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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. : October 6th, 2011

* * * * *

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

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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
- Paul Taskier, Esquire
- Adam Proujansky, Esquire
- Jason Wallach, Esquire
- Bruce Holcomb, Esquire

For the Defendant:

- David B. Tulchin, Esquire
- Steven L. Holley, Esquire
- Adam S. Paris, Esquire
- James S. Jardine, Esquire
- Sharon L. Nelles, 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.

THE CLERK: The matter now pending before this Court is civil docket JFM-04-1045, Novell versus Microsoft. This matter comes before the Court for a motions hearing. Counsel if you would please identify yourselves for the record.

MR. JOHNSON: Jeff Johnson, Dickstein Shapiro on behalf of Novell, Inc.

MR. SCHMIDTLEIN: John Schmidtlein, Williams and Connolly on behalf of Novell.

MR. TASKIER: Paul Taskier, Dickstein and Shapiro on behalf of Novell.

MR. PROUJANSKY: Adam Proujansky, Dickstein Shapiro on behalf of Novell.

MR. MARTIN: James Martin, Dickstein Shapiro on behalf of Novell.

MR. HOLCOMB: Bruce Holcomb on behalf of Novell.

MR. WALLACH: Jason Wallach, Dickstein and Shapiro on behalf of Novell.

MS. VISHIO: Miriam Vishio, Dickstein Shapiro on behalf of Novell.

MR. TULCHIN: Good morning, Your Honor, David Tulchin from Sullivan and Cromwell for defendant Microsoft.

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

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1 MR. JARDINE: James Jardine from Ray, Quinney &
2 Nebeker for defendant Microsoft.

3 MR. AESCHBACHER: Steve Aeschbacher for Microsoft
4 Corporation.

5 MS. NELLES: Sharon Nelles, Sullivan and Cromwell,
6 Your Honor, for defendant Microsoft.

7 MR. PARIS: Adam Paris, Sullivan and Cromwell for
8 defendant Microsoft.

9 THE COURT: Okay. Everybody can be seated. Martina,
10 this is all legal argument; you're free to stay, you're free to
11 go.

12 How do you all want to proceed, there are a lot of
13 motions? Have you all figured out how you want to go?

14 MR. TULCHIN: We haven't, Your Honor. I'm happy to
15 address some of them now. I also have a couple points about
16 collateral estoppel. I don't know --

17 THE COURT: We'll discuss those tomorrow.

18 MR. TULCHIN: Okay. Well, maybe we can finish today,
19 Your Honor.

20 THE COURT: Maybe we can get everything today.

21 MR. TULCHIN: But what would be the Court's
22 preference, the order in which to proceed?

23 THE COURT: I honestly don't care, do you all care?

24 MR. JOHNSON: We don't, Your Honor. There's some 12
25 motions.

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1 THE COURT: All right. Let's start with Microsoft's
2 motions and then come back to Novell's.

3 MR. TULCHIN: Thank you, Your Honor. What I'd like
4 to do if I could, and there's a number of us addressing these
5 motions today, we're dividing them up if that's okay. If it's
6 convenient for the Court, what I'd like to do is address first
7 our motion in limine concerning the netware evidence.

8 THE COURT: Okay.

9 MR. TULCHIN: That's one of the motions that we made.
10 I know the Court has been deluged with papers in the last week
11 or so. I hope we haven't tested your patience in any way.

12 THE COURT: No, I just -- you're doing your job and I
13 try to do mine.

14 MR. TULCHIN: Thank you, Your Honor. One of the
15 reasons that I think that this motion is suitable for going
16 first, Your Honor, is I think at least part of it raises an
17 issue that cuts across several of these other motions. And in
18 part, Your Honor, it's because the case that Novell apparently
19 now wishes to submit to the jury has expanded in a significant
20 way from the case that's set forth in the complaint. And the
21 only case I think, Your Honor, that can be presented to the
22 jury.

23 Our motion with respect to netware has to do with a
24 number of documents that predate the time that Novell ever
25 acquired WordPerfect or Quattro Pro. And just to get this

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1 chronology right, Your Honor, because I know these dates are
2 probably floating around, there's so many of them. Novell
3 announced on March 21st, 1994 that it had a deal to buy
4 WordPerfect Corporation, and also to acquire -- a second deal
5 to acquire the Quattro Pro spreadsheet application from
6 Borland, a company in California. And both those transactions
7 closed in June of 1994. I believe June of '94.

8 The complaint, of course, Your Honor, talks about in
9 paragraph 24, it defines the products at issue and the markets
10 at issue. And it says very clearly that there are three
11 markets that are relevant to the complaint that Novell was
12 bringing. The market for Intel-compatible PC operating
13 systems, the market for word processing software, and the
14 market for spreadsheet software. And it makes claims, and it's
15 quite specific in this regard, concerning damage to WordPerfect
16 and Quattro Pro for the period in which Novell owned those
17 products. Novell announced in October of 1995, so really about
18 15 months after they acquired WordPerfect and Quattro Pro, that
19 they intended to sell those products. And the sale to Corel
20 closed in March of 1996. So there was a very brief window of
21 time when Novell actually had ownership of WordPerfect and
22 Quattro Pro.

23 Professor Noel says in his report, and confirmed at
24 his deposition, that it's his understanding that Novell cannot
25 complain of any conduct prior to June 24th, 1994, the date that

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1 it acquired WordPerfect and Quattro Pro. And that's obviously
2 true as a matter of logic as well. You can't be compensated
3 for damage to your property, to your business, under the
4 antitrust laws, at a time when you did not own that product or
5 that property, in this case, WordPerfect and Quattro Pro.

6 On this motion concerning netware, Your Honor,
7 netware, as I think we've explained, was Novell's principal
8 product before it bought WordPerfect and Quattro Pro. It was a
9 server operating system. There's no dispute that netware was
10 never in the market for PC operating systems, or for that
11 matter, within any of the other two markets they're defined in
12 paragraph 24 of the complaint. And as the Court also knows,
13 Novell has complained of three acts that it said Microsoft
14 committed. Your Honor set them forth in your decision on March
15 30th of 2010. That was in the second part of your decision on
16 our motion for summary judgment where you reached, and
17 discussed at great length, the viability of Novell's claim,
18 Count 1, for unlawful monopolization of the PC operating system
19 market.

20 Those three acts, as the Court set them forth there,
21 took place -- the name space extension decision by Mr. Gates to
22 withdraw those APIs -- withdraw support for them, I should say,
23 they remained in Windows 95, took place in October of '94. And
24 the conduct attacked by Novell in the other two acts took place
25 in 1995. The last of what Novell says was wrongful, the

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1 decision not to include custom print processor functionality in
2 Windows 95, according to Novell, took place in June of '95.

3 So I set forth this chronology, Your Honor, at some
4 length because I think it's important not just for this motion
5 about netware, but for several of the others. What's happened
6 recently is Novell, I think, is seeing a little bit of a
7 difficulty in proving its case with respect to those three
8 acts. And is instead of concentrating on the core of the case,
9 the conduct alleged to be unlawful in the complaint, now seems
10 to be moving out in sort of ever wider concentric circles to
11 try to capture conduct that is unlike any of the three acts
12 that it complains of. And more importantly, conduct during
13 other time periods and against other products and in some cases
14 other companies. That's part of what the collateral estoppel
15 debate has been about.

16 And importantly, Your Honor, not so much for this
17 motion, though I'm coming more to the point there, the
18 causation portion of Your Honor's opinion, it's at 699
19 F.Supp.2d at pages 747 at the bottom to 750, states very
20 clearly that for Novell to prevail in this case at trial,
21 Novell must prove that the conduct directed at WordPerfect and
22 Quattro Pro caused harm to those products and contributed
23 significantly to the maintenance of the monopoly in the PC
24 operating system market.

25 Now, conduct directed at netware, of course, doesn't

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1 fall within that category at all. It can't. And there are two
2 reasons in our brief why we say that the documents and the
3 deposition testimony concerning netware ought not to come into
4 evidence. The first reason that we set forth in our brief,
5 Your Honor, is that this conduct directed towards netware is
6 nowhere set out in the complaint. I'll come to the second
7 reason, but the reason it's not in the complaint, one might
8 say, is that it can't be because it was released.

9 But sticking on the first reason, Your Honor, the --
10 there's no dispute, of course, that netware is not in any of
11 the three markets here. And I should say that I don't believe,
12 if I recall correctly, in reading Novell's brief in opposition
13 to our motion in limine that Novell even addresses our argument
14 that the deposition testimony about conduct in 1992 and 1993,
15 pertaining to netware, is not admissible. What Novell says is
16 that the documents, and they attach them all to an accompanying
17 declaration, the documents in question should come in because
18 they apparently are part and parcel of this whole course of
19 conduct. There are two reasons that that's not so, Your Honor.

20 And I should say, and I think this is just so
21 revealing of what's going on here, Your Honor, not just with
22 this motion, but with some of the differences between the
23 parties about what this trial should look like. It goes way
24 beyond this motion. It goes to the preliminary jury
25 instructions, the final jury instructions. It goes to a number

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1 of other issues that I think we'll discuss today.

2 In its very lengthy brief in opposition to this
3 motion about netware, Novell discusses the content of these
4 e-mails and other documents, but I didn't see anywhere, in any
5 of that discussion, any reference to the time period to when it
6 was that the e-mails and other documents were written. I went
7 through all the documents, Your Honor, and there was some from
8 1992, at least one I found, that's Exhibit F. There were a
9 large number from 1993, including Exhibits E and G and M and N,
10 O, R, S, T, U, V, X and Y. And there are few that were written
11 again about netware early in 1994 even before Novell announced
12 that it was going to buy WordPerfect and Quattro Pro, those
13 include Exhibits P, Q, and Z.

14 And again, the significance here, Your Honor, is
15 fairly apparent. This is a case in which Novell complains
16 about conduct directed at WordPerfect and Quattro Pro. It
17 says, and I'm sure hopes, that at the end of the trial the jury
18 will award it damages for harm suffered by those two products.
19 Documents written before Novell owned them, documents written
20 before Novell announced that it was going to own them, at a
21 time when no one at Microsoft or elsewhere in the world
22 contemplated that this would occur, those documents cannot be
23 relevant.

24 They must be used -- they must be important to Novell
25 to be used only for the purpose that I described earlier. This

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1 ever widening concentric circles. So you try to capture
2 conduct directed at Java and Netscape in 1996 and 1997. You
3 put that in front of the jury. You try to capture conduct in
4 1992 and '93 against netware, and you put that in front of the
5 jury. And in effect what you argue to the jury is that
6 Microsoft violated the antitrust laws, unlawfully maintained a
7 monopoly, and Novell should recover damages on account thereof.

8 THE COURT: Well, I'm not -- there are parts of this
9 which I'm becoming increasingly sympathetic to Microsoft on, as
10 will come out today, but I don't understand why, in determining
11 what happened in the relevant period, from June of '94 to
12 October of '95, whatever it is, it's not relevant to say what
13 was going on in the time preceding and the time after.
14 Basically, you know, it may be other times, but from attacks on
15 netware, through attacks on Java and Sun, I frankly don't
16 understand that to understand what happened in the relevant
17 period, why you can't have a broader concentric circle as you
18 put it.

19 MR. TULCHIN: Well, that's the second part of the
20 argument, Your Honor, which I was just about to get to. So if
21 I may, I wonder if I could hand up, I have five slides if I
22 could that deal with the second part of this argument. Would
23 that be okay, Your Honor?

24 THE COURT: Of course.

25 MR. TULCHIN: And, Your Honor, the second part of

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1 this argument concerning the documents and deposition testimony
2 relating to netware has to do with the 2004 settlement
3 agreement between Microsoft and Novell. So even if the Court
4 is correct --

5 THE COURT: Well, what about -- one thing you have to
6 address, I mean, I was persuaded, but then -- you probably are
7 going to address that the settlement agreement said this does
8 not exclude evidence that's relevant to what's in the -- in the
9 complaint.

10 MR. TULCHIN: Well, that's not exactly what it says,
11 Your Honor.

12 THE COURT: Well, I know it's a bad --

13 MR. TULCHIN: But I'm happy to deal with that, it's
14 right here. The agreement says that it doesn't exclude facts
15 that are relevant to the WordPerfect claim.

16 This is a little bit different, though, Your Honor,
17 because Microsoft and Novell entered into this settlement
18 agreement in 2004. And I guess the Court has seen our papers
19 on this, the settlement release, the release contained in it on
20 page 2, is very broad. Because what we got for that
21 settlement, Your Honor, was exactly a release from the alleged
22 wrongdoing that's reflected in the documents that Novell now
23 wants to use. And we asked for and obtained a release that was
24 a general release with three exceptions. The release says,
25 "Any and all claims that Novell ever had or has, known or

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1 unknown, except for" -- and the third exception is the only one
2 that could be relevant here -- "the claims set forth in the
3 draft WordPerfect complaint that Novell provided to Microsoft
4 on or about November 5th."

5 The complaint -- that draft complaint is exactly the
6 same, it's identical to the complaint that was filed the next
7 week, on November 12th, 2004, in the district of Utah. And
8 when we're talking about, later on, the new middleware theory
9 that Novell has, and I call it new because it's not set forth
10 in the complaint, never anywhere. The complaint is very clear
11 about what middleware is, around 49 paragraphs, 49 to 51 in the
12 complaint. But there the release I think has some very, very,
13 some very strong things to say about a middleware theory not
14 set forth in the complaint. That was released.

15 I think the same is true here when talking about the
16 documents pertaining to Microsoft's conduct towards netware in
17 19 --

18 THE COURT: But you would agree there's a difference
19 between a claim and facts underlying that claim that might be
20 relevant to another claim.

21 MR. TULCHIN: I agree with that, Your Honor, I do. I
22 also would say, though, Your Honor, there is a difference and
23 there's no question, there's no question that the two words are
24 not synonymous. I'm happy to agree with that. But what we're
25 talking about here, Your Honor, is this: Microsoft paid Novell

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1 a lot of money to settle that case. If it didn't pay for a
2 release pertaining to these acts the Jim Allchin e-mails that
3 are quoted by Novell in its brief in opposition to its motion,
4 for example, then it didn't pay for anything. And what we have
5 here --

6 THE COURT: It did pay for something. It got a
7 release of the claims relating to netware.

8 MR. TULCHIN: Correct, Your Honor. That's right.
9 But we got more than that. The release is much broader than
10 that. And the only thing that was carved out, the only
11 relevant thing, the third exception was what's stated in the
12 complaint that we were handed three days before we signed this
13 contract. And I think that's the important thing that maybe I
14 didn't say clearly enough.

15 THE COURT: You're always clear, Mr. Tulchin.

16 MR. TULCHIN: Well, Your Honor the language is,
17 "except for the claims set forth in the draft WordPerfect
18 complaint." Now there's nothing in the draft WordPerfect
19 complaint about netware. And it's one thing to talk about
20 general background information. There's a lot of background
21 information pertaining to 1990 and '91 and '92 and '93, that is
22 relevant to the claims in this case. There's a lot of it. And
23 I suspect from both sides. A lot of what WordPerfect
24 Corporation did before it was acquired by Novell, there's a
25 whole lot that will come in. But the documents --

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1 THE COURT: Is that like how Mormons don't like to
2 party, for example, which will come in actually.

3 MR. TULCHIN: I'm not sure I would make that general
4 statement, Your Honor.

5 THE COURT: No, I have some -- I have some college
6 classmates, so I -- who are Mormons.

7 MR. TULCHIN: Well, Mr. Jardine was actually going to
8 address that. And he'll know better than I the extent to which
9 they party or in what fashion. But when it comes to the
10 network documents, Your Honor, what's really happening again,
11 if I can use this concentric circle analogy, we're getting
12 further and further away from the core of this case. The three
13 acts that Novell said in opposing our motion for summary
14 judgment, the acts Your Honor referred to in your opinion in
15 2010, that were directed at WordPerfect and Quattro Pro.

16 And let me just say something, Your Honor, your
17 opinion on causation I think is correct. I think you had it
18 right. You don't come at a private treble damages case for
19 damages --

20 THE COURT: No, that's -- and this will come out,
21 since we're talking about generalities, I think, although I
22 gather that both sides agree, from looking at Netscape's
23 instructions -- excuse me, Novell's instructions, that I mean,
24 there are issues about whether you maintained the monopoly,
25 whether your maintenance was due to anticompetitive conduct.

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1 That is an issue that the jury here has to decide. And I think
2 Novell may be wrong when it says that there's not a missing
3 element. You can't skip from that to damage to the product,
4 you may have to also find that the anticompetitive conduct
5 included conduct directed to Novell that significantly
6 contributed to harm in the operating system market. You may be
7 right on that, so -- but let's not confuse the issue.

8 MR. TULCHIN: That's what I was going to say, Your
9 Honor. And what I was going to follow it with is this: I
10 mean, if that's so -- and I adopt the way the Court just put
11 it, I think that's consistent with your opinion in 2010. If
12 that's so, allowing Novell to put in evidence about this
13 conduct towards netware in an earlier period is an invitation
14 to the jury to skip that causation step.

15 THE COURT: Yeah, but if I tell them, I tell them.

16 MR. TULCHIN: Well, that of course --

17 THE COURT: And I'll tell them as clearly as I can.
18 A lot of this -- I mean, a lot of this can be handled by
19 curative instructions on a lot of the motions in limine, not
20 all of them, but I just have a difficult time conceptually
21 understanding how you can appreciate the significance of
22 something that happens in a given period of time without
23 looking at evidence concerning things that are happening in
24 surrounding periods.

25 MR. TULCHIN: Your Honor, I agree with you as a

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1 general proposition. I completely agree. The significance of
2 what happened in 1994 to '96 should be evaluated with evidence
3 about what happened beforehand. I mean, there's no question as
4 a general proposition that may well be so. We say, for
5 example, that a reason that WordPerfect declined, sales of
6 WordPerfect, revenues, the product decline, has a lot to do
7 with what happened beforehand, and that those trends continued.
8 This situation I think is different for the two reasons that I
9 gave, that this conduct took place, it was directed at Novell,
10 but before WordPerfect could have been a middleware threat,
11 therefore, it is not relevant to the claim in the complaint.
12 And secondly, because I believe that the release covers it. It
13 covers the conduct that's expressed in the e-mails and other
14 documents from the period before March of '94.

15 Just one last word, Your Honor, and I appreciate your
16 taking a lot of time on this first motion. I think the Court
17 is correct that some of this, if this evidence comes in, some
18 of this can be handled, the worries that I'm expressing, that
19 Novell will be in effect feasting off this other carcass, the
20 carcass, the netware claim that we already released, that we
21 already paid for and that they released --

22 THE COURT: I understand the concern. You've got to
23 believe in the jury system. And if I tell them that it's not
24 coming in, that those claims have been released, this is not
25 about damage to netware, but it's coming in for that reason, I

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1 don't see how -- I can't just exclude it because we're worried
2 that jurors are going to run amok.

3 MR. TULCHIN: Well, that's the 403 portion of this,
4 Your Honor. But that's what I was going to say, some of this
5 can certainly be taken care of with curative instructions and
6 with final instructions that make clear what Novell's burden is
7 on causation. Thank you, Your Honor.

8 THE COURT: I understand.

9 MR. MARTIN: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. MARTIN: James Martin. I think it helps to go
12 back through his chronology a little bit, because the Court has
13 recognized, I think, what is important here. And that is
14 Microsoft is asking for a blanket exclusion of all evidence of
15 conduct, and they talk about conduct directed at netware.
16 Because largely those claims have been released. We're not
17 asking for damages for conduct directed at netware. And,
18 frankly, the documents and the evidence that we've identified
19 don't deal with conduct. They deal with concerns that
20 Microsoft expressed about Novell.

21 And what Microsoft wants to do is they want to create
22 a case that focuses on an e-mail, Bill Gates saying "Let's
23 withdraw those extensions." And they want to say everything
24 else is irrelevant. Now they've got two others, the three
25 specific acts. And they want to make this case this big, and

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1 they want to deprive the jury from hearing the context, the
2 background facts, how did we get here.

3 And I want to just walk through a little bit of that
4 chronology and submit that this will all become much clearer in
5 focus as we start going through trial. We're here before
6 opening arguments, before the evidence has come in. A lot of
7 these documents, they don't really deal with netware. They
8 deal with APIs. They deal with events in '94. Some are
9 outside that time period. Why does it matter? It helps to
10 understand the case and how it's developing.

11 Now, the case that Microsoft wants to litigate is
12 that one little case. And they want to say, WordPerfect was
13 never threat. We were never threatened by WordPerfect or
14 Quattro Pro. They're little applications that could never have
15 threatened our operating systems monopoly. But the story is
16 different.

17 THE COURT: You know, as I -- I think it's true and I
18 don't want to change the terms of the debate because it's far
19 too late in the game to do it, but -- and I absolutely
20 understand how all these -- the activities towards middleware
21 was designed to protect the monopoly in the operating systems
22 market. But from an academic point of view, one might really
23 say what was that was all about was keeping the operating
24 system market relevant. It wasn't that it was trying to
25 maintain the monopoly.

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1 That, in fact, the threat posed by middleware wasn't
2 that -- what Microsoft was really worried about was that it was
3 going to become a producer of a commoditized product. And what
4 it really wanted to do -- this whole thing about maintaining a
5 monopoly and in the operating system market really might not
6 have been its motivation. Its motivation was to be where it
7 wanted to be, both in terms of what its mission was and in
8 terms of the markets, it wanted to be on top of the cutting
9 edge technology.

10 And it seems to me that what -- the concern about
11 middleware was that if the threat posed by middleware wasn't so
12 much to protect the monopoly in the operating system market,
13 but was really designed to continue to make the operating
14 system market relevant to what it was engaged in. The reality
15 is what I think Bill Gates was concerned about was he was going
16 to become, instead of GM he was going to be making batteries
17 for GM. And that in order to really -- and actually what
18 really finally started make me think about this, ironically,
19 was the exhibit you want to get in, which I probably will let
20 in, which is the very thoughtful e-mail to Warren Buffett, that
21 in fact I never understood, frankly, just reading the opinions,
22 how Microsoft positioned that this was a dynamic industry which
23 really made a difference.

24 It did make a difference. They were creating a
25 product. And I'm not saying we're going to revisit this,

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1 because we're not. But I understand now where they were coming
2 from. It's not like oil, it's not like getting oil out of the
3 ground, like Rockefeller did and dominating the transportation
4 markets. It was about they were creating the product. And in
5 order -- in a dynamic market, where you are creating the
6 product, what you want to do is to be on the cutting edge of
7 technology. And the real concern here, posed by middleware, at
8 least, was that it was going to make the operating -- the
9 operating system market wasn't going to be relevant anymore.
10 And that's -- and I now finally, I mean, ironically I found
11 that by reading the e-mail to Buffett. I never got it by
12 reading the D.C. Circuit opinion, which sort of dismissed this
13 dynamic market idea.

14 Now, I'm not saying we change the terms of the
15 debate, but this is a far more complex situation than judges
16 have made it out.

17 MR. MARTIN: I appreciate that insight. That will
18 help us engage in our dialogue today. I think it raises two
19 points quickly for me. First of all, that makes the evidence
20 of intent all the more relevant.

21 THE COURT: I agree with you.

22 MR. PARIS: And the second point is, I do not want
23 the Court to be misled into thinking there's a single
24 middleware theory, there are two reasons --

25 THE COURT: No, there's also the whole other idea

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1 that WordPerfect was so popular that it was -- that if it
2 worked with other middleware, if it worked with another
3 operating system, then that was going to be the challenge. I
4 understand that.

5 MR. MARTIN: Absolutely. And by definition the term
6 commodity suggests a competitive market. And the evidence that
7 we intend to introduce will show that Microsoft's concern was
8 not creating a better product, it didn't withdraw the APIs to
9 create a better product. And it's in all of these documents
10 and evidence about Bill Gates's concern, and other executives
11 concern about Lotus Notes, about Novell, about Sun, about
12 Netscape, is the fact that they could commoditize the operating
13 system they could attract additional competitors, they could --
14 Novell's netware -- and I wasn't prepared to argue this -- but
15 Novell's netware is conceivably a competitor, one company that
16 could have started to --

17 THE COURT: No, I understand that. I'm not
18 suggesting we change -- the terms of the debate are the terms
19 of the debate, and it's a relevant market. And I understand
20 how all this could effect the operating system market. But
21 really it seems to me what Gates's concern may very well have
22 been, I want to keep the operating system market relevant. You
23 know that -- if we don't do that, you know, the ties that we
24 have to our applications programs, the brand that we've
25 established, it's going to fall through. And if -- and the

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1 challenge of netware was -- of middleware really was it was
2 going to become irrelevant, as the kind of market that it had
3 been.

4 So -- but I don't think that -- I don't think that
5 changes the debate here, but it certainly makes me -- it
6 actually makes me understand Mr. Gates a little bit more. I
7 think he wanted to make a lot of money, don't get me wrong, but
8 I think he also wanted to be on the top of things. I think his
9 mission was to have Microsoft be the best technology company.
10 And in order to do that, he did what he did, which caused
11 potential antitrust concerns, don't get me wrong.

12 MR. MARTIN: And our view would be that that's the
13 jurors' job. They will -- we'll present this evidence and
14 they'll decide what Mr. Gates's motivation was.

