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

 3    NOVELL, INC.                 :   CIVIL NO.:

 4            Plaintiff,           :   JFM-04-1045

 5        vs.                      :

 6    MICROSOFT,                   :   Baltimore, Maryland

 7            Defendant.           :   October 13th, 2011

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 9
           The above-entitled case came on for telephonic hearing
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      before the Honorable J. Frederick Motz, United States District
11
      Judge.
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                    *   *   *   *   *   *   *   *   *   *   *
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14                       A P P E A R A N C E S

15    For the Plaintiff:

16        Jeffrey M. Johnson, Esquire
          James Robertson Martin, Esquire
17        John E. Schmidtlein, Esquire
          Marilyn English, Esquire
18        Max Weiner, Esquire

19    For the Defendant:

20        David B. Tulchin, Esquire
          Steven L. Holley, Esquire
21        James S. Jardine, Esquire
          Sharon L. Nelles, Esquire

22
      Also Present:  Steven J. Aeschbacher, Esquire
23                   Associate General Counsel for Microsoft

24    Christine T. Asif, RPR, CRR

25    Official Court Reporter
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 1                    P R O C E E D I N G S

 2              THE COURT:  Good afternoon.  I'm sorry I'm late.  I

 3     get you at 4:00 o'clock and then I'm late.  But I had a

 4     sentencing that went longer than I thought it was going to.

 5     Let's take up first our friends in Utah -- I've got a court

 6     reporter here, so everybody who's here ought to identify

 7     themselves go ahead.

 8              MR. JOHNSON:  Jeff Johnson on behalf of Novell.

 9              MR. SCHMIDTLEIN:  John Schmidtlein on behalf of

10     Novell.

11              MS. ENGLISH:  Marilyn English for Novell.

12              MR. WEINER:  Max Weiner for Novell.

13              MR. MARTIN:  I'm sorry, I didn't mean the step on

14     your line.  This is James Martin at Dickstein for Novell.

15              MR. TULCHIN:  David Tulchin at Sullivan and Cromwell

16     for Microsoft.

17              MR. HOLLEY:  Steve Holley, Sullivan and Cromwell for

18     Microsoft.

19              MS. NELLES:  Sharon Nelles, Sullivan and Cromwell for

20     Microsoft.

21              MR. JARDINE:  James Jardine of Ray Quinney & Nebeker

22     for Microsoft.

23              MR. AESCHBACHER:  Steve Aeschbacher for Microsoft.

24              THE COURT:  Okay.  Do we have anybody from the

25     clerk's office out in Utah?
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1   MS. PORTER: Chris Porter here from the jury office.

2   THE COURT: Thank you. Thank you, Ms. Porter, and

3   thanks for all the fine work. You've been doing.

4   MS. PORTER: Thanks. We have Theresa Brown here as

5   well as Loise.

6   THE COURT: The -- let's take up the jury issues

7   first because then we might let Chris and her friends go. I

8   have received a stipulation as to who you think should be

9   struck for cause or hardship. Frankly, I have not reviewed

10   them, but I suspect that if -- I mean, I have no problem

11   approving the stipulation. Is there anybody else on either

12   side who you have not been able to agree upon, who one side or

13   the other believes should be struck for cause, either or for

14   hardship?

15   MR. WEINER: Your Honor, this is Max Weiner, I think

16   both sides have jurors that we could not agree upon with

17   respect to striking for cause, but we think we can handle those

18   during the voir dire phase of jury selection without Your Honor

19   having to go through those at this time.

20   THE COURT: How many are left, just so I have some

21   idea of time?

22   MR. WEINER: It's in the neighborhood of 40 that we

23   question, but we've been talking to Chris Porter about possibly

24   randomizing the jury early. So maybe we could see if a lot of

25   these people are going to fall off the back end any way, we

 1   have so many. And we're not going to need that many unless --

 2   I mean, even if all of these 40 were stricken for cause we

 3   would still have an abundance of jurors left. We thought that

 4   maybe we could just reserve until we see where we are on

 5   Monday. And that each side could request of you and inquire

 6   further as to these 40 people that we could not agree upon.

 7   MS. NELLES: And, Your Honor, it's Sharon Nelles for

 8   Sullivan and Cromwell well. And just so Your Honor's clear,

 9   for example, there may be -- there are several people who I

10   believe both sides agree may need to be struck for cause, but

11   it's unclear given the cursory nature of some of the responses.

12   For example, if someone says I'm self-employed it may not be

13   clear whether or not they can work in the afternoon given the

14   schedule. So some follow-up is necessary. And we expect that

15   some of these -- of these 40, we will agree once we hear the

16   answers. And that will leave us with a handful that I think

17   both sides may want to argue should be rehabilitated or struck

18   for bias. But I think a lot of the hardship will become very

19   clear once we go through the voir dire process.

20   THE COURT: Okay. Well, I'm of mixed mind. I

21   frankly would rather do it now so that we could not

22   inconvenience other jurors who are sitting there. But I

23   realize that some people may come off just by -- they may be at

24   the bottom of the list and not needed. And that's silly for us

25   to spend time talking about them. I guess all I urge you all

1 to do is between now and you've got a lot else to do, but if

2 you can meet, the more we can whittle that list down the

3 better.

4   MS. NELLES: I think we all agree, Your Honor. I

5 think we've made some great progress so far. Some of these

6 items are just as simple as someone says they have a vacation

7 planned, does it happen to be the week we're off.

8   THE COURT: Okay.

9   MS. NELLES: And we just know the answer to those

10 questions, yes.

11   MR. WEINER: Your Honor, if you would authorize the

12 randomizing of the jury now, we may be able to get rid of a lot

13 of these questions any way because they'll -- many of those

14 will have high numbers and will not be in the mix to be

15 selected any way.

