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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 7th, 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
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

1 P R O C E E D I N G S

2 THE COURT: Good morning.

3 THE CLERK: The matter now pending before this Court
4 is civil docket JFM-04-1045, Novell versus Microsoft. This
5 matter comes before the Court for continued hearing.

6 THE COURT: You all can be seated. Couple
7 preliminary things. Martina, you're free to stay, free to go.
8 Mr. Tulchin, I'm sorry for you I can't say that Baltimore is
9 unhappy about the fact that the Yankee season is over.

10 MR. TULCHIN: Well, Your Honor, I always say wait
11 till next year.

12 THE COURT: We've even stopped saying that. A couple
13 preliminary things. No. 1 we can discuss instructions at the
14 end of the day. I really think the ball is in my court to make
15 up my mind. But if anybody wants to say anything I'll be glad
16 to hear from them. But I think I ought to get to you, and I
17 don't have them today, to show you what I have in mind.
18 Otherwise, I'll be guided by you all as to what you want to
19 address first. Secondly, we'll stop so Mr. Tulchin can get his
20 2:30 train. Have you got another flight?

21 MR. JARDINE: There's a slightly earlier flight, Your
22 Honor. But the weather's better here and I'm happy to be among
23 friends.

24 THE COURT: We'll probably try to stop around 1:00.
25 Two other things, and I really think, going to Utah I ought to

1 apply Utah culture. But we have a local rule here that I have
2 found saves a lot of time, which is that once an exhibit is
3 mentioned by somebody during the course of examining a witness
4 it's automatically introduced into evidence. We can put on the
5 record first, and of course, everybody preserves every
6 objection they previously made, but it saves a lot of time. So
7 consider whether you would apply that rule.

8 It's just really just a time saving device. If you
9 mention an exhibit and it's not objected to, it's deemed
10 admitted into evidence. It's not meant as a trap for the
11 weary, if somebody realizes five minutes later, look, I should
12 have objected to the exhibit, that's fine. And all objections
13 made via motions in limine I would put on the record are
14 preserved. Provided the 10th Circuit allows that procedure it
15 makes perfect sense. I mean you all have been heard, it just
16 saves time, instead of having to admit a document into
17 evidence.

18 The next one is entirely up to you all, and I doubt
19 very seriously whether it's going to be an issue any way.
20 Years ago when I first came on the bench, it really was years
21 ago, I realized every judge had a different interpretation of
22 what sequestration rule meant. So our rule sort of defines
23 when you can talk to a witness. So I'm used to that. I think
24 it's helpful. If you all want to look at it, if you want to
25 disagree with it, that's fine.

1 But it would be a good guide for you all so we
2 don't -- when I was a U.S. Attorney some judge was angry
3 because one of my assistants had called a potential witness and
4 didn't say what other witnesses testified to, but because of a
5 question that had arisen asked the witness a question. And the
6 mere fact of the contact was found to have been a violation of
7 the sequestration rule, which I didn't understand it to be.
8 And then I sort of polled my colleagues and found they all had
9 different interpretations. So it's a good starting point. So
10 if you all can find it, it's in our local rules. And if you
11 all want to jointly have a different rule, that's fine with me.
12 I just think we ought to have a common understanding to avoid a
13 problem.

14 Okay. Who wants to be heard on what first?

15 MR. JOHNSON: Your Honor, one preliminary matter, and
16 that is I'd like to ask that yesterday's transcript be sealed.
17 There were two motions discussed, one involving the NetWare
18 settlement and one involving the anti-Mormon bias, both those
19 motions were filed under seal by the parties.

20 THE COURT: Do you want to seal the whole thing or
21 just those portions of the argument? Why don't we just seal
22 any portion of the arguments that related to either of those
23 issues.

24 MR. JOHNSON: That would be great, Your Honor. Thank
25 you.

1 THE COURT: Let me also say the one thing that I
2 probably, knowing me, will come out the same way I did, the one
3 ruling about which I have some question, and I realize you all
4 need guidance on it, if I'm going to change my mind I'll let
5 you know immediately. And I know it's an important ruling. Is
6 the interaction of Perfect Office and Netscape and Java
7 products. I mean, I want to relook at that. I think I'm
8 right, but it's a -- but it sort of depends upon how you look
9 at it. And I understand the complaint as saying, look, it's
10 these two -- it's these applications which are the -- expose
11 the APIs. And that's the view I adopted, but I understand the
12 other perspective, look, we always said it was these two. And
13 as technology developed they ought to be considered in the
14 context of developing technology which included Netscape and
15 Java.

16 And I ruled the way I did, because I accepted, and I
17 probably will continue to accept Microsoft's view, look, the
18 complaint says what it says. The focus has been on these
19 products stand alone as exposing APIs. I think I'll come out
20 that way, but I frankly want to reread the papers. Because
21 it's obviously an important issue because it has to do with
22 nothing else significant -- contributing significantly to the
23 monopoly in the operating system market. I just want to make
24 sure I'm right, that's all. So I -- overnight I realized I'm
25 content with my rulings, that one I'm a little queasy about so

1 I want to go back and reread the papers.

2 MR. JOHNSON: Thank you, Your Honor.

3 MR. TULCHIN: Your Honor, may I ask a question about
4 the subject that you mentioned first today, that is when an
5 exhibit is mentioned it's automatically in evidence.

6 THE COURT: In questioning, not in argument.

7 MR. TULCHIN: That's what I thought, Your Honor.
8 That does not include openings.

9 THE COURT: That does not include openings.

10 MR. TULCHIN: Thank you, Your Honor.

11 THE COURT: It does not include openings.

12 MR. TULCHIN: Thank you.

13 THE COURT: Because I don't want people to stand up
14 and object to openings. Oh, that does raise another question.
15 Tell me sometime, we have a local rule here that absent court
16 order, openings and closings are limited to one hour a side. I
17 suspect the closings are going to have to be longer than one
18 hour. If you all want more than one hour for openings let me
19 know. Whatever you want to agree upon that's reasonable is
20 fine with me. Frankly, I think you're probably doing
21 yourselves a favor by trying to keep it an hour, but if you
22 want more time just let me know so I can sort of plan out the
23 schedule of the trial. Closings you're going need more than an
24 hour so.

25 MR. JOHNSON: We've been having some discussions on

1 that subject, Your Honor, and we'll let you know.

2 THE COURT: Anything that's reasonable is fine. But
3 in asbestos cases long ago, I limited the time that people
4 could have to try the case. And there was outrage. And then
5 the lawyers -- and I said, look, I've sat through one of these
6 and it's terribly boring. And if I'm bored, I'm sure the
7 jurors are too. And they ended up agreeing with me. If you
8 need more than an hour, fine. But just try to, in terms of
9 scheduling, knowing what the schedule's going to be, I'd like
10 to know.

11 MR. JOHNSON: Thank you, Your Honor. Your Honor, may
12 I suggest we address the motion to strike the spoliation motion
13 first?

14 THE COURT: That's fine. Mr. Holley had a question.

15 MR. HOLLEY: Your Honor, I just was wanting to make
16 sure I understood what the Court's desire was with regard to
17 jury instructions, I mean, I don't --

18 THE COURT: Jury instructions, if somebody wants to
19 be -- let's put that as the last item today.

20 MR. HOLLEY: Okay.

21 THE COURT: And if we have time I will hear from
22 people. I really think the ball is in my court. I mean, I
23 think that we had full argument on that the other day, I think
24 I have to make up my mind. If there's something further
25 somebody wants to say, I'd be glad to hear from them if we have

1 time.

2 MR. HOLLEY: I think Mr. Martin and I addressed the
3 big issues. I mean, I think there really are three principal
4 differences between the parties. One has to do with what are
5 the elements of the claim. The second one has to do with how
6 does one define exclusionary conduct and the third one is what
7 is the relevant causation standard. But I don't know that we
8 need to burden the Court with further argument about that,
9 because I think both sides have made their points.

10 THE COURT: And also you want, at least in the
11 closing instructions, you want focus upon what they allege.

12 MR. HOLLEY: Absolutely.

13 THE COURT: And some mention of the duty not to
14 cooperate with the competitor.

15 MR. HOLLEY: I think of that, in my sort of
16 hierarchy, as part of what is exclusionary conduct.

17 THE COURT: Fine. That's fine.

18 MR. HOLLEY: But I don't see any need to repeat what
19 we said.

20 THE COURT: I think I know your positions. I think
21 Mr. Martin, you wanted to be heard.

22 MR. MARTIN: I think at the end of the day, if
23 there's time, I would like a few minutes to talk about the
24 proposed modified instruction that was submitted and explain
25 why we modified it.

1 THE COURT: If we have time, that's fine.

2 MR. MARTIN: Thank you, Your Honor.

3 THE COURT: But you all have made excellent arguments
4 the other day and that ball really is in my court.

5 MR. MARTIN: Thank you.

6 MR. HOLLEY: Thank you, Your Honor.

7 THE COURT: Yes, Mr. Johnson.

8 MR. JOHNSON: Thank you, Your Honor. And good
9 morning again. We're here this morning on a motion to strike
10 Microsoft's spoliation motion as untimely. That's the issue
11 before the Court, not whether any spoliation occurred, and not
12 whether an adverse inference instruction is appropriate in this
13 case. The matters of which Microsoft complains occurred in
14 2008, over three years ago. Fact discovery in this case closed
15 March 6th, 2009. Not once during those years did the defendant
16 raise any issue of spoliation; not with this Court, not with
17 us. Summary judgment motions were briefed and argued, again,
18 no issue of spoliation was raised with this Court, not with us.
19 The case was remanded after appeal, and a trial date was set.
20 A pretrial schedule was established. Again, no mention of any
21 spoliation issue to this Court or to us.

22 The issue of spoliation first arose at a meet and
23 confer to discuss objections to exhibits. The threat of a
24 spoliation motion was brandished if the plaintiff did not
25 abandon its foundation objections to Defendant's Exhibits. The

1 motion itself was not filed until after the final pretrial
2 conference in this case.

3 Now in the *Goodman* opinion Magistrate Judge Grimm, a
4 well-regarded authority in discovery and procedural matters,
5 collected the cases from multiple jurisdictions, and distilled
6 from them the factors the Court should consider in evaluate the
7 timeliness of a spoliation motion. As an initial matter
8 Magistrate Grimm pointed out that spoliation motions are
9 fact-intensive inquiries that should be undertaken, quote,
10 "during the discovery process, not after it has closed," close
11 quote.

12 He then set forth a four-part test to evaluate the
13 timeliness of such a motion; the length of time since close of
14 discovery, the temporal proximity between a spoliation motion
15 and any motion for summary judgment, whether there was any
16 governing deadlines for filing such motions, and the
17 explanation the moving party presents as to why the motion was
18 not filed earlier. On top of these tests Magistrate Grimm
19 warned that quote, "Courts should be weary of any spoliation
20 motion made on the eve of trial," close quote.

21 Microsoft fails each of these tests. It's not even a
22 close call.

23 THE COURT: The first question I obviously have to
24 ask is, I have respect for Judge Grimm, it's a well-reasoned
25 opinion, is it the law of the 10th Circuit?

1 MR. JOHNSON: I'm going right to that, Your Honor.
2 Rather than address the factors set forth by Magistrate Grimm,
3 Microsoft resorts to misdirection, claiming that it does not
4 reflect the law of the 10th Circuit.

5 THE COURT: Well, my question couldn't have been more
6 timely, could it have?

7 MR. JOHNSON: It was right on, Your Honor.

8 THE COURT: It was right on, as soft a ball as one
9 can get.

10 MR. JOHNSON: Well, we're on the same wavelength.
11 Microsoft instead points to a 10th Circuit case called *103*
12 *Investors, LLP, versus Square D Company*, it's a 2006 10th
13 Circuit case. This is important that you hear this, Your
14 Honor, Microsoft claims in its papers, quote: "This decision
15 is squarely on point and directly contradicts Novell's
16 position," close quote. "This is -- quote -- the most
17 important case on point from the 10th Circuit," close quote.
18 Quote: "Plaintiff raised the issue of timeliness in opposing
19 defendant's motion," close quote. Quote: "On appeal the 10th
20 Circuit took no issue with the district court's rejection of
21 plaintiff's timeliness argument," close quote. Quote: "Here
22 Novell bases its motion to strike Microsoft's spoliation motion
23 on the very same timeliness argument that was unsuccessful in
24 *103 Investors*." Microsoft goes on to characterize the *103* case
25 as quote, "Controlling 10th Circuit law." And it cites it for

1 the proposition that, quote, "Spoliation motions, particularly
2 those seeking adverse inference jury instructions as a
3 sanction, may be properly filed shortly before trial."

4 Your Honor, this is a gross distortion of the holding
5 in *103 Investors* in this case. In truth this case does not
6 provide controlling case law on the issue of timeliness at all.
7 This case involved the actual destruction of physical evidence,
8 an electrical busbar from a building that was destroyed by
9 fire. The plaintiff claimed that the manufacturer of the
10 busbar failed to affix a warning label to the device.
11 Plaintiff however had destroyed all but one section of the
12 busbar, rendering it impossible to know if the warning label
13 was there.

14 Plaintiff, in opposition to the spoliation motion,
15 made only passing reference, not argument, to the fact that the
16 defendant filed the motion after a substantial delay.
17 Plaintiff cited no cases with respect to the timeliness of the
18 motion. Plaintiff did not argue that the timeliness of the
19 motion was the reason that the motion should not be considered.
20 The entirety of the discussion of timeliness in the district
21 court and on appeal was the following statement in plaintiff's
22 opposition to the motion for sanctions.

23 Lastly -- I'm quoting from plaintiff's opposition to
24 the motion for sanctions, "Lastly, it is certainly worth
25 mentioning that defendant waited until the eve of trial,

1 approximately four years after suit was filed, to bring on
2 spoliation before the Court. Defendant argues it is entitled
3 to a dismissal with prejudice, by virtue of the doctrine of
4 spoliation, yet defendant waited four years to file its motion.
5 If defendant truly believed the doctrine of spoliation
6 warranted a dismissal, then why spend tens of thousands of
7 dollars in legal fees defending this action before filing this
8 motion?"

9 That is the entirety of the discussion in the
10 district court with respect to the issue of timeliness. It is
11 clear from that quoted material that plaintiff doesn't even
12 argue the motion is timely. Instead it implies the defendant
13 doesn't really believe in the motion because it waited so long.
14 The district court record did not address this issue. Neither
15 party raised it on their briefs on appeal. And the 10th
16 Circuit did not mention it in the opinion they cite to you,
17 Your Honor. In the 10th Circuit a claim raised before the
18 district court, but not briefed on appeal, is waived. Thus,
19 timeliness could not have been the grounds for the reversal.
20 Even if the district court had rejected an argument on
21 timeliness, and even if the 10th Circuit disagreed with that
22 ruling by the district court.

