

1 THE COURT: Let me clarify what I meant. And
2 obviously I might not let you all avoid my ruling in terms
3 of --

4 THE COURT REPORTER: I'm sorry. I can't hear you.

5 THE COURT: -- in terms of Mr. Schmidtlein's
6 objection. I just think it was in the realm of fair argument.
7 I don't recall what I said before. I mean, I really, to some
8 extent it is a defense to the deception. It may not audibly
9 be a defense to anticompetitive conduct, and that's something
10 with which -- I had -- it just seemed to me it was in the
11 wrong --

12 MR. SCHMIDTLEIN: What we'll probably do is, I take
13 Your Honor's point about the context right now giving that
14 instruction, but what we might do is submit something to you
15 so that when they do produce --

16 THE COURT: Sure.

17 MR. SCHMIDTLEIN: -- because it may come up in the
18 first witness.

19 THE COURT: That's when I think it might come up.
20 And I may submit something. But again, recheck the
21 transcript. It's not so much -- it's obviously deception
22 blurs any anticompetitive conduct. But I really thought it
23 was not a defense to anticompetitive conduct.

24 MR. SCHMIDTLEIN: Right. We'll look at that this
25 afternoon, and we'll probably approach you in the next day or

1 so.

2 THE COURT: Fair enough.

3 MR. SCHMIDTLEIN: Thank you, Your Honor.

4 THE COURT: We have another half hour?

5 MR. TULCHIN: I hope it's more like 20, Your Honor,
6 20 or 25.

7 THE COURT: You're not doing anybody any disfavor
8 by breaking up the collateral of estoppel.

9 MR. SCHMIDTLEIN: Well, I think what we're going to
10 do, Your Honor, if it's okay, if Mr. Tulchin gets done roughly
11 around 1 o'clock, we could do probably a half hour of it and
12 split it in half.

13 THE COURT: That sounds perfect.

14 MR. SCHMIDTLEIN: And pick up it up in the morning.

15 THE COURT: That's fine.

16 MR. SCHMIDTLEIN: Thank you.

17 (Whereupon, the jury returned to the court
18 proceedings.)

19 MR. TULCHIN: Thank you, Your Honor.

20 Ladies and gentlemen, I will try to finish up in
21 the next 20 or 25 minutes, and I thank you for all the
22 patience that you've shown already.

23 THE COURT: This is a good part of the next hour.
24 The bad part is during the collateral estoppel, so enjoy it
25 while you can.

1 MR. TULCHIN: I think you will remember that during
2 his opening Novell's lawyers said it was absolutely critical
3 to get an application out to the market at around the time
4 that a new operating system was coming out. And in that
5 connection, what I thought I would do is to show you now
6 evidence from Novell's own files about what was happening at
7 Novell. They own the products now. We're in the period from
8 June of '94 to '96. What was happening at Novell and the
9 reasons Novell was late.

10 Let's start with Slide 58. Now, this is August of
11 1994. So it's less than two months after Novell takes over
12 WordPerfect. And this is a memo written by a man named Mr.
13 Reed Felt, who was a senior executive at WordPerfect and then
14 Novell. And what he says is:

15 After Windows 3.1 products are released this
16 year, move large percentage of Windows resources
17 over to Chicago, 32-bit.

18 Well, I think the evidence will show that
19 Windows 3.1, which was the Microsoft operating system that had
20 come out years before, was what's called a 16-bit system.
21 Windows 95 was 32. It was an improvement in the technology.

22 And what this memoranda by Mr. Reed Felt indicates
23 is that WordPerfect Novell has very few resources working on
24 Chicago Windows 95, even in August of '95. They're still
25 working on versions of the products, which did come out in

1 late '94 that will run on the old Windows operating system,
2 Windows 3.1.

3 So as you hear the evidence as we go through the
4 trial, there will be evidence on this and related subjects.
5 Why was Novell late? Novell like WordPerfect before, it was
6 always late. They're way behind here. They're working on the
7 prior version, versions of their products to run on the old
8 technology. And there are very few resources on Chicago
9 Windows 95 even then.