16   THE COURT: That would be fine. I'd like to

17 randomize it by putting all 40 at the bottom of the list, but

18 I'm not sure that's random. Of course, that's -- and let's see

19 how many -- well, we're going to pick -- I think what we ought

20 to do, I haven't looked at the Rule, but I do know the Federal

21 Rule is that everybody who is sitting at the end of the case

22 sits as long as there are not more than 12. What I would

23 recommend is that we pick six jurors, six alternates so you --

24 which would -- should be plenty, gives you -- we can lose six

25 and still have a six-person jury, not have anybody that have to

1   sit as an alternate, who wouldn't serve as a full jury. If you

2   pick 13 or 14, then the 13th and 14th wouldn't be able to

3   participate if all 13 or 14 still came.

4   And then I guess the Rule provides for a number of

5   strikes. But if we pick 12 jurors, how much would you -- how

6   many would you all like for peremptories?

7   MS. NELLES: Your Honor, I think the local rule, and

8   I should defer to my local colleagues, I suppose, is that each

9   side is three peremptories. I think Microsoft would like to

10 take advantage of the Federal Rule, which I believe calls us to

11 seat a jury of 12. And then if we lose some along the way, we

12 lose some along the way. So I think what we need to have is a

13 panel of 18.

14   MR. WEINER: We need more than that.

15   MR. TULCHIN: Not a panel, I'm sorry. We need to

16 have 18 jurors for the peremptories and then have a jury of 12.

17   MR. JOHNSON: Your Honor, this is Jeff Johnson. I

18 didn't understand that to be the case, nor do I think that that

19 is necessary. Under the Rules if we empanel 12, and during the

20 course of the trial we lose a few, that's neither here nor

21 there, because any number up to six is sufficient for a

22 verdict. So I certainly don't think we should be impaneling

23 18, that's --

24   MS. NELLES: No, I'm sorry --

25   THE COURT: She didn't mean that, she meant that if

1   there's jury of 12 and if each side gets three peremptory

2   strikes, that's how I understood she got the 18.

3   MS. NELLES: That's what I meant, Your Honor, so we

4   would have a panel of --

5   MR. JOHNSON: I misunderstood.

6   THE COURT: No, no --

7   MS. NELLES: It was my fault entirely.

8   THE COURT: No, it was ambiguous. But that's what I

9   understood. Now, the question I would have is, and I'm trying

10   to look in the rules, if you all want more than three each, if

11   we've got enough jurors, and of course I assume we've got

12   plenty of jurors, I'd give you a couple more than three each,

13   but I'd leave that up to you all.

14   MR. WEINER: We're quite happy with three, Your

15   Honor.

16   MS. NELLES: So are we, Your Honor.

17   THE COURT: Okay. Are you sure you wouldn't like a

18   couple more, so if there's any -- might make the strikes for

19   cause easier. I could say, look, you may have a good argument

20   but if you don't like that person I gave you three extra

21   strikes.

22   MR. WEINER: I think it will be fine after voir dire,

23   I don't think we're going to have a problem, Your Honor.

24   THE COURT: We'll leave it at three each, but I may

25   resolve some of the strikes by giving you all a couple more

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 1    peremptories.

 2             MS. NELLES:  Understood, Your Honor.  As long as you

 3    put the ones I don't like in the back, that's fine.

 4             THE COURT:  That's -- okay.  I'll randomize it -- I

 5    randomize equally, all the ones Microsoft doesn't like are in

 6    the back and all the ones Novell don't like are in the back.

 7             MS. NELLES:  Exactly.

 8             THE COURT:  Chris, how many jurors -- since we're

 9    going to need 18 in the final analysis, how many do you think

10    we ought to bring in?  Ms. Porter?

11             MS. PORTER:  I would say 32 at the most, but that's a

12    normal case.  I don't know.

13             THE COURT:  Okay.  Well, look and see how many --

14    after you randomize it, see how many of the 40 -- you know, we

15    may have to have a few more than 32, if we're unlucky and a lot

16    of the people who they may have questions about are in the

17    extra 16.

18             MS. PORTER:  Right.  That makes sense.

19             MS. NELLES:  What I would suggest, Your Honor, and

20    Ms. Porter, if everybody agrees, is that I think plaintiff and

21    defendants, once we see the randomization, can probably agree

22    what number we want to bring in.

23             THE COURT:  That's fine.  Obviously, my goal is to

24    bring as few as possible so as to not inconvenience the

25    potential jurors.  Also, if there's follow-up questioning, you
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1   know, they take some time and I don't want to inconvenience

2   people. On the other hand, I certainly don't want to bring

3   people -- I don't want to be short and have to bring people a

4   second day. They're the two biggest issues, and you know it as

5   well as I do. So why don't you all agree and anything you all

6   agree, after talking to Ms. Porter, is reasonable to me.

7   MR. WEINER: All right. That works.

8   MS. NELLES: And, Your Honor, I assume we may agree

9   over the weekend too, and that there may be additional people

10 that both sides agree can go for cause once we spend a little

11 bit more time, maybe not, but my guess is there may be a few.

12 In which case I think we could raise that with you first thing

13 in the morning, unless you prefer we just tell Ms. Porter.

14   THE COURT: Just tell Ms. Porter, I'll approve

15 anything you say. Like the self-employment, you know, probably

16 there are going to be people -- if people are self-employed my

17 instinct is to let them go if we have plenty of people. You

18 know, I don't like to -- the problem is you end up with retired

19 people and government workers on juries, and that's a big

20 problem. I understand that. But I really don't like to impose

21 upon self-employed people. Okay. Fine. You all work that

22 out. And whatever you do is reasonable.

23   I guess, Ms. Porter, the one implication would be the

24 people who you call who have not been struck for cause, tell

25 them, whatever number it turns out to be, don't have to be

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 1    there on Monday, but they may -- and if we don't have enough

 2    jurors we may have to call them in on Tuesday.  So does that

 3    make sense?

 4              MR. WEINER:  That's fine, Your Honor.

 5              THE COURT:  If for some reason we have 35 people come

 6    in and we -- and luckily we get -- you know, we have whatever

 7    35 minus -- less than 18, then we'll have to have them come in,

 8    have a couple more come in.  So just alert them to that

 9    possibility, but say we don't think it's going to happen.

10              MS. PORTER:  That makes sense.  I think we can do

11    that.

12              THE COURT:  Okay.  Let's now turn to the jury

13    instructions.  And the people in Utah are free to stay, but

14    they don't have to.