23 But the district court never even considered that as
24 a grounds for not considering the spoliation motion. We went
25 back and looked at a 350 page transcript of the hearing with

1 respect to this motion. Not once was timeliness mentioned in
2 the district court's opinion -- transcript.

3 THE COURT: Poor associates of Dickstein Shapiro,
4 what a job.

5 MR. JOHNSON: Actually, I have to credit Mr.
6 Schmidtlein's associate at Williams Connolly. We were all here
7 busy, she was back working on this case and digging into the
8 record on pacer.

9 THE COURT: Just don't impose that job on my former
10 clerk.

11 MR. JOHNSON: In short Microsoft has
12 misrepresented --

13 THE COURT: Actually, it's better than looking at
14 documents, I guess.

15 MR. JOHNSON: Your Honor, Microsoft has
16 misrepresented to this Court the *103 Investors* case. Microsoft
17 cites no 10th Circuit case in support of its position and in
18 opposition to Novell's position.

19 Microsoft similarly mischaracterizes the Court's
20 conclusion on timeliness in the 8th Circuit case they cite
21 *Sylla-Sawden versus Uniroyal Goodrich Tire Company*. Microsoft
22 cites this case for the proposition as, quote, "Affirming
23 exclusion of evidence and adverse inference instruction as
24 sanctions for spoliation where defendant filed motion one day
25 after plaintiff submitted proposed jury instructions" close

1 quote. And for the proposition that, quote, "This --
2 apparently referring to the alleged propriety of bringing
3 motions during trial -- is particularly true when relief sought
4 in a spoliation motion is an adverse inference jury
5 instruction, because the whole issue of jury instructions is
6 one that is not typically addressed until the eve of trial."
7 That's what Microsoft says about this case.

8 The 8th Circuit's opinion says nothing of the sort.
9 It, like the 10th Circuit in *103*, fails to even mention
10 timeliness in the opinion. It does not reference the timing of
11 the motion for sanctions. It's likely not mentioned because
12 neither party raised timeliness on appeal. Moreover, it isn't
13 even clear from the record that timeliness was ever raised to
14 any court in that case. The district court's order, and the
15 party's briefs at the district court, are unavailable
16 electronically. And Microsoft does not cite any argument or
17 decision of the district court level referencing timeliness.
18 In the 8th Circuit, like the 10th, the failure to raise an
19 issue on appeal results in waiver.

20 Microsoft cites -- and this goes on for a while, Your
21 Honor, if there are sanctions here, it should be for the filing
22 of this opposition.

23 THE COURT: Well, before -- let's not talk about
24 that -- obviously, I'm concerned about the providence of the
25 motion, and Judge Grimm certainly has done his usual thorough

1 and thoughtful job, a 5th factor that I might be inclined to
2 consider, and you may not want to go there because this is not
3 what your motion is addressing, but sort of Judge Grimm is very
4 process oriented and I respect him for it, and I don't disagree
5 with him, but to some extent I'm bottom-line oriented. Can you
6 give me some -- the 5th factor would be whether or not the
7 motion has merit.

8 Could you give me some idea of why these documents
9 weren't produced? It seems to me, I'm concerned on the one
10 hand the fact it was raised late, and apparently in the
11 context, and I'll hear from Mr. Tulchin about this, I realize
12 his position is that the time to raise this was when jury
13 instructions were presented. But he -- but you say it was in
14 the context of an argument about another motion, about the
15 foundation documents, which does not make me happy. But I -- I
16 don't quite understand what happened. I mean -- and although
17 you say it happened in 2008, I think what happened -- that's
18 when the documents were produced. The -- tell me -- and you
19 don't have to go there, because that's not what your motion is.
20 Your motion is not on the merits of the spoliation.

21 MR. JOHNSON: I'm happy to go there, Your Honor. And
22 I guess what I would say is there was a production of millions
23 and millions and millions of pages of documents in this case.
24 Over 20 million pages from us. I think over 25 million
25 documents from Microsoft in this case. A lot of the documents

1 came from backup tapes from the time period, that have
2 preserved these documents after, as you recall, this business
3 was sold to Corel. But WordPerfect -- Novell actually,
4 preserved the documents by making copies of the servers with
5 these tapes.

6 And so we found the tapes. And we proposed to have
7 experts come in and download the material from the back up
8 tapes and to produce it to Microsoft. And we did that. Again,
9 if Microsoft had a problem with that procedure, and I'm not
10 saying they didn't have some complaints during the course, I
11 mean, there are some letters where Mr. Holley says, we're not
12 necessarily satisfied --

13 THE COURT: As I understand the question, the problem
14 is not with the documents that were produced, it's with the
15 ones that weren't preserved.

16 MR. JOHNSON: Ah, okay. Let's get to that.

17 THE COURT: I mean, I --

18 MR. JOHNSON: Yes.

19 THE COURT: As I read the correspondence, you did
20 exactly the right thing and are to be commended, I don't think
21 that -- maybe Microsoft was then concerned. That seems to me
22 you tried to get to the bottom of it and you did. But the
23 question is why was this set of documents preserved, but back
24 then litigation was contemplated, why were other documents not
25 preserved.

1 MR. JOHNSON: Well, Your Honor, the only thing
2 Microsoft points to, to suggest that other documents were not
3 preserved, is that a former Novell employee, a witness in this
4 case, someone who had gone on to work for Corel, apparently had
5 kept a stash of documents from his work at Novell. And he --

6 THE COURT: Again, excuse me, that's the second
7 justification for bringing the --

8 MR. JOHNSON: Yes.

9 THE COURT: -- motion so late, it was the time of
10 joint instructions and within two weeks, or some period of time
11 when they had those documents.

12 MR. JOHNSON: Yes. And that's what I want to
13 address, Your Honor, because I think that's important. This
14 employee had recently turned over 16, quote, "highly relevant
15 documents." That's what Microsoft said, that were not produced
16 by Novell in discovery.

17 I brought those documents with me, Your Honor. It's
18 no accident that the new documents that Mr. Bushman produced
19 are not attached to their motion in opposition to the motion to
20 strike. Of those 16 documents, Your Honor, one, two, three,
21 four, five, six were actually produced by us in this case.
22 Another one, two, three, four documents were produced that were
23 substantially identical, containing the same information,
24 different drafts, from a different period.

25 The documents that were not produced in this case

1 include these stunning revelations: Mr. Bushman's business
2 card. A letter to Mr. Bushman offering comp -- a completion
3 bonus if he stayed on after the sale to Corel. Mr. Bushman's
4 employee of the year nomination. And two documents which are
5 European documents that were created in Europe, that were
6 stored on servers over in Europe and which, yes, we didn't have
7 those docs, which have virtually no significance in terms of
8 the issues in this case.

9 So what's happening here, Your Honor, is that
10 Microsoft is, frankly, blowing smoke at you. They're blowing
11 smoke with respect to the holdings of the 10th Circuit and the
12 courts in this case. They're blowing smoke with respect to the
13 significance of these allegedly, docs that weren't found. We
14 produced over 20 million pages of documents in this case. This
15 is the best they can do? The man's business card? His
16 employee of the year nomination? I'm not even sure that those
17 docs frankly, Your Honor, would have even been a hit on the
18 search terms we created. We may very well have those docs, but
19 if there isn't a search term hit, the document isn't produced.
20 It's pretty simple.

21 So, Your Honor, this was a tactical motion brought
22 for the sole purpose of pressuring us with respect to our
23 objections to their exhibits. It is being pressed for tactical
24 advantage. If there was a problem, it should have been raised
25 when the problem could have been addressed. For instance, Your

1 Honor, they complain we only did 70 tapes. Well, Your Honor if
2 they had brought that complaint to the Court at the time, we
3 could have done 100 more. It's a very expensive process, Your
4 Honor. Certainly we would have had some discussion about that.
5 Doing the 76 we did cost hundreds of thousands of dollars. But
6 we could have done 100 more.

7 But the fact that they waited till today means that I
8 can't cure the problem of which they now complain. I could
9 have cured the problem of which they now complain back then.
10 And that's why such motions must be brought during the
11 discovery process when the parties can, if they can, do
12 something about it. I mean, if you've destroyed the busbar in
13 a fire case, I guess there's not much you can do about it. But
14 in this case there would have been plenty we could have done
15 about these complaints. And the Bushman documents add nothing
16 to this debate.

17 THE COURT: Thank you, Mr. Johnson.

18 MR. JOHNSON: Thank you, Your Honor.

19 THE COURT: Mr. Tulchin.

20 MR. TULCHIN: Thank you, Your Honor. May it please
21 the Court. Your Honor, it's, I guess, a little ironic that
22 Novell is so full of accusations about this motion. We heard
23 about blowing smoke and misrepresentations, and this is some
24 tactical maneuver on our part, on Microsoft's part. I don't
25 really think we heard any justification for Novell's

1 spoliation. And, in fact, there was really no response, no
2 explanation from Mr. Johnson concerning the Court's question
3 about what really happened here.

4 And a couple of preliminary points if I could, Your
5 Honor. First, as in our -- we set this forth in our spoliation
6 motion. I don't believe we repeated it in our response to the
7 motion to strike. But we did take a 30(b)(6) deposition of
8 Novell on this subject. Novell designated an internal lawyer
9 named Ryan Richards. Mr. Richards testified that Novell
10 employees had discretion to dispose of documents, to throw them
11 away in the ordinary course of business. He also testified
12 that there was no effort to collect documents. Normally a
13 company contemplating litigation has an obligation to send
14 around a notice to all employees saying please retain the
15 documents on the subject matter of the anticipated litigation.

16 There's been no response from Novell to the point
17 that we made that this case, and claims similar to it, were
18 contemplated in 1994 and '95 and '96. And the memos that the
19 general counsel, Mr. Bradford sent to Mr. Frankenberg, the CEO
20 at the time, plainly say that. So there was no retention of
21 documents at the time, except a systematic effort to retain
22 documents that Novell believed would be helpful to its
23 position. That's the file that Mr. Richards kept, which was
24 entitled "bad acts" or "Microsoft bad acts."

25 So the background here, of course, is that Novell

1 didn't comply with its obligations to retain documents, other
2 than those that it thought would be helpful to the case. For
3 its own reasons it waited eight or nine years before filing the
4 case.

5 I should also say, Your Honor, that when we were here
6 last Thursday, I believe it was the 29th of September, Mr.
7 Johnson got up and said that in lieu of responding on the
8 merits to Microsoft's motion he wanted to submit a motion to
9 strike our motion on the ground that the leading authority was
10 Magistrate Judge Grimm's opinion. And the Court of course
11 permitted that. That motion was filed on Tuesday of this week.
12 We responded the next day, on Wednesday.

13 And I do think that it's worth pointing out that
14 while there was plenty of time to look through a 350-page
15 transcript of the district court proceedings in *103 Investors*,
16 and there was plenty of time for Mr. Johnson during trial
17 preparation to prepare his brief and now his argument on the
18 motion to strike, the reason perhaps that Novell is so focused
19 on the motion to strike is that there is very little to be said
20 for Novell on the issue of spoliation. And the 5th factor that
21 the Court identified in questions to Mr. Johnson, does the
22 motion have merit, is one that, at present, I think the only
23 answer that one could come to, given the absence of a response
24 from Novell on this very point, is that it does.

25 Now, let me address the reasons that the motion was

1 made when it was. The Court has already seen this in our
2 papers, but there were really three things, Your Honor. The
3 first is that this was not a discovery motion, unlike the
4 motion in the case that Magistrate Judge Grimm decided, a case
5 which has been cited, as far as we can tell, by one other court
6 ever. And I don't mean to diminish its importance in this
7 district. But there the issue was discovery and whether there
8 should be sanctions in discovery. Maybe this fits in the
9 category of no good deed goes unpunished the fact that we
10 didn't complain during discovery.

11 And, frankly, Your Honor, our motion for a jury
12 instruction seeks a very limited remedy for spoliation. We're
13 not asking for dismissal of the claim on the basis of
14 spoliation. We haven't asked for an expert witness to be
15 stricken, which was the remedy adopted in the *103 Investors*
16 case, if I recall correctly. Our request is very limited and
17 is timely --

18 THE COURT: I always knew you had a big heart.

19 MR. TULCHIN: Well, but I really do think, Your
20 Honor, that while this was a motion that deals with jury
21 instructions, the right time to make a motion on jury
22 instructions is when that subject is ripe. We also thought
23 during discovery, Your Honor, that the case wouldn't reach this
24 stage, we were wrong. We thought for substantive reasons it
25 wouldn't, and here we are. And you know, that's just the way

1 it goes.

2 The second reason is, of course, Mr. Bushman. And
3 Mr. Bush -- Mr. Jardine went to see Mr. Bushman, we are calling
4 him as a witness at trial. We have subpoenaed him or perhaps
5 will subpoena him. I don't know if it's been served yet. And
6 Mr. Bushman at the first meeting with Mr. Jardine handed him
7 six documents, not the 16 to which Mr. Johnson refers, which
8 include the business card, but there were six. And we say on
9 page 18 of our brief, our spoliation brief, that of those six,
10 five had never been produced. And that's correct. One had
11 been.

12 And we gave as an example of the documents that
13 haven't been produced, a highly relevant document that I do
14 think may get used at the trial. It was prepared in 1993,
15 before Novell bought WordPerfect. But the document, yes, it's
16 about business in Europe, but the market here is worldwide, and
17 the damages that Novell is seeking include injury to its
18 product worldwide, not just in this country.

19 So yes, it has to do with developments in Europe, but
20 the document says very clearly that the reason that WordPerfect
21 has been losing business. And we quoted from this at great
22 length, I won't read it all, Your Honor, is that Word Perfect
23 Corporation had made some significant business errors. Instead
24 of developing for the Windows platforms they were developing
25 for other technologies, other platforms. And of course they

1 were very, very late to realize that the market was shifting to
2 suites. Where they didn't -- and this is what the document
3 says, we don't have a compelling story to tell regarding
4 suites.

5 Well, as the Court, I think, has heard a little bit
6 of, part of what we will say at trial is exactly this. And we
7 now have it from an internal Novell business record.

8 THE COURT: Let me ask, Mr. Tulchin, and it's a
9 loaded question, I guess, but Mr. Johnson says this whole
10 issue, the potential spoliation motion was raised in the
11 context of the discussion about withdrawing -- Novell
12 withdrawing his objection to the foundation documents is that
13 true?

14 MR. TULCHIN: It's true, Your Honor. But it's true
15 with a little bit of a modification.

16 THE COURT: With modification, and was the
17 implication that the motion would not be filed if the objection
18 was withdrawn?

19 MR. TULCHIN: No. I wasn't present for the meet and
20 confer, but I have this from those who were. And here's what
21 happened, Your Honor, it was -- the meet and confer was on
22 September 13th, a few weeks ago. And this was before our
23 discussion about Novell's objections to documents on our trial
24 exhibit list that had come from their files. They objected to
25 almost every one of our trial exhibits that came from their

1 files on the ground that they lacked foundation.