15 THE COURT: I agree, that's what jury's are for.

16 MR. MARTIN: Now, to revisit this chronology just a
17 little bit, Novell had netware. And there's no question that
18 Microsoft was concerned about netware in part because of this
19 concern that network operating systems could become a real
20 competitor to PC operating systems. And then there's a
21 question of what is the threat presented by WordPerfect and
22 Quattro Pro. And you can actually see in the documents and the
23 testimony, a change in Microsoft's view, the day that Novell
24 acquires them. Because the threat posed by WordPerfect and
25 Quattro Pro is different when it's in Novell's hands. You

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1 know, that is a different threat than when it's just in the
2 hands of Pete Peterson in Provo, Utah.

3 So that is part of the story. And we see some of the
4 documents saying, oh, we would be really concerned if
5 WordPerfect coupled up with Lotus or if WordPerfect coupled up
6 with Novell, because that would be a much more credible threat
7 to us, Microsoft, and to our operating systems monopoly. It
8 gets directly to that question that you've now articulated,
9 which was what was the motivation, what was Microsoft doing
10 when they engaged in these acts later on in an intent to harm
11 WordPerfect and Quattro Pro and keep them off Windows 95.

12 And this question of whether -- what is the value of
13 WordPerfect and Quattro Pro in Novell's hands, it's also a
14 damages issue. Microsoft's expert says that Novell vastly
15 overpaid for those two products. And that's because in
16 Novell's hands those products weren't going to be worth much.
17 And obviously we disagree with that and want to be able to put
18 down the evidence that says it is significantly more
19 threatening to Microsoft, and it's actually more valuable as an
20 office productivity application set in Novell's hands.

21 So many of these documents and the testimony go to
22 that. They also will rebut the argument that Microsoft will
23 make that Novell bumbled, that it took these products on and
24 didn't know what it was doing. They cut staff. They fired
25 sales force. It's all WordPerfect's fault that its value

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1 crashed. What some of these documents show, there's at least
2 one, where Microsoft executive says Novell's doing it right.
3 They're really on the ball in business. You know, they're
4 making the right cuts. They're being cost-effective. That's
5 the kind of evidence that would rebut Microsoft's argument that
6 Novell doesn't know what it's doing.

7 And, again, these are documents in evidence that I
8 think will come into clearer focus through the course of trial.
9 And I assume, although no protocol has been set, that there
10 will be a protocol where when we want to introduce a document
11 or testimony that has been the subject of an objection, we'll
12 have to meet and confer. And if that isn't resolved we'll come
13 to the Court. And when we come to the Court you'll have the
14 evidence before you you'll have a better understanding how it
15 fits into the case. Rather than making some blanket exclusion
16 now that says if it says netware, not all these documents do,
17 but if it says netware then it's out. So that in principle, I
18 think, is the best way to proceed.

19 THE COURT: And what is the language in -- I just
20 don't think it is in Mr. Tulchin's -- what is the language in
21 the settlement agreement about it doesn't cover facts?

22 MR. MARTIN: The --

23 THE COURT: It's in your memo, I just don't remember.

24 MR. MARTIN: The sentence, it's in the middle of
25 2(a), under release, and it says -- and I've learned to read

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1 slowly -- "Nothing herein shall limit Novell's rights to
2 present any facts relevant to its WordPerfect claims." I mean,
3 as far as I'm concerned it couldn't be any clearer. These are
4 facts relevant to WordPerfect's claims. We're not trying to
5 get damages for our harm to netware --

6 THE COURT: Okay.

7 MR. MARTIN: We understand that the jury will be told
8 you can't award damages for harm to netware or harm to
9 somebody, it has to harm WordPerfect or Quattro Pro or Perfect
10 Office. I think the settlement agreement argument is
11 fundamentally flawed and completely rebutted by that language.

12 There are also a couple of documents in here from
13 1994 that I would draw the Court's attention to. There are
14 Exhibits D and K. I'm sorry, C and D. And Exhibit C is the
15 one we know, which is the Bill Gates e-mail saying we're going
16 to take the APIs away. It's written on October 3rd, 1994.
17 Exhibit D is a document that has a Bill Gates e-mail written on
18 October 4th, talking about a meeting or a presentation that he
19 attended that was given by Mr. Frankenberg who headed up
20 Novell. And it's a meeting that happened before Bill Gates
21 wrote his October 3rd e-mail.

22 And in that e-mail from Mr. Gates, he talks about how
23 Novell is innovating, how they've created this platform-like
24 concept that integrates WordPerfect and integrates the
25 internet. He writes, at the very end of his e-mail, "Novell is

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1 a lot more aware of how the world is changing than I thought
2 they were. Frankenberg comes across well." Within Days he
3 decides to withdraw the APIs. I think the jury should be
4 allowed to hear this chronology and to take these documents in
5 evidence, take these documents in context, find out whether Mr.
6 Gates really withdrew those APIs because he thought it was
7 going to be good for his product or good for competition, or it
8 was another purpose.

9 The Court referenced the jury instruction issue about
10 causation. Now I want to make sure that when we discuss this
11 tomorrow that the Court has had a chance to look at not only
12 our proposed instructions, but the instructions proposed from
13 all the other -- and accepted, in all of the other case. And
14 the model instructions, which set up the typical --

15 THE COURT: But I mean you have to prove -- what I'm
16 suggesting is you've got a right -- and you've got to
17 distinguish between causation, I think maybe you didn't get it
18 quite right enough, that there's actually three levels. You've
19 got to cause -- the anticompetitive conduct, if it's found to
20 exist, has to have caused the maintenance of the monopoly.
21 There has to have been cause to your client's product.

22 MR. MARTIN: Sure.

23 THE COURT: But I'm suggesting that there is a third
24 level of causation, that the anticompetitive conduct included
25 conduct that was directed towards Novell, and that that conduct

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1 caused -- what's the language -- significantly contributed
2 to --

3 MR. MARTIN: Harmed competition.

4 THE COURT: -- the monopoly in the operating system
5 market. Actually, you're right. I think you're right in
6 distinguishing between the two that you did. Where you may be
7 wrong is you haven't made the third distinction. And that's
8 where Microsoft says, look, number one my prior opinion, but
9 secondly, just in terms of -- there's got to be a connection
10 between what was done to -- it can't be what was done to Sun or
11 Netscape, it's got to be done -- or to netware, it's got to be
12 what was done to these products. And that there has to be a
13 causal link there to antitrust harm, which is harming the
14 competition in the operating system market.

15 MR. MARTIN: I'm unaware of any case that has that
16 third level of causation.

17 THE COURT: This may be the first.

18 MR. MARTIN: It would be the first. It absolutely
19 would be the first. And it would be jury instructions that no
20 one has seen before. The causation instruction would be, and
21 you floated the idea last time whether we would --

22 THE COURT: But what is concerning, I was with you,
23 frankly, on this. But the more I thought about it, to jump
24 from anticompetitive conduct which caused maintenance of the
25 monopoly, and then simply look did that harm WordPerfect,

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1 there's something missing there. There's something missing
2 analytically in making that jump. And I'm not sure that's
3 antitrust injury, because there has to be harm to competition.
4 And harm to competition has to be in the relevant market, which
5 is the operating system market.

6 MR. MARTIN: Let's remember what the term
7 anticompetitive conduct means, because it is, by definition,
8 conduct that harms competition, otherwise, it's just conduct.
9 So once the jury has found anticompetitive conduct, that
10 conduct has, by definition, harmed competition. That is where
11 if there's some link between the conduct --

12 THE COURT: I'm not sure I follow that. I'm not sure
13 I agree with that as a matter of antitrust law.

14 MR. MARTIN: And I would direct you to the jury
15 instruction on unlawful maintenance, because that is -- as a
16 fundamental matter, that is what the jury instructions talk
17 about. The conduct has -- if it's anticompetitive it harms
18 competition, that's what makes it anticompetitive, otherwise,
19 it's just bad conduct.

20 THE COURT: -- business tort.

21 MR. MARTIN: Business tort, exactly. The rules don't
22 say a business tort that harms competition. It's conduct that
23 harms competition. By definition it's anticompetitive.

24 THE COURT: I'm beyond my level of ability of
25 conceptualization --

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1 MR. MARTIN: Right, business torts harm competitors,
2 whereas, anticompetitive conduct harms the process. Right. So
3 the conduct would have, by definition, have been found to have
4 harmed the process.

5 THE COURT: I feel like I'm back in law school
6 talking to my friends who thought they understood antitrust law
7 and I'm not sure they ever did.

8 MR. MARTIN: I'm doing my best to dissuade you to
9 think I actually do know what I'm talking about. And I know
10 we'll revisit this.

11 THE COURT: Okay. Well, that's --

12 MR. MARTIN: It's important, I think, to recognize
13 that -- and I think this is one of the mistakes, if you will,
14 in your 2010 opinion, which is that it talks about
15 anticompetitive conduct and then a requirement of harm to
16 competition.

17 THE COURT: No, I understand you all don't agree with
18 that opinion. And that's perfectly fine.

19 MR. MARTIN: But -- not all of it, of course.

20 THE COURT: Well --

21 MR. MARTIN: But it's that concept that there is some
22 sort of conduct that is anticompetitive that doesn't harm the
23 process that is --

24 THE COURT: But in terms of this jury -- forget all
25 of this conceptualization. The jury simply can't jump from the

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1 conclusion that Microsoft engaged in anticompetitive conduct to
2 maintain its monopoly without -- and the only -- the other
3 thing they have to decide is whether your client's products
4 were hurt as a result. There's got to be some nexus that at
5 least the anticompetitive conduct included conduct that was
6 directed toward Novell. I mean, you would agree with that
7 much.

8 MR. MARTIN: Look, what I would suggest -- I think I
9 do agree with you in principle. And I would suggest to you
10 that the nexus is in the causation instruction. When we were
11 here you said, what if we put in the instruction something like
12 "The conduct directed at Novell was the material cause of
13 injury." And I said I disagree with that in principle, because
14 it doesn't matter where it's directed and I thought it was
15 specific intent.

16 But at the same time I think that something could be
17 done with that injury causation instruction to make sure the
18 jury understands, don't award damages for anything that harmed
19 Netscape or Sun or any other product. You need to link the
20 damages or injury -- frankly, it's not even damages, because a
21 causation injury is just injury, damages are separate. But you
22 need to -- you, jury, need to find that that conduct harmed
23 Novell. You can't rely on things that happened to other
24 companies. That causal link needs to be --

25 THE COURT: Just so I understand, what you don't

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1 agree with is that the instruction should not include language
2 that you have to find that the conduct directed towards Novell
3 contributed significantly to maintenance of the monopoly in the
4 operating system market.

5 MR. MARTIN: Right.

6 THE COURT: You don't think that has to be there?

7 MR. MARTIN: No, I don't think it's appropriate. I
8 don't think it's in any of the jury instructions. They will
9 get, believe me, a healthy dose of conduct directed at Novell.
10 I mean, that's what the 4th Circuit has talked about. Most of
11 what we're talking about here, the three acts, there's no
12 dispute that we're putting on evidence of acts directed at
13 Novell. The core of this case is acts directed at Novell. You
14 know, Sun, Netscape, netware, and I'm putting netware
15 in sights, I'm not sure that factors into harm to competition,
16 but Sun and Netscape do. Those go into, does this conduct harm
17 competition.

18 I don't really think there's going to be enough
19 evidence, with the collateral estoppel ruling, for any jury to
20 try to award damages to Novell based on that limited amount of
21 conduct that you're going to allow to present to the jury. As
22 a practical matter, you know, if we set aside all the theory,
23 they're going to get lots and lots of evidence about what is
24 directed at Novell. The e-mail is directed at Novell. The
25 withdrawal of the logo, or refusal to grant a logo, is directed

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1 at Novell. The withdrawal of the print processing function is
2 directed at Novell. The OEM agreements were directed at
3 Novell. They're going to get that.

4 There's no, I think realistic chance that a jury is
5 going to award us, you know, damages, sizable damages based on
6 collaterally estopped facts, or whatever you choose to let in
7 regarding netware, if any. You know, again, that's through the
8 course of the trial what you choose to let in how you instruct
9 the jury. I do fundamentally disagree with creating a new kind
10 of instruction that would create a third level of causation,
11 because I think it's wrong and it's confusing.

12 THE COURT: I understand. I've got to decide that.

13 MR. MARTIN: That's it. Thank you.

14 THE COURT: Mr. Tulchin.

15 MR. TULCHIN: Your Honor, just a couple of words on
16 that first motion concerning the netware documents. Just to be
17 clear on a couple of things. One, I don't believe we sought
18 exclusion of any of the documents that Mr. Martin mentioned
19 during the period that Novell owned WordPerfect. Our motion
20 was directed to the netware materials, deposition testimony and
21 documents. And I don't think they defended the deposition
22 testimony at all, but only for the period before there was the
23 announcement, that was in March of '94, that Novell was going
24 to buy WordPerfect and Quattro Pro. Anything after that we
25 agree is okay.

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1 Secondly, Your Honor, I just can't help myself but to
2 mention that although Mr. Martin now says that your opinion
3 from 2010 was incorrect in a --

4 THE COURT: He also said that two weeks ago.

5 MR. TULCHIN: Sorry?

6 THE COURT: He also said that two weeks ago, so I
7 wasn't surprised.

8 MR. TULCHIN: Right, I remember that, Your Honor.
9 But at the time Novell never said that, either to this Court or
10 to the 4th Circuit, what they did was to defend --

11 THE COURT: Well, why would it tell me -- they won on
12 that portion.

13 MR. TULCHIN: They did, Your Honor. But if they
14 thought that there was some significant error on the causation
15 standard that would affect the case going forward, were they to
16 get a reversal on the sale of the claims issue, I think one
17 would have heard from them.

18 And just one last point on the first motion, Your
19 Honor. One thing that's being left out of this is, that harm
20 to netware and conduct directed at netware, I don't think
21 anyone says could have had an impact in the relevant market,
22 the market for PC operating systems. So it's not only too
23 early in time, because Novell didn't even own WordPerfect. It
24 not only raises this question of the possibility -- and I hear
25 what the Court says about a curative instruction -- that the

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1 jury will want to award damages for something that we paid for
2 and we got a release for, but it's outside the relevant market
3 and there's no dispute about that either.

4 What I'd like to do, Your Honor, is turn to the next
5 one.

6 THE COURT: Okay. I'll rule on this. I'm going to
7 deny this motion in limine. It's without prejudice on all of
8 my rulings not to reconsider whether instructions should be
9 given. Obviously, here a curative instruction has to be given.
10 Clearly, on a document-by-document basis I'll be open to what
11 you have to say. But generally, as a general proposition, the
12 motion's denied.

13 MR. TULCHIN: Thank you, Your Honor.

14 THE COURT: I didn't mean to make you unhappy before
15 you went on. I think it's best for me to give these rulings as
16 we go along.

17 MR. TULCHIN: I think my happiness, Your Honor, will
18 turn on the jury's verdict. And in the meantime, we're
19 just --

20 THE COURT: That's right.

21 MR. TULCHIN: We'll keep going. So it's fine.

22 THE COURT: And my happiness will turn on whether you
23 get this resolved before there's a jury.

24 MR. TULCHIN: Well, there Your Honor, I'm going to be
25 the one, I think, disappointing you, I'm sorry.

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1 THE COURT: I think that's probably right.

2 MR. TULCHIN: Your Honor, the second motion, at least
3 the one I think of as second, because it's related to the one
4 we just discussed, in a way, is the motion that we called
5 pertaining to the new middleware theory. And this one, I
6 think, is in a much stronger position than the first one when
7 it comes to the effect of the release. And the really -- I
8 appreciate the fact that the Court has clearly read these
9 papers. And I won't go through every point. But there are two
10 important points to be made here.

11 As the Court knows, the complaint in this case never
12 says, and there's no dispute about this, that Microsoft caused
13 harm to Perfect Office. The complaint never says, either
14 directly or in any other way, that Perfect Office was a target
15 of any alleged anticompetitive conduct. The complaint never
16 says that Perfect Office was middleware. And the complaint
17 also never says that Perfect Office, either alone or in
18 combination with other products posed a threat to Microsoft's
19 PC operating system monopoly. All of that is new --

20 THE COURT: They say, maybe you can address, that
21 although it may not have been in the complaint, it became part
22 of the life of this case. They mention at various times in
23 the -- since I don't usually read complaints on the front end,
24 they become relevant at some point, but somehow that this
25 Perfect Office became part of the history of the case which

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1 gave you fair notice of what was happening.

2 MR. TULCHIN: That is what they say, Your Honor. And
3 that's exactly the debate we had about GroupWise. It's the
4 exact same debate. The Court will remember that when we moved
5 for summary judgment, one of the things we asked for was a
6 dismissal of any claim pertaining to GroupWise. We pointed out
7 the same things that I just said about Perfect Office were true
8 about GroupWise. Novell said it's part of the case. They said
9 you took discovery about GroupWise. They said it's in our
10 expert reports, allegations about GroupWise. They said that
11 there were deposition witnesses who testified about GroupWise.

12 And all of that was true. And Your Honor disposed of
13 that contention in the same opinion at 699 F.Supp.2d, and in
14 this case, it's at page --

15 THE COURT: I could be wrong, but GroupWise, it
16 seemed to me was there, it was in the report. I remember
17 saying I'm not going to fault you for taking depositions about
18 things that might become part of the case, I'm liberal -- but
19 somehow I just get the impression, reading your memorandum, but
20 I could be wrong, that this was much more a part and parcel of
21 the case, and not a separate claim like the GroupWise claim
22 was. That, in fact, that it emerged Perfect Office really was
23 a suite containing all of this. And I think even some of my
24 opinions, at least, and the 4th Circuit reflected on knowledge
25 of that, which was different from the GroupWise claims, which

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1 were sort of a category different. So I guess I'm not
2 persuaded that the fact I excluded GroupWise should be a basis
3 for me excluding Perfect Office.

4 MR. TULCHIN: Well, Your Honor, it is the same
5 argument. I mean, you dealt with this at page 744 of 699
6 F.Supp.2d. And, you know, what you said there is "What
7 material is subject to discovery and what conduct may serve as
8 the basis of a claim are two distinct inquiries with different
9 standards." And on appeal Novell complained of that decision
10 concerning GroupWise. On appeal, in its brief, Novell said
11 that the complaint repeatedly identifies the harmed products,
12 as WordPerfect and other business applications.

13 THE COURT: I'm just curious, what is going to happen
14 to all those rulings? Is the 10th Circuit going to consider it
15 as law of the case? What's going to happen, if they disagree?
16 I'm just conceptually curious.

17 MR. TULCHIN: It's a good question. I do want to
18 come back to this, Your Honor, because there's an important
19 point there, and a second point that's even stronger.

20 THE COURT: You go on, it's --

21 MR. TULCHIN: It's a good question, Your Honor. The
22 way I think of it, and I hope I'm correct, is this: Rulings
23 that the 4th Circuit made when the Novell case was part of the
24 MDL, and its venue was here in the District of Maryland --

25 THE COURT: Are binding.

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1 MR. TULCHIN: -- are law of the case. I think
2 they're law of the case, just like rulings, interlocutory
3 rulings --

4 THE COURT: It's up to the 10th Circuit, but I would
5 assume that is what it is. And that the avenue for reviewing
6 those is by certiori. But I think you're right.

7 MR. TULCHIN: Well, I think actually, Your Honor, the
8 judgment that's entered in the district of Utah, of course, can
9 be appealed to the 10th Circuit, doesn't go from there -- from
10 the district of Utah to the U.S. Supreme Court.

11 THE COURT: I meant if it -- I'm just talking is it a
12 matter of conceptual -- I think you're right, it seems to me
13 that as long as it was a pretrial ruling appropriately here on
14 the MDL, and the 4th Circuit affirmed or reversed me, that
15 became the law of the case. And then that's what the 10th
16 Circuit would hold. What I meant by, if the 10th Circuit -- if
17 the party still felt aggrieved by the 4th Circuit's ruling,
18 then the Supreme Court would review, that's what I meant.

19 MR. TULCHIN: Right. And I should say that there are
20 occasions when a court comes out differently the second time
21 even if a prior ruling is the law of the case. I'm not sure
22 law of the case is binding. It's a sort of jurisprudential
23 doctrine that says I'm not going to revisit prior rulings. The
24 10th Circuit might well be free to revisit rulings of the 4th.
25 I'm not entirely sure.

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1 THE COURT: Particularly if there's a greater
2 evidentiary record as to whether or not the claim here was
3 directly or indirectly related to a -- that's up to the 10th
4 Circuit too.

5 MR. TULCHIN: I was thinking of exactly that Your
6 Honor when I said --

7 THE COURT: I thought you might be.

8 MR. TULCHIN: That sometimes --

9 THE COURT: There might be a fuller evidentiary
10 record.

11 MR. TULCHIN: In any event, Your Honor, returning to
12 our motion about Perfect Office being middleware, Novell's
13 brief made the same point that they made here, that by saying
14 business applications in their complaint that that's somehow an
15 umbrella term that captures something like the suite. And it
16 was similar to the argument they had made to Your Honor, and
17 the 4th Circuit very squarely rejected that. They pointed out
18 that the complaint's description of office productivity
19 applications, by its terms, excludes GroupWise. It says
20 WordPerfect and Quattro Pro are the office productivity
21 applications, that's paragraph 24 as well. And these little
22 slides or demonstratives that I gave you on the first motion
23 are very relevant here, maybe more so.

24 The second point here, Your Honor, about Perfect
25 Office being middleware, again, pertains to the release. And

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1 with respect to the motion we talked about concerning netware,
2 I understand the Court's ruling that the documents at issue
3 might be relevant because they're facts that pertain to the
4 WordPerfect claim. This one really is of a completely
5 different character. The release we got says -- it's a general
6 release with an exception, we spoke at that earlier, Your
7 Honor. And the exception is for the claims set forth in the
8 draft WordPerfect complaint that Novell provided to Microsoft
9 on November 5, 2004.

10 The claims set forth in that complaint, I think
11 fairly read, the word "claims" has to include the middleware
12 theory that is set forth in the complaint. That's at
13 paragraphs 49 to 51 of the complaint. That theory and that was
14 the only theory that we had notice of, but it's also the only
15 theory that is the claim, not covered by the release, had to do
16 with a combination of OpenDoc, AppWare and WordPerfect. That's
17 paragraph 51 of the complaint. In the paragraphs preceding it
18 there's explanation of why AppWare, OpenDoc and WordPerfect, in
19 combination, might be a middleware threat to Microsoft's
20 monopoly in the PC operating system business. But the release
21 here -- I mean, this is different than just a fact, a
22 document --

23 THE COURT: No, I understand.

24 MR. TULCHIN: That the Court, at least in your prior
25 ruling, indicated while maybe there was specific documents that

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1 we might come back to, I think the Court indicated -- I mean,
2 you said the motion was denied. And I understand that. Those
3 documents perhaps are facts pertaining to the WordPerfect
4 claim.

5 This is a theory, it is the claim. Count 1 after
6 all, if it says anything at all, if it survived the statute of
7 limitations argument, it did so only because, as Your Honor
8 noted several times in the past, Count 1 was ingeniously
9 designed to make a claim for harm to applications, and at the
10 same time say that that harm affected competition in a market
11 in which they didn't compete, the operating system market. And
12 that was the theory that allowed Novell to get past the motion
13 to dismiss at the outset in 2005 in this case.

14 So here we have a release. A settlement agreement
15 that we entered into in 2004, which says we get released from
16 everything Novell has, except the claims set forth in the
17 complaint. It is intrinsic or integral to the claim in Count 1
18 that the middleware theory was WordPerfect, combined with
19 OpenDoc and AppWare. And, of course, it is true, I have
20 acknowledged it, Your Honor --

21 THE COURT: Let me -- well, I understand and you've
22 been saying, factually is the problem now that Quattro Pro
23 may -- has something to opening APIs, I'm not sure I understand
24 the significance of all this.

25 MR. TULCHIN: I'm sorry.

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1 THE COURT: I'm not sure I understand the
2 significance of allowing them to -- the complaint mentioned
3 WordPerfect?

4 MR. TULCHIN: WordPerfect.

5 THE COURT: Open --

6 MR. TULCHIN: OpenDoc and AppWare.

7 THE COURT: And AppWare.

8 MR. TULCHIN: Which were two other Novell
9 technologies.

10 THE COURT: To include -- again, you don't have to
11 answer these questions because it might be giving trial
12 strategy, what is Microsoft's concern about adding that to
13 include Perfect Office?

14 MR. TULCHIN: Well, the concern --

15 THE COURT: As I say, factually, what is it that the
16 concern is? That if you -- I guess, WordPerfect -- excuse me,
17 office -- excuse me, I can't remember these -- what's the name
18 of the suite?