15              I've reviewed your written submissions.  And let me

16    tell you my general reactions.  No. 1, I think Microsoft

17    probably is entitled to a instruction that having monopoly is

18    not itself unlawful, without going into a whole lot of -- just

19    leave it at that.

20              I really don't want to reach some of the issues.  I

21    mean, it seems to me that probably I will -- there is a

22    question, I think a reasonable question, whether in terms of

23    the causal connection on the maintaining the monopoly, whether

24    it's engaging in conduct which significantly contributes to the

25    monopoly, or is reasonably capable of contributing
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 1    significantly to the -- and I think that's an issue, which
 2    frankly, I just assume not decide right now.
 3             That said, it seems to me that the instruction that I
 4    give, really I was a little surprised about who was going to
 5    complain more about the instruction.  I thought Microsoft would
 6    be relatively happy with my instruction, because it does make
 7    clear -- and I've somehow misplaced my instruction.  Here it
 8    is.  It does make clear that the anticompetitive conduct -- and
 9    I would say, as I will define it at the conclusions I give at
10    the end of the case.  I think Microsoft's entitled to that too.
11    But it says that they had to willfully maintain it by engaging
12    in anticompetitive, which implies a causal connection between
13    the anticompetitive conduct and the -- it's by engaging in it
14    and the maintenance of the monopoly.
15             So it seems to me that there's plenty for Microsoft
16    to, as the case develops I'll understand it better, but to
17    argue, look, they've got to prove that anticompetitive
18    conduct -- we maintained the monopoly by engaging in that,
19    which implies a causal connection without me now saying what
20    the causal connection is.
21             As far as Netscape's objection is concerned, it
22    really is a very -- it raises a deep issue which, you know,
23    about sometime on Sunday afternoon is when it dawned on me what
24    may divide the lot.  And I originally -- and I'll come back to
25    that, I originally included in the instruction something about
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1   I was going to admit evidence about things that happened after

2   the relevant period. And I was going to say, you can consider

3   that for the intent of Microsoft and purpose of Microsoft

4   engaging in the conduct it did during the relevant period, but

5   you can't consider that in terms of causation. But then I

6   realized that -- and you all have understood this better than I

7   have the whole time, that there is some overlap of acts

8   connected -- committed vis-a-vis Netscape and Java during the

9   relevant period. So it becomes a very complicated instruction.

10   And I just knocked that instruction out for that reason.

11   The problem and Novell might not be happy with me

12   about this, and I could be wrong, but as I analyze this, and

13   this is when the light went off, I am admitting this evidence

14   for the purpose of shedding light on what -- why Microsoft may

15   have acted as it did during the relevant period. I mean,

16   Microsoft's position is, look, we withdrew the whatever, the

17   name space extensions, because we had, you know, we had reasons

18   having to do with our computer. Net -- Novell's going say

19   that's not so, they did it because they were worried, they

20   wanted to, you know, they wanted to destroy WordPerfect, either

21   because it was middleware or because it was such a popular

22   thing. And I'm admitting the evidence of what happened later

23   so the jury can understand that.

24   Now Microsoft objects to that. I understand that.

25   But that's the decision I've reached. But I don't think that

1   Novell can rely upon what happened after the relevant period to

2   show cause in the maintenance of the monopoly. To go back to

3   the -- and they may be in trouble on that, in light of the

4   testimony of, I guess it's Mr. Noel, but that in terms of -- to

5   make it easy, the thousand small firm analogy, which has been

6   given, which is entirely hypothetical, I understand that.

7   But let us suppose that Microsoft only went after one

8   competitor during the relevant period. Actions it took later

9   against the other 999, or some significant number, would be

10   admissible to show why they went after the one competitor

11   during the relevant period. But I don't think that Novell

12   could then say, but look, what they did later caused them to

13   maintain the monopoly. Just as in this case, to the extent

14   that activity is directed towards Netscape and Sun outside of

15   the relevant period, so what, except to the extent that it

16   shows intent and purpose. Because at that time Novell didn't

17   own WordPerfect and Quattro Pro anymore, they weren't in the

18   market.

19   So that is why I don't really want to give Novell's

20   proposed alternate instruction. And I really, at this stage,

21   don't want to get into the fact that I'm going to be admitting

22   some evidence later, because frankly, I think we need to talk

23   through what these overlapping acts are so that I understand

24   them better. And I think frankly to give it on the front end

25   to the jury is going to confuse them more than not. So what I

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 1    want to do, in a very simple way, without getting into what's
 2    anticompetitive and what's not, because once I start doing that
 3    I have to get into legal issues, like duty to cooperate with
 4    competitors, which is a very complicated issue.
 5              I just rather not do this.  I rather just tell the
 6    jury, look, this is what the case is about.  I think Microsoft
 7    is entitled -- the jury knowing having a monopoly itself is not
 8    per se illegal, but they have to prove this.  And I think
 9    Microsoft's entitled to have, anticompetitive conduct is
10    somewhat confusing, but for me to simply say, as I will define
11    it at the conclusion -- the instructions I'll give you at the
12    end.  I think the causal connection is already there by virtue
13    of the fact that I'm saying that they had to maintain the
14    monopoly by engaging in anticompetitive conduct.  And I'm not
15    inclined to give what Novell wants me to give, because I think
16    to the extent that it suggests that you can consider acts after
17    the relevant period, in terms of maintaining the monopoly, is
18    wrong.  Because I don't think they can.
19              So that's -- so that's basically what I -- I would
20    make a few minor modifications to the proposed instructions,
21    but not a lot.  Now, we can -- you can respond now so I can
22    think more about it.  You can -- we can talk about it on Monday
23    after you've seen the transcript of what I've just said.  Maybe
24    I'm not being as clear as I should be.  And you can analyze it.
25    Or whatever you all want.
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1   MR. HOLLEY: Your Honor, it's Steve Holley at

2   Sullivan and Cromwell. I appreciate the Court's willingness to

3   tell the jury that it's not illegal to have a monopoly per se,

4   and I think that's very helpful. But for similar reasons I

5   think it's very important to tell the jury that things that may

6   seem a little bit sharp-elbowed to them are not necessarily

7   anticompetitive, as that term is understood under the antitrust

8   laws. I mean, this isn't a business tort case, it's a

9   antitrust case. And, you know, jurors, when faced with things

10   like, you know, some e-mail saying "Shoot Novell in the head,"

11   may get confused about what the case is about.