2 THE COURT: And I'm with you on that.

3 MR. TULCHIN: Yes. And they said at this meet and
4 confer, to my colleagues who were present, that their
5 foundation objection was based on the fact that for many of
6 these documents there is no date, or there is an incorrect
7 date, sometimes the date appears in 2008, which is the date the
8 document was printed, I gather. And also because many of the
9 documents don't contain information about the author. So we
10 couldn't establish who at Novell had written the document --

11 THE COURT: Your position was, well, if that's their
12 position then you're going to file a spoliation motion because
13 you can't establish.

14 MR. TULCHIN: Slightly more complicated than that.
15 We said that we had -- we were prepared to file a spoliation
16 motion --

17 THE COURT: Excuse me, just excuse me for two
18 minutes. I'll be right back.

19 (Pause in the proceedings.)

20 THE COURT: Go ahead.

21 MR. TULCHIN: Thank you, Your Honor, what I was about
22 to say, Your Honor, is that yes, it was raised for the first
23 time at this conference on September 13th, that's correct. We
24 said then, and it was true then, that we were prepared to make
25 this motion in any event. But that a foundation objection on

1 the ground that we couldn't establish who the author was, when
2 that problem was a function of the lost metadata, because these
3 backup tapes had degraded to a point where the metadata wasn't
4 available, that for Novell to take that position was forcing
5 our hand. There wasn't any choice about whether we were going
6 to make the motion. It was a motion we had contemplated any
7 way and were prepared to make. But we certainly couldn't let
8 the spoliation be used by Novell as a sword against us.

9 And in addition, Your Honor, the overruling of the
10 foundation objections does not cure the problem. It does in
11 part, yes. That part of it is cured. But the remainder of the
12 problem is this: For nine or ten years, at least, and maybe
13 more, until the lawsuit was filed, documents were discarded in
14 the ordinary course by employees at WordPerfect and Novell.
15 There was no retention notice, there was no effort to collect
16 documents, except for the ones that helped them. And what we
17 find is that there are gaps in the documents. There are whole
18 sections where there are no documents available where one would
19 expect to see them.

20 So obviously, Your Honor, the obvious point is we
21 don't know how many documents are missing or what they say. We
22 certainly knew from Mr. Bushman on September 20th, when he gave
23 Mr. Jardine the first six. There were ten more that he gave to
24 Novell later. And I should say Novell contacted him, as they
25 have a right to do. I'm not being critical. We don't

1 represent him. We've subpoenaed him or will. And when Novell
2 talked to him after he gave us the first six, he then produced
3 ten more documents to Novell, which he said apparently he had
4 found at home. After that he gave Mr. Jardine the same ten
5 documents, as I understand it, that he had provided to Novell's
6 lawyers.

7 THE COURT: Well, let me ask you this, two things.
8 The first question is, Mr. Johnson says, forget the discovery
9 aspect of it, if this had been raised earlier, they could have
10 had a meet and confer with you and if necessary gotten ruling
11 from me as to whether additional things should be reviewed, and
12 he can't do that now.

13 MR. TULCHIN: Well, I don't think it's correct that
14 you couldn't do it now. You could try to restore the tapes.
15 It would be difficult --

16 THE COURT: Let's recognize we have trial two weeks
17 from now.

18 MR. TULCHIN: Yes, it would be difficult to do it
19 before the trial started I don't think it's impossible to do.
20 But, Your Honor, that only deals with the portion of the
21 problem represented by the degraded tapes. It doesn't deal
22 with the portion of the problem pertaining to documents such as
23 the ones that Bushman -- Mr. Bushman gave us, like the one that
24 we quote from on page 19 of our brief, having to do with the
25 real reason that WordPerfect was behind Microsoft. Had nothing

1 to do with APIs or any Microsoft --

2 THE COURT: Well, let me ask you the second question,
3 which is sort of a compromise. But, I mean, the problem with
4 spoliation instructions is just like you're concerned,
5 legitimately, about giving judicial imprimatur to the
6 government case. Though, there is -- the problem with
7 spoliation instructions it's like Novell is a bad guy and the
8 Court's -- or was a bad party, and the Court's saying that by
9 virtue of the spoliation instruction.

10 Why isn't the appropriate compromise, and maybe it
11 needs to be a stipulation, that these documents, that you think
12 are highly relevant, which I'll have to make a decision on,
13 were not produced. And have you be able to make the argument
14 without having a re-enforcing instruction, look, they were
15 supposed to retain these documents in anticipation of
16 litigation, clearly they were anticipating litigation. There's
17 no question about it. They kept the bad act documents, but
18 documents that might help us weren't preserved. Why isn't
19 the -- why isn't a appropriate way to resolve this issue,
20 instead of having me re-enforce your argument by an
21 instruction, simply let you have that argument and let the jury
22 determine its relevance.

23 MR. TULCHIN: Your Honor, it's a creative suggestion
24 and I'd like to consider it a little bit further, maybe
25 hereafter. I will say that it strikes me as not going very far

1 in our direction, maybe deliberately, but --

2 THE COURT: I think it goes pretty far. It seems to
3 me in the final analysis should be a jury question, look, they
4 kept these bad acts files, they obviously contemplated
5 litigation, they didn't send out a retention notice, there were
6 documents which Microsoft says hurt them, and the jury can say
7 maybe there is something.

8 MR. TULCHIN: Well, Your Honor --

9 THE COURT: Without me coming in and saying, boy,
10 Novell was bad because it, you know, you should infer that --
11 me telling them they should infer bad things from the fact
12 there was not a retention of documents.

13 MR. TULCHIN: Just a couple of thoughts about that,
14 Your Honor. One is that the instruction that we drafted could
15 be modified so that the Court is not telling the jury in any
16 way that Novell somehow is a bad actor. So that part of it, I
17 think, the sting could be taken out of the instruction.

18 But secondly, just trying to think in the Court's way
19 of approaching this, if we are to do that, Your Honor, perhaps
20 what we -- Microsoft should be permitted to do, is to call at
21 trial Ryan Richards, the man who kept the bad acts file, and
22 who testified at deposition that documents were not retained,
23 to allow us to call Mr. Richards, though he's not now on our
24 list. If it's acceptable for all, that the cross must stay
25 within the scope of direct, which would be the normal rule any

1 way. And that Mr. Richards not be permitted to testify about
2 what he claims to be Microsoft's bad acts. That is that the
3 examination remain focused on this subject of the documents.
4 That would be at least one way, Your Honor. Otherwise, all we
5 have --

6 THE COURT: I understand, otherwise you don't have
7 much.

8 MR. TULCHIN: All we have is Mr. Bushman and a few
9 documents. AND since we don't --

10 THE COURT: You don't even have that, because BushMAN
11 doesn't know what was produced.

12 MR. TULCHIN: Correct.

13 THE COURT: There's a problem of getting the relevant
14 facts before the jury.

15 MR. TULCHIN: Correct. Mr. Bushman doesn't know
16 whether those documents were retained at Novell. It turns out
17 they weren't. He just happened to have some, I think, in his
18 garage that he somehow --

19 THE COURT: He knows it now, but he only knows it by
20 hearsay.

21 MR. TULCHIN: Excuse me, Your Honor?

22 THE COURT: I first said he doesn't know, but I said
23 he probably does know now, but he knows by hearsay.

24 MR. TULCHIN: I don't know if he even knows that.
25 Who told him?

1 THE COURT: I don't know. But it's not admissible
2 and you can't -- you have to have something in addition to Mr.
3 Bushman.

4 MR. TULCHIN: Oh, Your Honor, Mr. Holley points out
5 to me that I got one thing wrong and there was a bit of a brain
6 freeze. The deposition testimony came from Jim Lundberg. And
7 I guess it's Mr. Lundberg whose presence we would require in
8 Salt Lake City. I can't remember if Mr. Lundberg still works
9 for Novell, and I just don't know.

10 But Your Honor, I just to go back to one other point.
11 I mean, what we're here to talk about, according to Novell's
12 counsel, is their motion to strike. I don't think the motion
13 to strike is well taken for all the reasons we've discussed.
14 But we've never had a substantive response to our spoliation
15 motion at all. Perhaps the response is merely what counsel
16 said a few moments ago, which I think, if anything, confirms
17 that as I was saying, that this problem is much more extensive
18 than whether or not information on backup tapes can be
19 restored. That's a part of the problem. But the restoration
20 of the tapes, including the meta data, those are just backup
21 tapes. And the only tapes that were searched were tapes from
22 one day.

23 But the problem of course is much more widespread
24 than that, it goes to the retention problem in general. Which
25 is why I do think that an instruction on spoliation is not only

1 appropriate, but I think really mandated here. And because
2 there will be gaps in the documents, gaps in the documentary
3 record of what was going on at Novell. It's difficult
4 sometimes to fill them. We've done the best we can with the
5 information we have.

6 But it's now open to Novell's witnesses, for example,
7 there are a couple of developers who were working on the shared
8 code team, who will come in, and these are the people who say
9 that we needed the name space extension APIs. There are no
10 documents, of which I'm aware, during the relevant period,
11 where anyone from the shared code team, including these
12 witnesses, Mr. Richardson and Mr. Harral, complain in any way,
13 internally at Novell, about this problem with the name space
14 extensions. There's nothing. There were no documents at all.

15 If we're to examine these people, to cross-examine
16 these witnesses, it certainly wouldn't be fair to have them
17 hide behind the absence of any documents to say, well, the
18 reason there are no documents is because they weren't retained.
19 The reason that there are no complaints, internally at Novell,
20 that we're late in developing a product because Microsoft
21 wouldn't support the name space extension APIs, the reason for
22 all that, we complained bitterly, and our complaints are in
23 plenty of documents, but those documents weren't retained.
24 That would be, again, using this problem of spoliation as a
25 sword against us, which doesn't seem fair at all.

1 So I think the motion to strike, Your Honor, should
2 be denied. I do think that the jury instruction is
3 appropriate. The exact words of it could be tweaked, no
4 question. And I'm very happy, Your Honor, to consider further,
5 your suggestion, which I appreciate, that perhaps we can solve
6 this in the way you suggest, maybe including having Mr.
7 Lundberg come to Salt Lake and testify, if that's feasible, if
8 he's within Novell's control. And again, I forget if he's
9 still an employee. Thank you, Your Honor.

10 THE COURT: Thank you. Mr. Johnson.

11 MR. JOHNSON: Thanks, Your Honor. First of all, Your
12 Honor, this was a motion to strike, I didn't address the merits
13 in detail.

14 THE COURT: No, I understand.

15 MR. JOHNSON: At all. And so there's assumption in
16 Mr. Tulchin's remarks that somehow spoliation has been proved,
17 it hasn't. One of the things we have in this case was these
18 backup tapes, which were made every day. And a back up tape
19 captures all of the documents that have been stored on that
20 server at that time, and prior periods, and prior periods, all
21 the way up to the time, the date that the picture is taken. So
22 there's no evidence whatsoever, apart from the one document
23 apparently, critical document that Mr. Bushman produced, that
24 anything is missing. That one document is a draft, it says so
25 right on its face --

1 THE COURT: Well, let me, and I realize we're not --
2 this is the merits of the motion, you agree, though, there was
3 a retention obligation?

4 MR. JOHNSON: Well, I must say, Your Honor, yes,
5 there was a retention obligation. How that occurred in terms
6 of electronically stored information in a 1994 period, frankly,
7 we haven't researched. But, you know, the complaints with
8 respect to metadata and that kind of thing --

9 THE COURT: That's all developed --

10 MR. JOHNSON: I'm not even sure back in that time
11 period, metadata of the type we have today is even available --

12 THE COURT: I don't want to talk about metadata in
13 1994.

14 MR. JOHNSON: One of the things, Your Honor, and I
15 want to get back to this meet and confer when they pulled this
16 out as a cudgel to use against us with respect to the
17 objections, Mr. Tulchin wasn't there, I was. When they raised
18 the issue of the lack of dates on some of the documents and
19 lack of authors, I agreed to work with them and get our people
20 to work with them to find out the dates of the documents and
21 the author if there was any such information available. We had
22 supplied them, in this production process, virtually all the
23 metadata that was available from these tapes.

24 And they talk about some sort of, you know, the tapes
25 breaking down, this, that and the other. 76 tapes, 72 of them

1 were reproduced in their entirety. Four of the tapes from this
2 single day were reproduced substantially. They had small
3 sections that we weren't able to get. But again, had this been
4 a matter of complaint in a timely fashion, we could have
5 addressed any objection they had.

6 THE COURT: What about the Mr. Tulchin's point that
7 in terms of the developers saying that they needed the name
8 place extensions, and there's no contemporaneous evidence that
9 they complained of that, how is that handled at trial?

10 MR. JOHNSON: There is tremendous amounts of
11 contemporaneous evidence that they complained about it at the
12 time. In fact, it's kind of interesting, they really don't
13 like this Microsoft bad acts file kept by Mr. Richardson, it is
14 filled with documents complaining about the name space
15 extensions and what had occurred here. There are status
16 reports from employees complaining about this action and how it
17 really prevented them from doing what they wanted to do. The
18 notion that there isn't multiple documents addressing the name
19 space extensions, and some documents addressing the printing
20 issue, and some documents addressing the logo issue, and why we
21 thought that was not right to have an NT compatibility
22 requirement, are replete in the exhibits of the parties in this
23 action.

24 It is simply not true -- and this is what I mean
25 about getting into the merits of spoliation, that's a fact

1 intensive process. There has been no proof offered, Your
2 Honor, that there are any gaps in the evidence. Or that
3 something is missing. You're going to hear from these
4 developers. These are the kind of guys that put their nose to
5 the grindstone every day. And when Microsoft pulled these
6 extensions, and they said you can't go down that road anymore,
7 they put their nose to the grindstone to find another way. It
8 is not in their nature to sit and complain when Microsoft
9 presents and says we're not going down that path, we're going
10 to -- we may break these APIs, you have to stop using them.
11 What else is the developer to do but turn around, march down
12 the road and try to get around the mountain in another way?

13 And that's what these gentleman did. They're not
14 thinking about antitrust bad acts. They don't know that Mr.
15 Gates has withdrawn these extensions because he wants to
16 advantage Office, and he want technologies hurt Lotus,
17 WordPerfect, Novell. They don't know that. But, in fact, when
18 the -- when inquiries are made about bad acts that Microsoft
19 has engaged in, these acts come up over and over and over
20 again.

21 In fact, we'll even see in one of the exhibits we're
22 going to discuss later today, which we already looked at a
23 little bit, DX-1, which they like because it says nothing
24 hurting our products, which is after we sold WordPerfect and
25 Quattro Pro. That one of the items in the list of things that

1 are hurting their products is the name space extensions. And
2 they talk about that in the context of GroupWise, because
3 Novell still owned GroupWise.