10 And let's look at Slide 60. This is Exhibit 271.
11 We're now in April of 1995. Novell Business Applications
12 Business Plan, produced by Novell in this case. And again,
13 this is six months after the NameSpace extension APIs. That
14 decision was made by Mr. Gates.

15 And in this document, which is lengthy. And I
16 can't show you all of it now, but the document will be in
17 evidence. What Novell recognizes is this tremendous growth in
18 the suite category has resulted in a corresponding drop in
19 standalone applications like WordPerfect and Quattro Pro. And
20 as I showed you earlier, and the evidence at trial will show,
21 Novell was very weak in suites. Microsoft Office, you
22 remember that prior exhibit, has the strongest 1-2 punch in
23 the industry, so said Novell.

24 And let's look at 61. This is from the very same
25 document, Defendant's Exhibit 271. It's just a little bit

1 deeper into it. Again, it's Novell's business plan. And
2 here's what I thought was a revealing comment. Was it the
3 NameSpace extensions that caused Novell's product to be
4 unsuccessful, or is it something more basic, something that
5 all of us can relate to? Good products sell; weak products
6 usually don't.

7 And here's Novell itself in its own business plan.
8 In the middle of 1995, after all, Windows 95 is coming out in
9 August of that year, just a few months later. And Novell
10 candidly evaluates its own position in the market. And it
11 says, quote:

12 Weak vis-à-vis Microsoft in perception for
13 corporate strategy, vision and ability to develop
14 software, unquote.

15 Ability to develop software. Pretty basic thing.
16 These are both software companies, Microsoft and Novell.

17 And then let's look at the Slide 62. This is the
18 next month, May of 1995. The prior document was April.
19 Novell says, we're weak as compared to Microsoft in ability to
20 develop software.

21 Now, the acquisition that Novell made of
22 WordPerfect had taken place a little less than a year earlier.
23 And there will be evidence from witnesses who will come here
24 to testify who worked for Novell during the relevant period
25 about the difficulty Novell had in integrating WordPerfect

1 into the Novell business. As some of you I'm sure can relate
2 to, when one company buys another, it's sometimes very
3 difficult to integrate the businesses and make people work
4 together well. Borland, and Quattro Pro was the Borland
5 product, was in California. And the software engineers who
6 worked on Quattro Pro at Borland remained in Scotts Valley,
7 California, not too far from San Francisco.

8 And here's Exhibit 16. A survey was taken by
9 Novell. Novell employees survey.

10 48 percent of employees originally hired at
11 WordPerfect are thinking about quitting.

12 It's indicative of the difficulty Novell had in
13 this period in integrating the two businesses. There would be
14 evidence from a number of witnesses who were former Novell
15 employees. Dave Acheson, who worked as -- at WordPerfect
16 beginning in '93 and at Novell into the middle of '95, will
17 testify about the difficulty and what that meant for Novell's
18 ability to be successful with these products.

19 Craig Bushman will also come in, another former
20 WordPerfect Novell employee. I think he worked a total of
21 about 10 years for those companies. Nolan Larsen is the third
22 one. He worked from 1985 to 1996 for Novell and WordPerfect.
23 There may be others, as well.

24 And let's look at Slide 63. We showed that almost
25 half of the people who had been hired at WordPerfect wanted to

1 quit. Things were not going well with Novell. There were
2 lots of problems. This is much later in the year, December of
3 '95. And it's just a little snippet. You need the whole
4 document to understand it. But it's Exhibit 230. It will
5 come up during the trial.

6 And what happened is that out in California, the
7 Quattro Pro developers were quitting in mass. And in December
8 of '93, about 15 additional people submitted their
9 resignations. All except one are going to Oracle. From a
10 development standpoint this leaves us with just two people.
11 Two software engineers.

12 Now Novell's lawyer pointed out that Corel wasn't
13 able to get the Perfect Office suite out into the market until
14 May of '96. There was a long delay there. Here is some of
15 the reasons.

16 There was -- in California among the Quattro Pro
17 software engineers, according to Exhibit 230, there were just
18 two left in December. And you can't get the suite out. The
19 suite includes WordPerfect and all the functionality of
20 Quattro Pro. The suite itself can't be released until
21 Quattro Pro is finished.