12   So I fully appreciate that you don't want to go into

13   a long-winded dissertation on Section 2 of the Sherman Act, but

14   I do think it's -- I just ask the Court to consider, once

15   again, whether some kind of description of what anticompetitive

16   conduct means would be quite useful.

17   THE COURT: My problem is, frankly -- I mean, I

18   didn't write that e-mail, you didn't write the e-mail, but if

19   somebody wrote the e-mail saying -- they shouldn't have written

20   it and they shouldn't have been thinking that way. And the

21   time for me to instruct the jury, I mean this -- I will

22   instruct the jury, I will make decisions at the end. But I

23   don't think I should -- I don't think I have any obligation at

24   the beginning of the case, not knowing what all the evidence

25   is, to parse this out.

1   And, frankly, if they wrote it and if the jury is

2   shocked, that's something Microsoft ought to be worried about

3   in terms of evaluating its risks in this case. I mean, if

4   somebody at Microsoft wrote a memo "shoot" -- you know, they

5   shouldn't have done it. And the fact of the matter is, you

6   know, that's something you've got to live with as lawyers. I

7   don't think you ought to lay it off on me to sort of

8   pre-emptively immunize you from the effect of what your clients

9   wrote.

10   MR. HOLLEY: Your Honor, I appreciate what you're

11   saying, but I do think that business people can write extremely

12   inflammatory things which are not illegal. I mean, there's a

13   famous story about Andy Grove at Intel saying what we ought to

14   do is shove a garden hose down our competitor's throat. It's a

15   nasty thing to say, but it doesn't establish a violation of

16   Section 2. It's sort of what Areeda is talking about when he

17   talks about departures from, you know, sort of nice behavior.

18   I'm not here to defend people who write extreme

19   e-mails, but I do think it's important -- I am actually, but

20   I'm not here -- that's not the argument I want to have with

21   you. What I'm trying to say is it's important to distinguish

22   in a Section 2 case between things that may sound malicious and

23   things which are actually antitrust violations. And there's a

24   lot of law about this. And I'm just afraid that over the

25   course of eight weeks the jurors will have no framework in

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1    order to try to distinguish between the two kinds of things;

2    some things that are just nasty and things that are antitrust

3    violations.  Because no one will have ever told them, here are

4    the things you need to bear in mind to find that something is

5    literally a Section 2 violation.

6              THE COURT:  But do you think it's really fair to me,

7    these are not easy questions, and I am -- I am just very loathe

8    to give, A, it seems to me the time to instruct the jury is at

9    the end of the evidence, not the beginning.  I think at the

10   beginning is to sort of tell them what the case is about.

11   Frankly, I don't want to be making judgments about, you know,

12   about what I should be saying until I've heard the evidence.

13   You all know the case better than I do.  And I'm -- but I want

14   to know it as well as I can by the time that I decide what the

15   instructions are.  And that could very well be, I'm not saying

16   that -- I absolutely understand that things can be a business

17   tort but not an antitrust violation.  Absolutely.  And my

18   proposed instructions are a little rough on Novell in that

19   respect.

20             But I just don't -- the idea of a preliminary jury

21   instruction isn't -- it seems to me is just -- frankly, I

22   usually don't give them at all except for saying, hi, I'm Fred

23   Motz, and here is so-and-so, and by the way this will be the

24   schedule.  But I think in this case it is complicated enough

25   that they should be given a general idea of what the case is
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1   about. And I do think certain things are important, like that

2   Microsoft -- it's not illegal to just have a monopoly. I think

3   that is something. But this other stuff, it seems to me I will

4   understand better what to tell them after I know what the

5   evidence is.

6   And I -- and frankly, some of the stuff may be

7   favorable to you. I am not -- I think you have got a point in

8   that you're entitled to have instructions focused upon Novell's

9   claims about the three things they did. I think you may very

10   well be entitled to instruction about under what circumstances

11   a -- there's a duty to cooperate with a competitor drawn from

12   *Aspen Ski* and other cases. The things which Novell has

13   excluded from its instructions I think, perhaps, should be

14   included. I'm not make a definite ruling on that. But that's

15   the kind of thing, it seems to me, on the front end I'd rather

16   not be making that decision. Provided that I have fairly told

17   the jury what the case is about and then leave it to you all to

18   try the case.

19   I mean, you can very well tell the jury in your

20   opening statement under the framework, look, there are going to

21   be -- Mr. Johnson referred to these e-mails; they exist, but

22   they don't show anticompetitive behavior. Because as you will

23   learn during the course, simply because something sounds nasty

24   doesn't mean it's anticompetitive within the meaning of the

25   antitrust laws. That's fair to say. And just seeing the trial

1   develop, you know, I don't think Mr. Johnson is going to object

2   to that. If he does I'd overrule it, because I think that

3   that's something which is fair in the development of the case

4   to say.

5   And you can refer back to this instruction saying

6   because the judge has told you -- he's going tell you what

7   anticompetitive is. It's not just writing bad e-mails. And he

8   also says that the conduct engaged in has to be anticompetitive

9   to maintain the market. I mean, it seems to me I'm giving you

10   enough that in opening statement you -- I don't want to tie one

11   side's hands or the other. I want you all to be able to fairly

12   argue the case. And then have me decide, specifically, what to

13   say when I know the case better than you do -- excuse me,

14   better than I do now.

15   MR. HOLLEY: Understood, Your Honor. And I

16   appreciate -- I think it's -- I understand your point that

17   it's -- the lawyers have some leeway in openings to say what

18   they think the relevant standards are. But the Court -- as the

19   Court you don't want to be dictating that at the very outset of

20   the case.