4 And so it was relevant to point out that Microsoft
5 had hooks that they had originally offered us, and then
6 withdrew them. And now we see that Microsoft's applications
7 are using them, and they're now republishing them after taking
8 them away from us for a year and a half. So to say that there
9 is no reference to the problems caused by these name space
10 extensions or the printing or the logo is just factually false.

11 And this is why, Your Honor, in a spoliation motion
12 it requires deep analysis. It requires jumping into. And the
13 fact here is they waited until the eve of the trial to do
14 this --

15 THE COURT: Tell me a little bit more about what
16 happened in 2008, what Microsoft -- I really just don't -- I've
17 read it but I don't know enough, in terms of what Microsoft
18 asked you to do and what you did, and what Microsoft didn't ask
19 you to do, in terms of you now say you could have searched
20 more.

21 MR. JOHNSON: Sure, we could have, in fact --

22 THE COURT: Did you do what Microsoft asked you to
23 do, back in 2008?

24 MR. JOHNSON: Did I do what Microsoft -- Microsoft
25 did not ask me to do anymore than I did.

1 THE COURT: So --

2 MR. JOHNSON: I brought to their attention --

3 THE COURT: That answers my question. You brought
4 the problem to their attention.

5 MR. JOHNSON: Yes.

6 THE COURT: You said what you have done and they
7 didn't ask you to do anymore.

8 MR. JOHNSON: They did raise complaint, I want to
9 make that very clear. There are some letters from Mr. Holley
10 in which he says, you know, you're only doing one maybe you
11 should do some more, blah, blah, blah, there's some complaints.
12 But none of those complaints were ever pressed. None of them
13 resulted in anything more than a letter from Mr. Holley. And
14 my answering letter saying here's what we're doing. We're
15 going to use search terms, I'd like you involved in that
16 process. And Mr. Holley and I met and conferred on the search
17 terms. And they offered search terms to add to our list of
18 search terms, which were all added. And that was sent off to
19 the experts, which by the way, this process took months. The
20 notion that we could do this now is absurd. Went through this
21 process. And it's not like we didn't produce a lot of papers
22 here, Your Honor. We produced over 20 million pages of
23 documents.

24 THE COURT: I -- that argument never impresses me,
25 because you give a lot of hay and no needle, but that's true on

1 both sides.

2 MR. JOHNSON: The point is here, Your Honor, if
3 Microsoft saw gaps in the evidence, or Microsoft felt that we
4 had somehow engaged in some spoliation, after all, he just
5 acknowledged they took the deposition of Mr. Lundberg and he
6 told them the things he told them. If that didn't cause them a
7 problem back when it happened, and they didn't raise that issue
8 with the Court in a timely fashion, why is it that we're here
9 now having to address that issue. Why isn't it when Mr.
10 Lundberg said that we didn't -- to my knowledge he said, by the
11 way, that he thought that the notice to, you know, hold
12 documents didn't go out until much later.

13 If that raises a spoliation concern, why weren't they
14 rushing into court? Why weren't they at least raising the
15 issue with me? They didn't do that. They didn't seek to meet
16 and confer on the subject. They didn't bring a motion before
17 this Court. You know, litigation choices are made, but you've
18 got to live with your choices. You can't turn around and on
19 the eve of trial surprise somebody and demand a instruction
20 that is devastating, and frankly, personally insulting that we
21 didn't do everything in our power to produce the documents
22 which they requested, which we did.

23 So, Your Honor, you know, getting back to the *Goodman*
24 case, Magistrate Grimm went through the factors you should
25 consider. I think they fail every one. And the explanation

1 for not raising it sooner is these Bushman docs? Mr. Tulchin
2 tried to act like there were more docs than I talked about.
3 There were 16 total, six was in the first installment --

4 THE COURT: Well, we don't know. Mr. Tulchin's
5 position is we don't know, there may be more. That there's 16
6 they know of. And of those they include a business card.

7 MR. JOHNSON: They include a business card, his
8 employee of the year nomination, it includes something called
9 the last harpoon, which was apparently some NORA article that
10 appeared in some publication. I don't know what the heck that
11 was. It certainly wouldn't have been produced on the servers
12 of Novell. And with respect to all the 16 documents, the only
13 one they want to talk about is a -- is a document that is a
14 draft. And on its face you can see it dealt with Middle East,
15 South Africa, Finland, Denmark and Norway. Right, Your Honor,
16 we didn't have tapes from the servers in Europe. So this draft
17 document was not produced.

18 That is hardly a spoliation motion. The notion that
19 Mr. Tulchin doesn't have a boatload of documents that he's
20 going to use to try to show that we were quote, "late to
21 suites," by the way, Your Honor, that may factor into some of
22 your thinking. This whole case is going to be centered around
23 the suite issue, and what the suites are, and how these office
24 productivity applications were packaged in suites for the
25 marketplace. He's got a boatload of documents about that.

1 This document does not add anything to that. And it's one
2 document.

3 THE COURT: Anything further, Mr. Tulchin?

4 MR. TULCHIN: Just very quickly, Your Honor. Thank
5 you. A few quick points. Mr. Johnson says that Mr. Holley's
6 complaints amounted to blah, blah, blah, in the letters. And I
7 won't go through the letters. They're available for the Court
8 as exhibit to the papers. But we did complain at the time.
9 And we did think much more could be done and should be done.
10 And then Mr. Johnson says, well, these -- we didn't have a lot
11 of documents, there's only one that Mr. Bushman had that's
12 really important. And it's a draft, which of course begs the
13 question of what else is missing.

14 Lundberg testified in his deposition that no
15 retention notice went out until around 2004. There's no
16 dispute that Novell was thinking about this case in 1994, 5 and
17 6. There's no dispute that they had a retention obligation
18 then. And merely because backup tapes exist doesn't mean that
19 all documents have been captured on those tapes. Clearly they
20 weren't. Counsel just said that, we didn't have backup tapes
21 from Europe. So nothing can be down now, or back in 2008, to
22 fix the fact that, for example, this Bushman document was never
23 produced. Whatever documents were discarded in those ten
24 years, until 2004 when the retention notice first went out,
25 those documents are gone forever, unless they happen to be on

1 the tapes. We don't know what's missing.

2 And, finally, again Your Honor, we're here on a
3 motion to strike. The efforts being made to avoid the merits
4 of this, I think are maybe Herculean or heroic, but the truth
5 is there really isn't any answer to the fact that spoliation
6 occurred. The question now is, I think, what the proper remedy
7 is. I'm happy to think about the Court's suggestion. I don't
8 think that counsel for Novell said the same, or responded to my
9 question about Mr. Lundberg, but maybe those are ways of
10 dealing with it, Your Honor.

11 THE COURT: Well, I just think it's a little late to
12 raise this, so I'm going to grant the motion to strike.
13 However, I may let in, if Microsoft wants to put it in, the
14 fact that no notice went out until 2004. And if you -- and
15 presumptively to go with that, a stipulation that there was
16 retention obligation when they first thought of the litigation.
17 So the point -- it provides a context in which
18 cross-examination can be conducted of people. If, in fact, Mr.
19 Johnson -- if Novell takes a position that there was no
20 retention obligation back in the '94, '95 time period, then he
21 can brief that. And I'm not saying that -- but I'm not going
22 to give a spoliation instruction, I think under the
23 circumstances Mr. Johnson is right, it's untimely.

24 On the other hand, in the context of the case, if in
25 fact -- I mean, Novell did keep some things, they didn't keep

1 others. Well, they didn't meet their obligation allegedly,
2 which was upon them when they were taking the bad acts files.
3 And if there is clear evidence in the deposition of the lawyer
4 Lindberg or Lundberg, whatever, that notice didn't go out until
5 2004, and it's agreed there was an earlier obligation I may
6 allow that and let Microsoft argue that, but I'm not going to
7 give a spoliation instruction. So the motion is granted.

8 MR. JOHNSON: Thank you, Your Honor.

9 THE COURT: What's next.

10 MR. JOHNSON: Should we do exhibits?

11 THE COURT: Oh --

12 MR. JOHNSON: Sigh. This isn't actually going to
13 take very long, Your Honor.

14 THE COURT: I may not -- I think I left them back in
15 the office. I'll go get them.

16 (Pause in the proceedings.)

17 THE COURT: Is everybody ready? Okay. And let me
18 say in terms of the prior ruling, I don't think what happened
19 in 2008 is particularly relevant. I mean, the question is
20 because back, you know, the question is whether there should
21 have been a direction to retain all relevant documents, and so
22 therefore, whether or not they were on the backup tapes really
23 isn't the issue, because we don't know that -- you know, they
24 may have been there but may not have been. As I say, I think
25 Mr. -- I understand the resolution reached by you all, frankly,

1 I think both sides were entirely reasonable.

2 MR. JOHNSON: Thank you, Your Honor. Your Honor,
3 this I don't think will take as long as perhaps we had
4 initially thought, there had been some pretty clear indications
5 from the Court with respect to some of these documents. And
6 there's also been some concessions by the parties that have
7 illuminated some objections to certain exhibits. But the first
8 one we're going to consider is actually one I just talked about
9 a few moments ago, which is Defendant's Exhibit 1. It is tab
10 A, Your Honor, to our supplemental memorandum regarding
11 objections to the opposing party's trial exhibits. Do you have
12 that, Your Honor?

13 THE COURT: I do.

14 MR. JOHNSON: This is DX-1, and we talked about this
15 the last time. And we think that this doc should be excluded.
16 It is a part of Ryan Richard's file with respect to the
17 Department of Justice investigations of Microsoft. And it was
18 his notes, his reflections with respect to the interview of
19 these two GroupWise developers in May of 1996. And that's
20 pretty significant, Your Honor, because by this time
21 WordPerfect and Quattro Pro have been sold. So Microsoft likes
22 this because, of course, the first sentence says "No big issues
23 that are harming our products." And that, of course, is Mr.
24 Richardson's reflections with respect to what two GroupWise
25 developers are saying. Not terribly significant in and of

1 itself but more importantly --

2 THE COURT: What product was there other than
3 GroupWise?

4 MR. JOHNSON: None that are relevant to this case,
5 Your Honor, there's NetWare. But you know this is GroupWise
6 because --

7 THE COURT: No, no, I'm just being like Clarence
8 Thomas. It says "harming our products" as opposed to "our
9 product." And if, in fact, GroupWise was the only thing being
10 contemplated why do they say --

11 MR. JOHNSON: Well, GroupWise -- there are multiple
12 products in GroupWise. There's NetWare products. I mean,
13 Novell has many, many products, Your Honor. So don't put too
14 much significance on the "s".

15 THE COURT: Okay.

16 MR. JOHNSON: What we can be clear about.

17 THE COURT: There were other products other than
18 GroupWise at the time.

19 MR. JOHNSON: Sure. But what we can be clear about
20 is they couldn't have been talking about WordPerfect or Quattro
21 Pro --

22 THE COURT: Because they had been sold.

23 MR. JOHNSON: They had been sold. They're gone. So
24 for that reason we think this document is irrelevant and should
25 not be shown.

1 But I did want to point out, Your Honor, because
2 we've just had some argument where they've said there are no
3 documents describing this name space extension problem and the
4 complaints about them. If you would look at this document,
5 Your Honor, No. 3. I'd like to read it, "The Win 95 -- that's
6 the Windows 95 beta, that's the M6 beta, Your Honor -- had APIs
7 for Explorer -- that's the Windows Explorer -- so that GW --
8 GroupWise -- could run with the Explorer" -- Microsoft's
9 Explorer. Then they announced that they were taking out those
10 APIs. Four weeks ago -- and remember, Your Honor, we're in May
11 of 1996 now, Windows 95 was released in August of 1995 -- "Four
12 weeks ago they released documentation for those same APIs in
13 the form of a mail reader. It appears they were never taken
14 out. Explorer -- meaning Microsoft's explorer -- and other MS
15 apps -- meaning Microsoft applications -- have been using
16 them."

17 THE COURT: Why don't you withdraw your objection?

18 MR. JOHNSON: Because this has language that they
19 will distort. I don't need this one. I've got dozens of
20 these. They've got language that they will distort "No big
21 issues are harming our products. Lots of little things that
22 seem like bullying tactics. When we push hard enough and long
23 enough they always come around." Again, that's the reflections
24 of Mr. Richardson with respect to what two GroupWise developers
25 were telling him in May of 1996. That has zero relevance to

1 the products at issue in this case. And for that reason we
2 think --

3 THE COURT: I'm just going to -- it's -- in the third
4 sentence, who is the "they" that's being talked about,
5 Microsoft or people -- the software developers at Novell.

6 MR. JOHNSON: No, Microsoft, they is Microsoft. Then
7 they meaning Microsoft, announced that they were taking out
8 those APIs, that was Mr. Gates' decision. Of course, these
9 guys didn't know that. They just got word, they were GroupWise
10 developers, they were going to use these extensions to hook
11 into the Explorer. They were just told Microsoft has announced
12 they're taking out those APIs. Now, technically that wasn't
13 right. They just took away the documentation for the APIs and
14 told ISVs they shouldn't use these because they could change it
15 any minute. We're not going down that road. We're going to
16 write these APIs. Then, in accordance with Mr. Gates' plan,
17 they kept developing to these APIs for their own products.

18 And then long after Windows 95 was released, long
19 after the other application suites in the market were unable to
20 get to market in time, Microsoft republished the same -- the
21 same APIs and the same documentation that they said that's a
22 road we're not going down back in 1994. And our GroupWise
23 developers see this and they said, we're just getting these and
24 they are the same ones. And they're using them. They're using
25 them in their Explorer, and Microsoft applications are using

1 them. Exactly the plan of Mr. Gates to withhold that
2 functionality from the ISVs in order for it -- his applications
3 to benefit from their use.

4 THE COURT: Excuse me, I asked the wrong question
5 before, I meant the fourth sentence. Does "they" refer to
6 Microsoft or to Rich and Lynn.

7 MR. AESCHBACHER: Did they always come around?

8 THE COURT: Does anybody know?

9 MR. PARIS: Which they, Your Honor?

10 THE COURT: "If the DOJ wants to come and ask them
11 questions they would be happy to talk to them. I honestly just
12 don't know. Maybe there's not an answer to that question. I'm
13 not sure it's relevant to the present inquiry. Clearly "they"
14 in the previous sentence refers to Microsoft, but then at the
15 bottom, Rich and Lynn both acknowledged that one of the
16 difficulties is just keeping up with the volume. It makes more
17 sense that --

18 MR. JOHNSON: Mr. --

19 THE COURT: -- talking about Novell employees rather
20 than Microsoft employees.

21 MR. JOHNSON: Yeah, I think it is a reference to
22 Novell employees. Mr. Hume was actually deposed with respect
23 to this. And by the way, he said he wouldn't have said any
24 such thing, as it is contained in the first paragraph here. In
25 fact, he said there were lots of things harming the products

1 and went on about that in considerable detail at his
2 deposition. But, again, we think it's a misuse of this
3 document to try to use this language in the first paragraph to
4 suggest to the jury that a reference to no big issues that are
5 harming our products refers to the issues in this case.