19 MR. TULCHIN: Perfect Office.

20 THE COURT: Perfect Office includes WordPerfect and
21 Quattro Pro.

22 MR. TULCHIN: Quattro Pro and a number of other
23 technologies.

24 THE COURT: Is the concern that -- is the concern
25 that if we expand this to include Perfect Office and not just

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1 WordPerfect, along with the other two, OpenDoc, and whatever it
2 is, that more APIs are open, I --

3 MR. TULCHIN: No. No, it's not that, Your Honor. I
4 don't think that actually -- I'm not sure if there are more or
5 fewer, I don't know what number of APIs would be exposed. I
6 wouldn't say the concern has to do with the number of APIs, but
7 this is a classic case, Your Honor, of Novell trying to move as
8 far away from the only claim that they legitimately can bring
9 because of the release. That's the claim that was set forth in
10 the complaint that they gave us just before we signed the
11 settlement agreement. And one of the reasons, perhaps, that
12 the complaint has never been amended, is that it cannot be.
13 The release was very clear. We got a release from all claims
14 that Novell ever had, or then had, whether known or unknown,
15 except for the claims --

16 THE COURT: No, I understand.

17 MR. TULCHIN: -- set forth there.

18 THE COURT: Let me phrase -- try to phrase my
19 question differently. What does a, quote, new middleware
20 theory add that -- to the case, in terms of --

21 MR. TULCHIN: It's a whole different theory about
22 what the middleware threat was.

23 THE COURT: Okay.

24 MR. TULCHIN: Instead of WordPerfect combined with
25 OpenDoc and AppWare, they now want to move to Perfect Office

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1 combined with other technologies, including Perfect Offices
2 distributed hypothetically in the future with Java. And it's
3 not that it's a slightly different twist on the old theory,
4 it's a completely different claim. This isn't a question about
5 facts and evidence, exactly what will come in or a particular
6 e-mail or document. It's very similar to the GroupWise
7 discussion that we had. But more importantly, a claim, if the
8 word claim is to mean anything, as it's used in the settlement
9 agreement, the claim --

10 THE COURT: You know, your position is very simple,
11 it wasn't claimed and everything except what was in the drafted
12 is released. Simple as that.

13 MR. TULCHIN: It is, Your Honor. I think with that I
14 can leave it with the Court. Mr. Holley wants me to address
15 one thing, if --

16 THE COURT: Make sure that you agree with your junior
17 partner.

18 MR. TULCHIN: I mean, the point that Mr. Holley has
19 asked me to make is that Professor Noel suggested this Perfect
20 Office theory combined with other technologies. It's now the
21 theory that's in the pretrial order that Novell wants to go to
22 trial on.

23 And, again, at the risk of repetition, the release we
24 got covered everything except what was in the complaint. The
25 claims in the complaint. There is nothing more basic to this

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1 claim, because it is the way that they escaped our motion to
2 dismissal at the outset, than the middleware theory; that
3 WordPerfect with OpenDoc and AppWare was the middleware threat.
4 And to change now to Perfect Office -- and yes, there's been
5 mention of Perfect Office in discovery, in expert reports, and
6 in various briefs. But that doesn't change the fact that we
7 got a release on exactly the claim that Perfect Office, either
8 alone or in combination with other products, is the middleware
9 threat. That's what we paid for. That's what we got. Thank
10 you, Your Honor.

11 THE COURT: Mr. Schmidtlein.

12 MR. SCHMIDTLEIN: This is not like GroupWise. If
13 this was like GroupWise they would have moved for summary
14 judgment. And they didn't. They didn't move for summary
15 judgment on Perfect Office because this bears no resemblance to
16 the situation with GroupWise. GroupWise was never called out
17 by name in the complaint, Perfect Office was. GroupWise is --
18 although in theory could be included as another business
19 application, which -- and there's mention sort of generically
20 of that category, Perfect Office it is --

21 THE COURT: GroupWise is what?

22 MR. SCHMIDTLEIN: It's e-mail.

23 THE COURT: It's e-mail.

24 MR. SCHMIDTLEIN: Client software.

25 THE COURT: That's right.

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1 MR. SCHMIDTLEIN: Server.

2 THE COURT: It's an e-mail product.

3 MR. SCHMIDTLEIN: Right. Perfect Office is really a
4 delivery device primarily for WordPerfect and Quattro Pro.
5 It's a suite. It competes against Microsoft's Office suite,
6 which in the complaint Novell alleges, discusses, discusses the
7 competition with Microsoft Office, even going so far as to
8 describe Microsoft Office as middleware. So the notion that
9 this is, you know, some out of left field complaint, or that
10 the conduct involved here is not set forth in the complaint I
11 think is absolutely wrong.

12 As Your Honor may remember, the facts arising around
13 GroupWise had to do with something called MAPI and messaging
14 APIs and those things. There was not detailed allegations
15 about MAPI in the complaint. The allegations that we claim
16 harmed Perfect Office, and relate to the Perfect Office's
17 middleware theory, it's the exact same things that we allege
18 having to do with WordPerfect and Quattro Pro. I mean, the
19 harm to WordPerfect and Quattro Pro by the dedocumentation of
20 the APIs in these types of things, also harmed Perfect Office.
21 So, and Perfect Office is WordPerfect, the OpenDoc -- or the
22 AppWare and Quattro Pro. This isn't some seismic shift there
23 is a middleware theory in the complaint. And we sort of view
24 this as it's -- maybe we didn't name it as explicitly, but this
25 has always been in the complaint.

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1 THE COURT: I'm sorry, I can't remember, is Quattro
2 Pro mentioned in the complaint?

3 MR. SCHMIDTLEIN: Oh, absolutely. And that's one --

4 THE COURT: I thought so, WordPerfect plus Quattro
5 Pro plus OpenDocs and --

6 MR. SCHMIDTLEIN: Correct. And Quattro Pro is one of
7 the separate -- the spreadsheet application market, there was a
8 separate claim for that which Your Honor found --

9 THE COURT: But Perfect Office is the two of them.

10 MR. SCHMIDTLEIN: Correct.

11 THE COURT: They say no.

12 MR. SCHMIDTLEIN: No, it is, and it's some other
13 technologies, absolutely. But the damages we're claiming here,
14 we're not claiming damage for GroupWise. GroupWise was a
15 separate damage claim that Your Honor --

16 THE COURT: But whatever -- this is what I'm trying
17 to understand factually, would it have -- I mean, I honestly
18 don't see the difference, unless the other technologies in
19 Perfect Office somehow caused a greater threat of exposure of
20 APIs. I'm probably missing something, but it seems to me that
21 it's the same theory unless there's an absence of discovery or
22 something that you all are going to get in, look, these other
23 technologies which are included in Perfect Office, somehow
24 including or expanding the scope of the claim.

25 MR. SCHMIDTLEIN: I don't think that's the case, Your

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1 Honor. They have been provided from the very beginning, going
2 back as early as our opposition to the motion to dismiss, where
3 the Perfect Office description as middleware was mentioned. It
4 was provided to them in interrogatory answers. I mean, this
5 was not a claim where they arose, they got up and said, gee,
6 the first time we heard of Perfect Office was in Dr. Noel's
7 report.

8 THE COURT: It first appears in the response to the
9 motion to dismiss.

10 MR. SCHMIDTLEIN: Correct. Correct. And references
11 to that -- references to that are made throughout the briefs in
12 both in the 4th Circuit, I mean, this is not a surprise issue
13 for them. Perfect Office, just like Microsoft Office is
14 Microsoft Word and Excel. I mean those are sort of the
15 cornerstone franchises. Perfect Office is --

16 THE COURT: Well, what do you gain by including it?

17 MR. SCHMIDTLEIN: There are more than a few documents
18 in Microsoft's files which specifically discuss Perfect Office.
19 The threat that Perfect Office included. And maybe it's more
20 specific, or it's named in more detail, but it's essentially --
21 it's the combination of these products, in a bundle with other
22 technologies, that expose APIs and is the middleware threat.
23 And the middleware threat posed by WordPerfect and other
24 technologies was pled in the complaint. We think this is --

25 THE COURT: It seems to me if the other -- if

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1 WordPerfect and Quattro Pro are both mentioned, then it seems
2 to me it's just a variation.

3 MR. SCHMIDTLEIN: Correct.

4 THE COURT: If, in fact, and you may not know the
5 answer, what caused Microsoft's concern was not the combination
6 of WordPerfect and Quattro Pro, but the other technologies
7 which were incorporated into Perfect Office, then Mr. Tulchin's
8 release point may have a point.

9 MR. SCHMIDTLEIN: Well, and one of the points that
10 they -- they hyped -- they say it's a hypothetically, but the
11 facts will show that Perfect Office did, in '95, enter into a
12 deal with Netscape to distribute Navigator. And there was also
13 a deal to distribute Java. So absolutely Perfect Office -- and
14 their documents show it, they are very concerned about Perfect
15 Office in this broader context.

16 THE COURT: It's then owned by Corel, I'm just --

17 MR. SCHMIDTLEIN: No.

18 THE COURT: Novell still owns it?

19 MR. SCHMIDTLEIN: Correct. And they saw this
20 confluence of events. And it contributed to their intent and
21 their purpose to harm, not only WordPerfect, which was sort of
22 the corner stone, but it would -- harming WordPerfect and
23 harming Quattro Pro, by definition, would harm Perfect Office.
24 So, I mean, I think that's our -- that's our point.

25 THE COURT: So from your perspective the big issue is

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1 it's mentioned in Microsoft's documents. And, secondly, you
2 want to use it as leverage to -- as a nexus to get into the
3 fact that there was a deal between Word -- between somebody and
4 Netscape through these -- through the prism of --

5 MR. SCHMIDTLEIN: WordPerfect had a deal as well.

6 THE COURT: Excuse me, Mr. Johnson?

7 MR. JOHNSON: Yeah, Your Honor, and really Mr.
8 Tulchin kind of admitted it by saying he doesn't know of any
9 difference on APIs. All the technologies we're talking about
10 here were also part of WordPerfect standing alone, as a stand
11 alone product. Perfect Office is simply a collection of
12 products, but it doesn't add or subtract anything to the
13 middleware story. AppWare, Perfect Fit Technologies, which is
14 the middleware stuff, is as much in WordPerfect standing alone
15 as in Perfect Office. Perfect Office is simply --

16 THE COURT: So the other technologies don't add
17 anything?

18 MR. JOHNSON: Well, AppWare certainly does --

19 THE COURT: Well, AppWare and OpenDocs do, but
20 they're mentioned in the complaint.

21 MR. JOHNSON: There's no addition, it's -- we're
22 putting it all in one box. That was the way the market
23 developed and the competition developed between the products.

24 THE COURT: Because suites became the way to go.

25 MR. JOHNSON: Because suites became the way to go.

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1 And one of the their big things is we were late to suites. The
2 evidence is going to show we had a very, very good suite at the
3 time they did the acts against us to prevent us from getting on
4 Windows 95. But that's for trial. But the technologies are
5 all the same. And our deal with Netscape, to bundle Netscape,
6 was to bundle Netscape with all of our products, whether
7 they're stand alone or in a box together. So it's all part and
8 parcel of the same thing. There is no difference.

9 MR. SCHMIDTLEIN: And this does go, Your Honor, this
10 middleware -- and this goes back to your earlier observation
11 about sort of looking at this from a different perspective and
12 understanding now sort of what maybe Mr. Gates was talking
13 about in some of those e-mails. I mean, I think Your Honor's
14 right, what we really had here was a platform competition. And
15 Perfect Office was a -- was a potential platform. And what Mr.
16 Gates was --

17 THE COURT: Judge Jackson didn't buy that, because
18 that the relevant market would have been platforms not the
19 Intel --

20 MR. SCHMIDTLEIN: No, I think what he saw was -- yes,
21 there was a defined -- a relevant antitrust market that was
22 computer operating systems. It was a distinct product. But
23 the fact that Microsoft saw the threat -- what they're all
24 competing for is really the developers' attention. And when
25 Mr. Gates saw that people were doing development -- they were

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1 doing technological advances at the middleware level, and the
2 developers might actually get more interested in that
3 technology and the benefits of that, that was a threat to him.
4 And he could have done two things, he could have improved his
5 operating system to compete with that threat, or he could take
6 actions to harm those technologies which ran on top of his
7 operating system. Our case is about the harm that Microsoft
8 caused to the people on top of the operating system. And that
9 does have an impact on competition in the operating system
10 market.

11 THE COURT: I hear you. But I'm not sure -- be that
12 as it may, I'm not sure how improving the operating system was
13 going to solve the problem.

14 MR. SCHMIDTLEIN: No, but if he wants -- if he's
15 worried that those middleware people --

16 THE COURT: No, no, I don't want to change the terms
17 of the debate. To protect against the middleware threat was
18 protecting -- in some ways it was protecting his monopoly in
19 the operating system market. I understand that. But I real
20 disagree do think another way of looking at it, not from the
21 legal standpoint, he was trying to keep the market, in which he
22 had the monopoly, relevant. And that the middleware threat
23 really was threatening its very relevance, that that is not
24 what developers are going to write to.

25 MR. TULCHIN: Your Honor, if I may, Mr. Martin and

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1 Mr. Johnson, I don't think responded to --

2 THE COURT: Mr. Schmidtlein.

3 MR. TULCHIN: -- the two points I made on this motion
4 concerning Perfect Office as middleware. And I appreciate Mr.
5 Martin's theory about what Mr. Gates was thinking. I agree
6 with him that that will be for the trial. But our motion in
7 limine concerning this is not dependant on some notion of what
8 Mr. Gates was thinking. It has to do with the complaint, and
9 it has to do with the release. It's not about an issue for
10 trial. This is exactly like middleware because -- sorry
11 GroupWise. There you said, Your Honor, and the 4th Circuit
12 said that the phrase office productivity applications, which is
13 used in the complaint many times, and is defined in paragraph
14 24 to be WordPerfect and Quattro Pro.

15 THE COURT: But not GroupWise.

16 MR. TULCHIN: Not GroupWise. And that phrase
17 couldn't be expanded to include GroupWise. The same is true
18 here.

19 Your Honor, I know that you have this chronology, but
20 the complaint was filed in 2004, which was more than nine years
21 after the last of the three bad acts.

22 THE COURT: Alleged three bad acts.

23 MR. TULCHIN: Alleged bad acts, thank you, Your
24 Honor.

25 THE COURT: That's the only time I'm going to --

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1 MR. TULCHIN: Let's hope.

2 THE COURT: It's the first and the last.

3 MR. TULCHIN: There may be others, there may be
4 others who knows.

5 THE COURT: At least it's the first.

6 MR. TULCHIN: Probably, Your Honor. But obviously
7 Novell had nine and ten years to think about their claims. And
8 they defined their office productivity applications to be
9 GroupWise -- sorry, to be WordPerfect and Quattro Pro. That's
10 it. They tried to put GroupWise in, Your Honor and the 4th
11 Circuit said no. Perfect Office is another example of trying
12 to expand this definition to include something that wasn't
13 included. Perfect Office is mentioned, I believe, twice in the
14 complaint, and only in the passing. And never, never when it
15 comes to the middleware theory.

16 And let me be clear on something, Your Honor. The
17 theory in the complaint is WordPerfect combined with two other
18 Novell technologies, OpenDoc and AppWare. That's the only
19 theory. It's the only thing that is the exception to the
20 release we got. Now they say it's Perfect Office combined with
21 Netscape and Java. And I think Mr. Schmidlein said we had an
22 arrangement in later years where Perfect Office would be
23 distributed with Netscape Navigator and include the Java
24 technologies.

25 So the middleware theory has changed completely.

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1 This isn't some question about whether there's one more API
2 exposed. And as I said I don't know the number of APIs, I
3 don't. I'm not sure any were exposed that were ever written
4 for. In other words, none of these products ever became
5 middleware. I don't think that's even in dispute. But, again,
6 the debate sort of shifted, because Mr. Schmidlein and Mr.
7 Johnson sort of started talking about the evidence, and whether
8 particular documents showed some intent to attack middleware.

9 This motion is about two legal points. The first is
10 the same as GroupWise. It just isn't in the complaint.

11 THE COURT: No, I understand that. And I'm getting
12 myself in an area where I really don't know what I'm talking
13 about. But Mr. Johnson may have made the relevant point. Now
14 I think I understand the concern is that this is a spring board
15 for tying Novell's programs to Java and Netscape. I mean, that
16 seems to me to be the concern. But Mr. Johnson said, and I
17 don't know if we can revisit all of this, that all of the
18 relevant -- whatever is relevant, and I don't want to try to
19 say what's relevant, is included in the stand alone WordPerfect
20 product and that the other products added nothing and would not
21 have added interest to Netscape and -- is that right, Mr.
22 Johnson?

23 MR. JOHNSON: The deal with Netscape was that we
24 could bundle it with any of our products. So we could bundle
25 it in Perfect Office, which is just a bundle. We could put it

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1 with WordPerfect. For that matter, I guess we could have put
2 it with Quattro Pro.

3 THE COURT: But by the time it came along, the
4 bundling would have been with the suite, because that's what
5 the market was asking for.

6 MR. JOHNSON: Well, no stand-alone products were
7 still selling. But clearly the market was moving towards
8 suites. But there were still stand-alone products. But the
9 point I was trying to make, Your Honor, is that Perfect
10 Office --

11 THE COURT: Your point is just language, the
12 reality -- as I -- the reality is that the other technologies,
13 other than Quattro Pro and WordPerfect which are mentioned in
14 the complaint, those two are mentioned in the complaint, but
15 the other technologies add nothing. And the fact of the matter
16 is the deal, although people were using the term Perfect Office
17 by that time, it basically --

18 MR. JOHNSON: It's just a bundle.

19 THE COURT: It's just a bundle.

20 MR. TULCHIN: It was not a bundle.

21 MR. JOHNSON: You're putting the same products into
22 the box. In fact, we're going to bring the box. It's just a
23 bundle.

24 MR. TULCHIN: Your Honor, the --

25 MR. JOHNSON: Thank you, Your Honor.

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1 MR. TULCHIN: This idea that it was just a bundle, I
2 don't know what that means. But what Novell said at the time
3 was that Perfect Office, the suite, was more than just a bundle
4 of particular products dumped together into a box. But of
5 course none of that really matters. What matters is that the
6 release here covered everything except the claims set forth in
7 the draft complaint. Those claims for Count 1 included a
8 middleware theory of WordPerfect combined with OpenDoc and
9 AppWare, and that's it.

10 And I would ask Your Honor to look at paragraphs 49
11 to 51 of the complaint. It's very clear about that. There's
12 no mention of Perfect Office. I mean, under Mr. Johnson's
13 theory WordPerfect is sort of a subset of this larger box,
14 Perfect Office. And if it were the other way around, if
15 Perfect Office were a subset of WordPerfect, maybe the argument
16 would be more relevant. But to come up now with a new theory
17 of middleware, that is not, I'm sorry, not covered by the
18 exception to the release.

19 The claim in the complaint was the only thing that we
20 didn't get when we settled. The claim of harm in Count 1 to
21 WordPerfect and Quattro Pro. The 4th Circuit said you can't
22 expand this to other products, because you defined office
23 productivity applications in paragraph 24 to include only
24 WordPerfect and Quattro Pro. When they wrote their complaint
25 in 2004, certainly they knew about Perfect Office from a decade

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1 before. And the middleware theory is very clear.

2 We got a release that was all encompassing. We
3 didn't get it for the claim in that draft complaint, and for
4 that theory. To change it now to something entirely different,
5 what Mr. Johnson calls the box, this suite, now with Netscape
6 and Java, there was no mention of Netscape and Java in
7 paragraphs 49 and 51 as part of the middleware theory, none.
8 It was just WordPerfect with these other two Novell
9 technologies. This is going way, way beyond what the complaint
10 sets forth. It's Perfect Office with Netscape and Java.

11 And, of course, it's no coincidence, I suppose, Your
12 Honor, that they now want to hitch on to that band wagon, for
13 the very purpose of trying to collect damages on account of
14 conduct in the government case, conduct that's the subject of
15 the findings of fact. And I don't want to revisit collateral
16 estoppel, that is what it is. But it's one thing to get those
17 findings into evidence and to be read to the jury, as Your
18 Honor said you would, it's another thing, in the face of this
19 release, to change the theory now at all. The complaint is the
20 complaint. Perfect Office is never mentioned as middleware or
21 a middleware threat. Neither is Netscape. Neither is Java.
22 They're not middleware --

23 THE COURT: Okay. I'm going to reserve ruling on
24 this motion in limine. I may understand it better at trial.
25 To the extent that Novell -- this really may become an issue

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1 when Novell tries to introduce evidence of an agreement with
2 Netscape and/or Java to -- what's the word, distribute with --

3 MR. JOHNSON: Bundle.

4 THE COURT: Bundle. I'm afraid to use that because
5 Mr. Tulchin doesn't know what it means, nor do I. But to
6 bundle this with another product. I can understand that that
7 could have impact. Don't anybody mention this in opening
8 statement. I'll reserve ruling.

9 MR. JOHNSON: Your Honor --

10 THE COURT: Do you have to mention this?

11 MR. JOHNSON: Yeah, you have to. I mean it's -- the
12 entire debate in this case from Day One has been Microsoft
13 Office versus Perfect Office, and what they did to advantage
14 Microsoft Office against Perfect Office. I mean, it has to
15 be -- it has to be -- all the evidence that we would be showing
16 says that. So you can't --

17 THE COURT: How about on the other side -- how about
18 on the other theory --

19 MR. JOHNSON: You know, Your Honor, on the Netscape
20 thing, you may remember one of the findings you found on
21 collateral estoppel was the middleware threat that Microsoft
22 faced. And how the Court went on to say that Microsoft viewed
23 this threat as a category, okay. It wasn't just this piece,
24 this piece and this piece. It was a category to be attacked
25 across the board. So attacking us and attacking Netscape and

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1 attacking Java is all part and parcel of the concerted attack
2 Microsoft made on these products because of the middleware
3 threat. This isn't some sort of -- our attempt to glom on to
4 anything. This was a part of the middleware threat.

5 THE COURT: No, I understand.

6 MR. JOHNSON: Which caused harm to competition in the
7 operating system market. So yes, I couldn't do an opening
8 without saying Perfect Office. It just -- the documents are
9 replete with respect to that. And as I said, the complaint
10 itself says "Perfect Office." The complaint itself says
11 "suites." The fact that a couple paragraphs don't point to
12 that as a middleware threat is irrelevant, because the same
13 technologies are in both, the stand-alone product and the
14 suite. And as Your Honor has pointed out, from Day One, this
15 case has been litigated on that basis. And Microsoft is trying
16 to cut out our case from under us. I understand why they want
17 to do that, but it is just not right given the way this case
18 has been litigated from Day One.

19 THE COURT: Thank you.

20 MR. TULCHIN: Your Honor, nothing Mr. Johnson has
21 said, or Mr. Schmidlein before him, addresses the question of
22 the release. I mean, you settle the case, Microsoft paid a lot
23 of money to settle the netware case. The consideration
24 received was a very broad release, which says no more claims
25 from Novell except the claims set forth in the WordPerfect

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1 complaint. It's exactly the complaint that was filed and
2 served a few days later. That theory of middleware is about
3 WordPerfect, OpenDoc and AppWare. This is a complete change,
4 it's a new claim.

5 THE COURT: It includes Quattro Pro too, doesn't it?

6 MR. TULCHIN: No.

7 MR. JOHNSON: Yes, of course it does.

8 MR. TULCHIN: Not in the complaint, Your Honor, the
9 middleware theory mentioned Quattro Pro not at all. And the
10 debate we had about GroupWise is very similar to this. Where
11 Novell said, Mr. Johnson said, well, we said office
12 productivity applications, and after all that's a broad
13 category. And the 4th Circuit said, you defined it to mean
14 WordPerfect and Quattro Pro. Perfect Office includes other
15 technologies besides those products. But, of course, that's
16 besides the point. It's mentioned in passing twice in the
17 complaint; not as a product that was harmed, and not in
18 connection with any middleware threat.

19 This whole case rides on this middleware theory,
20 that's how the limitations period was tolled. The middleware
21 theory being that WordPerfect was middleware when combined with
22 these other technologies, and therefore, posed a threat to the
23 same market, PC operating systems as was involved in the other
24 case. So that was the only thing not settled of the claims
25 remaining in this case.

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1 And no lawyer for Novell has addressed this. In
2 Novell's brief in opposition to our motion on this point, Your
3 Honor, Novell talks at great length about Perfect Office,
4 making the same kinds of arguments that it made about
5 GroupWise. And then has a footnote on page 16 -- 18, page 18
6 of their brief, which in three sentences, it's footnote 6, says
7 that our argument about the 2004 settlement agreement is not
8 well taken. That's all they say. That one sentence, that one
9 footnote of three sentences. And nothing so far today about
10 the release.

11 And, Your Honor, I think this is just fundamental --
12 THE COURT: I'm still having problems whether you're
13 just talking about words or substance.

14 MR. TULCHIN: No.

15 THE COURT: In terms of the release and everything
16 else, if in fact there was a failure to -- assume there was a
17 failure that a -- the complaint should have said at the
18 relevant point that these technologies, and there's a factual
19 dispute whether Quattro Pro is then mentioned, and we can come
20 back to that. But that -- and when put together in the same
21 box were called Perfect Office, that's one thing. That seems
22 to me to be a problem of words only, and there's no -- if
23 there's no change in the underlying substance, that the failure
24 to say that these two are called Perfect Office, and that that
25 is a phrase then used in Microsoft documents, that seems to me

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1 to be a -- not a problem of substance at all. It becomes a
2 problem of substance if in fact there's some technological
3 difference between Perfect Office.

4 MR. HOLLEY: Your Honor, I --

5 THE COURT: And I -- I'm sorry, maybe I'm not making
6 myself clear. I'm much more willing to forgive something in
7 the amended complaint saying, look, we didn't say, when bundled
8 together called Perfect Office, as opposed to when it changes
9 if somehow the technology is substantially different.

10 MR. HOLLEY: Your Honor, they could not be more
11 different. And I hesitate to tag team, but Novell has done the
12 same thing. It is one thing to say that WordPerfect, a word
13 processor, plus a component technology called OpenDoc, and some
14 application framework called AppWare, which never actually
15 existed other than in papers, is a middleware threat. And
16 that's what the complaint says.