21   THE COURT: That's basically it. And you guys are

22   good lawyers on both sides, there are issues -- there are risks

23   on both sides, but I want you to be able to fairly argue the

24   case. And it seems to me that what I've said at the beginning

25   is sort of indisputably true. And it's subject to refinement,

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1    you know, in the closing instructions.

2           MR. MARTIN:  Your Honor, this is James Martin for

3    Novell, if I could?

4           THE COURT:  Sure.

5           MR. MARTIN:  First of all, with regard to instructing

6    the jury that a monopoly is not unlawful, what I would suggest

7    is and I was prepared to suggest before actually, was there's a

8    paragraph in the model instructions.

9           THE COURT:  Yeah, which basically says that if it's

10   by good product or something like that?

11          MR. MARTIN:  It says mere possession of monopoly

12   power, if lawfully acquired, does not violate the antitrust

13   laws.  And it goes on.  I think it's three sentences long.  It

14   actually has another paragraph that discusses the difference

15   between anticompetitive conduct and conduct that has a

16   legitimate business purpose.  I would suggest get that and we

17   pull from the model instructions.  And perhaps counsel --

18          THE COURT:  Sure.  Okay.

19          MR. MARTIN:  -- Microsoft talk that over.

20          THE COURT:  That's fine.  That's perfectly all right.

21   I want to make it as neutral as possible.  That's fine.

22          MR. MARTIN:  And that may be why, Judge, you were

23   surprised why we didn't object quite so heavily to those

24   preliminary instructions, is that I thought that -- we have

25   philosophical disagreements, that including "conduct to"
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1   language, I understand the Court is going to preserve our

2   objection to that language. But my view was for purposes of a

3   preliminary instruction, it's probably consistent with the

4   evidence. And the final jury instructions will be the ones

5   that the jury really relies on.

6   THE COURT: That's absolutely right.

7   MR. MARTIN: With regard to the timing issue, I think

8   that I would like to accept the Court's offer, if it was one,

9   to readdress or address this again more fully when we're in

10 Salt Lake, because I think it's a big issue.

11   THE COURT: It's a very, very big issue. And you can

12 address it again in Salt Lake. I mean, it's a huge issue. And

13 it's one of those things, I could be wrong, but now I'm sort of

14 stubborn. And now that I'm where I am, the light went off in

15 my head at some point. I was reading all these cases and I

16 said, wait a minute, that's not what this case is. And

17 frankly, I think on the middleware side it poses real problems

18 for Novell, except that there is overlapping conduct. And I

19 have not analyzed, you know, what was done vis-a-vis Java and

20 what was done vis-a-vis Netscape during the relevant period.

21 At one point I thought it all happened after the relevant

22 period. And then I was thinking, my goodness, in light of what

23 Dr. or Mr. Noel said, this could be a real problem in terms of

24 the sufficiency of Novell's proof on the middleware.

25   So I absolutely understand that it is a big issue.

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 1   And the problem I have, to make it as clear as I can on the

 2   record, is I still think it's relevant to show intent and

 3   purpose of what was done during the relevant period.  But it

 4   seems to me that if Novell sold the product, which

 5   unquestionably it did, then things that happened thereafter to

 6   maintain the monopoly cannot be relied upon by Novell on the

 7   causation issue as to -- on the first causation issue, which is

 8   did this -- whatever the standard is, that did engaging in the

 9   anticompetitive conduct cause the maintenance of the monopoly.

10   Because the only time that is relevant that the monopoly was

11   maintained was during the relevant period.  So that is where I

12   am and I understand it's a significant issue.

13           MR. MARTIN:  Right.  And if I could just take a

14   second, if not we're going to try to address this again in Salt

15   Lake.  What's going the happen and what typically happens is

16   the evidence of the conduct comes before the jury, then the

17   jury has to find out the plaintiff is -- what would have

18   happened but for that misconduct?  What are the effects on

19   competition from that conduct?  And in this case, particularly

20   where a technology, that developing technology, the fast moving

21   market, you know, with Netscape and Java they were not existing

22   present threats.

23           You need to look after the time of the conduct to

24   find out how it would have developed, what would have happened

25   if that conduct had not happened, if WordPerfect had been
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1   successful, A, it might not have been sold. That is a

2   presumption that I don't know is actually correct if they had

3   gotten their products out with Windows 95. And you also need

4   to look at -- and this is what Professor Noel did, look at what

5   really happened as opposed to what would have happened in some

6   hypothetical market, where the only bad thing that ever

7   happened was the alleged conduct directed at Novell.

8   THE COURT: No, no, I hear you. And I'll hear you

9   again in Salt Lake. This to me though is the problem, you can

10   read cases, you can read expert reports and everything, the

11   fact is what happened. You sold the product. And absent

12   evidence that you would not have sold the product, and frankly,

13   that seems to me to be entirely speculative, but for something

14   else developing. I mean, if you've got some executive who's

15   going to say, we wouldn't have sold it. But I -- that to me is

16   matter of evidence, and that's a little speculative.

17   But I hear you. And that's not the way that -- you

18   know, when your instructions about -- proposed instructions

19   about viewing this in context, I understand what you're saying.

20   And I've sort of been with you. But this, to me, is I think

21   what I meant when I said you can't piggy back. You know,

22   you've got to prove that before you sold the product they

23   maintained the monopoly because of what they did to you.

24   Now there's a whole different theory, which frankly,

25   I still think the best case you all had was the attempted

1   monopolization of the applications market, but that's neither

2   here nor there. And it's there now because it's been held to

3   be time barred. But these are difficult issues. And I'll be

4   glad to readdress them. But that's about where I am.

5   The odds are, Mr. Martin, just so you know, and

6   unless you think you really need it in the preliminary

7   instruction. I'm probably inclined, just as I told Mr. Holley,

8   I'm probably inclined not to get into that now, because it's

9   obviously going to surface again when the collateral estoppel

10   findings are read. And it's going to surface again at the

11   conclusion when I give my concluding instruction.

12   So this is a big issue, as is the issue about what

13   does, you know, what does Novell have to prove under what

14   standard of significant contribution or reasonably significant.