6 THE COURT: No, I understand. Had Rich and Lynn
7 worked on WordPerfect or Quattro Pro, do we know that from the
8 record?

9 MR. JOHNSON: Rich and Lynn did, they were
10 GroupWise --

11 THE COURT: They were GroupWise the whole time? You
12 don't know.

13 MR. JOHNSON: I'm sorry, Your Honor, I couldn't --
14 they did move these people around occasionally. But at least
15 at their deposition the total focus was GroupWise.

16 THE COURT: Okay.

17 MR. JOHNSON: And that's all we talked about.

18 THE COURT: All right. Mr. Paris?

19 MR. PARIS: Thank you, Your Honor.

20 THE COURT: Ms. Bradley you're free to sit up here if
21 you want to.

22 MS. BRADLEY: I didn't want to interrupt.

23 MR. PARIS: May it please the Court, Adam Paris,
24 Sullivan and Cromwell for defendant Microsoft. I think the
25 conversation you just had with Mr. Johnson is actually

1 illuminating and demonstrates why this document is, in fact,
2 relevant. But starting from first principles, the fact that we
3 did manage to discover in Mr. Richards bad acts file one
4 document that we think is, in fact, helpful to us, I mean, it's
5 an admission of party opponent and we're allowed to use it.

6 THE COURT: If it pertains to WordPerfect and Quattro
7 Pro.

8 MR. PARIS: If it tends -- if it's relevant to this
9 case.

10 THE COURT: I know --

11 MR. PARIS: And one of the reasons it's relevant to
12 this case, Your Honor, is because of the name space extensions,
13 right, that were allegedly withdrawn or, you know, in the
14 language of this document that were taken out, were not a big
15 deal to Mr. Hume and to Monson, even if we take it at Mr. --
16 take Mr. Johnson at his word that this only involved GroupWise,
17 if it wasn't a big deal to them, then that would tend to show
18 that it may not have been a big deal to others at Novell or
19 WordPerfect, right. I mean, it's the same -- if we take him at
20 his word, and again, we're not sure of that because there's
21 been no testimony of that tact.

22 THE COURT: In a way yesterday I ruled against you
23 and I let in facts or evidence relating to claims not being
24 pursued. Your position here would be the same, if the evidence
25 even if it relates to GroupWise, it's relevant to the defense.

1 MR. PARIS: Absolutely, Your Honor. And again, there
2 are other statements in this document that are, in fact,
3 important. Again, if they want to bring Mr. Hume to trial to
4 say otherwise, or Mr. Richards to say, oh, I got it wrong. I
5 mistranscribed this interview. Then we'll deal with it there.

6 But the penultimate paragraph is actually extremely
7 important to the overall, whether you want to call it ethos or
8 themes that are at issue in this case. Richard Lundberg
9 acknowledged that one of the difficulties is just keeping up
10 with the volume of material Microsoft produces. It is hard to
11 prove that Microsoft is maliciously keeping things away from
12 people because there was this constant flow of information from
13 Microsoft to people at Novell. Part of what they've said,
14 again, in this case, is this head fake, this withdrawal of
15 information, you know, we were misleading them, this whole
16 notion that there was some fraud at issue here, this tends to
17 rebut that. And so we think it's relevant for that reason.

18 THE COURT: Mr. Johnson?

19 MR. JOHNSON: Yeah, it is hard to prove that
20 Microsoft is maliciously keeping things away --

21 THE COURT: But certainly not impossible.

22 MR. JOHNSON: Not impossible when you can look at
23 their own e-mails. When you can see behind the curtain, it's
24 pretty easy to prove. And that's what we will prove in this
25 case. Look, or objection to this is, they want to show this

1 and say no big issues are harming our products. And it cannot
2 be the products that are in issue in this case. And that just
3 is irrelevant to this proceeding.

4 THE COURT: Okay. I'm going let it in on the theory
5 that what's sauce for the goose is sauce for the gander. Even
6 if it's GroupWise, I think you've got good arguments say, look,
7 A, it's wrong, B, it's GroupWise, C, this is a conclusion based
8 upon not being able to look at Microsoft's files. I mean,
9 everything you've told me you can tell the jury. And I have
10 complete confidence in the juror -- if you're right, they're
11 going to find you right. I'm going to let the document in.
12 And you can obviously point out the products were not included,
13 because they didn't work on Quattro Pro and WordPerfect and
14 they had been sold by that time. I absolutely understand. But
15 I think there's enough -- if this is the perception of the
16 Novell software developers that vis-a-vis GroupWise, at least,
17 they were being given information. I'm going the let it in.

18 MR. PARIS: Thank you, Your Honor.

19 THE COURT: But I'm not sure it's worth much.

20 MR. JOHNSON: We'll have a very interesting
21 cross-examination about that document.

22 THE COURT: Just lengthened the trial, great.

23 MR. JOHNSON: Should be fine. Your Honor, the next
24 doc we're going to talk about is Defendant's Exhibit 109, this
25 is Exhibit D. This is the one where some --

1 THE COURT: By the way, if I didn't rule -- I don't
2 know if I did, I didn't see them in the exhibits here. I don't
3 want that -- there can be reference to that list of employees
4 whose salaries were being cut, but I don't want the document to
5 come in. I just think on 403 grounds -- I don't know if I
6 ruled upon that last time. But clearly if you want to show
7 mismanagement by that, that's fine. But I think I agree with
8 Novell that the document itself is tangentially relevant and
9 could be unfairly prejudicial.

10 MR. JOHNSON: Your Honor, you've just dealt with one
11 of the exhibits so thank you very much.

12 THE COURT: I didn't see it reattached.

13 MR. JOHNSON: It is reattached in their papers, Your
14 Honor.

15 THE COURT: Fine.

16 MR. JOHNSON: In Microsoft's papers.

17 THE COURT: It can be alluded to, but it just doesn't
18 come into evidence. The event can be alluded to.

19 MR. PARIS: We understand, Your Honor.

20 MR. JOHNSON: Your Honor, this is a report of an
21 employee, a Rod Shiftman, a Novell employee, I guess, Rod
22 Shiftman.

23 THE COURT: Can the issue here be handled by
24 redaction? I mean, I take it it's a very limited purpose for
25 which -- it may not be because I understand that you say that

1 Mr. -- the guy was given, Mr. Richter was not a Microsoft
2 employee, but --

3 MR. JOHNSON: Yeah, I mean --

4 THE COURT: He did seem to have access to Microsoft,
5 I'm just wondering if whatever you're concerned about in the
6 memo, since it's a very limited purpose for which Microsoft
7 wants it in, whether it can be handled by redaction.

8 MR. JOHNSON: Your Honor, I mean, what you just said
9 is what troubles us. You said he appears to have access to
10 Microsoft. And that's the point. We'd like to be able to
11 cross-examine this man with respect to his access to Microsoft
12 if this is going to come in, to provide some sort of notice to
13 us. I don't see how a third party, is not a Microsoft
14 employee, provides us with notice with respect to their
15 intentions, Microsoft's intentions --

16 THE COURT: But from the context of the memo it
17 appears that your employee thought that they were providing
18 notice.

19 MR. JOHNSON: Well, two employees --

20 THE COURT: -- both critical comments because he was
21 not a Microsoft employee, but also -- imparted a lot of insight
22 into Microsoft's directions and priorities as well.

23 MR. JOHNSON: And, Your Honor, those two employees
24 that apparently only two people attended this session, whatever
25 it was, neither has been deposed in this case, neither is

1 listed as witnesses. So we're at a loss. They're going to
2 waive this document in front of the jury and say we had notice
3 of some sort of intention with respect to Windows NT being
4 where we had to go.

5 THE COURT: You all are not putting it in for the
6 truth?

7 MR. PARIS: Correct, Your Honor. We're not --

8 THE COURT: Is it true?

9 MR. PARIS: What you just said is correct. We're not
10 putting it in for the truth.

11 THE COURT: Is it true NT became the future
12 direction?

13 MR. PARIS: I mean --

14 MR. JOHNSON: No.

15 MR. AESCHBACHER: Yes, Your Honor. And Windows XP is
16 when the Windows 95 stream and the NT stream came together as
17 NT, except they renamed it. And since then it's all NT.

18 THE COURT: And Chicago is?

19 MR. AESCHBACHER: Just Windows 95.

20 MR. JOHNSON: We would dispute that, Your Honor,
21 Windows NT never amounted to anything. Now, Windows XP did,
22 but not Windows NT. In fact, one of the things in this case is
23 the claim that some sort of incompatibility with Windows NT was
24 widely --

25 THE COURT: That's what I'm wondering. I just want

1 to understand the significance of this. Is that where this
2 really comes about, that the compatibility requirement was
3 important is that why this is deemed an important document by
4 both sides?

5 MR. HOLLEY: Yes, Your Honor, I don't mean to
6 interrupt, but what Mr. Johnson just said is flatly wrong.

7 THE COURT: Okay. Wait until your time, but I'm just
8 trying to understand now the significance of this comes up with
9 the compatibility of the second claim, the logo claim.

10 MR. HOLLEY: That's correct.

11 MR. PARIS: That's precisely correct.

12 THE COURT: Go ahead.

13 MR. JOHNSON: And, Your Honor, at the time, of
14 course, of the logo discussion, Microsoft's own executives
15 called Windows NT sales anemic. They were a niche, niche
16 product, which nobody was using, frankly, because they were
17 using Novell's product, NetWare during the time period in
18 question. So this document from 1995, I don't understand how
19 it's supposed to provide us notice from Microsoft when it isn't
20 even a Microsoft --

21 THE COURT: There's also the question of -- maybe if
22 it is in effect being introduced to show that NT was the future
23 direction, that therefore, compatibility was important, I'm not
24 even sure why notice to you of that fact is relevant. What's
25 relevant is the fact that they want to get in, through this

1 document, that it was the future direction, because they want
2 to show that, therefore, the compatibility on the -- being able
3 to meet NT was important. So I -- I'll hear from Mr. Paris on
4 that, but -- well, let me hear from Mr. Paris on that now. I'm
5 not sure why notice is what's at issue here and really in this
6 document.

7 MR. PARIS: The reason why this is important for
8 notice, Your Honor, is because it's a contemporaneous document
9 from May of 1995 that rebuts is charge that they've leveled
10 against us in this case that the reason we didn't grant them a
11 logo, right, was pretextual, right, because their thing
12 wouldn't run on NT and somehow that was unfair. The point of
13 this is simply -- it's a limited purpose document, Your Honor,
14 and you were exactly right, if you want to deal with some
15 redactions, I have no problem with that at all. We were
16 telling the world --

17 THE COURT: I was suggesting redacting what's
18 important, so forget it.

19 MR. PARIS: Oh, then I do not agree with that, Your
20 Honor. But the point is simple, to show that as of early May
21 '95, at this architecture's, developer's conference this is
22 something we were telling the world, this wasn't something we
23 were just telling Novell that Novell didn't hear or shouldn't
24 have believed, we told the world that the place Microsoft was
25 going was NT.

1 THE COURT: I hear you, but isn't there a hearsay
2 issue because you allegedly were telling that to Jeff Richter,
3 who is not going to be a witness and who has not even been
4 deposed.

5 MR. PARIS: It's not a hearsay issue, Your Honor,
6 because it doesn't matter whether or not we, in fact, went to
7 NT. We did, but that's not what's important. What's important
8 is when we were engaged in the logo discussion, such as they
9 were, the logo license discussions with Novell, there cannot
10 be -- or at least this is relevant evidence to rebut the
11 notion, right, that they did not know of the significance, at
12 least in Microsoft's view at the time, of the need to be dually
13 compatible with 95 and NT. Whether or not that, in fact,
14 turned out to be true, that you know, NT became the future or
15 didn't become the future, doesn't matter. It shows essentially
16 that at the time --

17 THE COURT: What's important is that Microsoft saw it
18 as the direction of the future. And you've got to -- I mean, I
19 take your point that you were telling the world including Jeff
20 Richter.

21 MR. PARIS: Right and Rod Shiftman.

22 THE COURT: But I don't -- I don't see -- it's
23 clearly just a hearsay -- I accept everything you have to say,
24 but it would seem to me that to prove that Microsoft was
25 telling this to everybody, including Jeff Richter, I need

1 testimony from Jeff Richter. And they have a right to
2 cross-examine Jeff Richter how did you know that.

3 MR. PARIS: Again, Your Honor, it's not to prove the
4 substance, right, of whether -- you know, whether or not it was
5 in fact -- let me back up --

6 THE COURT: I agree with that. But what it is truth
7 about what Microsoft thought.

8 MR. PARIS: Not proof of what Microsoft thought --

9 THE COURT: It's not important whether NT did become
10 the wave of the future or not, but at the time that Microsoft
11 thought that it was going to be the wave of the future,
12 therefore, it was not reasonable for them have a compatibility
13 restriction. It seems to me that for that you have to have the
14 person to whom it was allegedly told.

15 MR. PARIS: I don't disagree with Your Honor that
16 that -- if used for the purpose that you just enunciated that
17 would be hearsay. There would be an exception there that we
18 haven't briefed, because we don't plan to use it that way, this
19 document. But that would be some sort of present sense
20 impression or state of mind exception to 803. You'd have that
21 to apply to that. But I'm not discussing that simply because
22 that's not why we want it, Your Honor. We don't want to show
23 that this is what Microsoft believed at the time. We want this
24 document to show that this is what Microsoft told the world at
25 the time.

1 THE COURT: But you have to have Richter -- Richter
2 was the world.

3 MR. PARIS: But Shiftman wrote it down. And he wrote
4 it down in the course of doing his job for Novell. So that
5 would rebut any charge that they may level at us at trial that
6 they're going to say this was news to us. Well, it wasn't news
7 to you, you had Shiftman at this trial who heard it. And by
8 the way, at that same conference where Microsoft didn't just
9 tell Shiftman, told everyone --

10 THE COURT: That's where I don't know the case well
11 enough. Where does become relevant it was news to us? That
12 doesn't seem to me to be the substance of the claim. The
13 substance of the claim is that it was an unreasonable
14 restriction. I mean, I just -- from what I now know about the
15 case, the fact that it's news to Novell is not the issue. That
16 what this really, what you want it for is to show that, look,
17 it was true, and it's a perfectly reasonable requirement of the
18 logo to have it compatible, because this was the waive of the
19 future. And I don't quite know how the fact that it's news to
20 Novell when they find out is relevant.