17 THE COURT: That's what they've said.

18 MR. HOLLEY: Those three things are the middleware
19 threat. Now what they're saying is something entirely
20 different, that a suite of applications that had some glue that
21 held the different applications together called Perfect Fit,
22 plus Netscape Navigator, plus Java, which after all, was a
23 platform, it was you'll remember from the Sun case there were
24 all those libraries of code that people --

25 THE COURT: -- long environments or something.

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1 MR. HOLLEY: You may try to suppress the memory.

2 THE COURT: I sure have.

3 MR. HOLLEY: That was a very, very different thing.
4 So now they're saying we said in the complaint that a word
5 processor, plus a component technology, plus an application
6 framework are middleware, that is the claim we made, all other
7 claims are released. Now, after their expert said that theory
8 makes no sense, they have a new theory. And the new theory,
9 which isn't in the complaint, and which is released, is that
10 the suite, plus Netscape Navigator, plus Sun's Java are the
11 middleware platform. And what Microsoft's position is it's too
12 late to make that change. A, because you escaped summary
13 judgment and the motion to dismiss on another theory. And B,
14 because you gave that claim away.

15 MR. TULCHIN: One thing more thing, Your Honor, I
16 just have to add, if I may.

17 THE COURT: Well, let him respond and then you can
18 respond and then we'll take a break.

19 MR. TULCHIN: Your Honor, may I?

20 THE COURT: No, no, let me hear from Mr. Johnson.

21 MR. JOHNSON: Thank you, Your Honor. I thought Mr.
22 Holley was knowledgeable about the technology, it's obviously
23 he is not. Perfect Fit --

24 THE COURT: Why don't we take a recess. As I said
25 I'm going to reserve ruling on this, don't mention it in

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1 opening statement.

2 (A recess was taken.)

3 THE COURT: All right. I'll rule on this later. I'm
4 still of the view I should reserve ruling. My view is that if
5 the claim is that if it simply -- excuse me, you all can be
6 seated -- if the only mistake in the complaint was not to
7 mention that Quattro Pro and WordPerfect, together known as
8 Perfect Office, that seems to me to be nothing. If, in fact,
9 the claim now is that Perfect Office combined, bundled with
10 Netscape and/or Java is the claim, the middleware threat, that
11 is not simply a question of evidence. I mean, I've tentatively
12 said I agree with Novell on that. But it seems to me that's a
13 separate claim which I don't think can be asserted. So if
14 that's what it comes down to --

15 MR. TULCHIN: And that's what it is, Your Honor.

16 THE COURT: If that's what it is -- and I can
17 understand that this may be a way of finding significant
18 contribution to harm in the relevant market. If that's what it
19 is, that was released. So to that extent the motion in limine
20 is granted. Okay. Next motion.

21 MR. TULCHIN: Mr. Holley will address the next one,
22 Your Honor.

23 MR. HOLLEY: Your Honor, I'm going to talk about the
24 motion in limine directed to Mr. Alepin. The basic facts
25 regarding Mr. Alepin are not disputed, he has no bachelors

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1 degree, master's degree or Ph.D --

2 THE COURT: Does Mr. Gates?

3 MR. HOLLEY: No, but on the other hand Mr. Alepin
4 hasn't founded the most successful software company in human
5 history --

6 THE COURT: -- most successful testifying witness.

7 MR. HOLLEY: Yes, he is. I can't tell you how many
8 times we run into Mr. Alepin. He hasn't written any books or
9 articles in the field. He hasn't done any basic research in
10 the field. And he's never taught a course --

11 THE COURT: I'm really going to have to reserve on
12 this -- I'll be glad to hear from you -- until trial. I mean,
13 it seems to me he testifies to some -- go ahead, I'll hear from
14 you.

15 MR. HOLLEY: Well, you know, Novell suggested that
16 maybe we should have a *Daubert* hearing, maybe that would be
17 appropriate, I know Your Honor has read the papers. But 39
18 years experience in the computer industry does not give
19 somebody a sufficient basis to testify about the specific
20 issues that are relevant here and the 10th Circuit cases we
21 relied on make that point, Your Honor, just because you know
22 something about the broad area of knowledge doesn't mean that
23 you have sufficient knowledge to be an expert on the design of
24 PC operating systems, or the design of applications like
25 spreadsheets or word processors.

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1 THE COURT: Well, I hesitate to even ask this,
2 because I'm sure the answer is they testify all the time, but
3 God knows I quoted them in my opinion, why is there such a
4 thing as a liability expert, it would seem to me that that's
5 argument in facts? That really what there ought to be, if
6 somebody's got relevant information whether the withdrawal of
7 the name space extension was relevant, they can testify for
8 that, that seems to, frankly, you know, small town lawyer and
9 judge, that seems to me what people ought to be testifying
10 about. You shouldn't get somebody on the stand to say this is
11 our liability theory.

12 MR. HOLLEY: I agree with you, Your Honor.

13 THE COURT: That's a whole -- that's a much more
14 broad question than this. And I realize in my opinion I quoted
15 him a lot.

16 MR. HOLLEY: Well, that's what one of my partners
17 refers to Your Honor as the intent --

18 THE COURT: Now, we're in trial, it seems to me that
19 it's up to you all to say that happened, this happened, this
20 happened and this shows this, this shows that and that shows
21 this. And to the extent somebody can shed light on whether a
22 particular action taken by one side or the other, you know, we
23 don't understand software, that they can explain that to us it
24 might be relevant. That seems to me the way we ought to go.

25 MR. HOLLEY: I think that's exactly right, Your

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1 Honor. It's obviously a big can of worms, because there are
2 all these experts who run around doing what one of my partners
3 refers to as intentology, where they read a bunch of deposition
4 excerpts, and read a bunch of documents, and then they want to
5 testify as an expert about what all that stuff means. And I
6 couldn't agree with the Court more that what really ought to
7 happen is that knowledgeable witnesses ought to testify about
8 what happened. And then the jury ought to get to decide
9 whether that complies with the Court's instructions.

10 There are, however, certain things that Dr. Bennett,
11 for example, has done that are useful and are actually computer
12 science as opposed to armchair opinionating. For example,
13 Dr. Bennett has actually torn apart the versions of Microsoft's
14 applications to see whether they ever used these name space
15 extension APIs. That is the sort of thing that I think experts
16 do. And they can actually make a contribution to a trial. But
17 having a man like Mr. Alepin who really is a professional
18 witness, after all his job for years was to be the technical
19 advisor to Morrison and Foerster, read a bunch of documents and
20 then start opining about Microsoft's business intent and its
21 effect on the market, I don't think that's admissible expert
22 testimony.

23 So, you know, it's true that in response to this very
24 long expert report submitted by Mr. Alepin, Professor Bennett
25 looked at the same documents and came to different views. But

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1 if the Court is inclined to limit expert testimony to actual --

2 THE COURT: I'm not saying I am. Clearly they
3 testify all the time. But the more I thought about this the
4 more -- why do I want to have an expert say -- now we're at
5 trial, we've got a jury, we've got good lawyers, we've got the
6 facts coming in. There may be facts as to which expert
7 testimony is relevant, don't get me wrong, about the effect of
8 the withdrawal of the APIs. But I guess that's just a
9 fundamental premise which I've got to ask the question.

10 MR. HOLLEY: Well, how would the -- we're happy to
11 proceed however you like, Your Honor, if you want to defer
12 this --

13 THE COURT: Go ahead, however, you feel.

14 MR. HOLLEY: Well, I think I've made my basic points.
15 I mean, I was accused of asking carefully crafted questions at
16 Mr. Alepin's deposition, and I cop to that completely. Yes, I
17 asked him the question, "Are you an expert in PC operating
18 system design?" And his answer to me was "That's a very
19 difficult question to answer." Now, I've never heard --

20 THE COURT: That's because you had been around the
21 block with him before.

22 MR. HOLLEY: But if he's not prepared to say yes,
23 Your Honor, what is he doing giving expert testimony in this
24 case. The reason that he didn't want to answer the question is
25 because he doesn't have any expertise in the development of PC

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1 operating systems. He knows about Amdahl mainframe clones of
2 IBM mainframes. He knows about some office automation software
3 that he once wrote back in the 1980s. And he knows whatever
4 he's gleaned from professional consulting, but that isn't
5 industry expertise. He's never written a PC operating system.
6 He's never written anything vaguely approaching that. And, you
7 know, unfortunately for Novell, Professor Bennett actually has.
8 His Ph.D. dissertation is on the predecessor of Java called
9 Smalltalk. He's written multiprocessor distributed computing
10 systems. He teaches the advanced operating system class at the
11 University of Colorado. He is a real expert on the design of
12 operating systems.

13 So, you know, I don't want to go on to all the
14 things, but what Mr. Alepin said in his deposition, both in
15 this case, during the trial in Iowa and in his earlier MDL
16 deposition, is that he doesn't have any expertise in any of the
17 relevant fields. And it isn't enough to say, I know about the
18 computer industry. That's like having somebody testify about,
19 you know, some lug nut in a car, and whether it failed. And
20 say, well, I've been in the automotive industry for 30 years
21 because, you know, I once worked at Ford. That isn't enough.
22 The 10th Circuit cases make clear that you have to know about
23 the specific issues that are relevant to the case.

24 So it's Microsoft's position that Mr. Alepin should
25 not be allowed to testify about things that are well beyond any

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1 expertise that he might have. Thank you, Your Honor.

2 THE COURT: Mr. Schmidtlein.

3 MR. SCHMIDTLEIN: Your Honor, I think all of these
4 arguments go to weight, they don't go to admissibility. Mr.
5 Alepin has broad experience writing software code for all sorts
6 of different types of writing software code. Their position
7 essentially is -- and I think it really boils down to, if you
8 haven't been hired by Microsoft to write for PC operating
9 systems, which during this period meant Windows, or you haven't
10 worked writing WordPerfect or Word applications, then somehow
11 you aren't qualified to give an opinion in this case.

12 Mr. Alepin has broad experience. He has written
13 operating systems, he has written code for operating systems.
14 He hasn't written code for a PC operating system, but he has
15 written code. And the broad experience he has writing for
16 other times of operating systems, writing for other types of
17 applications, including applications that have been developed
18 for the DOS operating system, we think absolutely make him an
19 expert. They can stand up and they can try to trash him
20 because he doesn't have a college degree --

21 THE COURT: What about the broader question, a lot of
22 things in his report really shouldn't be the subject of expert
23 testimony at all.

24 MR. SCHMIDTLEIN: Such as?

25 THE COURT: Which you may not be prepared to discuss

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1 today. But -- and don't get me wrong, in my opinion I quoted
2 him all the time, but then I started thinking now we're going
3 to have a trial with very skilled lawyers, we're going to have
4 the relevant facts in, why do I want an expert on the stand
5 saying what he thinks is anticompetitive, I mean, that's
6 your --

7 MR. SCHMIDTLEIN: I don't -- Mr. Alepin's not going
8 to testify about anticompetitive -- he's not going to give
9 economic sort of conclusions like that. He's not going to give
10 conclusions about legal issues, but he is qualified to evaluate
11 whether from a tech -- for example, from a technical standpoint
12 Microsoft had a legitimate justification in dedocumenting the
13 APIs after they had been evangelized and published and relied
14 upon by ISVs.

15 THE COURT: No, I understand.

16 MR. SCHMIDTLEIN: I mean, these technical business
17 justification types of issues is where his testimony is going
18 to be. For example, on the logo, Microsoft says it was
19 legitimate for us to have a logo program that said you have to
20 have your application run perfectly on Windows NT, which is a
21 completely different type of operating system, and on Windows
22 95. And even though we allow exceptions, we didn't give you an
23 exception. And he is in a position to say, as a technical
24 matter, denying them that exception, when Microsoft gave its
25 own applications exception, like Internet Explorer, there's not

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1 a valid technical justification for that. Those are the types
2 of technical, computer-types of issues I think he's primarily
3 going to testify to. He's certainly not going to stand up and
4 talk about, you know, broad harm to competition. He's not
5 going to testify about legal conclusions. Thank you, Your
6 Honor.

7 THE COURT: Okay.

8 MR. HOLLEY: I wish I could be so sanguine, Your
9 Honor, about what it is that Mr. Alepin is going to offer
10 opinions about. I asked him at his deposition about a
11 statement in his report where he quotes on page -- where he
12 says on page 149, quote, "The proposed printing functionality
13 in Windows 95 bore a substantial similarity to that already
14 implemented in Windows NT with which WordPerfect developers
15 were already familiar," close quote. And then I asked him
16 whether he was trying to imply by that, that it would have been
17 easy for Microsoft to include this same custom print processing
18 functionality in Windows 95. He had never done any study of
19 that question. And, in fact, he said it's entirely possible
20 that that was the case, they certainly knew how to do it in
21 Windows NT.

22 Well, you know, I can offer that view. I mean, if
23 you've done it once it must be easy to do it again. But that's
24 not the sort of expert testimony that the jury ought to be
25 hearing. Contrary to what Mr. Johnson said the last time we

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1 were here, the functionalities to support custom print
2 processors was not in Windows 95 at the time the product was
3 released. Somebody thought it might be a good idea, people
4 talked about doing it, but like all complex products things
5 have to be cut in order to get them out the door. And it's a
6 fundamental misunderstanding between the nature of an API,
7 which as Your Honor knows, is just an interface, and all the
8 software code that you have to write underneath the API to
9 implement the functionality that gets called when you call the
10 API.

11 The fact that somebody talked about putting some APIs
12 in Windows 95 doesn't mean they had done one thing to write all
13 of the code that had to go in the system underneath the API.
14 Mr. Alepin doesn't know anything about that. Neither does
15 anyone else, because there's nobody on the Novell witness list
16 who knows about what Microsoft did or did not do to implement
17 the functionality to support custom print processors. But at a
18 minimum, no expert who has done no work, other than to read a
19 couple documents, should be testifying about this very complex
20 situation. It's just not appropriate.

21 Now, if Your Honor would prefer me to, you know,
22 raise this as we get --

23 THE COURT: I wouldn't prefer that, but maybe we can
24 discuss this out in Salt Lake City before he gets on the stand.
25 The motion generally is denied, but I certainly will

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1 entertain -- that's without prejudice to particular areas where
2 he shouldn't testify to.

3 MR. HOLLEY: I understand, Your Honor. Thank you.

4 THE COURT: Keep you all from preparing trial, when
5 the jury's gone home we can talk about this. Mr. Jardine.

6 MR. JARDINE: Yes, Your Honor, I appreciate the
7 privilege of appearing in the courtroom in Maryland as the sole
8 representative of the Utah bar so far.

9 THE COURT: Good to see you.

10 MR. AESCHBACHER: Almost sole.

11 MR. JARDINE: I forgot Mr. Aeschbacher has
12 multi-jurisdiction status.

13 THE COURT: Soon the situation will be reversed,
14 there will be at least be somebody on the other side.

15 MR. JARDINE: Yeah. And Your Honor --

16 THE COURT: We'll all be the visitors, unless you
17 want to rethink, come back -- you know, it seems to me there's
18 equal -- I'm not sure I know who wants to be in Salt Lake City
19 now that I've had the motions in limine, maybe you all want to
20 come to Baltimore. Love to have you here.

21 MR. JARDINE: I'll comment later and offer my advice
22 to anyone who's interested in knowing the standards for
23 partying in. --

24 The motion I'm here to argue, Your Honor, is the
25 motion to exclude evidence on Microsoft's conduct towards

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1 Netscape and Sun. And I understand that I am not writing on a
2 blank slate here in my argument.

3 THE COURT: You're presumptively wrong, but I have a
4 relatively open mind.

5 MR. JARDINE: Thank you. I'd like to just direct
6 myself to three points today, Your Honor. The first is to
7 argue that as to relevance, there is a critical time factor.
8 And I want to talk about it on some of the same facts, but from
9 a different view than Mr. Tulchin argued this morning, and why,
10 given the Court's language in its March 2010 opinion, there
11 is -- there is a lack of relevance to the Netscape and Sun
12 evidence that Novell proposes to offer in the multiple exhibits
13 and multiple witnesses they've designated.

14 The second point I'd like to address is why there is,
15 with respect to this evidence, a particularly heightened risk
16 of juror confusion. And then third, I'll address briefly what
17 to do if the Court proceeds with its tentative ruling on
18 collateral estoppel and evidence comes in, what is the -- what
19 are the issues associated with duplicative or cumulative
20 evidence if they were to produce these witnesses and exhibits.

21 THE COURT: That's fine.

22 MR. JARDINE: Your Honor, let me turn very quickly,
23 and again, without taking much time, to talk about the time
24 frames. Because the three acts they have identified, on which
25 they're alleging that Microsoft engaged in anticompetitive

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1 conduct towards Novell, are the withdrawal of the name space
2 extension APIs, a decision in October '94, three months after
3 Novell acquired WordPerfect and Quattro Pro, the denial of the
4 Windows 95 logo, which is in the first several months of '95.
5 And the announcement that they were not going to include
6 functionality for the custom print processor in Windows 95,
7 which according to Novell occurred in June of '95. So that's
8 the time frame. They sell the product to Corel, WordPerfect
9 and Quattro Pro, in March, announced in January of '95, but
10 finalized it in March of '96. So that's the time frame.

11 And what I want to say first, Your Honor, about
12 relevance is this: That if you think about the relevance in
13 terms of anticompetitive conduct, if that's the window we look
14 at the relevance of the Netscape and Sun evidence, and
15 especially as it may relate to motive or plan, the primary act,
16 which they focus on, which is the withdrawal of the name space
17 extensions, it's really, of the three, has much more weight in
18 the way which we've seen the case unfold for them, occurs
19 according to Judge Jackson, before Microsoft had ever
20 apprehended any risk of a middleware threat from Netscape. He
21 says in finding 71 that they knew -- that Microsoft knew that
22 Netscape was developing Navigator, but it just didn't apprehend
23 any threat.

24 And it's not until sometime in 1995, according to
25 Judge Jackson, when they begin to apprehend that Navigator may

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1 present a threat. And so you have to ask yourself the
2 question, what does the Netscape evidence tell us about
3 Microsoft's intent or motive, when they made the decision in
4 October of '94 to withdraw the name space extension APIs. That
5 seems to me to be a real issue about relevance given the timing
6 of the decisions they challenge in this case. The time line
7 for Sun is even later, as we put out in our papers. But that
8 it seems to me, Your Honor, is a challenge for them to be able
9 to show relevance.

10 If I now move to the second issue on which they seem
11 to suggest relevance of the --

12 THE COURT: Excuse me, when -- according to finding
13 71, when did they perceive the threat?

14 MR. JARDINE: According to -- if you read finding 71
15 and 72, Your Honor, and I may just take a minute just to read
16 these very quickly, because I think they're helpful on this.
17 Judge Jackson says in 71, "Microsoft knew in the fall of '94
18 that Netscape was developing versions of a web browser to run
19 on different operating systems. It did not yet know, however,
20 that Netscape would employ Navigator to generate revenue
21 directly, much less that this product would evolve in such a
22 way as to threaten Microsoft. In fact, in late December 1994,
23 Netscape's chairman and chief executive officer, Jim Clark,
24 told a Microsoft executive that the focus of Netscape's
25 business would be applications running on servers, and that

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1 Netscape did not intend to succeed at Microsoft's expense."

2 In '72 they say that when it was released on -- when
3 Netscape Navigator was released on December 15th it began to
4 enjoy dramatic acceptance and this alarmed Microsoft. And it
5 talks about kind of late spring '95 when this apprehension
6 began. That's how I read those findings, Your Honor.

7 THE COURT: But that does not necessarily go to
8 whether exposure of the APIs was perceived earlier, that was
9 sort of Netscape specific was it not, those findings?

10 MR. JARDINE: Yeah, those findings were Netscape
11 specific. Your Honor, I think Novell's entitled to put on
12 whatever evidence they can that Microsoft felt threatened by
13 what Novell was doing with WordPerfect. But my concern is what
14 would be the relevance of the Netscape evidence to that issue
15 since the finding is that it -- that they weren't worried about
16 it at the time the name space extension APIs were withdrawn.

17 And the Sun evidence is even later than that, that it
18 was sort of mid-1995. And I think the evidence in -- for Judge
19 Jackson, was that none of this, there was no harm to either
20 Netscape or Sun until after March of 1996, after Novell had
21 sold the product. Which gets to my second point, which is that
22 arguable relevance of this evidence might also be suggested to
23 go to the issue of whether there was a weakened market. But
24 because the evidence in the DOJ case, and the evidence they
25 propose to present here with respect to Netscape and Java, all

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1 relates to harm in -- after March of 1996, that's when they --
2 the testimony is there began to be evidence of harm. There
3 couldn't have been a weakened market for Novell and for the
4 actions taken as to Novell's products in the fall of '94 or in
5 '95.

6 So, again, there's this subsequent action, I guess
7 Judge Jackson found did hurt the operating system market in '96
8 and thereafter. But there's no evidence with respect to Sun
9 and Java that would be relevant to a claim that there was a
10 weakened market in '94 and '95, the time at which this conduct
11 is alleged to have occurred. So --

12 THE COURT: And the time that the sale was made.

13 MR. JARDINE: I'm sorry?

14 THE COURT: And the time that the sale was made.

15 MR. JARDINE: The sale to Corel?

16 THE COURT: Yeah. So if there wasn't -- there wasn't
17 even a weakened market then?

18 MR. JARDINE: According to the evidence in the DOJ
19 and that we've seen, it was after that. The sale was March
20 30th, I think of 1996, March 1st, excuse me.

21 THE COURT: March 1st of?

22 MR. JARDINE: Of '96.

23 THE COURT: That's when it closed.

24 MR. JARDINE: Yes. And their damages expert says the
25 damages to Novell has to be measured in that time frame;

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1 between the time they acquired it in June of '94 and when they
2 sold it March of '96.

3 So, Your Honor, they have, I think our papers sets
4 out, I think, a number, 19 exhibits relating to Sun and
5 Netscape, much of it involving Microsoft internal documents
6 talking about strategies for the internet competition. And
7 proposed testimony from five people all relating to events
8 largely, though not entirely, in the '96, '97 time frame. So
9 we think there is a relevance issue, Your Honor. We understand
10 that you've been wrestling with this. But I think those time
11 frames, when you drill down on them become -- the more you
12 think about them become more and more dominant as you try to
13 analyze what the relevance is.

14 Let me just talk, if I can briefly, Your Honor, about
15 the prejudice. And it seems to me that in this case, and we've
16 talked a lot about it, there is a heightened risk of jury
17 confusion by the inclusion of this evidence. And I'm going to
18 be repetitive, but I thought it was a point that made a lot of
19 sense to me. When we were last here Mr. Holley said -- posed
20 to the Court, would it be possible for a jury to find that none
21 of the three acts were, in fact, anticompetitive and still find
22 somehow that Microsoft had engaged in anticompetitive conduct
23 with respect to that element of Novell's proof. And if the
24 answer to that is even possibly yes, then we're dealing with a
25 very significant --

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1 THE COURT: No, I heard that Mr. Mr. Holley too. But
2 it seems to me the cure on that is on the instructions not what
3 you admit in evidence. I heard him loud and clear, obviously,
4 I think one of my remarks earlier this morning showed that. I
5 think that's a legitimate concern. The jury's focus has got to
6 be on what Microsoft allegedly did to Novell. I think that is
7 clear. But I'm not sure that there shouldn't be a context for
8 evaluating that conduct. That clearly somewhere in the
9 instructions I have to say, look, this is -- the mere fact
10 that -- otherwise, it's piggy backing as it were.

11 But that aside, the fact of the matter is I think the
12 focus has to be on harm directed to -- I mean, conduct directed
13 towards Novell. That -- I've heard Mr. Holley loud and clear
14 and I think he's right. We still have the question whether or
15 not that conduct itself had to either, you know, have a
16 reasonable capability of or significantly contribute to
17 anticompetitive conduct, which is a slightly -- a related but
18 slightly different question. But in any event, the focus has
19 got to be on -- you can't just say, look, they engaged in
20 anticompetitive conduct and WordPerfect got hurt. I mean,
21 that's -- there's not sufficient nexus.

22 MR. JARDINE: You have in mind the risk. Our remedy
23 that I'm arguing for is a motion in limine, but I understand
24 that a curative instruction would deal with that.

25 THE COURT: Well, not only a curative instruction,

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1 but also a substantive --

2 MR. JARDINE: Clarifying, yes. Let me just add one
3 other point about -- two other points about potential
4 prejudice. One is one that comes from the 10th Circuit in the
5 case of *Coletti versus Cudd Pressure*, which we cited, it's a
6 wrongful termination case. And the district court precluded
7 testimony of a proposed witness who was going to testify from
8 later time period about what they thought were the kinds of
9 retaliatory grounds being employed by the defendant.

10 But in that the Court wrote the following in its
11 opinion: "The Court was disturbed -- the district court was
12 disturbed, as we are, that Mr. Orr's proposed testimony relates
13 to events that occurred after Ms. Coletti was discharged.
14 Testimony about later events is even less relevant, and of less
15 probative value, than evidence of prior bad acts generally.
16 Because the logical relationship between the circumstances of
17 the character testimony and the employer's decision to
18 terminate is attenuated."

19 And Mr. Tulchin argued this morning about conduct
20 prior to the key time frame in question, but the Netscape and
21 Sun evidence is subsequent, and I think suffers from the same
22 challenges that the 10th Circuit was worried about in that
23 case.