15   Those are big issues which eventually have to be decided. All

16   I'm saying is you've learned to know me well enough that I

17   would prefer to postpone deciding this very issue we're

18   discussing about timing until later on. So if I rule against

19   you on the front end does not necessarily mean I'll rule

20   against you on the back end. On the other hand, you may all

21   decide this is important enough it's got to be in the

22   preliminary instructions. So that's about where we are. But

23   that's the best -- that's where I am.

24   MR. MARTIN: Okay. I understand and while our

25   objections are preserved, again, we thought that for purposes

 1   of getting this trial going, with our objections, that this was

 2   adequate to, you know, start the ball rolling and get the

 3   evidence in. And we'll deal with the legal issues, apparently,

 4   understandably, as we go along, and, frankly, in our final jury

 5   instructions. I understand that.

 6   THE COURT: Okay. So I think everybody's got a risk

 7   in this case. And I -- which means to me you ought to be doing

 8   other stuff, but that's your business not mine.

 9   The other question I have is in terms of, it's just a

10   factual question on this, this quote -- and I realize that

11   Novell denies it's a new middleware theory, but it's a very

12   convenient thing. What happened about -- was there -- were

13   there any dealings between Novell and Netscape and Java during

14   the relevant period?

15   MR. JOHNSON: Your Honor, Jeff Johnson. Let me try

16   to address this, that question which you put into your letter

17   decision. And I want to be careful because I want to be

18   complete about this. There's certainly no evidence that I am

19   aware of, with respect to a deal between Novell and Netscape

20   and Java to create middleware, which is the way you expressed

21   the question in your letter.

22   However, that being said, I want to make it clear

23   that there was an agreement, a licensing agreement between

24   Novell and Netscape, to allow Novell to -- and I'm taking this

25   right from the agreement, "to use, reproduce, distribute,

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1   combine, and integrate Netscape Navigator into Novell's

2   products."  And further, that there will be evidence that

3   WordPerfect intended to use the name space extension APIs that

4   we have been talking about so much, to integrate Netscape into

5   its file open dialogue in WordPerfect.  So that kind of, in a

6   nutshell, the evidence with respect to Novell and Netscape.

7   And, of course, Netscape included Java Technologies as well.

8               THE COURT:  Right.

9               MR. JOHNSON:  I hope that is responsive --

10              THE COURT:  Did that agreement continue after the

11  sale by Novell of WordPerfect, do you know?

12              MR. JOHNSON:  It did, Your Honor.

13              THE COURT:  It did.  Okay.

14              MR. JOHNSON:  It did.

15              THE COURT:  That's a fair answer.  What would the

16  effect of that have been from Novell's point of view?  That

17  Novell -- that they could have used Netscape Java Technology --

18  well, I'll find that out as the case goes along.

19              MR. TULCHIN:  Dave Tulchin, Your Honor, sorry to --

20              MR. JOHNSON:  You will, Your Honor.  You will learn

21  all of that as the case develops.  And I think you were wise in

22  many ways to listen to the evidence as it comes in before you

23  make decisions that --

24              THE COURT:  Well, that's -- I don't want to do that.

25  I mean, I think it's the worst thing for jury if they hear two
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 1    different things from the judge.  And I, frankly, don't want

 2    the do it.  I mean the -- Mr. Martin and Mr. Holley know the

 3    antitrust laws certainly better than I do.  And they're tough

 4    doctrinal issues, but they're also evidentiary issues in the

 5    applications of the doctrine in the specific context of the

 6    case.  And I would just like to know the case as well as I can

 7    before I'm making broad pronouncements.  But at the same time,

 8    fairly, I want to tell the jury enough about the case so

 9    that -- it is a complicated case -- they have some general

10    idea.  And I want to give you all leeway within -- you know, I

11    have not made final rulings on some of these things, you know I

12    haven't, but to fairly argue to the jury.  And I think you're

13    good enough lawyers you can walk that line pretty successfully.

14             MR. TULCHIN:  Thank you, Your Honor.  This is David

15    Tulchin.  A couple things, if I may, on this point.  First,

16    Your Honor, I think you have ruled on this issue.  And the

17    ruling was pretty clear.  Our motion was granted to the extent

18    that this new theory of WordPerfect combined with Java and

19    Netscape -- and it's very important to understand that, as Mr.

20    Johnson just said, there was a distribution agreement with

21    Netscape Java was not involved, nothing -- no Sun product was

22    involved in that agreement.  And this is a legal issue, Your

23    Honor, not an evidentiary issue.

24             THE COURT:  Well, I agree with you.  I've ruled your

25    way on that, that's the ruling.  So Mr. Johnson should not get
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1    into that in opening statement.  If he wants me to reconsider

2    he ought to do so at some appropriate point.  But I have ruled

3    your way on that point.

4              MR. TULCHIN:  Thank you, Your Honor.

5              MR. JOHNSON:  Your Honor, let me be clear, because

6    you had ruled that you didn't -- did not want me to refer to

7    that at all during oral openings.

8              THE COURT:  I don't think you should --

9              MR. JOHNSON:   And I'm not going to do that.  I don't

10   intend to refer to that distribution agreement.  But obviously

11   we have the collaterally estopped facts, which deal with

12   Netscape and Java.  And I disagree with Mr. Tulchin that,

13   although Java wasn't involved directly, their Java language is

14   built into Netscape.  So Java was indirectly involved.

15             THE COURT:  Is there anything in the collateral

16   estoppel about the distribution agreement with you all?

17             MR. JOHNSON:  I'm not going to mention the

18   distribution agreement in my opening.

19             THE COURT:  That's fine.  But Mr. Tulchin is right.

20   In the way the case is presently structured I have ruled

21   Microsoft's way.  But I will reconsider it at some point, but

22   nobody -- but that -- but it becomes at this point -- if Novell

23   wants to put something in then I'll consider it then.

24             MR. JOHNSON:  Thank you, Your Honor.  We appreciate

25   that, because it is -- it is something that needs to be
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1   addressed. And I think Microsoft goes too far when it tries to

2   suggest that this fact had to be pled in our complaint somehow.