21 MR. PARIS: That's the substance of the charge. But
22 if there's any contention to Novell that this was a surprise to
23 us --

24 THE COURT: Does anybody know where Richter is now?

25 MR. PARIS: I do not.

1 THE COURT: Okay. I understand you're on the eve of
2 trial, unlike trying to recreate all these documents. I'm
3 going to sustain the objection. But if you can find Richter
4 and you want to depose him, there are plenty of lawyers on both
5 sides, I'll allow that. Because this to me is an important
6 document. I understand what you want it in for. But I think
7 there's a hearsay component. And I'm not going to let it in,
8 but it seems to me people can -- it seems to me this is a short
9 thing, but they're entitled to cross-examine.

10 MR. PARIS: Thank you, Your Honor.

11 THE COURT: So the motion is granted, but I'm
12 granting leave if you all -- if Microsoft wants to depose
13 Richter on this limited issue, you can.

14 MR. JOHNSON: Your Honor, the next document --

15 THE COURT: Sorry, I'm being namby pamby. I realize
16 you all are busy, but this could be an important document. It
17 is about truth, if nothing else.

18 MR. JOHNSON: Your Honor, Exhibit E to our papers,
19 we've looked at before, and these are important documents with
20 respect to the printing functionality, which was not provided,
21 which was promised and promised and promised and then not
22 provided in Windows 95. Microsoft made an objection that
23 somehow these were documents prepared for litigation purposes.
24 And except for the cover page, that's simply not true. The
25 cover page is actually, it's not lawyers, it's two nonlawyers

1 talking to each other, but it is in connection with Mr. Jensen
2 forwarding --

3 THE COURT: As I understand, do you really care about
4 the cover page?

5 MR. JOHNSON: No, not at all.

6 THE COURT: I didn't think so.

7 MR. JOHNSON: It's the underlying documents, which
8 he's simply forwarding, here's something you ought to look at.
9 And these documents were created during the events in question
10 by Mr. Jensen and his colleagues that were working on the
11 printing problem. So the cover memo is of no moment. And I
12 guess it was only put in here because that's the way the
13 document was produced. But I'd be happy to take the cover page
14 out. But the underlying documents --

15 THE COURT: My understanding is these -- your
16 position is these were contemporaneous documents, not prepared
17 by Mr. Jensen. Mr. Jensen simply compiled them and sent them
18 on.

19 MR. JOHNSON: Exactly. Simply compiled them saying
20 you asked about stuff that was a problem. Here's some stuff
21 from when this happened that you should take a look at. And so
22 this is not simply documents created for this DOJ inquiry.
23 Now, they do --

24 THE COURT: They were kept in the bad acts file, is
25 that how they became?

1 MR. JOHNSON: I don't know that for -- yes, Your
2 Honor, they were kept in the bad acts file. I take that back.

3 THE COURT: That's why they exist?

4 MR. PARIS: Yes, Your Honor.

5 THE COURT: Now Microsoft wants them in.

6 MR. PARIS: No, this is a plaintiff's --

7 THE COURT: Excuse me, you want them in. Plaintiff's
8 Exhibit.

9 MR. JOHNSON: So it's the underlying documents which
10 are important, Your Honor, not the cover memo. And this is not
11 to say that these documents weren't looking at the bad acts of
12 Microsoft. I mean, they clearly were. We were -- the
13 developers at Novell, and this again is, remember we were told
14 there aren't any documents complaining about these matters,
15 these are the documents complaining about the printing problem.
16 These are very important.

17 THE COURT: I'll hear from Mr. Paris, this
18 re-enforces my view that Microsoft is entitled to something on
19 the nonretention.

20 MR. PARIS: Thank you, Your Honor. I was actually
21 going to --

22 THE COURT: I mean, I think, in terms of you had --
23 you know, we've got cherry picked -- from Microsoft's point of
24 view, cherry-picked documents that found their way into the bad
25 acts file. It re-enforces the view that I expressed before

1 that although I'm granting the motion to strike the spoliation
2 instruction, that I think Microsoft is entitled to something.
3 The fact that there was a retention obligation and the fact
4 that notice didn't go out until later. Mr. Paris?

5 MR. PARIS: Thank you, Your Honor. You actually
6 ended with exactly where I was going to begin, this re-enforces
7 the point of Mr. Tulchin's argument a few moments ago.

8 THE COURT: But in the meantime you want me to strike
9 the document.

10 MR. PARIS: In the meantime is the PX-316 itself. I,
11 frankly, can't believe we're still talking about this document.
12 It's one of these documents that was in the bad acts file that
13 was specifically prepared in anticipation of some sort of
14 litigation against --

15 THE COURT: But it does say --

16 MR. PARIS: I understand that, let me speak to that
17 specifically. In anticipation of litigation by the DOJ against
18 Microsoft. If you look at it, it sort of -- the document
19 itself doesn't make much sense. The cover memo from Jensen,
20 the subject is "DOJ Inquiry," it's dated July 13th, 1995. The
21 underlying document we have no idea when it was created,
22 because there's no testimony in the actual record as to it.
23 And it suffers from the problems --

24 THE COURT: That's hardly a ground for you to object
25 to the document.

1 MR. PARIS: Sure enough. But the fact is it appears
2 to have been created at some point a couple weeks earlier,
3 again, in response to this same DOJ inquiry where, you know,
4 apparently Novell was approached by the DOJ and asked to
5 compile information it may have had as to Microsoft's
6 anticompetitive conduct or not. And if you look at the last
7 document, this is dated even later than the first two. It
8 appears to have been prepared -- it says in there, it's in very
9 small type, but it says today, 8-17-95, so it's August 17th.

10 THE COURT: I'm sorry, where are you?

11 MR. PARIS: I apologize --

12 THE COURT: No, it's me, not you.

13 MR. PARIS: It's the last page. So it's the one
14 that's Novell and ends with 225, it's apparently -- this was
15 part of what Jensen was doing, was gathering information,
16 again, in anticipation of litigation against Microsoft by the
17 Justice Department, about what we supposedly told them, and how
18 we supposedly changed our positions, and when we did, created a
19 table.

20 And he has some notes there talking about, "It would
21 strengthen the case a lot more" -- I mean, this is no ordinary
22 course of business document -- "it would strengthen the case a
23 lot more if we had specifics from Rich Hume about his inquiries
24 of Microsoft concerning this same issue." He notes that the
25 date is August 17th as I said to you. There's a statement at

1 the end, which talks about, in parentheses, the very last
2 statement of the document, "The problem with putting this in
3 your table is that there is no single person that knows enough
4 of all the details to make it convincing." This is a -- right,
5 this whole thing is some sort of document that was compiled to
6 create some -- to help some lawsuit by the government against
7 Microsoft.

8 And we've cited a bunch of authority to Your Honor.
9 Two of the cases we discussed the last time, the *Gwathney* case
10 in our brief, as well as *Timberlake Construction versus*
11 *Fidelity*, and I'll give you the cite because I think that one's
12 the most relevant, 71 F.3d 335, the relevant discussion is
13 around page 341. It's a 10th Circuit case from 1995.

14 And it talks about that one involved correspondence
15 between parties immediately prior to litigation that were
16 clearly designed, you know, in anticipation of litigation. And
17 the essential holding was, you can't use your own hearsay
18 statements, that you generated in anticipation of litigation,
19 in a subsequent litigation. I think it's, frankly, a very
20 straight forward proposition. I'm surprised we're still
21 arguing about it. I have nothing else unless you have
22 questions.

23 THE COURT: Mr. Johnson.

24 MR. JOHNSON: Your Honor, Mr. Jensen, Stuart Jensen
25 is a named witness in this matter. He's going to come in.

1 They keep saying this was prepared for DOJ litigation. He will
2 testify otherwise.

3 THE COURT: How does he know?

4 MR. JOHNSON: He did this, he assembled these docs.

5 THE COURT: He assembled them, but he didn't prepare
6 the original.

7 MR. JOHNSON: I'm not certain about that.

8 THE COURT: I'm not sure, who wrote the -- who wrote
9 the letter to Adam or the e-mail to Adam?

10 MR. PARIS: I don't think we have any clue, Your
11 Honor. I mean, that's the issue with this document. If Mr.
12 Jensen is going to be here at trial, he can testify and we'll
13 cross-examine him. But not on this document, they can't --

14 THE COURT: Well, if he says he wrote it. And he
15 says it was not written in -- that it was contemporaneous, not
16 related to DOJ, that changes things.

17 MR. JOHNSON: Yes, Your Honor, that's exactly the
18 point.

19 THE COURT: Okay. I'm going to reserve ruling until
20 we see what happens at trial.

21 MR. JOHNSON: Thank you, Your Honor.

22 THE COURT: I agree with Mr. Paris's general
23 position, you can't use a document that was -- I read this as
24 the first page was collecting documents which previously
25 existed -- which were contemporaneously prepared if they

1 themselves -- the previous documents were prepared in
2 connection with the inquiry, I agree with Mr. Paris then it
3 becomes problematic. So I will sustain the objection but
4 subject to if Mr. Jensen's at trial you all want to examine him
5 about that, that's fine.

6 MR. PARIS: Thank you, Your Honor.

7 MR. JOHNSON: Thank you, Your Honor.

8 THE COURT: What's next?

9 MR. JOHNSON: I guess you're actually overruling the
10 objection, Your Honor, not sustaining the objection.

11 THE COURT: I think --

12 MR. JOHNSON: We get to use it at --

13 THE COURT: I'm sustaining the objection subject to
14 you producing the witness who can clarify.

15 MR. JOHNSON: Thank you, Your Honor.

16 THE COURT: I'm overruling the objection to the
17 extent that you can produce somebody who's going to testify.

18 MR. JOHNSON: Thank you, Your Honor. The next one
19 actually has been resolved. Microsoft has withdrawn its
20 objection to PX-324, which is tab F. So we don't need to talk
21 about that one.

22 MR. PARIS: That's correct, Your Honor. We -- just
23 to show that we take our cues from Your Honor, we withdrew to
24 this e-mail, Plaintiff's Exhibit 324.

25 MR. JOHNSON: And I think we've already heard Your

1 Honor understands that the --

2 THE COURT: For business record purposes, I
3 understand -- I think that Mr. Rakes is a very subtle man. I
4 read this as really what this is the same as a swallow of Coke
5 and you all have to rethink. I mean, I could see why he said,
6 but certainly not -- he's a subtle man. But I think he -- I
7 think he was trying to get -- I think it can be read as he was
8 trying to get Gates to invest --

9 MR. JOHNSON: Mr. Buffett to invest.

10 THE COURT: Mr. Buffett to invest.

11 MR. PARIS: May I be heard on that, Your Honor,
12 briefly?

13 THE COURT: Yes.

14 MR. PARIS: I know I feel -- I think I feel a little
15 bit like Jude must have felt, the Patron Saint of Lost Causes.

16 THE COURT: You can tell me why I'm wrong.

17 MR. PARIS: Here's the issue, Your Honor, frankly,
18 two issues, one legal and one sort of on the factual relevance
19 piece of it. Legally, again, it's very clearly a piece of
20 personal correspondence between Rakes and Mr. Buffett. When
21 you read it, and I know Your Honor has because you talked about
22 it yesterday, it's very clear that what Rakes is asking Buffett
23 is sort of to boil -- sum it all up, sort of what am I missing?
24 You won't invest in Microsoft, so what's wrong with our
25 business that you're afraid to invest. That's really what's

1 happening here.

2 So however you want to characterize it as he was
3 trying to get him to invest. His protestations that I'm not
4 trying to get you to invest were not true, or you know, sort of
5 he was being a little bit funny with that. That's not really
6 what's of any moment. Why it's important is simply because it
7 means that this document is not a Microsoft statement.

8 So it's not a party statement that they could use
9 that's of any relevance to this case under 801(d)(2). And it's
10 not a business record, a Microsoft business record under
11 803(6), because it's simply -- it's a piece of personal
12 correspondence between Rakes and Buffett. If the case were
13 Novell versus Jeff Rakes, of course this document would be
14 admissible. But the fact is not every piece of correspondence
15 between people, you know, is admissible and chargeable as to
16 their, you know, as to their employer, as to the company for
17 which they work. So I think that's first.

18 Second of all, you know, we do come back to this
19 issue of 403 based upon the fact that it's written years later,
20 after the events in this case. There's a lot in this e-mail
21 that, frankly, is not bad for Microsoft, sort of along the
22 lines of what Your Honor was talking about yesterday, right,
23 it's not that it's substantively bad, the discussion about the
24 moat is, of course, not helpful to us. You know, him taking up
25 Mr. Buffett's analogy that he used in his book and then sort of

1 trying to apply it to Microsoft. That's what happened here.

2 So I think it's misleading in the way that Mr.
3 Johnson explained he was going to use it in his opening or
4 whatever, is not fair, and it is going to mislead the jury into
5 believing that this was Microsoft's strategy in 1994 in 1995,
6 because years later one of its senior executives picked up a
7 book written by Warren Buffett and had a discussion about an
8 analogy in it, right, that that was the business model and that
9 was the plan of Microsoft years earlier, I think that is
10 misleading and I think that's unfair.

11 And so I think there is a legitimate 403 argument
12 that can and should be made, you know, as to this document. I
13 mean, whatever -- the jury will surely be asked to conclude
14 that because this man, Jeff Rakes, years later, you know,
15 thought -- had some thought of, you know, that was triggered by
16 a passage in Warren Buffett's book, that they're going to argue
17 that that's what Microsoft and Bill Gates was thinking in
18 October of 1994 when he withdrew documentation for the name
19 space extension APIs. And that's -- we think that's an unfair
20 use of this document. It's unfair and it mischaracterizes.

21 THE COURT: Well, I'd like to pun on this, but Mr.
22 Johnson wants to use it in his opening statement, we'll let it
23 in. I recognize the time problems. And Rake's position is
24 what? He's supposed to be going out and raising capital, isn't
25 that his job?

1 MR. PARIS: No, that wasn't his capital, he was the
2 head of sales. He was a senior executive in charge of sales.
3 He wasn't investor relations. He wasn't corporate investments.
4 It was nothing like that. He was selling -- and I will note
5 also there are other --

6 THE COURT: I was under a misapprehension on that,
7 but he was the head of sales.

8 MR. JOHNSON: He was the head of their business -- I
9 mean, he's a top, top Microsoft executive.

10 MR. SCHMIDTLEIN: He's the current head --

11 THE COURT: I'm not changing my ruling, but I -- but
12 that's what -- it was part of my mind --

13 MR. JOHNSON: I think he's the current head of the
14 Melinda Gates Foundation.

15 THE COURT: You want to get into that?

16 MR. JOHNSON: No, I don't, Your Honor.

17 MR. PARIS: I think we won on that one, Your Honor.

18 MR. JOHNSON: But this is a top guy here.

19 THE COURT: I understand there are 403 problems, I
20 understand, but I -- I'm letting it in, I think.

21 MR. JOHNSON: Thank you, Your Honor.

22 THE COURT: And I've been living with this for a long
23 time. I'm not -- this was the first time I saw really a
24 nonlawyer's view of what was happening, and I -- I'd object
25 too, vigorously, to its introduction. It doesn't entirely hurt

1 you in terms of what your big point is, look, this was a very,
2 very competitive industry, we weren't just taking oil out of
3 the ground like the Rockefellers did. We were creating a
4 product. In order to do that right we had to be on the top of
5 technology. And that is conveyed very effectively in this.

