraska is  
12 playing Wisconsin next weekend.

13 MR. JOHNSON: Now we get down to some important  
14 stuff, Your Honor.

15 THE COURT: All right.

16 MR. JOHNSON: That's all I have, Your Honor. Thank  
17 you.

18 THE COURT: I won't decide the issue. I think it  
19 comes in, but in any event I'll -- I have to view that in the  
20 context of the deposition of Mr. Rakes. Anything else?

21 MR. JOHNSON: That's it, Your Honor.

22 MR. PARIS: I have a few, Your Honor. You've  
23 resolved the foundation issues. But there are some instances  
24 where they've interposed improper opinion objections to certain  
25 ones -- certain documents --

1 THE COURT: Other documents you mean?

2 MR. PARIS: Mostly to their own documents, yeah.

3 THE COURT: You make a pretty compelling case that  
4 the rule contemplates opinions.

5 MR. PARIS: I agree, Your Honor. Leave that open to  
6 Mr. Johnson.

7 THE COURT: I mean, the way the rule is written seems  
8 to contemplate that opinions can be part of business records.

9 MR. PARIS: We obviously agree entirely. We think  
10 that --

11 THE COURT: No, I was asking Mr. Johnson.

12 MR. JOHNSON: Your Honor, which document are you  
13 talking about?

14 THE COURT: I think anywhere where you say it  
15 reflects an opinion. I think the business record rule, I mean,  
16 I didn't know it, but Mr. Paris has written very persuasive  
17 point that, you know, if I accept this general view of  
18 foundation, which I do, which I understand you disagree with,  
19 that the fact that something may be an opinion is not a reason  
20 to keep it out.

21 MR. JOHNSON: Well, if someone doesn't have the basis  
22 for giving an opinion, is not going to appear at trial and has  
23 never been deposed about the subject, I'm left with an opinion  
24 that's being quoted to the jury as to which I can't even  
25 cross-examine.

1 THE COURT: It's an admission. In any event, the  
2 rule -- you know, the things both of you got some explaining to  
3 do, and that's why you're such good lawyers. Okay. So to the  
4 extent that something is an opinion is not a reason to take it.

5 MR. PARIS: Thank you, Your Honor. I don't think --

6 MR. JOHNSON: Thank you, Your Honor.

7 THE COURT: Have I forgotten anything else?

8 Obviously, I didn't know what we were going to talk about  
9 today.

10 MR. PARIS: Just give me one moment, Your Honor. I  
11 don't think so. I think the rest of ours, there were just a  
12 handful -- a couple actually. And they were both in the sort  
13 of in the realm of 403, in order to elicit Your Honor's view as  
14 to what may qualify for exclusion under 403.

15 THE COURT: And I hope there's not a lot of that, but  
16 if I have to do it, I'll do it as we go along.

17 MR. PARIS: I mean, I think just to give you a  
18 general number. I don't think -- there are a number of 403  
19 objections on both sides, but I can't think of sort of any  
20 overarching way to present them.

21 THE COURT: Think about them again, and think about  
22 the difference between prejudice and unfair prejudice.

23 MR. JOHNSON: Your Honor, Thursday, when we come  
24 back, next Thursday, can we set that one aside for the motions  
25 in limine?

1 THE COURT: I thought we did.

2 MR. JOHNSON: And then on Friday we'll go back to the  
3 jury instructions and we'll deal with this spoliation thing.

4 THE COURT: Sure.

5 MR. JOHNSON: Thank you, Your Honor.

6 THE COURT: And I'll give you my opinions. If  
7 there's something you want to submit on any of these, get them  
8 in by Tuesday at the latest, on either side. If there's any of  
9 these open documents. But I've sort of told you what I'm going  
10 to do.

11 MR. PARIS: Thank you, Your Honor.

12 THE COURT: Seriously, are those all the topics? I'm  
13 embarrassed -- what happened is I had on my calendar hearing on  
14 collateral estoppel issues. And I realized that that was  
15 shorthand or things that had overtaken it. Anything else?

16 MR. TULCHIN: I don't think there's anything else  
17 from us, Your Honor.

18 MR. JOHNSON: Thank you very much.

19 THE COURT: I'm looking forward to Salt Lake City.  
20 It's going to be a wonderful time. Each side has got risks.  
21 This case is not -- have somebody take a look at this. You've  
22 got -- you're sophisticated lawyers, you've got sophisticated  
23 clients, you've got a lot of money put in it, you all face  
24 risks, you've all got money, it may not quite be the bonanza  
25 that you think it is.

1 MR. JOHNSON: Your Honor, we have to have an offer  
2 before we can --

3 THE COURT: I'm the last I'm the last person to get  
4 in to -- to twist people's arms to settle. My job is to call  
5 them as I see them. And that's my job in the process. But I'm  
6 telling you sitting here, this case ought to be resolved.

7 MR. JOHNSON: Can't be settlement until there's an  
8 offer.

9 MR. TULCHIN: There hasn't been an offer from the  
10 plaintiff.

11 THE COURT: Which ain't going to happen. Now, I'll  
12 shake your hands.

13 MR. JOHNSON: Thank you, Your Honor.

14 MR. TULCHIN: Thank you, Your Honor.

15 (The proceedings were concluded.)

16  
17 I, Christine Asif, RPR, CRR, do hereby certify that  
18 the foregoing is a correct transcript from the stenographic  
19 record of proceedings in the above-entitled matter.

20 \_\_\_\_\_/s/\_\_\_\_\_  
21 Christine T. Asif  
22 Official Court Reporter  
23  
24  
25

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