3   THE COURT: No, I understand.

4   MR. JOHNSON: The settlement agreement didn't end the

5   rules of notice pleading, if I may so say, Your Honor. And I

6   also think that, frankly, this is simply another reargument of

7   the motion for summary judgment where they tried to limit what

8   Mr. Noel could talk about. And as to which they lost, before

9   Your Honor and before the 4th Circuit. And this is the same

10   motion in a different guise.

11   MR. TULCHIN: It really isn't, Your Honor. The

12   release claim was the claim about the nexus from one market to

13   the other. And that was the basis of our motion. This is not

14   the argument we made at summary judgment at all. The complaint

15   says, and it's very clear in paragraph 51, the only middleware

16   theory, the middleware theory being the nexus to get from word

17   processing and spreadsheet markets to the PC operating system

18   market where Novell says the monopoly was unlawfully

19   maintained. And it says that the middleware theory was

20   WordPerfect with AppWare and OpenDoc. It then goes on to

21   contrast that with what the government said about Java and

22   Netscape making very clear that Java and Netscape were not the

23   nexus to get from one market to the other for Count 1.

24   And that is what was released. This isn't a matter

25   of putting in evidence in support of Count 1, it is the claim,

1   the nexus between the two markets. And I think we set that out

2   in the short memorandum that we provided the Court this

3   morning, or maybe early this afternoon. And I think the Court

4   has adhered to the ruling that was made last week. So it seems

5   to me that this isn't a matter of going back to something that

6   came up on summary judgment. We never argued anything about

7   the release on summary judgment. We were dealing entirely with

8   the causation issue that, in our judgment, Professor Noel had

9   given away. Your Honor ruled otherwise, as did the 4th

10   Circuit, and here we are. But it's an entirely different

11   issue.

12   MR. JOHNSON: Your Honor, I don't think we need to

13   argue it. We've argued this point ad nauseam. I think

14   Microsoft has filed six briefs on it. But there will come a

15   point in time we're going to have to raise this, because I

16   disagree fundamentally with Mr. Tulchin with respect to this.

17   That settlement agreement said, nothing in it herein shall

18   limit Novell's right to present any facts relevant to Count 1.

19   And the fact -- fact with respect to Netscape is a

20   fact that is relevant to Count 1. And it goes to the same

21   exact issue that we talked about on summary judgment. And that

22   is, is Dr. Noel required too look at some hypothetical market

23   or is he permitted to look at what happened in this market,

24   based upon what Microsoft had done, and the actual facts that

25   existed in the market at the time. And this Court ruled that

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 1    Dr. Noel has the right to look at what happened to other

 2    middleware and other ISVs in conducting his analysis of harm to

 3    competition in the market.  And this argument is -- it's a

 4    disguised, the same thing over and over again.

 5              THE COURT:  Well, I'm not sure that it is, but I'd

 6    decide that later.  But to the extent that I -- to the extent

 7    that I previously ruled that necessarily you could look at

 8    things that happened after you sold the product, I'm not sure I

 9    was right.  And, secondly, I'm not sure I said that.  Because

10    it seems to me that that very ambiguous language that you can't

11    piggy back might have been intended to get to that very point,

12    that yes, you can look at what happened in context to

13    understand what happened during the relevant period.

14              I am not at all sure, as I just told Mr. Martin, I

15    am -- as I said in my preliminary remarks, I am not at all sure

16    that Dr. Noel can rely upon a hypothetical market, after the

17    product is sold, to determine whether or not Microsoft

18    maintained its monopoly in the operating system market by

19    engaging in anticompetitive conduct, by looking at things that

20    happened thereafter.  Because the relevant time period is, as

21    far as I'm concerned, the time prior to the sale of WordPerfect

22    by Novell.  But you all understand that.

23              MR. JOHNSON:  I understand the way you feel, Your

24    Honor --

25              THE COURT:  And we'll just -- and I'll hear from you,
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 1    these are certainly not easy issues.
 2              MR. JOHNSON:  And you know, one comment you made
 3    about that I thought was interesting, was that it would have
 4    been speculation that they wouldn't have sold it.  Actually we
 5    will present evidence that they sold it because of Microsoft's
 6    conduct.
 7              THE COURT:  Okay.  Well --
 8              MR. JOHNSON:   And they wouldn't have sold it absent
 9    Microsoft's conduct.  So there will be evidence on that point
10    but we can get into that.
11              THE COURT:  That's why I want to understand the case
12    better.  By the way, Nebraska beat Washington that year, and
13    this is at 1997 that Rakes memo.  I think that talks about -- I
14    went on the web and found the score.  I think that Nebraska, it
15    looks like to me that Nebraska was undefeated that season.  I'm
16    unsure.  So there you are.  Thanks a lot.
17              MR. JOHNSON:  Very good, Your Honor.
18              THE COURT:  Anything else we ought to be talking
19    about?
20              MR. JOHNSON:  I'm sorry --
21              MR. MARTIN:   This is James Martin.  I JUST wanted
22    to -- we talked about taking this issue up again on Monday.
23    I'm not sure if that was written in stone or we were just
24    talking.
25              THE COURT:  We're going to pick the jury first, if we
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1   have time we can revisit this. As I say, clearly my reference

2   would be not to decide this. Somehow to give a vanilla jury

3   instruction that doesn't get into all the ins and outs, but if

4   you think I've got to I will. Or if I don't you have an

5   objection that I don't.

6   MR. MARTIN: Right. Wait till Tuesday or Wednesday

7   even.

8   THE COURT: Yeah, I -- what I'm hoping is we pick the

9   jury promptly on Monday morning. That we hash out whatever we

10 have to. That you all have time to give finishing touches to

11 your opening statements. And begin at -- what time are we

12 beginning in the morning?

13   MR. JOHNSON: 8:30. And if I might be able to

14 address that schedule question with you.

15   THE COURT: Sure.

16   MR. JOHNSON: You certainly already indicated the

17 plan is on Monday to pick a jury and then to deal with some of

18 the issues we have to deal with. I'm a little concerned about

19 that. Because we still have objections on exhibits that Your

20 Honor's going to have to resolve, because some of these

21 exhibits are needed with respect to the openings.