6 MR. PARIS: I don't disagree whatsoever on that
7 point, Your Honor.

8 THE COURT: But that doesn't go to the point, I think
9 that given his position, given the fact that I understand that
10 it is much later, but I really think this is a real insight
11 into what was going on.

12 MR. PARIS: I understand. Thank you, Your Honor. I
13 think that's it for evidence this for this morning.

14 MR. JOHNSON: You're done with all of yours?

15 MR. PARIS: I think that covered the ones that we had
16 outstanding.

17 MR. JOHNSON: Thank you, Your Honor.

18 MR. PARIS: Thank you, Your Honor. You want to
19 take -- let's take a short recess for Christine. I'm ready
20 whenever anybody else is. What's left is collateral estoppel
21 and hearing anything on the instructions.

22 MR. HOLLEY: I think that's right, Your Honor.

23 MR. JOHNSON: Thank you, Your Honor.

24 (A recess was taken.)

25 THE COURT: Okay. Collateral estoppel, I think from

1 the written papers I understand Microsoft's position, it
2 frankly seems to me more to go to the admissibility than the
3 collateral estoppel effect, is that -- wasn't that all about
4 whether or not stuff about Netscape and Java comes in? I could
5 be wrong. My recollection of the papers, that's sort of was
6 what Microsoft's complaint was. The response was to my
7 proposed collateral estoppel log.

8 MR. TULCHIN: Yes, Your Honor, I think the paper that
9 this memorandum that we submitted a couple weeks ago --

10 THE COURT: No, no --

11 MR. TULCHIN: I'm sorry, couple days ago. It was
12 earlier this week, I'm getting confused. I'm sorry. I think
13 it might have been on Tuesday of this week.

14 THE COURT: Whenever. I just wanted to make sure in
15 my head --

16 MR. TULCHIN: Yes, because it really went to the Rule
17 404 issue, and to considerations of fairness that do arise once
18 you decide a finding of fact is subject to collateral estoppel.

19 THE COURT: Well, that I'll have to -- that is a fair
20 point that if you're -- that if you can't contest a fact and
21 they produce evidence, that's an issue which I'll have to
22 resolve. But Mr. Schmidtlein probably has a lot more problems
23 with my collateral estoppel.

24 MR. SCHMIDTLEIN: No, I mean, Your Honor, as Your
25 Honor is probably painfully aware, I'm a big proponent of

1 zealous advocacy. But it has its limits, and the arguments
2 that Microsoft filed in its brief two days ago are the same
3 arguments they've been filing --

4 THE COURT: I think I've overruled them. So don't
5 worry about that. I'm more worried about what your concerns
6 are.

7 MR. SCHMIDTLEIN: No, I mean, from our -- listen --

8 THE COURT: You can live with what I did?

9 MR. SCHMIDTLEIN: I would like more. I would like to
10 have the conclusions, particularly on some of these issues.
11 But I think as Your Honor pointed out, I think some of those
12 might be dealt with in terms of relevant market monopoly power
13 that the monopoly contested. I think we can find ways around
14 that. I'd like them to be written up and be sort of an
15 exhibit. But I absolutely understand Your Honor's concerns.
16 And we don't have a problem with what Your Honor has done.

17 THE COURT: Okay. Terrific. Mr. Tulchin? And what
18 about -- and we're not prepared to know yet what other evidence
19 you want to prepare, because as I understand it you all are
20 working on that right now.

21 MR. SCHMIDTLEIN: We are working on that right now.

22 MR. TULCHIN: If Your Honor, the Court adheres to the
23 conclusions here about how you will handle collateral estoppel,
24 that is that you will read the findings that you indicate --

25 THE COURT: Or maybe the plaintiffs will, because

1 it's really part of their case whichever, whatever you say.

2 MR. TULCHIN: Yes, and the reference will be to the
3 fact these findings were entered in a prior litigation.

4 THE COURT: And I think your preliminary instructions
5 handle my time frame problem, I hadn't read them yet, but I --

6 MR. TULCHIN: And on top of that, Your Honor, that
7 the findings themselves don't go to the jury in writing, as you
8 indicate here --

9 THE COURT: Unless all the transcripts are going I
10 think it's in effect testimony.

11 MR. SCHMIDTLEIN: We're fine with that, Your Honor.

12 MR. TULCHIN: And if those things are correct, Your
13 Honor, while I don't want to be told later that we've waived
14 our position.

15 THE COURT: You haven't waived anything. Everybody's
16 position is as originally stated. So but if -- what I'm trying
17 to do is to help you all out and these are my rulings. And
18 subject to -- and make it clear for the 10th Circuit if it ever
19 gets there, the party's position vis-a-vis collateral estoppel
20 is exactly as it was stated in the original positions before I
21 sent out my letter.

22 MR. TULCHIN: In that case, Your Honor, hearing what
23 Mr. Schmidtlein said, that he's okay with it, and also his
24 admonition about zealous advocacy, which I accept, then we are
25 as well.

1 THE COURT: All right. Which leaves me to hear from
2 Mr. Martin.

3 MR. MARTIN: Thank you, Your Honor. As a preliminary
4 matter did the Court get a copy of the modified --

5 THE COURT: I did.

6 MR. MARTIN: And the Court's been very patient
7 listening to me --

8 THE COURT: You're the first person who's ever told
9 me that.

10 MR. MARTIN: Because we have covered a lot of ground.

11 THE COURT: No, I'm just getting old and mellow.

12 MR. MARTIN: Thank you. So I just want to go over
13 what the modifications were and try to respond to the comments
14 the Court made yesterday. As I said yesterday the -- for us,
15 from my view, the issue that the Court has is about piggy
16 backing and making sure that there was conduct that harmed
17 competition, are more appropriately dealt with in the injury
18 and causation instruction. Typically that is how these
19 concerns are handled.

20 And I listened to the Court yesterday. And what I
21 did is I took that injury and causation instruction that we
22 proposed, which was based on the model instruction. And it
23 sets out three elements. The second and third, I think,
24 address this Court's concerns. The second one is that
25 Microsoft's anticompetitive conduct was a material cause of

1 Novell's injury. And that instruction actually has a whole
2 paragraph later on, at the bottom of the first page of it, that
3 discusses what the jury should consider in making that
4 decision.

5 And when we first proposed this it said that Novell
6 must also offer evidence that establishes as a matter of fact,
7 and with a fair degree of certainty, that Microsoft's illegal
8 conduct was a material cause of Novell's injury. I've revised
9 that to say it's anticompetitive conduct, and to include a
10 definition of anticompetitive conduct from an earlier
11 instruction, to make it clear that it has to be the
12 anticompetitive conduct that was a material cause of Novell's
13 injuries.

14 On the next page I added a sentence. We added a
15 sentence. You may not find that anticompetitive conduct which
16 harmed other applications alone was a material cause of
17 Novell's injuries. And these two changes were designed to
18 address the Court's concern that the jury may be inclined to
19 award damages or find injury based on conduct that was directed
20 at Netscape or Java or some other application, which are issues
21 that we believe are properly considered in the Section 2 arena,
22 in terms of determining whether there was harm to competition.

23 I did not put in "directed at language." And that is
24 because I continue to believe that is not required and it's not
25 correct as a matter of law. And I would refer the Court to

1 *Blue Shield versus McCready*, 457 U.S. 478. And that's a
2 Supreme Court --

3 THE COURT: I know it, but what is it?

4 MR. MARTIN: 457 U.S. it's at 478, 479. Those are
5 the particular pages not the full cite. And that's a case in
6 which there was a Section 1 violation, conspiracy alleged. And
7 it's another -- there seemed to be a lot of doctor cases. This
8 is one where an insurer tried to exclude psychiatrists or
9 psychologists from getting reimbursement. And they entered
10 into agreements with psychiatrists that said basically if a
11 psychologist comes in and is seen by one of our insureds, we
12 will not reimburse that.

13 And the target of that conduct was psychiatrists or
14 psychologists, I get them confused, but it was to exclude one
15 of those areas. And the plaintiff in that case was not the
16 target of the conduct. The conduct was not directed at the
17 plaintiff. The plaintiff was the insured who was faced with a
18 Hobson's choice either I go to see only the provider that my
19 insurer will reimburse me for, or I'll go see this other group
20 of providers but I won't get reimbursement.

21 And the Court actually says that, you know, in
22 response to an allegation that that plaintiff didn't have
23 standing, it didn't have a right to pursue a claim because the
24 conduct was directed at psychiatrists, the Court rejected that,
25 because it doesn't really matter where the conduct was

1 directed, so long as there is this material causation, this
2 strong link between the conduct and the injury.

3 I would also refer the Court to a case that we cited
4 in that supplemental paper, which was *Angelico*, 184 F.3d 268,
5 and that's a 3rd Circuit case in which the trial court found
6 that -- another doctor case, believe it or not -- a trial
7 court -- where a doctor alleged that he was being excluded by a
8 conspiracy among hospitals from practicing in that group. And
9 the trial court dismissed his claim finding that his injury
10 didn't harm competition. The fact that he was excluded, the
11 trial court says, didn't harm competition, because there are
12 plenty of other doctors and there's no shown effect on prices.

13 And the 3rd Circuit reversed finding the trial court
14 had inadvertently transported elements of Section 2, the
15 substantive offense, or Section 1 in that case, there's a
16 Section 1 and Section 2, I believe, into the injury
17 requirement. And sent it back so that the Court could properly
18 sequence its findings, so that there's finding of the conduct,
19 and the harm to competition is not the harm to the plaintiff,
20 it's the harm caused by the conduct. So those are the two
21 points that drove me to make these changes in this particular
22 paragraph.

23 In the next paragraph, which address the third
24 element of injury and causation, that Novell's injury is an
25 injury of the type that the antitrust laws were intended to

1 prevent, I changed the sentence that said originally, "If
2 Novell's injuries were caused by a reduction in competition,
3 acts that would lead to a reduction in competition are acts
4 that would otherwise harm consumers, then Novell's injuries are
5 antitrust injuries." And I changed that to make it more clear
6 that the injury has to be caused by conduct that harmed
7 competition. I mean, that's the purpose of that paragraph.
8 Such as acts that would lead to a reduction in competition.
9 And I also included some clarifying language in the next
10 sentence, to make it clear that's not just some conduct that
11 harmed Novell for which Novell seeks injury, but it's conduct
12 has harmed competition.

13 And, again, there are a lot of things that can be
14 seen as harm to competition. The Supreme Court in *Eastman*
15 *Kodak* wrote that one of the evils proscribed by the antitrust
16 laws is the creation of entry barriers to potential
17 competitors. And in large part that is what this case is
18 about. It's the creation or the artificial inflation of
19 barriers to entry. That's the harm to competition that flows
20 from the conduct that we've alleged. So it's my hope that
21 those two sets of changes will address the Court's concerns
22 that have been raised. And that is it for the injury and
23 causation.

24 I also wanted to make one observation about the
25 Court's comment yesterday that it believed there was a lesser

1 showing of causation required in a Section 2 claim, in just the
2 violation part. I believe the Court's view was that the
3 edentulous causation standard used by *U.S. versus Microsoft* is
4 not appropriate in a treble damages case. And, again, our view
5 is that Section 2 is Section 2, and that the Clayton Act
6 Section 4 is Section 4. So that by definition Section 4 only
7 grants a right to seek damages if the violation has been
8 proved. Section 4 doesn't modify.

9 THE COURT: But you would agree that the D.C. Circuit
10 thought it was important?

11 MR. MARTIN: Well, what I --

12 THE COURT: I'm not asking you to agree with the
13 D.C. -- because I really think that only comes up, the burden
14 of proof is the burden of proof.

15 MR. MARTIN: And I read that very carefully, Your
16 Honor. And what the D.C. Circuit says, and they emphasize
17 Section 2 liability, this is the causation standard. And they
18 say what the problem -- you have more purchase in the remedy.
19 And I would analogize that to whether or not we have a right to
20 seek damages. I don't believe that they said the remedy
21 changes this causation standard. It's just a matter of if you
22 make some further showing, then maybe you could have --

23 THE COURT: I'll have to reread -- I thought it
24 talked about causation when it -- I thought it talked about it
25 being a government enforcement action when it talked about

1 liability, but I could be wrong. I can just reread it. In any
2 event, I don't think it's -- right now it's not pertinent.

3 MR. MARTIN: Right. It's challenging to read, I
4 acknowledge that.

5 THE COURT: Because the important thing is, although
6 you want me to give the findings, I'm not going to give the
7 findings any way. My remark yesterday was only directed to
8 whether to give the findings. The burden is the burden.

9 MR. MARTIN: Understood. And I think there's two
10 examples that would help explain why I believe that the *U.S. v.*
11 *Microsoft* case is -- the way I read it is supported. The first
12 is the Court's -- well, the thousand firm example that was
13 cited by the Court in its footnote. Where if there are a
14 thousand firms and a monopolist directs its conduct at all of
15 them, then if that significantly contributed standard means
16 something more, none of those plaintiffs could ever pursue
17 damages.

18 THE COURT: I've heard that before and it makes some
19 sense, theoretically.

20 MR. MARTIN: Right, I understood that. And I think
21 it only makes sense if one reads *U.S. versus Microsoft* that
22 way, and Section 2 and Section 4 that way. Another way of
23 looking at it is if Netscape or Java had pursued their treble
24 damages and gone and sought jury instructions, if they had
25 gotten this far, and collateral estoppel, they would have

1 said --

2 THE COURT: Let me just say, thank God they didn't.

3 MR. MARTIN: What they would be doing here is they
4 say Microsoft can't challenge the Section 2 violation, this
5 case is just about damages and injury. That would assume that
6 the *U.S. versus Microsoft* case is actually a correct decision
7 on the violation. And the other reading would mean that Sun
8 and Netscape would have to come in and prove some additional
9 causation standard. And I think that would be incorrect. And
10 I think it's --

11 THE COURT: We don't know what happened, you and I
12 don't know. Maybe Mr. Tulchin and Mr. Holley know, that may
13 have been the subject of discussion.

14 MR. MARTIN: I don't need to know either. So those
15 are my comments -- I shouldn't say that, there's one more.
16 There are a series of cases, *Reazin*, that are available. I
17 cited the 10th Circuit one when I was here before. There's
18 also a district court case, 663 F.Supp. 1360, it's 133 pages.
19 But it also has some discussion about the jury instructions and
20 the standards that were used in that case. And I think that as
21 we go forward that *Reazin* case is actually going to be useful
22 on a number of issues.