24 THE COURT: Again, I'm not sure this is a question,
25 but the very things that makes me, after having read the --

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1 ironically, and I realize it wasn't written until '97, the
2 e-mail from Raines, what's his name?

3 MR. JARDINE: Jeff Rakes.

4 THE COURT: Who won the Washington Nebraska game by
5 the way? -- to Warren Buffett, it actually made me -- actually
6 more sympathetic to the general this is a dynamic industry so
7 things are really different. You always have -- you want to be
8 on the cutting edge and I understand that. But doesn't that to
9 some extent make later conduct relevant? I mean, the fact of
10 the matter is Microsoft had a lot of very smart people there.
11 And they saw things which we certainly didn't see. The reason
12 they were successful is they saw things that other people in
13 the software industry didn't see. And they were always alert.

14 I mean, they, as I say, I have no doubt that they all
15 want to make a lot of money, human nature is human nature, but
16 they also wanted to be doing relevant things. And simply
17 making operating systems, even assuming you have a monopoly,
18 isn't the -- where the interest was. That's not where you get
19 smart people. That's not how you grow the company. That's not
20 how you get the best people in the business. They were always
21 very alert to things that might keep them from being an
22 industry leader in all respects. And to some extent what
23 happens later, when they see a threat from Sun or from
24 Netscape, just as earlier when they may have seen a threat from
25 netware, isn't it consistent with, over a period, a reasonable

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1 period of time, what the company was all about, which was
2 always being alert to things that might prevent it from
3 engaging in what its mission really was, which was to have the
4 most advanced product.

5 It's -- as I say, I'm not really sure that's a
6 question. But it seems to me, it's not like a discrete
7 employment decision, it was part of the corporate culture, part
8 of what Microsoft was all about. Look, we want to be -- and
9 good for them, I'm not criticizing them. That's the way people
10 ought to be. They wanted to be the best, might have had
11 antitrust implications and that's what we're here about. But
12 they really were very alert from the beginning till the end --
13 well, there is no end yet, but certainly through the government
14 case the time frame. They were very, very alert to potential
15 threats that would, to them, that you know, that would keep
16 them from really accomplishing their mission. So, therefore,
17 things that happened in '95, '96, and even writing about it and
18 upon reflection, in '97, is relevant to what happened back in
19 the limited time frame we're talking about. I'm not sure it's
20 a fair question. I'm not sure it's even a question.

21 MR. JARDINE: And I defer to Mr. Holley on all things
22 technological, but from my prospective I do think it's true
23 that they had a lot of smart people trying to predict the
24 future and understand where technology was going, and that they
25 were good at guessing it. But there were a lot of other

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1 companies with very smart people doing the same thing. And
2 that was the competitive environment in which they lived. I do
3 think for a trial there are bounds to relevance. And that you
4 can get attenuated pretty quickly. And that's probably a
5 document by document call.

6 THE COURT: That's fair. And 403 certainly -- unfair
7 prejudice rears its head, I understand that.

8 MR. JARDINE: Let me add one other point about, just
9 from the perspective of Rule 403 on this one. And that is I
10 know that what the Court considered, the collateral estoppel
11 evidence with respect to Netscape and Sun, from the perspective
12 of the exception to 404(b). And I just would add, as you do
13 the 403 analysis, it's good to remember the caution in the
14 Areeda Hovenkamp treatise that in an antitrust case the
15 relevant intent to harm one's rival is impossible to
16 distinguish from the intent to behave competitively in a broad
17 range of situations. That doesn't answer every situation, but
18 I think it reminds us that this is a intent in an antitrust
19 case is really is a much more complicated thing to look at and
20 analyze it, in fact, to perhaps let evidence in, because of the
21 challenge that the intent to beat your competitor is something
22 we encourage and can be misconstrued by a jury.

23 THE COURT: We can talk about it later, I'm sure
24 Netscape (sic) wants to be heard too, Microsoft filed a
25 memorandum on my collateral estoppel. Some of it -- and that's

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1 not really a collateral estoppel issue, that's whether I let it
2 in at all. And you say under 403 I shouldn't. I'm sure
3 Netscape -- excuse me, Novell thinks I should put in
4 conclusions, more general conclusions reached by the D.C.
5 Circuit or even by the 4th Circuit, which, frankly, I don't,
6 but they can persuade me to the contrary.

7 There also is the issue of -- one of the problems is
8 the conclusion, I haven't gone back and looked at them, which
9 goes to the point Mr. Tulchin has been making for a long time.
10 And finally I realize the significance of it. If the
11 conclusion means that somehow they violated the antitrust laws
12 because of this, that does depend upon a whole different
13 standard of causation that the toothless standard, I don't even
14 remember -- what's the word?

15 MR. TULCHIN: Edentulous, Your Honor.

16 THE COURT: -- whether the fact -- if the finding --
17 there were factual findings which I would distinguish from the
18 conclusory findings that there was causation, that seems to me,
19 I'm not sure you do give collateral estoppel to -- you may give
20 it to the underlying facts, which lead to the conclusion, but
21 that you don't give it to the conclusion, because the jury in
22 this case is supposed to be applying a different standard than
23 the toothless standard in the government case. So as I say
24 I -- it seems to me that it's a lot -- there's a lot presented
25 in the collateral estoppel questions which are not technically

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1 collateral estoppel issues.

2 MR. JARDINE: And that will be -- that argument for
3 Mr. Tulchin. But I wanted to add this point as we're talking
4 about specifically the Netscape and Sun evidence.

5 The last point I just make, Your Honor, is that in
6 the event the Court proceeds with the collateral estoppel
7 rulings that it signaled in the letter of two days ago, then we
8 deal with the further issue of how much of what's proposed by
9 Novell by way of documentary and witness evidence will come in
10 given that the case law directive that we shouldn't have
11 cumulative evidence, which matters to us, because frankly, we
12 need to know where that lies, where our hands are tied to a --
13 to a significant extent.

14 THE COURT: That's one of the reasons I tried to give
15 you all a preview as to what I intended to do so you all could
16 analyze exactly that. It's obviously not a scholarly opinion,
17 but you all have to prepare for trial.

18 MR. JARDINE: I was not in the meeting, but I was
19 told some of our lawyers asked Novell lawyers what of this
20 evidence they now intended to utilize at trial and we're not
21 clear about that. So it's a little hard to know how to --

22 THE COURT: I'm sure they don't know yet. But that's
23 one -- I just want to tell you that's why I wrote it this way
24 in part, because I'm sympathetic to you all, you have to
25 prepare for trial.

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1 MR. JARDINE: Well, Your Honor, we just would
2 encourage, in the spirit of a tight trial, having some good
3 guidelines about what that's going to be so we know what we can
4 do. And we encourage a broad prohibition given if you
5 proceed --

6 THE COURT: It's a fair request. I realize it's
7 after 1:00. Why don't we break for lunch come back at 2:00 and
8 I'll hear the response.

9 (A recess was taken.)

10 THE COURT: All right. Now I get to hear from Mr.
11 Martin.

12 MR. MARTIN: Just for a very few moments, Your Honor.
13 We've obviously heard Your Honor this morning discussing the
14 jury instructions. With the Court's permission we'd like to
15 file an amended or modified instruction No. 17 that I think
16 that maybe adding a sentence or two would address some of the
17 Court's concerns about piggy backing, for lack of a better
18 term.

19 THE COURT: That would be fine. That's all I'm going
20 to hear from you?

21 MR. MARTIN: That's it. I know when to get out.

22 MR. WALLACH: Good morning, Your Honor, Jason Wallach
23 on behalf of Novell. Before we broke we heard from Microsoft
24 as to why the Court shouldn't hear evidence related to Netscape
25 and Java. And I think Mr. Jardine identified three areas that

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1 he was going to address. The first was relevance, he said it's
2 not relevant, different time periods. They've also said there
3 are different products involved.

4 But the time periods, as Mr. Schmidtlein said last
5 week, are a red herring. The time periods, as Your Honor
6 recognized, in terms of motive and intent, they're relevant to
7 show the motive and intent for the relevant time period. But
8 they're also irrelevant, because if you look at the D.C.
9 Circuit case, Netscape and Java were different products,
10 navigator and Java were different products. One was a browser.
11 One was program language. The D.C. Circuit looked at
12 Microsoft's conduct in its entirety, and looked at what that
13 conduct did to the middleware threat, which is what this case
14 is about. It's about the middleware threat to the application.

15 THE COURT: That's one half of what this case is
16 about.

17 MR. WALLACH: Right. One half.

18 THE COURT: I don't want Mr. Johnson to feel bad.

19 MR. JOHNSON: Thank you, Your Honor.

20 MR. WALLACH: You're correct, it's one half of this
21 case. So we address the time periods, Microsoft's assertion
22 that the time periods make this -- the Netscape and Java
23 conduct irrelevant. We address that in our reply to the
24 collateral estoppel brief and highlighted that.

25 One thing the D.C. Circuit also noted, one other

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1 aspect of the time period differences, it's not true that
2 periods are different. The D.C. Circuit, in fact, recognized
3 that one of the anticompetitive acts that Microsoft took in
4 relation to Java was to threaten Intel to back away from
5 supporting Java. And the D.C. Circuit said at 253 F.3d page
6 77, that one of those anticompetitive acts included Mr. Gates
7 getting involved in a meeting in August of 1995, in which he
8 announced that Intel's cooperation with Sun and Netscape
9 threatened Microsoft -- microsoft and Intel relationship. And
10 he was pressuring Intel to stop supporting them. So there is
11 overlap between the time periods.

12 With respect to the heightened risk, I think we've
13 already -- heightened risk and prejudice, I think we've already
14 heard from the Court on that. We think it's going to be -- it
15 can be easily addressed in an instruction to the jury. And to
16 the extent there's a 403 concern, the Court is better capable
17 to address that concern at the time the evidence is offered.

18 Finally, with respect to the Microsoft's motion to
19 exclude any evidence of what they would call cumulative
20 evidence, evidence shown to support a fact that was
21 collaterally estopped. We're working now to cut back on the
22 evidence that we had identified. We had identified evidence
23 without knowing the collateral estoppel ruling of the Court.
24 And so we are actually working at this time to narrow that
25 down. That is not to say that we are -- we should be prevented

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1 from presenting evidence that might relate to a collaterally
2 estopped fact for another purpose, for motive, just because a
3 document might relate to a collaterally estopped fact does not
4 mean it's not admissible to show motive, intent or some other
5 purpose.

6 THE COURT: I'll cross that bridge when we come to
7 it. Anything further, Mr. Jardine?

8 MR. JARDINE: I just would say this with respect to
9 the last point, Your Honor, again, if you proceed with the
10 collateral estoppel rulings you've signaled, our hands are
11 tied. And it would be helpful to know where they're coming --
12 you know, if they're going to cut back on all this proposed
13 testimony we would like to know that sooner rather than later
14 so that we know --

15 THE COURT: That's a fair request. Mr Wallach
16 agrees.

17 MR. WALLACH: We would, Your Honor.

18 MR. JARDINE: You know, it would be helpful to have
19 some idea of when we might know.

20 MR. WALLACH: Your Honor, I'd have to ask my
21 colleagues who know more about what evidence would be used for
22 what purposes.

23 MR. JOHNSON: We're working on it, Your Honor, I'm
24 certainly going to tell them before the start of the trial.
25 I'm going to -- already we can see things that are going to

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1 drop by the wayside, given your rulings on collateral estoppel.

2 THE COURT: I think at this point, in the context of
3 trial preparation I can't give them a deadline to do that.

4 MR. JOHNSON: Thank you, Your Honor.

5 THE COURT: But certainly they're going to give you
6 some reasonable notice. I mean, I just can't -- we've got a
7 week before trial starts.

8 MR. JARDINE: We all understand that, it's just --

9 THE COURT: No, I understand where you're coming from
10 and they're going to -- and we'll talk, my guess is we're going
11 to have a day after we pick the jury to finalize things any
12 way, but we'll see how -- maybe so, maybe not. But if you can
13 get it to them next week get it to them next week.

14 MR. JARDINE: Thank you, Your Honor. So I don't
15 forget, you asked us something at the last hearing, unrelated
16 to the argument I've just made, about the timing of the
17 conference call on issues --

18 THE COURT: Don't worry about it.

19 MR. JARDINE: You're okay for Thursday at 5:00?

20 THE COURT: Ms. Porter e-mailed me, said some of the
21 jurors want to supplement jury questionnaires they filed
22 yesterday, I think they maybe talked to their employers. She
23 just suggested that they e-mail any supplements to her. I'm
24 sure that's okay with you all.

25 MR. JARDINE: Yes.

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1 THE COURT: That's fine. And should I rent a car in
2 a Salt Lake City? How long from the airport?

3 MR. TULCHIN: It's very convenient. It's 10 to 15
4 minutes from the airport to the courthouse.

5 THE COURT: So the first week, if I'm working, I
6 don't need a car.

7 MR. JARDINE: Well, the weather -- I think we're
8 having snow in the mountains today, Your Honor, you may want a
9 car.

10 THE COURT: Have snow in Salt Lake City in October.

11 MR. JARDINE: Sometimes.

12 THE COURT: Oh, my goodness.

13 MR. JARDINE: We did host the winter Olympics.

14 THE COURT: I'll renew my offer to have you all --

15 MR. JARDINE: Just in the mountains, you can still
16 play golf in the valley.

17 THE COURT: Okay. How far are the golf courses from
18 the -- I'm not -- the first week I'm going to be thinking. All
19 right. Next motion.

20 MS. NELLES: Got the next two, Your Honor. I think I
21 should also warn you as a New York City girl, that the blocks
22 in Salt Lake City are really long. It's about four New York
23 city blocks to one Salt Lake City block. So when they tell you
24 something is only two blocks away, don't be fooled.

25 THE COURT: It's like the cross streets, not the up

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1 and down.

2 MS. NELLES: This is another one -- oh, well,
3 actually, let me take up the more complicated of the motions
4 first. We have this motion about settlements. And Mr. Johnson
5 offered, I believe, or Novell offered a compromise or a goose
6 and gander position, which is if we don't, they will not try to
7 enter into evidence any -- excuse me, I'm sorry, they will not
8 offer any -- into evidence any amounts paid in settlement if we
9 do the same, also not raising settled claims, we are perfectly
10 happy with that suggestion.

11 THE COURT: Fine. Good.

12 MS. NELLES: Okay. So this -- did I misstate?

13 MR. JOHNSON: No, you didn't. But I have to add a
14 footnote to it, Your Honor, I was informed last night, just --
15 and it's not that we're ever going to get into the amount of
16 any settlement, but apparently Microsoft's damages expert
17 argued that the market took into account Novell's past
18 struggles in acquiring integrating DR-DOS and UNIX when valuing
19 WordPerfect and Quattro Pro. And in response to that our
20 expert, Dr. Warren-Boulton rebuts that notion on the basis of,
21 among other things, that the DOJ named DR-DOS as a victim of
22 Microsoft's exclusionary OEM agreements, and Microsoft's
23 anticompetitive conduct ultimately led to a settlement with
24 Caldera. So it's just -- he needs to be able to just mention
25 that there was a settlement, not anything to do with amounts.

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1 THE COURT: Okay. You all talk about that. I
2 understand there's general agreement. And if you're in
3 disagreement about that we'll take it up later.

4 MS. NELLES: Yeah, I think we can say, at least
5 today, we definitely have an agreement that nobody's going to
6 be offering into evidence anything relating to amounts.

7 MR. JOHNSON: Absolutely.

8 MS. NELLES: So we'll stand there for now. I think
9 that's fine. The second of the motions I have, Your Honor, is
10 the motion on evidence concerning dismissed claims, which I
11 guess falls into the category of there must be bounds to
12 relevance that we've been talking about today. And I'll try
13 very hard not to be repetitive. I did not coordinate my
14 argument with Mr. Tulchin, but I was struck when he started
15 discussing about the concentric circles, because I had actually
16 drawn myself a little bull's eye. So I started to count the
17 circles just to see if it might be seven, but I came up with
18 six.

19 But what we have here is, if I can talk about those
20 circles, because I think we've been moving out throughout the
21 day, I think we have an agreement, the first circle was
22 obviously the acts related to -- that are directed at Novell.
23 We have the APIs, the logo program, the custom print processor.
24 I think there's no dispute that that evidence comes in.

25 We then have what we heard about earlier this

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1 morning, evidence regarding netware. It's a little bit further
2 attenuated. Heard what Your Honor had to say. I would say the
3 next circle is collaterally estopped findings of fact. Then we
4 have non-estopped findings of fact. I'm not going to talk
5 about collateral estoppel or findings of fact. The last time I
6 tried to do that you collaterally estopped 395 findings of
7 fact. So I'm not going to try again.

8 And then we get to the furthest out circle, which I
9 call the "just other stuff" circle. Where we have anything
10 that is conduct directed at the market, the PC operating system
11 market. And, in fact, here, particularly with respect to Lotus
12 Notes it's not even in the market necessarily, but maybe
13 touches upon the market. And what I would say to Your Honor
14 is, again, is I've heard everything you've said this morning.
15 I understand the kind of lines you're seeing, you're trying to
16 draw here. And I understand that there are ways to deal with
17 evidentiary issues through jury instructions and jury -- and
18 otherwise, but at some point you have to say, where does it
19 stop? I mean, how far up does the circle go? How many circles
20 can there be?

21 Here this is very interesting. We've got -- there's
22 a lot of evidence that I think we're going to hear about the
23 relevance of how it comes into this "just other stuff" circle.
24 But the two that we're addressing is evidence related to MAPI
25 and OEM. This is evidence related to two claims that Your

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1 Honor said cannot go forward in this case against Microsoft.
2 And what Novell says, and they're very blunt about it, is
3 that -- and I don't disagree with Novell at all that evidence
4 that goes to one claim can also potentially go to another
5 claim. But it doesn't, it doesn't go to the claim. And that's
6 going to be the issue.

7 What Novell says, and it's right at page 1 of the
8 opposition brief, that MAPI and OEM goes to whether Microsoft's
9 conduct harmed competition in the PC operating system market.
10 In other words, what Novell says, is that evidence that they
11 are precluded from introducing to show harm to itself, they can
12 introduce to show harm to others. And I would say, Your Honor,
13 that we're getting very, very far afield. If I was back to my
14 bull's eye I would say we just missed the target entirely.

15 And I'd like to focus on MAPI as an example. I think
16 the principles are the same, but I think it makes sense to
17 focus on MAPI. On page 6 of their opposition brief, what they
18 say and I'm going to read is, "Whether Novell's GroupWise was
19 among the products harmed is now irrelevant, but Novell does
20 not seek to use this evidence for that purpose. Instead,
21 Novell properly seeks to use this evidence in support of its
22 remaining Count 1 claim, to show how Microsoft's manipulation
23 of MAPI harmed Lotus Notes, another middleware threat to
24 Microsoft's PC operating system monopoly, and how Microsoft's
25 attack on Lotus impacted competition in the PC operating

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1 systems market."

2 So what Novell is saying, in shorthand, is that while
3 the Court held, and the 4th Circuit affirmed, that Novell
4 cannot put on any evidence that Microsoft conduct relating to
5 MAPI harmed its own product, GroupWise, because it was not
6 included in Microsoft's complaint and Microsoft had no notice
7 thereof, it should nonetheless be allowed to put this same
8 evidence on to show that MAPI harmed another company.

9 THE COURT: I think what the 4th Circuit and I held
10 was that they couldn't assert a claim for GroupWise.

11 MS. NELLES: That's right. I apologize. But if they
12 cannot -- but they claim that they cannot assert a claim, they
13 cannot put on evidence to support that claim.

14 THE COURT: Maybe so, maybe not. That's what we're
15 arguing right now.

16 MS. NELLES: Well, no, because they're trying to put
17 it on to support a different claim. But, Your Honor, again
18 speaking to how far afield we've gotten here, I would even
19 point you to page 12 and 13 of their opposition brief where
20 Novell says, "It is of no moment that MAPI-related products did
21 not compete in the market for PC operating systems, word
22 processing applications or spreadsheet applications. Instead,
23 the relevant question is whether Microsoft perceived such
24 products as a threat to its PC operating system monopoly and
25 acted on that perception to stifle such potential competition."

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1 So what Novell is saying is they get to put this
2 evidence in, even though they can't support a claim, and even
3 though there's no claim. And it doesn't even matter if it
4 caused harm to the market that's left here, the PC operating
5 system market. So it really is going to state of mind. I
6 don't think that's the legal standard. I don't think it's the
7 relevant question. And, frankly, what I think it does is
8 suggest what we're going to have is a series of mini trials
9 here. If they can bring in this kind of evidence to show that
10 Microsoft perceived such products as a threat to the PC
11 operating system monopoly, I mean, what -- then don't we have
12 to have a trial within a trial on whether Lotus Notes was
13 actually perceived as a middleware threat?

14 THE COURT: We have eight weeks set aside.

15 MS. NELLES: Excuse me?

16 THE COURT: We have eight weeks set aside.

17 MS. NELLES: Well, Your Honor, I promised my
18 13-year-old I would be home for Christmas. And trial within a
19 trial about whether Lotus Notes was a perceived middleware
20 threat --

21 THE COURT: You'll be -- that's a promise you can
22 keep.

23 MS. NELLES: Thank you. I'm going to tell her that.

24 THE COURT: Mini trial within mini trial, may have to
25 come back in January and February.

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1 MR. TULCHIN: I was going to ask Christmas of which
2 year?

3 THE COURT: That's a fair question.

4 MS. NELLES: Well, my 16-year-old informed me that
5 we're going to Alta, which is a ski resort nearby, for
6 February. So I think I'll be back any way.

7 Then we have a trial within a trial on whether Lotus
8 Notes was actually harmed. Are we going to have to put on
9 evidence about whether or not Microsoft's, and I'm quoting,
10 "Attack on Lotus impacted competition in the PC operating
11 systems market," even though MAPI-related products do not even
12 compete in that market.

13 I think we've got three key points I just want to
14 underline. The issue here, at least from my perspective, is
15 that Novell keeps framing the issue backwards. The issue is
16 that Novell must show that harm to Novell caused harm to
17 competition. The question is not whether there was
18 anticompetitive conduct generically aimed at a market and
19 collateral damage to Novell. This is what this Court has
20 already said. And that is the law of the 10th Circuit. And I
21 would point Your Honor to *Four Corners Nephrology* we cited in
22 our brief, in our motion, supporting our motion.

23 And that is really the missing causal link that we
24 were discussing this morning, that you were discussing with Mr.
25 Tulchin and Mr. Martin earlier this morning. To allow Novell

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1 to introduce evidence that Lotus somehow was injured by conduct
2 relating to MAPI, which Novell itself cannot recover for, would
3 entirely divorce the conduct that Novell alleges from the
4 elements that Novell has to prove at trial. Your Honor has
5 said before, it's precisely what the Court has admonished that
6 Novell cannot do. That is accept -- to accept Novell's
7 position here would be to allow Novell to piggy back on the
8 anticompetitive harm caused by conduct directed at third
9 parties. And that's what Your Honor said they cannot do.

10 Novell points to *Nobody in Particular* and *LePage's*
11 for the proposition that a defendant's conduct must be
12 evaluated as a whole. I don't disagree that's what those cases
13 say. But that does not mean that a private plaintiff has free
14 license to introduce any conduct at all by a defendant so long
15 as it happens to be in, or here they say, perceived to impact a
16 market generally. But that's -- the conduct that has to be the
17 conduct directed at Novell. It can be viewed as a whole. It
18 doesn't mean conduct -- all conduct that has ever been set
19 forward into the PC operating systems market. If was that the
20 case we'd be here for years.

21 And I have to note that the MAPI claims in particular
22 were already excluded due to lack of fair notice. If Microsoft
23 had no notice that during this case that these claims were part
24 of Novell's claims, it would be and incongruous and really
25 quite prejudicial to allow that evidence to come in under the

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1 guise of proving harm to Lotus resulting from the same conduct.
2 What makes the introduction of this kind of evidence so
3 particularly prejudicial is it violates the spirit of the
4 Court's order precluding Novel from asserting these claims.
5 And it forces Microsoft to defend against claims for which this
6 court and the 4th Circuit have held that it had no notice.

7 I also think getting this far afield is going to be
8 very confusing to the jury, to allow Novell to introduce
9 evidence that Lotus was injured by MAPI claims, that Novell
10 itself cannot recover for, would be confusing -- highly
11 confusing. Because even if Novell could show that Lotus was
12 harmed by Novell's MAPI allegations, it could not possibly show
13 that this has anything to do with alleged conduct regarding
14 name space extensions, custom print processors or the Windows
15 95 program.

16 You know, and I think we have to be very mindful
17 of -- and I know that, you know, the Court -- the jury
18 instructions will deal with some of this, but at some point it
19 becomes too much. And if Novell is introducing documents
20 touching on issues this far afield for -- and products this far
21 afield, I think we run a substantial risk that the jury will
22 believe that Novell is asserting claims for MAPI claims that it
23 cannot assert.

24 THE COURT: The time frame helps Novell, doesn't it?

25 MS. NELLES: Does the time frame help Novell? Look,

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1 I think some of the evidence, and there's a lot of evidence,
2 they put it in their brief, is outside the frame. But, no, I
3 don't -- the time frame doesn't -- I don't think the time frame
4 is the argument here.