22   And then as I think I mentioned to Your Honor a

23 couple times before, we started off with 120 pages of

24 objections to our deposition designation. Now, I'm happy to

25 report we're make progress on that front. And, in fact, today

 1   we notified Microsoft of a fairly substantial number of

 2   depositions that we don't think we need to even deal with

 3   because of Your Honor's ruling on collateral estoppel, which is

 4   a good thing, because that lessens the burden and probably

 5   takes away half of those pages of objections. Yet it is very

 6   clear to me that we are still going to have a fairly large

 7   number of remaining objections to deposition designations that

 8   the Court is going to need to deal with. And, frankly, we

 9   would like to show some of those designations early on in the

10   case.

11   So that being said, we might even want to think

12   about, and Your Honor could reserve this until Monday to think

13   about, about actually bringing the jury back on Wednesday

14   rather than Tuesday.

15   THE COURT: Well, you all talk about that. I'm

16   sorry, I thought we had -- and it's my fault, I realize

17   nobody's misled me. I thought the way we developed on the

18   exhibits, that since I ruled on the general authenticity thing,

19   that resolved a lot of the problems. And then the only ones

20   about which there were specific objections I had already ruled

21   upon. But are there really a lot of other exhibits that are

22   going to come up for particular review? I honestly thought we

23   had -- that that was -- that we had passed that, but I could be

24   wrong.

25   MR. JOHNSON: We thought obviously, and the purpose

1   of, you know, each side picking ten was to get your views, both

2   specifically and generally, and we hoped that that would push

3   the progress of our discussions forward. And in fairness it

4   did. Clearly, we have much fewer objections left than before.

5   However, I think probably on both sides, certainly on our side,

6   there are several exhibits as to which I don't quite understand

7   how they're maintaining their objections but they are. So

8   we're going to need to address those.

9   THE COURT: Okay. Well, I'll be guided by you all.

10   You all talk about these. My general view is that I would

11   rather begin Tuesday morning, if for no other reason than to

12   show the jury, you know, we're into this and we're moving

13   along, we've done our job. So to the extent we can bring them

14   back on Tuesday rather than Wednesday, that would be my

15   preference.

16   And my general -- the other general observation is I

17   think is obvious that I want to be making decisions, the

18   afternoon before things are introduced. So if you need to know

19   these answers before opening statement and we're going to need

20   all of Tuesday to go through them, fine, then we'll have the

21   jury come back Wednesday. If in fact we can bring the jury

22   back on Tuesday, and you really don't anticipate that you're

23   going to try to read the depositions until Thursday or so, I'd

24   prefer to that I can that up Wednesday afternoon.

25   So my general, just a trial assumes its own momentum

1   and dynamic and the jury becomes a part of it. To the extent

2   we can I would like to begin on Tuesday. I certainly want

3   to -- and I'm going to tell the jury, look, we're going to have

4   an occasional bench conference, but we're going to do

5   everything we can to anticipate an issue the afternoon before,

6   so that that's when we're going to argue about it. So if -- if

7   we need this resolved before opening statements we won't bring

8   the jury back until Wednesday. If, in fact, some of these you

9   really don't need for opening statement, but you do need by,

10   say, Thursday, we can discuss it Wednesday afternoon. That's

11   generally the way I want to approach things.

12   MR. TULCHIN: Thank you, Your Honor. It sounds great

13   to us. This is David Tulchin. And we also have a very strong

14   preference for starting Tuesday morning. If Mr. Johnson has

15   particular deposition designations or documents that he needs

16   to talk about we have -- I have a couple of my colleagues out

17   there meeting with his colleagues right at the moment to try to

18   resolve some of these objections. And if we can get a priority

19   list maybe we can get this done before Monday morning.

20   THE COURT: That would be great. And if not I can

21   rule -- if you've narrowed it down to a couple out of -- say

22   there are still 50 documents in dispute, but only ten need to

23   be decided before opening statement, I can do that probably on

24   Monday. It's just -- but if we can, we can; if we can't, we

25   can't.

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 1              MR. JOHNSON:  That's fine, Your Honor.  We're working

 2     on it.

 3              THE COURT:  No, I understand.  Everybody's busy.

 4              MR. JOHNSON:  People meeting on that right now.

 5              THE COURT:  That's terrific.  My general thing -- so

 6     you know I'm going the tell jury we've worked out a lot of

 7     things in advance, we will continue to try to -- we will have

 8     an occasional bench conference.  We will try to avoid them.

 9     Because I really am a great believer that when the jury is

10     there, both for reasons of efficiency and for jurors perception

11     of the way the process works, the more that evidence can be

12     taken when the jury is there and get started early, first thing

13     in the morning when they're there, as soon as they're there,

14     and presenting evidence, it's just better for everybody.

15              MR. HOLLEY:  Yes, Your Honor.  Your Honor, Steve

16     Holley.  One last thing, I did want to take Mr. Martin up on

17     his offer to send us a proposed jury instruction that the

18     parties could agree on and submit to Your Honor.  And I'll deal

19     with him.  But you should expect from us an agreed instruction

20     on, you know, it's not illegal to have a monopoly, and here's

21     what anticompetitive is.  And we'll adhere as closely as we can

22     to the ABA model so that we won't be fighting about this.

23              MR. JOHNSON:  You don't get the second part, we

24     discussed that ad nauseam with the judge just a moment ago.

25     Not going to get into what --
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 1              THE COURT:  Mr. Martin said maybe they would, so I

 2    understand where Mr. Holley's coming from.  To the extent you

 3    all can do that, the better.  One of the things that I -- I'm

 4    not faulting anybody, the submissions from each side have a

 5    little bit of a flavor of nonneutrality to them.  So to the

 6    extent I want to fairly -- so you guys know the antitrust

 7    doctrine, I want to give as good an instruction as can be

 8    absolutely neutral, okay.

 9              MR. JOHNSON:  Thank you, Your Honor.

10              MR. TULCHIN:  Thank you, Your Honor.  See you Monday

11    morning.

12              THE COURT:  See you.  Bye.

13              (The proceedings were concluded.)

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