23 THE COURT: Thank you.

24 MR. MARTIN: Thank you.

25 THE COURT: Mr. Holley?

1 MR. HOLLEY: Your Honor may recall that when the Sun
2 case was settled there was a pending motion on precisely this
3 point. Because Sun, as a private plaintiff, under Section 4
4 had to meet, in our view, a higher standard of causation than
5 the one the government had to meet. We never had to litigate
6 that question. But it's precisely the same issue, Your Honor.
7 Nothing in this new jury instruction solves all the problems
8 with Novell's existing instructions. They still have the world
9 upside down. They still want to say that they can recover,
10 based on anticompetitive conduct directed at other parties in
11 other markets. And that cannot be right.

12 For the reasons that Mr. Jardine mentioned yesterday,
13 and I mentioned last week, under this new instruction they
14 could still recover in this case even if the jury found that
15 the name space extension API withdrawal was not
16 anticompetitive, if the jury determined that it was not
17 anticompetitive for Microsoft not to give an exemption to the
18 dual compatibility requirement for the logo. And if the jury
19 determined that it was not anticompetitive for Microsoft not to
20 put custom print processing functionality in Windows 95. And
21 it ignores what the Court properly decided on the summary
22 judgment motion, which is that they have to show that the acts
23 that harmed WordPerfect and Quattro Pro also, those very same
24 acts, also harmed competition in the market for PC operating
25 systems. And this new instruction doesn't solve that problem.

1 THE COURT: Again, I've got to look back at the time
2 frame language of the instructions, there's a problem -- if the
3 other conduct, presumably, is that directed to Netscape and
4 Sun, it occurs at a time period after what's involved in this
5 case. So there's no possible way they can recover for it.
6 Now, I'm admitting it for reasons that I've said, but there's
7 no -- logically there's no way that they can look -- unless
8 they prove that there was a pattern of anticompetitive conduct
9 in the relevant period, which is 90 -- which Mr. Tulchin keeps
10 telling me what it is, I forget what it is, '94, '95, something
11 like that.

12 MR. HOLLEY: I couldn't agree with you more, Your
13 Honor. I think that leads me to point that I wanted to make
14 about what the Court meant when it talked about the weakened
15 state of competition. It's fair, obviously, to say that in
16 thinking about the impact on WordPerfect and Quattro Pro, that
17 you have to take the market as it then exists. And so there's
18 a real timing issue. We have to look at what the market
19 situation was at the time of the three allegedly bad acts.

20 And things that Microsoft allegedly did or did do to
21 IBM, Lotus, Sun, Netscape, later, can't have affected the state
22 of competition at the time. And secondly, those acts are
23 completely irrelevant under the Court's analysis, unless
24 somehow they affected competition in a way that exacerbated the
25 impact of these acts on Novell. Otherwise, they're just

1 completely irrelevant. Who cares what Microsoft did to Lotus
2 and IBM, unless somehow those acts made what we did to Novell
3 worse.

4 And I would argue, Your Honor, and it's actually kind
5 of funny, there was a brief that Novell filed earlier this week
6 which makes the obvious proposition that its products, its
7 applications and its collaboration software competed with Lotus
8 products. So as a matter of logic, if Microsoft was hurting
9 Lotus Smart Suite and hurting Lotus Notes, Novell should have
10 been applauding Microsoft because it was helping Novell.
11 That's just definitionally correct.

12 THE COURT: There should have been an applause file
13 as well as --

14 MR. TULCHIN: That's what we're missing, applause
15 file.

16 MR. HOLLEY: Your Honor, even if we pretend that the
17 chronology problem doesn't exist -- and it's a really serious
18 one for the reason Your Honor just said -- even if the
19 chronology problem doesn't exist, what does the state of
20 competition matter, unless Novell can somehow connect the dots
21 and say, things that you did to Lotus made what you did to us
22 worse. As opposed to what most normal people would assume,
23 which is, you know, the enemy of my enemy is my friend. If
24 you're hurting Lotus, you're helping me. That's just
25 definitionally true. So we have a real --

1 THE COURT: May be definitionally true, it may not be
2 realistically true. I hear you.

3 MR. HOLLEY: And then I'd like to talk a little bit,
4 Your Honor, about what is referred to in antitrust about the
5 inextricably intertwined test. This is what they talk about in
6 *Reazin*, what they talk about in *McCready*. And it's an
7 alternate standing test to the consumer or competitor test.
8 But what it requires you to show is that the injury to you, the
9 injury to Mrs. McCready who wanted to go to a psychotherapist
10 and the insurance wouldn't pay, because they were in cahoots
11 with the psychiatrists, is inextricably intertwined with the
12 injury to competition.

13 Now, how is what Microsoft did to other companies
14 later, sometimes years later, inextricably intertwined with
15 what Microsoft did to WordPerfect and Quattro Pro in 1994 and
16 early 1995? Those cases have no application here. Quite apart
17 from the fact that that isn't the argument Novell has been
18 making up until now, but you know, fair enough, they have a new
19 argument. But the inextricably intertwined cases don't apply
20 here. Microsoft stands by the assertion we made in the brief
21 on the jury instructions. There is no case, no case since the
22 Sherman Act was enacted, in which someone has been allowed to
23 recover for injury to other products developed by other
24 companies at a later period in time.

25 There is no such case and for very good reason, it

1 doesn't make any sense. You have to show that conduct directed
2 at you harmed your products and that that harm also harmed
3 competition in the relevant market. You cannot turn the
4 inquiry on its head and say can I show that there was some harm
5 to market X, and then show that there was some spillover effect
6 where I got hit. That's not what the law requires. The
7 Court's summary judgment decision is exactly correct on this
8 point.

9 THE COURT: Well, but -- I appreciate that, but
10 assume that I retain the view that you have to -- that Novell
11 has to prove significant contribution, one thing I meant to ask
12 both of you, reasonably capable significant contribution,
13 that's a slight change, a difference in language, but I -- I've
14 got to decide which to use. Assume that you've got to show
15 that. What you say makes sense maybe as a point of view of
16 antitrust legislation. But I still have a -- at some point
17 antitrust action wars with common sense and what judges do
18 every day in terms of figuring out what happened.

19 And -- just -- excuse me, I'm just thinking out loud.
20 But it's hard for me to reach the conclusion -- I mean, granted
21 that I absolutely agree that Novell cannot recover on the basis
22 of what was done to Netscape and Sun, but this is your last
23 crack at it and I've tried -- I just don't understand why what
24 happened a couple years later in a dynamic industry, when we
25 know from '97, what Mr. Rakes thought, which was a very

1 perceptive comment, why what was done a couple years ago did
2 not reflect, arguably, an anticompetitive intent and purpose on
3 the behalf of Microsoft, when it did what it did in terms of
4 the three alleged things?

5 It just -- maybe antitrust law says one thing and
6 common sense says another. But it seems to me they are -- not
7 in the language of *McCready*, inextricably intertwined, but as a
8 matter of evidence. If I'm wrong, this is your last chance to
9 tell me that I'm wrong. It just seems to me that under 404, if
10 somebody is engaging in conduct a couple years later, which
11 clearly is anticompetitive in its intent and purpose, and it
12 did the same thing a year or two earlier, and the time frame
13 we'll have to look at, well, why isn't it relevant?

14 MR. HOLLEY: I have two arguments to make to this,
15 Your Honor, the first one is, if Your Honor believes it's
16 relevant to show motive and intent, for the reasons that Mr.
17 Jardine explained yesterday I don't think that it does, and
18 because it's after the fact. And you're basically saying that
19 somebody has a character or propensity to engage in bad conduct
20 based on something --

21 THE COURT: Well, if you can explain to me the
22 difference between character and propensity, and what you can't
23 use it for, and motive and intent and what you can use it for,
24 please do.

25 MR. HOLLEY: Well, I think, Your Honor, usually the

1 cases talk about things you did beforehand that suggest that
2 you had an intent to do something that you did later. When you
3 flip that over and you ask a jury to infer from something you
4 did later that you had a bad intent earlier, you really do
5 leave the zone of the exception in Rule 404. And you really
6 are trying to prove that somebody is a bad actor, which I think
7 is what the rule says you cannot do.

8 But and I -- so I hear Your Honor that you -- that
9 that's not a concept that sits well with you. But even if you
10 ruled against us on the Rule 404 part, this evidence -- even if
11 it came in for intent, is irrelevant to the weakened state of
12 competition part of your elements of the claim test. Maybe
13 they can get it in to show that Microsoft intended to be mean
14 to WordPerfect and Quattro Pro, but it shouldn't be coming in
15 order to prove some sort of adverse effect on competition,
16 because it couldn't have had one.

17 THE COURT: I -- I hear you on that.

18 MR. HOLLEY: Okay. Your Honor, that's -- and I am
19 not at all waiving Your Honor, we adamantly believe --

20 THE COURT: Your positions are as stated. You're not
21 waiving anything. But that was not the purpose of my --

22 MR. HOLLEY: But I really do believe, Your Honor,
23 that this is a different situation than the normal case where
24 you're talking about somebody's acts as evidence of motive and
25 intent. And I'll just point out, what Mr. Rakes is saying to

1 Mr. Buffett two years later, is not that we engaged in any
2 anticompetitive conduct, all he's --

3 THE COURT: I -- that is certainly arguable. The
4 moat language from your point of view is troublesome, because
5 he may not have thought that, antitrust law may think that it
6 does.

7 MR. HOLLEY: Your Honor, I don't think there's
8 anything anticompetitive about the moat language, just like
9 Steve Jobs understood that the best way to make Apple devices
10 popular --

11 THE COURT: Did Mr. Jobs and Mr. Gates get along at
12 all?

13 MR. HOLLEY: They were friends, Your Honor. They
14 were friends, despite the *Pirates of Silicon Valley* movie. But
15 just --

16 THE COURT: -- was this after Mr. Jobs became a
17 Buddhist, accepting all things.

18 MR. HOLLEY: But just as Mr. Jobs understood that if
19 you're a platform developer, you need to develop applications
20 to show off your platform. And you need to develop
21 applications because that's the best way to figure out, when
22 you're developing your platform, whether you're providing the
23 proper services. That's the moat. The fact that Microsoft is
24 an integrated firm that develops both operating systems and
25 applications. Under *Berkey Photo* and a whole long line of IBM

1 cases, there is nothing, nothing wrong with a firm having
2 integrated operations and developing both applications and
3 operating systems. So if that's what the moat means, there's
4 nothing vaguely anticompetitive about it. And the thing
5 that --

6 THE COURT: I understand that. I'm not the D.C.
7 Circuit.

8 MR. HOLLEY: And, Your Honor, I just -- I don't want
9 to belabor the 404 point, but the *Coletti* case in the 10th
10 Circuit really does squarely address this issue. I know it's
11 in a different context, but just because someone discriminates
12 against an employee, you know, in 2005, does not mean that they
13 also discriminated against an employee three years earlier in
14 2002.

15 THE COURT: I understand. And, I mean, I could be --
16 you know, my -- I've expressed my views before, there's no
17 point --

18 MR. HOLLEY: Okay, I --

19 THE COURT: You have a very sophisticated and
20 arguably competitive company that wants to continue to succeed.
21 And it, as I said the other day, in a way it wants to keep the
22 relevant market relevant. And it saw that it might not be.
23 And if all it became is to be a parts manufacturer, even if it
24 had a monopoly in the operating system market, so what. It
25 wanted to be a on the cutting edge of technology. And I -- in

1 order to do that I think the memo shows very clearly that they
2 were legitimately concerned that here we have a dominant
3 position today, we may be rendered irrelevant tomorrow. And
4 that arguably is the essence of competition. I understand
5 that.

6 MR. HOLLEY: Your Honor, just -- I'm not entirely
7 sure where we stand on coming to a set of jury instructions --

8 THE COURT: Well, I'll tell you because I owe you.
9 What I'm going to do is, clearly the changes made by Mr. Martin
10 are responsible. I'm going to have to go back. I'm going to
11 have to write what my own preliminary jury instructions, I
12 certainly am going to tell you what they are before opening
13 statement. I hope my schedule will allow me to get them out to
14 you next week, so you'll have one more chance to tell me where
15 I'm wrong.

16 My guess is that I will not use -- there's just a
17 flavor on both sides that is probably, you know, you see the
18 case from your perspective and I may not -- I may borrow from
19 each, but I may not use either as a model, but sort of come up
20 with my own. And I've got to read some more cases. But I will
21 try to give you, by the end of next week, but I don't promise,
22 my proposed preliminary jury instructions so that you will
23 know, that will help shape opening statements.

24 MR. HOLLEY: And, Your Honor, obviously once the
25 jury's picked, I think both sides are very anxious for the

1 trial to proceed, but I do know for Microsoft, and I assume for
2 Novell, that we would very much appreciate an opportunity to
3 address the preliminary jury instructions after you've --

4 THE COURT: Absolutely, and that -- we'll see how
5 they go, unless magically I get something that you all agree
6 to, which I don't expect to. If we need to -- you know, I
7 don't know how long it's going to take to pick the jury.
8 Ideally, we can get the jury picked on October 16th and talk
9 about the instructions that afternoon and begin opening
10 statements the next morning.

11 MR. JOHNSON: 17th, Your Honor.

12 MR. HOLLEY: That would be very much Microsoft's
13 hope.

14 THE COURT: I hope that's -- I don't know how -- and
15 I'm not going to look for the strikes for cause unless you want
16 me to. My theory is you all go through them and I will have to
17 decide any disagreements you all have on our conference call,
18 is it the 13th?

19 MR. TULCHIN: I think it is the 13th.

20 THE COURT: I don't plan to review them myself, I'll
21 just wait to hear what you all have to say. Has anybody looked
22 at them yet, the last strikes for cause?

23 MR. HOLLEY: We've been here, Your Honor.

24 MR. TULCHIN: Haven't looked at them yet, sorry.

25 MR. JOHNSON: Neither have we.

1 THE COURT: You've been trying to do that back up
2 tape for Mr. -- all right. Okay. So I owe you a -- if I'm
3 going to change my mind about a very important issue about the,
4 quote, new, unquote, middleware theory I'll let you know as
5 soon as possible. I owe you instructions. Anything else I owe
6 you?

7 MR. HOLLEY: Not from our side.

8 THE COURT: I'll talked to you all, I think it's next
9 Thursday, whenever it is. Then I'll see you in Salt Lake City
10 on Monday the next week.

11 MR. MARTIN: Thank you, Your Honor.

12 MR. TULCHIN: Have a nice weekend.

13 (The proceedings were concluded.)

14
15 I, Christine Asif, RPR, CRR, do hereby certify that
16 the foregoing is a correct transcript from the stenographic
17 record of proceedings in the above-entitled matter.

18 _____
19 /s/
20 Christine T. Asif
21 Official Court Reporter
22
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