5 THE COURT: Right.

6 MS. NELLES: I think what the argument here is that
7 Novell wants to use the Court's words, the Court's words about
8 a weakened state, in an illogical way, to create a really big
9 tent. A tent under which they can sweep any conduct by
10 Microsoft directed to or in the operating systems market,
11 regardless of whether it has anything to do with Novell. They
12 say it's fair game to put before the jury. Respectfully, the
13 tent they construct is much bigger than this case.

14 A weakened state means, it must mean, that it's
15 somehow, the conduct at issue, the conduct they want to put
16 before the jury, somehow made Novell more vulnerable, not that
17 the market itself is weakened. Otherwise, any conduct at all,
18 any conduct at all that touches the PC operating system market,
19 or that in Novell's words, Microsoft perceived to be a
20 potential threat to the PC operating system market would be in
21 this case and that is not the law. Thank you.

22 THE COURT: Thank you.

23 MR. WALLACH: Good afternoon again, Your Honor.
24 We're dealing with two -- basically two areas that Microsoft
25 asked the Court to preclude evidence on. One is dealing with

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1 OEM agreements and one is dealing with GroupWise, which they
2 extend to MAPI, they include all MAPI-related conduct. As the
3 Court correctly noted, the Court -- this Court and the 4th
4 Circuit dismissed the claim for damages to GroupWise. That
5 does not mean that that -- that evidence regarding the conduct
6 that was the basis for that claim, that harmed other products
7 in the marketplace isn't relevant. This Court and the 4th
8 Circuit have both indicated that Novell doesn't have to create
9 some hypothetical marketplace where nobody -- where Microsoft
10 acted properly with respect to everybody but Novell, and then
11 show that its product harmed competition in that marketplace.

12 And so this Court and the 4th Circuit have both
13 recognized that the weakened state of the market, the operating
14 system market is the issue here. And the operating -- the
15 competition in the operating system market. And let me preface
16 this by saying, I am no antitrust expert. I've read a couple
17 cases, and I keep turning to my colleague, Mr. Martin, any time
18 I have a question. So he may kick me aside here pretty soon.
19 But the harm is -- the weakened state of the market is the
20 operating system market. And Microsoft perceived threats to
21 that operating system that it quashed. That's what the D.C.
22 Circuit found in Netscape, Java. And what the D.C. Circuit
23 said is just because they squashed this one and this one and
24 this one, and none of those can show by themselves harm to
25 competition, doesn't mean they get off free and clear.

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1 And what this Court and the 4th Circuit recognized is
2 it's the overall harm to competition. Now, I think my
3 colleague would say all we have to show is that conduct was
4 not -- was anticompetitive, and then you establish harm to
5 competition. This Court in its summary judgment ruling said
6 something more. But the reason the whole MAPI evidence is
7 relevant is because, well, other than intent and motive, is it
8 shows the weakened state of the market. They were targeting
9 Lotus Notes. They undertook this conduct with the aim of
10 harming a threat to their operating system monopoly that was
11 posed by Lotus Notes. Now, it may have been a nascent threat.
12 It may not have ever been able to become an actual threat. But
13 the D.C. Circuit said that doesn't matter. You can't just kill
14 all these different nascent threats and say, oh, no harm.

15 So the MAPI evidence goes to showing that. The OEM
16 agreements this Court specifically recognized could serve as a
17 basis for the Section 2 liability if they can be shown to be
18 anticompetitive conduct. In the ruling on the OEM agreements
19 under Count 6, this Court in summary judgment ruling in a
20 footnote said, I'm just going to assume that they were
21 anticompetitive to begin with, but I don't find that they
22 substantially foreclosed competition. And, therefore, you have
23 no Section 6 claim -- or sorry, Section 1 claim under Count 6.
24 And so we are still entitled to present evidence of the OEM
25 agreements, in support of our Section 2, claim as evidence of

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1 anticompetitive conduct. Now, it's up to the jury to determine
2 whether it was anticompetitive or not, but we should be able to
3 put that evidence on. Thank you, Your Honor.

4 MS. NELLES: Your Honor, nobody here is arguing that
5 evidence is per se out because a claim was dismissed. The
6 evidence here is out because it is not relevant. There is
7 going to be broad categories of evidence here that are
8 absolutely not relevant. The law is simply not that they can
9 put in evidence of anything that happened in the PC operating
10 system market to show anticompetitive conduct. They are not a
11 government enforcer, they are a private plaintiff. It has to
12 be tied somehow to Novell.

13 And in this -- and I'm not standing here today asking
14 the Court to take up broad swaths of evidence, I understand the
15 Court is going to look at that on a case-by-case basis as we go
16 through this trial. But here we have an added overlay, these
17 two claims were dismissed. And in particular with respect to
18 the MAPI claim Microsoft was not provided notice. If we are
19 going to defend a claim about Lotus Notes and a claim about OEM
20 or processor licenses, we are going to have many, many weeks on
21 a completely irrelevant mini trials. And this particular case,
22 given the history of this case, these -- we should decide now
23 that these -- that evidence on -- of this kind of evidence is
24 out. And it's too prejudicial. It's too prejudicial to
25 Microsoft, given the history of this case, and it's much, much

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1 too confusing to the jury and we will be here forever. Thank
2 you.

3 THE COURT: Well, I don't think I ruled on the
4 previous motion in limine. My inclination is, and I'll hear
5 from you Mr. Wallach if you want, but after what I say I don't
6 think you want -- you care. I am inclined to let in the
7 evidence about -- you know, subject to -- through collateral
8 estoppel or whatever, as to Java and Netscape. I'm inclined to
9 let it in about the OEMs and even MAPI. There's going to come
10 a point where I'm going to have to sit down and look at this
11 and see whether the tail is wagging the dog. Obviously,
12 there's a sound point on that, but that's what trial judges
13 have to do. I don't know what the line between piggy backing
14 and relevant evidence is, although I drew the distinction I'm
15 not sure it's a good one.

16 The focus has got to be on what Microsoft did
17 generally, and specifically what it did to Novell. I think an
18 amended jury instruction will probably address that. I still
19 have to make a 403 determination when I really hear this.
20 Based upon what's before me now, I think to understand what the
21 plaintiff's allege Microsoft did to Novell, this other conduct
22 is relevant, but there is a problem of going too far afield, so
23 I understand your point. It's a balance. But I'm generally
24 I'm inclined to let -- you know, some things I'm not with the
25 plaintiff on, on this one I think that I'm inclined to let it

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1 in.

2 MR. WALLACH: Okay. Nothing further, Your Honor.

3 MR. JOHNSON: Thank you, Your Honor. I think that
4 brings us to our six, hopefully these will go quicker than
5 Microsoft's six. I'd first like to introduce Mr. Paul Taskier
6 to the Court, he's going to do a couple of these for us. And
7 the reason I'm calling him first is for religious reasons he
8 needs to leave before Sun down.

9 THE COURT: Does anybody else have a problem? I'm
10 sorry about that. Okay. Did anybody else have a problem want
11 to leave by -- okay, because we can -- okay. Go ahead.

12 MR. TASKIER: Thank you, Your Honor. It's actually
13 tomorrow is the day --

14 THE COURT: I hope you're not going to argue that
15 long. Talk about trial within trial.

16 MR. TASKIER: It certainly feels like two days when
17 you're fasting.

18 THE COURT: I just read a review of a book about
19 Sandy Koufax. I didn't realize that he refused to pitch.

20 MR. TASKIER: It's a well-known fact among those who
21 observe. Your Honor, I'll try and be brief on the motion in
22 limine with respect to the preclusion of evidence on charitable
23 contributions by Microsoft's --

24 THE COURT: I'll tell you where I'm inclined to cut
25 that, but -- obviously, I don't think evidence of charitable

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1 contributions can come in. If Mr. Gates is going to testify in
2 person or by deposition, there's a risk but he's entitled to
3 say, what do you do now? Well, I'm the chairman of Microsoft,
4 I'm the chairman of the William and Melinda Gates Foundation,
5 which is I think -- and I don't think I can -- so what's the
6 foundation do? As they say also in the paper, everybody knows
7 he's that any way. But I think he can answer what he does, but
8 I'm not inclined to go any further than that.

9 MR. TASKIER: That's fine.

10 THE COURT: If Microsoft wants to be heard on that I
11 will, but I just can't -- I can't see how it's relevant. It's
12 not the same person I understand, but it's like the
13 Rockefellers coming in and defending against the Standard Oil
14 case on the basis, well, we've given a lot of money to charity,
15 giving to allegedly good causes.

16 MR. JARDINE: We think there's Mr. Gates and probably
17 one other witness who will describe their current professional
18 activity.

19 THE COURT: If they describe their present
20 professional commitments, I understand there's a risk, but I
21 think they're entitled to do that.

22 MR. JARDINE: That's all we intend, Your Honor.

23 MR. TASKIER: All right. With that, Your Honor, I
24 will move briskly to the motion to preclude evidence of
25 disclaimers in nondisclosure agreements relating to beta

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1 versions of Windows 95 software.

2 THE COURT: Excuse me, are we going to -- I don't
3 remember, we may have skipped over, am I going to hear separate
4 argument on the dismissed claims in the government case, or the
5 claims not pursued in the government's case?

6 MS. NELLES: That's Novell's motion. It is sort of
7 the flip side, yes. I'm assuming the goose and gander rule
8 will apply.

9 THE COURT: We'll reach that when we reach it, but I
10 think this is a different question. I think there's a hearsay
11 component in the fact that the government didn't bring it. So
12 that's a problem.

13 MR. TASKIER: Your Honor, with respect to this
14 motion, we brought this because at trial it's become apparent
15 to us that at trial Microsoft intends to use certain
16 disclaimers that were appended to nondisclosure agreements for
17 beta versions of the software for Windows 95 to rebut the
18 central argument of Novell, which is that it's dedocumentation
19 of the four name space extensions, API extensions was a
20 violation of antitrust laws and anticompetitive act.

21 The -- these particular disclaimers are
22 extraordinarily broad and have enormous impact. I will, if
23 Your Honor allows, I'll just read the boiler plate language for
24 prerelease code. "This product consists of prerelease code
25 documentation and specifications, and is not at the level of

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1 performance or compatibility of the final generally available
2 product offering. The product may not operate correctly and
3 may be substantially modified prior to first commercial
4 shipment. Company -- that is Novell -- assumes the entire risk
5 with respect to the use of the product."

6 Then there's a disclaimer of warranty on the back.
7 The second paragraph of which in pertinent part says: "To the
8 maximum extent permitted by applicable law, in no event shall
9 Microsoft, or its suppliers, be liable for any damages
10 whatsoever, including, without limitation, damages for loss of
11 business profits, business interruption, loss of business
12 information, or other pecuniary loss, arising out of the use of
13 or inability to use the product, even if Microsoft had been
14 advised of the possibility of such damages."

15 These disclaimers are entirely incidental to and
16 irrelevant to the claims that are at issue in this case. They
17 deal with Microsoft's copyrights, its intellectual property,
18 and the breach of warranty concerns that might arise out of
19 the -- within the context of consequential damages arising --

20 THE COURT: Isn't it, again, I'll hear you, but
21 Microsoft has arguments where it comes in, isn't this something
22 which can be handled by a curative instruction by saying I'm
23 letting it in, but obviously the disclaimer cannot -- if you
24 find that Microsoft committed antitrust violations the
25 disclaimer does not protect Microsoft from damages for

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1 antitrust violations, doesn't that solve the problem?

2 MR. TASKIER: It could, depending on how much its
3 used in Microsoft's case.

4 THE COURT: That's what I'm here for, isn't it?

5 MR. TASKIER: Yeah and -- well, but that is of course
6 why we're raising it to you, because this, in fact, a basic
7 evidentiary, trial preparation --

8 THE COURT: It would seem to me there is some
9 relevance to it, there is a danger that it could be misused,
10 but if I give a curative instruction, I don't expect Microsoft
11 counsel to use it for anything more than they say they want to
12 use it for. To say, look, this is -- the disclaimer is
13 relevant for some purposes, but the parties have agreed that
14 the disclaimer would not -- which I think Microsoft agrees,
15 does not -- would not immunize Microsoft from liability for
16 damages caused by antitrust violations.

17 MR. TASKIER: That could answer Your Honor, but there
18 is, in our view, a profound 403 issue with the use.

19 THE COURT: Well, let me hear from you then.

20 MR. TASKIER: Well, I think the fact of the matter is
21 the only purpose they could legitimately use this for is to
22 tell a jury, and jurors are not, as we all know sophisticated
23 creatures of law, they are laymen --

24 THE COURT: You may think that, I think they're
25 plenty good.

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1 MR. TASKIER: I think they're very good, but I don't
2 think they're lawyers. And lawyers, I think, would read this
3 differently and might -- and jurors, in fact, we're concerned
4 would respond to arguments that say this was our deal between
5 Microsoft and Novell, they were well-aware that they would
6 have -- that this could be changed. It was part of the course
7 of dealing. And to the extent that they had -- that we changed
8 the rules, and withdrew the name space extensions, it's part of
9 what they expected.

10 THE COURT: Well, why isn't that true?

11 MR. TASKIER: Well, because it is purely, this -- our
12 agreement is purely directed to the breach of warranty issues
13 and copyright issues. And the fact that it is, in fact, a beta
14 version, but it's not directed in any way to actions that are
15 intended to be anticompetitive under the antitrust laws. So
16 it's perfectly all right if you have a -- in a breach of
17 contract action to say, you know, we're no longer liable
18 because, in fact, you agreed this is our course of dealing.
19 But it's not all right if you have a monopolist evangelizing
20 these APIs and then dedocumenting them with an improper
21 purpose. This does not provide the get out of jail free card
22 that I think Microsoft would like to use it for. That's the
23 concern we have.

24 THE COURT: I understand your concern, it's not
25 baseless, but I mean, I've got to balance. Let me hear from

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1 Microsoft.

2 MR. TASKIER: Thank you.

3 MR. TULCHIN: Thank you, Your Honor. I think I can
4 be relatively brief on this one. Let me just say that Your
5 Honor is correct that it is not our position that the beta
6 license agreements provide immunity from the antitrust laws.
7 We've never said that, we've never suggested it. We also do
8 not say that the disclaimer in the contract is a defense to
9 conduct that would otherwise be anticompetitive.

10 Of course what Novell calls the disclaimer, there's a
11 portion of the contract that I think would properly be called a
12 disclaimer, but then there's the other portion which says, in
13 plain English words, that the product, the beta version, may be
14 substantially modified. And as we set forth in our brief, Your
15 Honor, obviously a beta version is a prerelease product. The
16 whole point of this is to get feedback from the ISVs, software
17 developers, which will allow the maker of the operating system
18 to make changes. So it's not new to anyone. But Your Honor is
19 correct that the language substantially modified, is relevant
20 to the claim in this case that Microsoft misled Novell into
21 thinking that these four APIs, the name space extension APIs
22 were somehow locked into the product and could never change.

23 I note in another brief, the brief that Novell filed
24 in opposition to our motion concerning netware, they said that
25 Microsoft had previously promised and evangelized these four

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1 APIs to Novell. I think Mr. Taskier, am I pronouncing your
2 name right, Taskier?

3 MR. TASKIER: Taskier.

4 MR. TULCHIN: Taskier, I'm sorry, said something very
5 similar to that a moment ago. Novell's theory, and it's also
6 in the pretrial order, is there's something misleading about
7 Microsoft's conduct. And for the jury to evaluate whether
8 there was something misleading, and one might ask whether that
9 could constitute an antitrust violation in the first place, but
10 leaving that aside, for the jury to evaluate whether the
11 conduct was misleading, of course the jury has to have the
12 information that the contract, the very basis for Novell's
13 receiving the beta versions said the product can be modified.
14 This is actually quite similar, Your Honor, to the *Christy*
15 *Sports* case involving the Deer Valley Ski Resort.

16 THE COURT: -- that was dirty pool what those people
17 did there. That clearly was dirty pool, but they got away with
18 it.

19 MR. TULCHIN: Yes, I mean you might say that, because
20 in that case the owner of this ski rental business had been
21 going for ten years, happily renting skis mid-mountain. And
22 all the sudden the owner of the resort comes by and says, well,
23 we're going to open our own ski --

24 THE COURT: That should come within *Aspen Skiing*
25 simply because it's skiing.

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1 MR. TULCHIN: I don't know if the 10th Circuit heard
2 that argument.

3 THE COURT: I doubt it very seriously.

4 MR. TULCHIN: I didn't see it in their opinion. But
5 this really is very similar there, because there the
6 restrictive covenant which hadn't been in force for all those
7 ten years, said very clearly no ski rental business in. --

8 THE COURT: How wasn't the covenant not an antitrust
9 violation?

10 MR. TULCHIN: Sorry, Your Honor?

11 THE COURT: How wasn't the covenant not an antitrust
12 violation?

13 MR. TULCHIN: You might wonder that, Your Honor, it's
14 a very different case than our --

15 THE COURT: Usually covenants aren't, but it's --

16 MR. TULCHIN: I mean, ours was a case Novell had this
17 beta of the APIs for three or four months --

18 THE COURT: I agree with you. I will give a curative
19 instruction. But I think that if the allegation -- implicit is
20 they think it's not going to be withdrawn, and the contract
21 says it can be withdrawn. It's relevant for that purpose.
22 There's potential danger, but I'll try to cure it. Okay.
23 What's next?

24 MR. JOHNSON: Mr. Proujansky, Your Honor.

25 MR. PROUJANSKY: Good afternoon, Your Honor. May it

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1 please the Court. Novell moves to exclude evidence of alleged
2 religious bias on the part of Novell employees.

3 THE COURT: Again, why can't they, to the extent that
4 it's reflected, I don't know whether it's factual, as opposed
5 to I don't like Mormons, or Novell doesn't like Mormons, can't
6 say look, one of the reasons for the fact the business didn't
7 turn out the way we thought it should is because of a clash of
8 culture from the people from Southern California and the people
9 from Utah. I just don't know to the extent that that's true, I
10 don't know the extent to which it's documented.

11 MR. PROUJANSKY: That's the thing, Your Honor, when
12 they talk about the clash of cultures they rely on the three
13 witnesses who talked about this rumor that Joe Marengi had said
14 something anti-Mormon. They, when they talk about the clash of
15 cultures during deposition they were pressed on does the clash
16 of cultures have anything to do with the fact that the legacy
17 WordPerfect employees were Mormon. And the best that they
18 could come up with was this hearsay -- this multiple hearsay
19 rumor that they had heard that Joe Marengi was anti-Mormon.

20 So now they, Microsoft obviously recognizes that
21 there's a big problem here, when they say in their opposition
22 we're not going to take about religious bias in our opening,
23 we're not going to talk about religious bias in our closing,
24 we're not going to ask any questions about religious bias, but
25 should it happen to come out in testimony that's okay. And I'm

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1 saying that that's not okay, because the only basis for this
2 Mormon versus nonMormon business is this multiple hearsay
3 about, I heard a rumor that Joe Marengi once said something.
4 And when you look at it from a Rule 403 standpoint, let's look
5 at the balance between unfair prejudice --

6 THE COURT: I'll hear from you, but let me hear from
7 Mr. Jardine on this, see exactly what's involved.

8 MR. JARDINE: Your Honor, one of the big issues in
9 the case, I think you understand, is why were the Novell
10 products late for Windows 95. And there will be lots of
11 evidence on that. And one of the pieces of evidence, among a
12 lot of different evidence, will be the problems Novell
13 experienced in integrating the WordPerfect and Quattro Pro
14 employee groups. Included in that will be that most of the
15 Quattro Pro developers resigned, but there will also be a lot
16 of evidence about what we call a culture clash. Some of it
17 will be described as the WordPerfect people thinking of
18 themselves as second class citizens. When we ask --

19 THE COURT: Thinking of themselves as what? I just
20 didn't hear you, the WordPerfect people thinking of themselves
21 as?

22 MR. JARDINE: Second class citizens.

23 THE COURT: Oh, second class. Excuse me.

24 MR. JARDINE: And it's sometimes described by some of
25 the witnesses that way, sometimes as a California/Utah issue,

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1 three witnesses mention that there was a feeling among
2 WordPerfect employees that there was an anti-Mormon bias among
3 Novell management. I think that's, they will testify that it
4 had an impact on morale, and that it caused some attrition.
5 That's got to be relevant. And we're offering it only for the
6 proposition that it impacted this very important challenge
7 Novell had to try to gear up its development process to produce
8 these products on time, when they were late and had all sorts
9 of other hurdles. So we won't --

10 THE COURT: No, no, I understand. In terms of the
11 403 balance, why doesn't the Southern California/Utah testimony
12 get you where you want to go. Everybody's going to know what
13 that means, maybe, maybe not.

14 MR. JARDINE: You know, we hate the Lakers on
15 basketball grounds, Your Honor, so it's -- it's processed
16 differently by different people --

17 THE COURT: Your team has got to -- unless you know
18 your team came from New Orleans, it's got to be the oddest
19 named team.

20 MR. JARDINE: I will stipulate to that, Your Honor.
21 Since we're in the sports arena, I might share with the Court
22 that the Ravens happen to be the most popular pro football team
23 in Utah.

24 THE COURT: Where?

25 MR. JARDINE: In Utah, because you have some Utah

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1 natives.

2 THE COURT: Oh, we have Mormons from -- a lot of
3 people from the island.

4 MR. JARDINE: And Paul Kruger and Dennis Pitta, so
5 there's quite a few, an aside.

6 THE COURT: But Heap is gone. Heap is gone
7 unfortunately.

8 MR. JARDINE: I would, Your Honor, these are not our
9 witnesses, they're former WordPerfect employees. So we don't
10 know what they'll say. The motion is not based on --

11 THE COURT: I'll reserve ruling on this. Try to, as
12 you prepare them, I mean, it seems to me that there is a 403
13 problem with mentioning an anti-Mormon bias. If you can do the
14 same thing, we felt like we were second class citizens. When
15 the Novell people came in there was a -- we were viewed that
16 way, to some extent there was a California/Utah clash. Seems
17 to me you may very well get what you need that way. But think
18 that through. The mention of -- based on hearsay, I understand
19 it's not being introduced for a hearsay, purpose but for its
20 effect on other people, I'd rather not have it mentioned.

21 MR. JARDINE: We certainly won't ask the questions
22 that way.

23 THE COURT: Presumably you'll prepare your witnesses
24 in advance.

25 MR. JARDINE: Of course, they're not our --

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1 THE COURT: Presumably they will prepare their
2 witnesses.

3 MR. JARDINE: However they go. Thank you.

4 THE COURT: What's next? I feel bad I cut off oral
5 argument, people who have done all their work. I'm sorry.

6 MR. WALLACH: Hello, again, I'm Mr. Wallach for
7 Novell. I am addressing the motion in limine to preclude
8 evidence regarding prior proceedings. And this -- and in the
9 motion we addressed, we had six requests. The first request
10 was to preclude any evidence regarding the appearance of bias,
11 the alleged bias or the disqualification of Judge Jackson from
12 the Microsoft case.

13 THE COURT: I think that probably is now totally
14 immaterial in light of my tentative collateral estoppel
15 rulings, which really focus only on what the D.C. Circuit
16 relied upon.

17 MR. WALLACH: My only concern is that in its
18 opposition Microsoft said that they have no intent to
19 presenting evidence of the bias unless Novell intends to
20 present through an expert or argue that certain findings from
21 the government case that were -- that are not related to
22 liability affirmed by the D.C. Circuit are introduced. Our
23 position is the bias is irrelevant regardless of whether it's a
24 finding --

25 THE COURT: Having a dagger hanging over your head is

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1 not going to hurt anything. Microsoft can have that dagger,
2 though.

3 MR. WALLACH: Thank you, Your Honor. The -- two
4 other areas that we asked for the Court to preclude evidence
5 on, and to which Microsoft offered no opposition, are the
6 decision by governmental entities not to pursue claims, other
7 than in the government -- the claims in the government case,
8 and any reference to motions in limine themselves. Microsoft's
9 opposition didn't address any of those, so we think the Court
10 should preclude evidence on those.

11 Now, to the meat of it. Novell has asked the Court
12 to preclude evidence regarding the claims on -- the government
13 did not pursue in the government case, and claims on which the
14 government did not secede in the government case, because that
15 evidence has no relevance whatsoever to the claims that Novell
16 is pursuing in this case. They not only have no relevance,
17 it's neither here nor there. Microsoft offers that it's
18 entitled to present it as background. It doesn't provide any
19 background. The Court's collateral estoppel ruling provides as
20 much background as is necessary to address the concerns of the
21 government case.

22 Not only is it not relevant, but allowing Microsoft
23 to use -- first of all, Novell doesn't object to proper
24 cross-examination of a witness. Microsoft suggests that our
25 motion would preclude them from asking a witness or -- asking a

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1 witness, or pointing out to the jury that the government case
2 did it involve conduct in a later time period. This ruling
3 would not do that. The only thing we're asking the judge to
4 preclude is Microsoft suggesting to the jury that the claims in
5 the government case didn't include Novell's claims because they
6 related to a government -- to a later period, there was no --
7 I've seen nothing that made any given --

8 THE COURT: -- time period I mentioned in my letter
9 causes me some concern. I would think that maybe when we read
10 the collateral estoppel we ought to specify what the time
11 period is. I think that's important in terms of presenting it
12 neutrally to the jury.

13 MR. WALLACH: We don't disagree, Your Honor.

14 THE COURT: You all tell me what that time period is.

15 MR. WALLACH: Well, in terms of what this motion in
16 limine seeks though --

17 THE COURT: No, I understand your position, you think
18 it's irrelevant and as I said it occurs to me to that to the
19 extent they say the government chose not to pursue something
20 there is a hearsay component that they have made a decision of
21 the worth that itself is coming in for the truth of it, the
22 government didn't think it was worthy of pursuing, but I'll
23 ask --

24 MR. WALLACH: That's all we're seeking is a motion in
25 limine to preclude evidence that the government made some

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1 decision, or the D.C. Circuit made some decision that it didn't
2 really reach. And in terms of the claims on which the
3 government did not succeed, as the Court is aware, Novell
4 wasn't a party to that litigation. Novell isn't precluded from
5 litigating the facts of that litigation, Microsoft is. To
6 allow them to introduce findings from the government case and
7 use them against Novell is improper. If they have a -- if
8 there is a finding that they believe we've presented evidence
9 on, that they -- that is that they're not collaterally estopped
10 from litigating, they're more than welcome to present the
11 evidence that contradicts the finding but they don't need to
12 bring in the evidence and suggest to the jury that the D.C.
13 Circuit found no liability on. Thank you, Your Honor.

14 THE COURT: Thank you.

15 MS. NELLES: Thank you, Your Honor. You know, this
16 is not the BoDeans ice cream cone case, it is not Microsoft
17 that seeks to use the government case as a sword. If all that
18 Novell is asking is that Microsoft not suggest that the
19 government did something, made a decision it didn't make, I
20 don't think we're going to have a problem.

21 But I think we just need to be clear, and I don't
22 know that we can get a -- define the scope today, but I think
23 it's more thinking about what's going to happen as this trial
24 unfolds, that it's not Microsoft that wants to inject the
25 government case into the proceedings. We really do not want to

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1 litigate the government case. But if Novell is going to come
2 in and it wants this case to be the imprimatur, as you said in
3 your preliminary ruling a couple days ago on collateral
4 estoppel, the imprimatur of the United States Government. If
5 Novell is allowed to talk to it then Microsoft needs to be
6 allowed to talk to it. I think this is an issue of opening
7 doors --

8 THE COURT: Don't you have a problem with the
9 doctrine of mutuality?

10 MS. NELLES: Your Honor, if the -- let's --

11 THE COURT: I feel for you, but I don't know if --

12 MS. NELLES: No, Your Honor, I think what we have
13 here is an issue where the devil's in the detail. And the
14 question is what are they going to say and how far is the door
15 going to be opened. We have collateral estoppel. There is a
16 tentative order. Your Honor, if I have it here, made a
17 suggestion in paragraph 7 about an ability to avoid possible
18 prejudice, about which Microsoft has expressed a concern. And
19 you may give some kind of a short preparatory statement that
20 says in previous litigation certain findings were made under a
21 doctrine known as collateral estoppel binding this case. If
22 that's what we're talking about I don't think we're going to
23 have an issue.

24 THE COURT: I don't think you should be able to -- I
25 don't think you can get into what wasn't prosecuted and what

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1 claims were not affirmed. But I certainly agree with you that
2 this has got to be presented in a -- I mean, collateral
3 estoppel is a very, very difficult thing. I think it really
4 should be limited to things that you all really had an
5 opportunity to litigate. Make sure it's the same standard
6 being applied to any finding made there is a finding made here.
7 And that's one of the reasons that I didn't express in my
8 letter, I have concerns about the causality finding. And I
9 don't want the imprimatur of either the D.C. Circuit, the D.C.
10 district court or the United States Government standing.
11 That's what this case is about. Excuse me, I cut you off.

12 MS. NELLES: That's fine, Your Honor. I think we're
13 starting to think about these things in the same way. This is
14 very helpful, I think, to all of us in putting this together.
15 We don't just have a issue here related to collateral estoppel,
16 there are other findings. Some that you are not going to grant
17 collateral estoppel to.

18 And Novell's experts rely on dozens, scores, scores
19 of findings from the government case. Professor Noel, for
20 example, uses some 95 findings of fact to support his claim
21 that Microsoft -- I'm going read here, quote, used exclusionary
22 contrast with ISPs, Internet service providers and IAPs,
23 Internet access providers to choke off the other main
24 distribution channel of browsers. And that Microsoft's
25 strategy was to offer free license for Internet Explorer, i.e.

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1 plus technical and marketing support for internet firms that
2 promised to promote Internet Explorer.

3 How is this going to be presented to the jury?
4 Professor -- none of these -- I'm not sure what any of that has
5 to do with the case, really, other than it falls into the broad
6 penumbra of conduct in the PC operating system market. But I
7 know Novell has not sought collateral estoppel on those
8 findings of fact. And the D.C. Circuit in the government case,
9 in fact, reversed the district court's conclusion that, in
10 fact, there was anything anticompetitive about giving Internet
11 Explorer away for free. If Professor Noel is going to be
12 allowed to get up on the stand and say this is my opinion, and
13 I base my opinion on 95 findings of fact that were in a
14 government case. We need to make sure that -- and I think
15 we're in agreement, but we are entitled to cross-examine on
16 that fully and clearly.

17 THE COURT: Mr. Schmidtlein said the other day he's
18 already advised his co-counsel and maybe his client that I'm
19 not going to let experts run the courtroom. I think what I
20 said today re-enforces that you and I won't.

21 MS. NELLES: Okay. Thank you, Your Honor, I was
22 not --

23 THE COURT: No, I just can't -- at the time -- I
24 don't want to come down on anybody I think the case is --
25 people are in disagreement about rulings, that's what the

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1 process is all about. There are some rulings I'm going to make
2 each way. But both sides are good enough lawyers they can try
3 a clean case. And the experts are there for a purpose. If
4 they help to explain the technical aspects, or indeed how the
5 technical aspects affect -- allegedly affect competition,
6 that's fair. But I don't want them getting in there, putting
7 Christmas balls all around the courtroom.

8 MS. NELLES: Okay. I think we're all in accord, Your
9 Honor. Thank you.

10 MR. WALLACH: The only thing I needed to address,
11 what was the ruling, Your Honor?

12 THE COURT: Beg your pardon?

13 MR. WALLACH: What was the ruling.

14 THE COURT: The ruling is the motion is denied. But
15 of course, I will take up at any appropriate time -- excuse me,
16 the motion is granted, but I will take up at any appropriate
17 time any objection to the way things are being presented. And
18 we'll try to figure out -- either you all can meet and confer,
19 in light of the things I've said already, and present to the
20 jury the collateral estoppel findings in as neutral way as
21 possible.

22 MS. NELLES: Your Honor, is that denied suggest to
23 the dagger exception?

24 THE COURT: Pardon?

25 MS. NELLES: Is that denied subject to the dagger

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1 exception -- or granted subject to that --

2 THE COURT: The dagger is still there.

3 MS. NELLES: I'm sorry, my -- I'm -- too long of a
4 day, Your Honor, too long of a week.

5 THE COURT: I believe in daggers being -- incentives
6 are a wonderful thing.

7 MS. VISHIO: Good afternoon, Your Honor. May it
8 please the court, Miriam Vishio on behalf of Novell. I'll be
9 addressing the trade press issue. Microsoft has designated 180
10 newspaper and magazine articles, which comprise more than one
11 quarter of its exhibit list. Now, Microsoft agrees, as it
12 must, that these articles, in fact, are hearsay if they're
13 offered for the truth of the matter asserted. So Microsoft
14 instead seeks to offer each one of these 180 exhibits be for
15 their truth, but for some purportedly legitimate nonhearsay
16 purpose. Microsoft cannot establish, however, the relevance of
17 these articles independent from their truth.

18 And because of that, these articles are inadmissible
19 for three independant reasons. One, they're inadmissible under
20 Federal Rule of Evidence 801, and there's no hearsay exception
21 that applies. They're also inadmissible because the articles
22 contain inadmissible opinion testimony subject to Federal Rule
23 of Evidence 701 and 702. And, finally, regardless of whether
24 Microsoft is able to establish a legitimate nonhearsay purpose
25 for these articles, the articles are inadmissible under Federal

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1 Rule of Evidence 403 because they present a risk of jury
2 confusion that far outweighs any probative value that they may
3 have.

4 Now, it is Microsoft's burden to establish that an
5 article is relevant for a purpose that is independent of its
6 truth or its -- or falsity of the information in the article.
7 And the crux of Microsoft's argument here is that these
8 articles are relevant to show that there are three categories
9 of so-called recipients. And Microsoft identifies these as one
10 is WordPerfect and Quattro Pro developers, two would be
11 investors and three would be consumers in general. And it says
12 these so-called recipients were on notice of such information
13 or that such information had an impact or an effect on these
14 recipients. But Microsoft cannot establish that these articles
15 were read or acted upon by these recipients in any way that is
16 relevant to this the case.

17 Now Microsoft --

18 THE COURT: Do they have to do that? Or is the
19 presumption that trade -- articles in trade magazines are read?

20 MS. VISHIO: Are what?

21 THE COURT: I thought there was case law, I haven't
22 read the cases, but I thought that presumptively if it's in
23 trade journal, one can assume it's read by the relevant
24 audiences. Maybe I'm wrong, but it does not seem to me to be
25 an unreasonable assumption that these companies, the companies

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1 that run the trade journals are in business to reach relevant
2 audiences. I wouldn't have thought that they have to bring
3 somebody in to say I have read it.

4 MS. VISHIO: Well, that may be the case, Your Honor,
5 but certainly Microsoft cannot show that they were acted upon
6 in any way in conformity with what they're trying to use
7 those -- the trade press articles for.

8 So for example --

9 THE COURT: Well couldn't an expert express an
10 opinion that they thought that they did?

11 MS. VISHIO: Except that Microsoft hasn't established
12 any evidence that they are going to present that evidence.

13 THE COURT: I see.

14 MS. VISHIO: So of the 180 newspaper and magazine
15 articles that Microsoft has designated, at least 143 of them
16 are product reviews. And now product reviews present a special
17 issue in this case because obviously we have some concerns
18 about the opinion testimony that's contained in these product
19 reviews, but product reviews also, on a general level, are not
20 uniformly positive or uniformly negative. And, in fact, even
21 within the same review there very well could be positive
22 statements about a certain Microsoft product, as well as
23 negative statements about that Microsoft product, and vice
24 versa for Novell.

25 Now, Microsoft suggests on page 10 of its opposition

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1 that it is -- the fact that the reviews were published, not
2 whether the reviews are accurate or not, that was likely to --
3 and this is their words, they were likely to influence
4 purchasing decisions. However, given that the reviews vary
5 widely, and given that different readers may require different
6 features, they may covet different functionality within the
7 suites, word processors and spreadsheets, it would be
8 impossible to determine the impact that any particular article
9 or series of articles may have on a consumer's purchasing
10 decision. And given the myriad of reviews that both sides have
11 designated in this case, the trial could quickly become just a
12 battle of reviews, a trial by trade press, if you will, because
13 it is -- there's no way to discern the relative impact of any
14 given review.

15 And I'll give you an example, Your Honor. One
16 consumer may enjoy a particular phone for its gaming features,
17 and another consumer may enjoy that same type of phone for its
18 ease of use with texting. And if a positive review comes out
19 about that phone relating to, say, its voice mail capabilities,
20 that doesn't give you any indication of how much or how little
21 those two consumers are going to take into account in either
22 buying or not buying the product. There's no way to discern
23 that from the information.

24 The same is true for word processing spreadsheets and
25 suites. And because there's no way to gauge the impact one

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1 review or a series of reviews has on consumers, there's no way
2 to show the effect of those reviews on consumer's purchasing
3 decisions. And thus, the relevance of these reviews is
4 inextricably intertwined with their truth. And Microsoft
5 cannot establish that the articles have any relevance apart
6 from their -- from the truth of the matters asserted in them.
7 So these articles are, therefore, inadmissible.

8 And for reasons I stated earlier, with respect to
9 801, I won't go into those. But with respect to 701 and 702,
10 and also with 403, there are obviously some significant
11 concerns with using the product reviews in that respect. For,
12 you know, under 701 certainly, you know, these are not lay --
13 what I would call lay opinion witnesses because they are basing
14 their opinions on scientific technical or other specialized
15 knowledge. And also under 701, as you know, it further
16 provides that the opinion is admissible only if it is
17 rationally based on the perception of the witness. So we don't
18 believe that these product reviews qualify as 701 lay opinion
19 testimony.

20 They also wouldn't qualify as 702 expert opinion
21 testimony either. First of all, there's no indicia of
22 reliability, no indicia of credibility for that matter, and
23 there's also no way for us to cross-examine the authors on the
24 tests that they did to test their methods to find out if they
25 were reliable, in other words, there's no way for us to probe

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1 their trustworthiness. And because it's impossible to evaluate
2 the qualifications of these authors, or the reliability of
3 their methods, this evidence must stay out.

4 Each product review essentially is its own expert
5 report. And it should be subject to those same requirements
6 and give Novell the opportunity to evaluate the credentials and
7 the reliability of the opinions being offered. And this is
8 particularly tricky in the subject of anonymous testers which
9 often these articles are, because then there's absolutely no
10 way to test or probe the qualifications.

11 And, finally, then with respect to 403, obviously we
12 have some concerns about how the jurors would interpret the
13 truth of the matter asserted versus an article being offered
14 for some other purpose. And even with a limiting instruction
15 it would be very difficult, and in fact, jury confusion would
16 probably be exacerbated, by the fact that they wouldn't be able
17 to make that distinction between am I looking at this document
18 for the truth of what the statements are, or am I trying to
19 find some other purpose.

20 There were three other categories that Microsoft --
21 THE COURT: Wouldn't the curative instruction here be
22 don't -- these are not being admitted for the opinions
23 expressed about the worth of any particular product, I mean, I
24 think that's probably what you're mainly concerned about. Make
25 it very simple. Jurors, you know, the person who has the

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1 opinion whether it's a good product or not is not here to be
2 cross-examined, so you can't consider it for that purpose. I
3 can't understand a juror not being able to understand that.

4 MS. VISHIO: Well, except for they may not be able to
5 understand the context of which the article is actually being
6 used for. And especially when these --

7 THE COURT: But it would seem to me the danger would
8 be -- I don't know, maybe there's some reviews which compare
9 Word favorably to WordPerfect, and that would be cause for
10 concern, but the jurors understand, look, we can't -- they
11 understand the fundamental principle we can't use these
12 articles to evaluate the worth of the respective products.

13 MS. VISHIO: I just think that from a juror's
14 perspective, who might be looking at one of these reviews,
15 especially seeing maybe the context of where that review came
16 from, like a PC magazine or an InfoWorld, they may put too much
17 credence in the source of the document, and therefore, instead
18 of viewing the document as being entered for or offered for
19 some other purpose, they may say, oh, well, this review says
20 that WordPerfect was, in fact, better than Microsoft's products
21 or vice versa and actually assert the truth in that. So there
22 are some 403 concerns with that. I appreciate the fact --

23 THE COURT: There are if you don't believe in jury
24 trials.

25 MS. VISHIO: I'm sorry, sir?

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1 THE COURT: There are if you don't believe in jurors.

2 MS. VISHIO: Oh, no, I just think that, in my
3 practice at least, I think that it's just something you have to
4 be careful about.

5 THE COURT: I couldn't agree more, something to be
6 careful about --

7 MS. VISHIO: -- appreciate the job that they have to
8 do, but you know, it's a difficult task from even a lawyer's
9 perspective to look at a document and try to figure out, you
10 know, why is this document being used for this purpose.

11 MR. SCHMIDTLEIN: It's also -- it's just very unclear
12 exactly how they think they're going to use these at trial.

13 THE COURT: Well, I'm going to hear from them.

14 MR. SCHMIDTLEIN: Are they going to waive it around
15 in openings and closings, are they going to introduce them
16 through witnesses?

17 THE COURT: I think they know me well enough not to
18 do that. If they do, I mean, I don't like to intervene but I
19 might.

20 MS. VISHIO: Well, there are three --

21 THE COURT: I've often said I don't think a judge's
22 job is being an umpire, it's more like being a referee in a
23 college basketball game. I hope I can influence the way the
24 game is played.

25 MS. VISHIO: There are three other categories that

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1 Microsoft has identified that their press articles fall under.
2 And there are some concerns raised in each one of these and
3 I'll take them in turn. The first one is articles about the
4 acquisition and alleged mismanagement of WordPerfect and
5 Quattro Pro, that Microsoft says then impacted sales. And our
6 concern, obviously, with this is that there's no way whether or
7 not you take the statements as true or not, that Microsoft's
8 speculation as to a decline in sales can possibly be determined
9 from these press articles. Microsoft has no foundation
10 whatsoever for attempting to correlate articles about an
11 alleged mismanagement of a company with a decline in its sales.
12 And I think that also raises some 403 concerns in addition to
13 not being a valid legitimate nonhearsay purpose.

14 The second category deals with the announcement of
15 the sale. And Novell had issued a press release in October of
16 1995 announcing the sale of its business applications division
17 when it did in fact not have a buyer. And the articles
18 regarding this announcement, according to Microsoft, are only
19 being introduced for the fact of the announcement, and not the
20 truth about the statements about the announcement, to show that
21 those announcements adversely affected the morale of
22 WordPerfect and Quattro Pro developers.

23 But they have yet to offer any evidence to show that
24 correlation. What's the connection there between the morale of
25 the WordPerfect and Quattro Pro developers and the announcement

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1 of the sale? They offered no reason why that's relevant to
2 these issues. And, in addition, its desire to introduce ten
3 documents, ten press articles concerning this, shows that the
4 relevance of these articles are inextricably intertwined with
5 their truth, and thus, this purported fact of the announcement
6 purpose is merely pretextual.

7 The final category deals with a time period issue
8 that Your Honor has been dealing with a lot today. But this
9 goes back even further than any of us have been in this case in
10 a while. And these are press articles that relate to Novell --
11 excuse me, WordPerfect Corporation's development for Windows
12 back in 1989. And Microsoft is offering this series of press
13 articles for what we believe is to be a completely irrelevant
14 purpose to this case. And Microsoft is obviously trying to
15 show that WordPerfect Corporation was late in releasing a
16 product for Windows 3.0. And our point is that that was five
17 years before Novell had even -- I'm sorry, the 1989 reference
18 to the articles that they're showing, is five years before
19 Novell had even acquired WordPerfect and Quattro Pro. And so
20 there's very little relevance, if any at all, which we don't
21 believe that there is, to these press articles.

22 THE COURT: What's the time limit I should place upon
23 relevant -- this, quote, relevant or irrelevant evidence, one
24 year?

25 MS. VISHIO: Well, it's certainly not 1989, I can

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1 tell you that.

2 THE COURT: How about 1995?

3 MS. VISHIO: Very relevant, Your Honor.

4 The real purpose for which Microsoft seeks to
5 introduce these articles is really to mislead the jury and
6 confuse the issues in this case. These are issues that were
7 long ago, and whatever delay had been involved with a
8 WordPerfect product for Windows 3.0 certainly would have been
9 factored into the purchase price, and therefore, evidence of
10 this nature is not needed. Thank you.

11 THE COURT: Thank you. Who wants to be heard on
12 Microsoft's side. Ms. Bradley?

13 MS. BRADLEY: Yes, Your Honor. I'll just start by
14 saying it seems pretty plain, also from Novell's argument, that
15 these articles just don't subject themselves to some broad,
16 categorical exclusion of anything that was ever published in a
17 newspaper or a magazine article, that these are items that we
18 have to look at on an individual basis. And Microsoft can and
19 has provided proper nonhearsay purposes for each of them.
20 These are all purposes for which the truth of the matters
21 asserted in the articles are totally irrelevant for the
22 purposes for which Microsoft seeks to put them in.

23 And for that same reason the facts that some of the
24 articles contain opinions is also irrelevant. Your Honor has
25 already overruled Novell's improper opinion objections to

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1 documents, many documents on Microsoft's trial exhibit list.

2 Here we see them again --

3 THE COURT: That's different, that's because they
4 were Novell's own opinions.

5 MS. BRADLEY: Fair enough, but where Microsoft is not
6 offering these articles for their truth, then the truth or the
7 propriety of the opinions contained in the articles --

8 THE COURT: Let me ask, it may not be fair, you don't
9 have to answer it. On something about the announcement of the
10 sale, instead of introducing ten documents about that, if the
11 other side is willing to stipulate that the announcement was
12 made on such and such a date, why doesn't that serve the same
13 purpose that you wanted in and get rid of any potential issue?

14 MS. BRADLEY: On the announcement I think you're
15 right that both parties can agree that the announcement was
16 made in October '95, that Novell planned to sell its
17 applications division before it had ever found a buyer. What
18 we need the articles for is to show something that Novell does
19 dispute, that this was a fact that was widely read, it was
20 published in the Wall Street Journal, we have an exhibit on our
21 list in the Wall Street Journal, it was published widely in the
22 trade press, things that developers were reading --

23 THE COURT: We could expand the stipulation to
24 include, and that announcement was made in the Wall Street
25 Journal, and in whatever publications it was in.

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1 MS. BRADLEY: You know, as to that, if Novell's
2 willing to stipulate that the developers all heard about this
3 and --

4 THE COURT: Well, that's not what the stipulation
5 would be, because they say they can't stipulation to what they
6 don't know. But the question is simply on the announcement. I
7 think the others get more difficult. As I heard the other
8 side's argument, it seems to me that that could be handled by a
9 stipulation. If everything relevant was in, which was the
10 announcement was made. And at the time, if in fact it's in the
11 trade press that they didn't have a buyer yet, and it was
12 published in X, X, X and Y.

13 MS. BRADLEY: If Novell is willing to stipulate to
14 that, I think we would be to willing to negotiate such a
15 stipulation.

16 THE COURT: -- threaten them with a spoliation
17 instruction, we'll come to that.

18 MS. BRADLEY: As to the other categories, I think
19 Your Honor's correctly inclined that there's a lot of material
20 in there that can be properly introduced for nonhearsay
21 purposes. The product reviews I'll take up first. And those
22 we have lots of evidence already in the record, Your Honor read
23 some of it in our papers, testimony from Pete Peterson of
24 WordPerfect, testimony from Clive Winn, vice president of
25 marketing at WordPerfect, saying that these things had a huge

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1 impact on sales. Pete Peterson said one good review about
2 WordPerfect was worth a million dollars to the company. So I
3 don't think we have a foundation problem here.

4 And it's not a question of whether the reviewers got
5 it right or wrong. It's not a question of whether the
6 reviewers even knew what they were talking about. The question
7 is, did people read the reviews and buy products or not buy
8 products as a result. Novell wants to argue that Microsoft's
9 product's succeeded and WordPerfect and Quattro Pro did not
10 succeed because of Microsoft's anticompetitive conduct. We say
11 there are lots of other explanations for that outcome, one of
12 which is that Microsoft, on balance, received a lot more really
13 good reviews, rightly or wrongly, in the press. And people
14 bought products as a result of that. That's the product
15 reviews.

16 We have another category that's sort of parallel to
17 that. And that is articles that were about WordPerfect and
18 Novell's business failures. Some of these, sort of along with
19 the product reviews, talked about big problems with WordPerfect
20 releases, things that were buggy, you know, other -- lateness,
21 anticipated lateness of future products. These are all things
22 that, similarly, were widely received in the marketplace and
23 could and did impact people's decisions on what software to
24 buy --

25 THE COURT: How do we know that it did?

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1 MS. BRADLEY: How do we know it did? We have that
2 same foundation, and we can lay it again at trial, from
3 WordPerfect executives saying that press like that was hugely
4 problematic for them. And so, you know -- and I don't know
5 that there would be any dispute that an article published in
6 the Wall Street Journal, for instance, widely reached the
7 market, people who were in the market for software, word
8 processing software, and impacted purchasing decisions.

9 We have one last category that we haven't talked
10 about, which is this notice to WordPerfect in the late 1980s
11 and early 1990s, that Microsoft, including Bill Gates, was
12 encouraging ISVs, including WordPerfect, to develop for
13 Windows, please develop for Windows. That's our plan, you
14 should plan to do so too. Part of Microsoft's defense in this
15 action is that WordPerfect was way behind in developing for
16 Windows, started out way behind in 1990 and really never caught
17 up. This is a case about WordPerfect getting to market late.
18 We say there are lots of explanations for that. One of that is
19 they started behind, five years earlier. And so Pete Peterson,
20 executive vice president at WordPerfect testified in deposition
21 that that was because WordPerfect was rooting for anyone but
22 Microsoft to win.

23 THE COURT: It saw the moat too.

24 MS. BRADLEY: It saw?

25 THE COURT: The moat.

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1 MS. BRADLEY: The moat?

2 THE COURT: The moat.

3 MS. BRADLEY: Maybe, maybe not. But in any event,
4 they through -- they made the conscious decision to throw all
5 of their weight behind IBM's OS/2. And the articles, whether
6 or not they're true, quote Mr. Gates as saying you should be
7 developing for Windows. The articles are being offered to show
8 that that WordPerfect was on notice that it ought to be
9 developing for Windows. Professor Noel says that somehow --
10 and that's Novell's purported antitrust liability expert,
11 somebody you've talked about some today already, says that
12 WordPerfect was somehow head faked, and that's why it didn't
13 develop soon enough for Windows.

14 THE COURT: Now what's the head fake here? I'm not
15 sure I understand. How does it work?

16 MS. BRADLEY: That Microsoft told everybody else to
17 develop for OS/2, while it was busily developing for Microsoft
18 Windows so that it would be the only one ready with
19 applications for Windows when it came about. That theory is
20 nonsensical in a number of respects, not the least of which
21 it's totally refuted by trade press, like the exhibits we seek
22 to put in, showing that Microsoft was encouraging developers to
23 develop for Windows. In any event, it's a valid nonhearsay
24 purpose, doesn't matter whether Bill Gates said it ever. What
25 matters is that's what was being reported in the press. That's

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1 what WordPerfect was on notice of at the time. And it's
2 admissible for that purpose.

3 THE COURT: Thank you.

4 MS. VISHIO: Well, Ms. Bradley proved my point, which
5 is that if the trade press refutes the head fake story then
6 it's being offered for the truth of the matter asserted and not
7 for some other purpose.

8 THE COURT: I don't think so. I thought that too,
9 but I'm not sure that's right.

10 MS. VISHIO: Pete Peterson, who is also --

11 THE COURT: Because I think in fact what she said was
12 the trade press showed that Gates was telling people to develop
13 to Microsoft.

14 MS. VISHIO: Well, and that is true. And what
15 Novell's evidence will show is that in fact WordPerfect was
16 developing for Windows at that time period. And so really the
17 trade press article is irrelevant on that ground as well.

18 THE COURT: That's a wonderful jury argument.

19 MS. VISHIO: Just a couple other points that I wanted
20 to raise. Ms. Bradley also mentioned that the truth is not
21 relevant. And, again, our position is that the relevance of
22 the review isn't intrinsically intertwined with the truth of
23 the matter asserted. I just wanted to reraise that point.

24 There's also, and my final point, Your Honor, is a
25 point that you touched on as well. There's a large foundation

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1 issue here. Microsoft has indicated that it is seeking to
2 offer these articles to show, one, that it impacted sales; two,
3 to show that it affected consumer purchasing decisions. And
4 yet there's no foundation in the record that gets us to that
5 point, that sales were affected or that it affected
6 consumer --

7 THE COURT: How about Mr. Peterson's testimony that a
8 good review is worth a million dollars?

9 MS. VISHIO: That is still one man's opinion. He
10 happened -- the executive at WordPerfect.

11 THE COURT: One man? He was the CEO --

12 MS. VISHIO: And he left WordPerfect in 1992, your
13 Honor. So he was with WordPerfect Corporation. And, of
14 course, I think any executive you would ask would obviously
15 want positive reviews for their products. I don't think
16 there's any question about that. I think when he's also
17 talking about it's worth a million dollars, it's also tongue in
18 cheek. No one has put on an actual value for what a trade
19 press or article is worth, and certainly Microsoft has not done
20 that.

21 THE COURT: Thank you. The motion is denied, except
22 I want you all to talk about whether or not as to the
23 announcement you can reach a stipulation. Because it seems to
24 me that is something which can be -- you all should be able to
25 do that by stipulation. What it's relevant for rather than the

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1 ten documents.

2 MS. VISHIO: Your Honor, we would then request that
3 there's a limiting instruction.

4 THE COURT: Of course, you all -- if you want to
5 negotiate it, tell me what it is you're concerned about, of
6 course I'll give a limiting instruction.

7 MS. VISHIO: Okay. Your Honor, thank you.

8 THE COURT: Obviously. At least I'll do something
9 realistic like it's not for the truth of the content, but the
10 concern really is about whether it's a good product, I'll tell
11 them that. That's fair.

12 MR. JOHNSON: I think this is the last one, Your
13 Honor.

14 THE COURT: Beg your pardon?

15 MR. JOHNSON: I think this is the last one.

16 THE COURT: Oh, no, there's one more.

17 MR. JOHNSON: That's what I'm going to do. That's
18 why I'm standing up.

19 THE COURT: I thought you were just telling me we
20 could all go home.

21 MR. JOHNSON: Well, I'm not going to spend too long
22 on these items. But these are the motion in limine with
23 respect to similar acts. And there's actually just four of
24 them we're going to talk about.

25 THE COURT: Antitrust, I forget what they are, you

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1 were sued by somebody for antitrust --

2 MR. JOHNSON: Yes, Lantec, the Lantec decision.
3 Apparently Novell was sued for an antitrust violation. It's
4 hard to believe that happened, being the upstanding company
5 they are. Apparently Microsoft wants to parade this unrelated
6 antitrust suit against Novell in front of the jury to
7 demonstrate, I'm quoting from their papers, that being sued
8 does not demonstrate that the defendant engaged in any wrongful
9 conduct. That certainly is a truism, but how is that relevant
10 to any issue in the case?

11 Microsoft points to a memo by David Bradford, he was
12 a former Novell employee, to the Novell board of directors
13 concerning antitrust issues against Microsoft. And claims that
14 the this Lantec case against Novell is in response to that
15 evidence. I don't get the connection there. But in any event,
16 that document is not an exhibit in this case. It's not an
17 exhibit proffered by either side. So I really don't understand
18 what they're talking about that this Lantec decision is in
19 response to that memo.

20 The obvious purpose of putting out a lawsuit in front
21 of the jury is to suggest to the jury that Novell does it too.
22 Microsoft tried to do this in the *Comes* case, Mr. Tulchin did,
23 and he was promptly shot down. And it required a curative
24 instruction from the Court to lessen the taint from what
25 occurred. We don't think we should be going through that

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1 again. And we think that's just open and shut.

2 THE COURT: Okay. What were the other three?

3 MR. JOHNSON: The second one is Novell's "yes it runs
4 with netware" logo. Microsoft wants to say that since Novell
5 also had a logo program relating to the netware product. You
6 remember the netware product they didn't want anybody to talk
7 about? Now they want to talk about the netware logo program.
8 The fact that the Novell logo program had a dual compatibility
9 requirement that will tend to show there was nothing wrong with
10 their "Designed for Windows" logo program.

11 But the issue, Your Honor, is not the existence of
12 the program, or whether it had a dual compatibility
13 requirement, the issue is whether Microsoft denied Novell an
14 exemption from that requirement for anticompetitive reasons,
15 where the evidence shows that Microsoft granted exemptions to
16 many other products, including their own application products
17 like Internet Explorer. And where denying WordPerfect the logo
18 is stark evidence that Microsoft had a willingness to forsake
19 short-term profits to achieve an anticompetitive advantage.
20 Granting us the logo would have meant more sales of Windows 95.
21 There were a lot of people in this country that still liked
22 WordPerfect at the time of the events in this case. And
23 denying us a logo --

24 THE COURT: True ten years later too, but that's
25 neither here nor there.

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1 MR. JOHNSON: Moreover, Your Honor, there's no
2 evidence in Novell's Yes program was controversial, unlike
3 Microsoft's program. In fact, Windows NT, Microsoft's server
4 operating system got the Yes logo from Novell. We gave them
5 the logo. Now, Microsoft relies heavily on the *Telex*
6 *Corporation* case which is a 1975 10th Circuit opinion, for the
7 proposition that this is all admissible because it will show
8 that Microsoft's logo program was an ordinary business practice
9 typical of those used in the competitive market.

10 First of all, there was nothing competitive about the
11 market for PC operating systems. There was one company that
12 had a monopoly in it. And that was really the only thing you
13 could get during that time period. If you read the *Telex* case,
14 though, Your Honor, you'll find that the defendant, IBM in that
15 case, did not possess monopoly power in the market being
16 considered. And the Court's ruling was primarily directed to
17 the fact at IBM's pricing still resulted in a 20 percent
18 profit. In other words, they weren't pricing below cost.

19 If the Court permits evidence with respect to
20 Novell's Yes program it sets us up for a mini trial on the
21 differences between the programs, and most importantly the
22 application of the Yes program. Novell didn't have a monopoly
23 power in server operating systems. Novell didn't deny Yes logo
24 to any product for anticompetitive reasons. As I said, Windows
25 NT got our Yes logo. Novell didn't grant its own products the

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1 logo that couldn't meet the requirements. And the list goes
2 on. We would have to get into all that to rebut the notion
3 that this logo program was anything like Microsoft's.

4 THE COURT: I'm perfectly prepared to adopt the
5 principle we should have no mini trials and we'll just focus on
6 the limited product in the limited time period. I bet you Mr.
7 Tulchin would even agree with that.

8 MR. JOHNSON: You know, Your Honor, I think
9 sometimes, and particularly today, we lose sight of what the
10 case is going to be about, because we're talking at the outside
11 of the circles. And, frankly, the case is not going to be
12 centered on the outside of the circles, despite all this stuff
13 that you've heard from the other side.

14 THE COURT: For me it's going to be in the 7th circle
15 which wasn't --

16 MR. JOHNSON: The case is going to be in the bull's
17 eye, Your Honor, and the conduct engaged by Microsoft against
18 Novell. And so we are talking about the outsides of the
19 circles.

20 The next one Your Honor, is they want to bring in
21 evidence that there were undocumented APIs in netware. Again,
22 we're back to netware. The thing they don't want to talk
23 about. Now we want to talk about undocumented APIs in netware.
24 The fact that netware had undocumented APIs is not relevant to
25 any issue in this case. Our complaint, our case is not about

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1 undocumented APIs. If that's what this case was about we would
2 have lost, probably lost in summary judgment given Your Honor's
3 ruling in *Daisy*, and some of the other cases that you've
4 decided. You made that point very clearly in your decision
5 that this was not about just undocumented APIs, and pointing to
6 the fact that there were elements of deception present in this
7 case.

8 So whether netware had undocumented APIs says nothing
9 about whether Microsoft's deceptive conduct was justified by
10 some nonpretextual business reason. In fact, our technical
11 expert, Your Honor, Mr. Alepin acknowledges that operating
12 systems have internal APIs, but that begs the question to be
13 addressed with respect to these APIs. These APIs were actually
14 published. These aren't just internal interfaces. They were
15 published to ISVs who were encouraged to use them, were told
16 that they could and should use these APIs. And these APIs
17 continued to be used by Microsoft's applications after they
18 were denied to outside ISVs. That's not just internal
19 interfaces. So the fact that netware may have had undocumented
20 APIs is really of no moment.

21 The last item, Your Honor, is access to beta copies
22 of Windows 95. I'm surprised, I was frankly surprised that
23 Microsoft wanted to fight this one. This evidence shows that
24 Microsoft blacklisted Novell from receiving certain betas and
25 internal bills. Frankly, that anticompetitive conduct relates

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1 to netware. And I'm surprised they even want to talk about it
2 here. But if they want to go there, I guess we could talk
3 about their beta blacklists, and what that meant to the
4 industry and the ISVs that were blacklisted at the time. We
5 had no intention of raising that issue in this case. It's
6 completely irrelevant.

7 The fact -- and the fact that one of Novell's
8 developers got access to such betas any way, in the interim
9 builds as well, despite Microsoft's efforts to deny Novell such
10 access, also is really of no relevance to this case. The fact
11 of the matter is he got it by perfectly legitimate means. He
12 identified himself to a Microsoft employee and said, can I have
13 access? And the guy gave him access. But we -- but if we get
14 into that, and we get into the acquisition of those betas and
15 interim builds, we'd have another mini trial, wherein, Novell
16 would show that that employee gained such access in a
17 completely legitimate manner.

18 Finally, as to Plaintiff's Exhibit 170, which they
19 trot out with respect to this argument. That was not being
20 offered to show that Microsoft denied us internal builds. In
21 fact, I'm not even sure that they ultimately did deny us
22 internal builds. Because when WordPerfect and Novell got
23 together they had a real issue because they were denying them
24 to Novell, but they were granting them to WordPerfect. And
25 sometimes the right hand and left hand don't know what they're

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1 doing at Microsoft. Rather, that exhibit demonstrates that
2 Microsoft changed its attitude towards WordPerfect once it was
3 bought by Novell. And it is important evidence to show that
4 what was a cooperative course of conduct for a long time with
5 WordPerfect suddenly became an entirely different matter when
6 WordPerfect was bought by Novell, leading to the actions by Mr.
7 Gates.

8 Those are the four areas, Your Honor, unless you have
9 some questions I'll let Microsoft go.

10 THE COURT: Too tired to ask.

11 MR. JOHNSON: Thank you, Your Honor.

12 THE COURT: Actually, I'm too tired to think of any.

13 MR. HOLLEY: Your Honor, it isn't just the 10th
14 Circuit in *Telex*, but the 8th Circuit as well in a case called
15 *Trace X Chemical*, which says when you're in a Section 2 case
16 it's important to look at what is the ordinary business
17 practice typical of people in the industry and try to figure
18 out whether something is or is not anticompetitive. And so you
19 can't -- Novell can't win this by stipulating that their
20 behavior was competitive and ours was anticompetitive, because
21 part of the inquiry is, did other people do this too?

22 Now, looking first at the logo licensing program,
23 they're asking to exclude from evidence the fact that netware,
24 which at the time, I believe, if my memory is correct, had a 75
25 percent share of the server operating system market. They

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1 never were found to be a monopolist. But under Judge Jackson's
2 view of monopolies they were a monopolist at that time. They
3 had in their logo licensing program exactly the same dual
4 compatibility requirement that Microsoft had in its logo
5 licensing program. And the fact that they both had this dual
6 compatibility requirement tends to prove -- it's not the end of
7 the question -- but it tends to prove that such a dual
8 compatibility requirement is not anticompetitive. So I don't
9 see any basis for excluding the evidence entirely. They can
10 argue about its weight.

11 With regard -- the same point applies to undocumented
12 APIs. The fact that somebody may decide not to fully document
13 an interface in an operating system, it is less likely to be
14 anticompetitive when you know that every operating system,
15 including netware and UNIXware, and all these operating systems
16 that were Novell products, also had undocumented APIs. It
17 isn't the end of the story, but it's also not a basis to
18 exclude the evidence. The evidence is relevant because the
19 existence of such internal interfaces tends to show that what
20 Microsoft did vis-a-vis the name space extension APIs was not
21 anticompetitive.

22 And I don't want to get into the merits, but I don't
23 want the Court to be confused. When people say that these APIs
24 were removed from the system, the evidence at trial will show
25 that that's completely untrue. They never went anywhere. They

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1 stayed there throughout the existence of Windows 95. And if
2 somebody wanted to call them, they were free to do that. Now,
3 we'll obviously hear stories about why they might not have
4 wanted to. But the APIs were in the system.

5 THE COURT: Mr. Schmidtlein doesn't seem to agree
6 with you. The way things are going, I'm afraid I'm going to
7 hear evidence.

8 MR. HOLLEY: All right. Well, I'll move on, Your
9 Honor. In terms of the *Lantec* case and the beta versions, the
10 reason -- and I don't want to go into this at trial either, but
11 the reason that Microsoft was very weary of Novell in terms of
12 betas is because Novell had stolen betas from Microsoft during
13 the Windows 3.1 era. This is all very well laid out in the
14 transcript of the Iowa trial. So we don't want to go there.
15 If somebody is going to argue at trial that Microsoft had no
16 basis, other than an anticompetitive one, for being leery about
17 what Novell might do with beta versions of Windows, then they
18 have opened the door to evidence that there was a very good
19 reason why we didn't want Novell to have free access to betas,
20 because we didn't trust them as far as we could throw them in
21 terms of betas.

22 Finally, in terms of *Lantec*, it's another door
23 opening issue. We don't intend to tell the jury about *Lantec*
24 or suggest that Novell was sued, and therefore, they must be
25 bad people, in some sort of *in pari delicto* defense. We

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1 haven't made that argument. We don't intend to make that
2 argument. But if one of Novell's experts suggests, and opens
3 the door by suggesting that Microsoft must have been guilty of
4 antitrust violations because it was investigated by multiple
5 agencies or it's been sued, you know, 14 times, then we do want
6 to say to the jury, the fact that somebody gets sued doesn't
7 mean that they're liable. But it's certainly not part of our
8 affirmative case. And we have no intention -- I don't see Mr.
9 Tulchin saying anything different. We have no intention of
10 arguing that, you know, the existence of the Lantec complaint
11 is somehow evidence that Novell is as bad as Microsoft is
12 alleged to be. Thank you, Your Honor.

13 THE COURT: Anything further?

14 MR. JOHNSON: Your Honor, briefly. I mean, they did
15 it in *Comes*, so I had to assume they would try to do it here.
16 And they seem to be acknowledging that that would be improper
17 to take the *Lantec* opinion before the jury. So I think too
18 that extent the motion should be granted. If they have some
19 cross-examination about the fact that people get sued for
20 antitrust violations and they're not always found guilty, I
21 guess we probably wouldn't have any objection to that. But not
22 to hold up a complaint against Novell and to try to make that
23 point. So I just think that's improper.

24 The Yes program, again, you know, it's the
25 application of the program that is in issue here, it's not its

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1 existence. Everybody had logo programs. That was a pretty
2 common practice. It's how you administer the logo programs.
3 It is what you do when you deny exemptions to products that
4 would have actually resulted in you making more money, but you
5 do it for an anticompetitive purpose in order to exclude
6 another key franchise application sitting on your operating
7 system. That's the question for the jury, not the existence of
8 the Yes program.

9 And netware APIs. Again, our expert, Mr. Alepin
10 acknowledges that their undocumented interfaces in operating
11 systems. There's no dispute about that. The question is
12 that's not what happened here. They evangelized these APIs to
13 us. They published them to us. We relied on them. The
14 evidence is going to show that we were 80 percent done with the
15 work that was involved with these interfaces when they pulled
16 them. They sent us down a road and then they put up a
17 roadblock. And then we had to come all the way back and try to
18 go all the way around the mountain the other way. And that's
19 why we were late. And that's what the evidence is going to
20 show. So netware APIs, the fact that there are undocumented
21 APIs in netware is totally irrelevant.

22 And the beta copies, I'm not sure what they were
23 saying there, but I sense that they didn't want to get into
24 this issue. But if they get into the issue of the blacklisting
25 of Novell, and the fact that -- we don't intend to get into it,

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1 but if they get into it we'll get into a mini trial of what
2 happened there. And that was really bad acts against netware,
3 it has nothing to do with what we're talking about here.

4 Thanks, Your Honor.

5 THE COURT: Okay. Well, I -- I'm sort of tired so
6 I'm a little reluctant to do this, but I'm going to rule. If
7 somebody wants to revisit this, remind me I was tired when I
8 ruled. I'm going to deny the motion as to the first two
9 issues, the undocumented APIs and the dual program. From what
10 I've heard, I mean, I understand Novell's concern. Frankly, I
11 think it's -- it's a relatively simple issue, I think it could
12 be handled very effectively by examination of witnesses and by
13 evidence and say that's not the issue here. The issue here is
14 the application, not the existence of the program.

15 And, look, and the same thing with the undocumented
16 APIs. I think there's more of a risk if I exclude the evidence
17 the jury is going to think there something wrong with the dual
18 program to begin with. And I -- I will revisit this if you
19 want me to. I honestly, from what I've heard today, you all
20 can handle it very effectively. And there is a risk that the
21 jury would think -- without the evidence of the fact that the
22 programs otherwise exist, that there are other undocumented
23 APIs, that there's something wrong with that in and of itself.
24 So I -- so I'm denying the motion as to that.

25 I will grant the motion as to the -- as to the other

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1 lawsuit and about the early access that Novell allegedly wasn't
2 supposed to have. But that's without prejudice to being
3 reopened in the event that Microsoft thinks the door has been
4 opened. I think that's where you handle that. Obviously, you
5 can't throw -- somebody's on the stand, well, weren't you sued
6 too? That's silly. And the other one, from what I hear, it's
7 just best not to get into it. But if Microsoft thinks we
8 should then they can revisit this. But I think the easiest way
9 to do this is to treat this as a motion in limine in the case
10 in chief, to that extent it's granted.

11 MR. HOLLEY: Thank you, Your Honor.

12 MR. JOHNSON: Thank you, Your Honor.

13 THE COURT: Case in chief isn't fair, because it
14 could come out in their case, because the case in chief's going
15 to be in response, but you know what I mean. Okay. What do
16 you all want to do? I think poor Christine -- if we stay we
17 ought to take a short break. The other things I know we still
18 have to discuss are those pieces of evidence, miscellaneous
19 pieces of evidence, we have collateral estoppel if you want to
20 discuss it. And I always find discussion about the
21 instructions fruitful, because it helps me to understand the
22 case.

23 I am perfectly willing to take a short break and then
24 forget the instructions and talk about the collateral -- and
25 just talk about the exhibits, just break for the day and have

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1 you all go home and come back tomorrow. I don't know what your
2 schedules are.

3 MR. JOHNSON: Your Honor, our suggestion would be
4 that we break. You did indicate that you are tired, and
5 frankly we're tired too. We're due to be back here tomorrow
6 morning at 10:00.

7 THE COURT: That to me would make sense, but I think
8 Mr. Tulchin -- I inferred from something he said hopefully he
9 go back to New York tonight.

10 MR. TULCHIN: Your Honor, I'm here, of course, at
11 your pleasure. We're happy to come stay over night and be back
12 here tomorrow. And perhaps that's the way to do it. Some of
13 these issues could even be discussed, I mean, I hesitate to say
14 this because our time is so short, but for example, on the jury
15 instructions, if it's helpful for the Court to wait a few days
16 and perhaps do this by phone next week. Because your thoughts
17 will be more solidified if we give you more time, then maybe we
18 should do that. But I'm happy to do --

19 THE COURT: Why don't you come back tomorrow. I
20 think we'll stop early. What time do you want to go back to
21 Salt Lake City, Mr. Jardine.

22 MR. JARDINE: I have a flight at 5:50 tomorrow night.

23 THE COURT: We might try to go -- what time can we
24 get started in the morning? What time did I tell you?

25 MR. TULCHIN: We're scheduled for 10:00, your Honor.

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1 THE COURT: Okay.

2 MR. TULCHIN: And there is a religious holiday
3 tomorrow evening. I was hoping to be on a 2:30 train.

4 THE COURT: Let's plan on going in the morning, we'll
5 reach what we can, then we'll stop.

6 MR. SCHMIDTLEIN: We should be done by lunch.

7 THE COURT: We should be finished. I think it's
8 worthwhile, and the more we discuss this I will -- I've reread
9 the instruction stuff, I'll read it again. I'm not going to
10 make any final decisions. But you all really, as I say, and
11 the collateral estoppel I'll be glad to hear from you all. I
12 understand your points on the collateral estoppel. It seemed
13 to me it went more to the admissibility of the evidence, but be
14 that as it may if -- I will be glad to hear anything Novell has
15 to say, because you all have got to prepare for trial. Because
16 you've got to know -- you've got to have an idea what I'm going
17 to do. And the more I can tell you, the better off we'll be.
18 We may have to reserve a day after we pick the jury to finish
19 things up before you give opening statements. I hope we don't
20 have to do that. I hope we can get things in good enough shape
21 that we can just proceed right away to set a good pace. But
22 we'll see how we go.

23 MR. TULCHIN: Can I ask you one question, Your Honor,
24 I'm sorry I don't mean to hold you up, take a couple minutes.
25 I wanted to get the Court's guidance on one small point, which

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1 is getting advanced notice about what witnesses are coming and
2 when. We've asked Mr. Johnson about this, and so far he's
3 declined to give us any indication of who will be first and so
4 on. I'm not asking for anything that's written in stone.

5 THE COURT: Try to give him -- so he can prepare his
6 cross try --

7 MR. JOHNSON: Your Honor, we both -- pretty hard to
8 say I didn't tell him, there's a proposal from them and us in
9 the pretrial order. We made a proposal that we would provide
10 them 48 hours notice with respect to witnesses to appear, and
11 the order that they would appear. And they asked for a week, a
12 week's notice. And frankly, when they first asked me about
13 this, I didn't even know what I could put on because of their
14 objections to the depositions. So we're working on it. And
15 I'll be happy to provide them notice but we do have proposals
16 here.

17 MR. TULCHIN: We had proposals, Your Honor. I wasn't
18 asking for something formal or --

19 THE COURT: Sounds to me like two days notice is
20 enough, but I could be wrong in terms of --

21 MR. JOHNSON: Thank you, Your Honor.

22 THE COURT: Seems to me if they give you 48 hours you
23 know generally, if that's a problem let me know.

24 MR. TULCHIN: It's a slight problem, Your Honor, just
25 in terms of preparing for the first week. We have to prepare

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1 an opening statement --

2 THE COURT: Try to give him the whole first week and
3 then 48 hours thereafter. We don't even know when we're going
4 to be sitting the first week. We don't know how long it's
5 going to take to pick the jury, don't know a lot of things.

6 MR. TULCHIN: That would be very much appreciated.

7 THE COURT: The more that you can give them, the more
8 that you really know somebody's coming, let him know in
9 advance, but you've got --

10 MR. JOHNSON: Your Honor, we've already traded will
11 call lists.

12 THE COURT: I know that, but they want to know the
13 day in advance so they can prepare the cross.

14 MR. TULCHIN: Sequence, Your Honor.

15 MR. JOHNSON: I understand that as to the 48 hours we
16 can give them.

17 THE COURT: I think 48 should be fine, but give
18 them --

19 MR. JOHNSON: Thank you, Your Honor.

20 THE COURT: Okay. The only thing we have to discuss
21 tomorrow definitely is spoliation, whether it should be struck.

22 MR. TULCHIN: Yes, Your Honor. Thank you.

23 THE COURT: Did he really say he wasn't trying to get
24 Buffett to invest, in deposition?

25 MR. PARIS: That's exactly what he said.

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MR. HOLLEY: Your Honor, there's -- Buffett is infamous for having lost a billion dollars for not investing in any tech companies.

THE COURT: I know he did. It actually is a very, very interesting e-mail.

(The proceedings were concluded.)

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

_____/s/_____
Christine T. Asif
Official Court Reporter

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