22 Let's look at Slide 64. This is more about
23 Quattro Pro, and I'm going back in time now to the middle of
24 1994. One slight explanation. I know there's so much
25 information that's been thrown at you this morning. But when

1 software engineers talk about internationalizing a product or
2 sometimes they say localized versions as you'll see there,
3 they're talking about writing a piece of software for some
4 language other than English. Of course, all these products,
5 Microsoft products, Novell products, WordPerfect, were so
6 worldwide. And if you're a user in France, I pick France
7 particularly, I guess, you may not want the version that runs
8 in English. You want to see it in French. Same for many,
9 many other places around the world. Sometimes Americans
10 forget that people speak other languages elsewhere.

11 And so here's a document, Exhibit 4, from the
12 middle of '94, which indicates that Quattro Pro has a little
13 bit of a problem. They need to increase resources to write
14 the Quattro Pro spreadsheet to foreign languages.

15 And then let's look at 66. Now we're already in
16 1995. It's on the same subject of getting Quattro Pro written
17 to local languages so it can be sold outside English speaking
18 countries. February 2nd, '95. This is months after the
19 NameSpace extension APIs decision. And if the question is,
20 could Novell have been ready to come out with a suite by
21 August when Windows 95 came out, here's in part one of the
22 answers. It's a Novell document, Exhibit 219. It says that:

23 Quattro Pro folks are still working on
24 international versions of Quattro Pro 6.0.

25 That was the old Quattro Pro written to run on

1 Windows 3.1, which ultimately came out in 1994, October of
2 '94. But it came out in English, and they're still working on
3 international versions.

4 Expect to finish that by the end of March '95,
5 and then, according to Novell and only then, will
6 they begin working on the next version of Quattro
7 Pro.

8 That's the version of Quattro Pro to be written to
9 Windows 95.

10 So the NameSpace extension decision, and it's the
11 only thing that Novell's lawyer told you this morning that
12 Microsoft did wrong, the only thing, the only thing he said
13 that caused all these problems and made these products late
14 was Mr. Gates's decision in October of '94. That's what he
15 said. There were no other, no other acts that Microsoft
16 committed that he said caused any delay.

17 And here he is, this document indicates that it's
18 not going to be until March or April of '95 that Novell is
19 even going to begin working on the version of Quattro Pro that
20 would be written to run on Windows 95. Quattro Pro, that
21 version didn't depend on the NameSpace extensions. What
22 Novell's lawyer told you this morning, it was the shared code
23 group that was writing their PerfectFit technology, which
24 would be used for all their applications in the suite. It was
25 the shared code group that needed the NameSpace extension

1 APIs, he said. They weren't going to begin working on the
2 next version of Quattro Pro until a few months before
3 Windows 95 comes out.

4 And then let's look at 60 -- sorry -- Slide 70. We
5 talked earlier before your break about the fact that
6 WordPerfect and Novell were late. They were always late.
7 WordPerfect was late to see the shift to Windows. They were
8 king on DOS, and they were happy making money and pulling in
9 the revenue on DOS. But when the shift to Windows came, when
10 Windows 3.0 came out, that was a revolutionary technological
11 leap in May of 1990, they were way behind. It took them a
12 year and a half to get out a product to run on Windows 3.0.
13 When it came out, that product was slow and buggy. They were
14 behind. Microsoft Word was doing much better on Windows.

15 And we talked also about suites. WordPerfect had
16 no spreadsheet. They couldn't develop a suite until they
17 partnered with Borland. And the first two suites that
18 included the WordPerfect Word processing software were called
19 Borland Office 1.0 and Borland Office 2.0. Those products
20 were panned. Even Novell itself and WordPerfect in their
21 documents say those products were way behind Microsoft and
22 that Microsoft was first to suites.

23 And by the way, I don't think I mentioned this
24 earlier. Microsoft was the first company in 1990 to come out
25 with an Office suite. It was an innovation. It was

1 Microsoft's idea. And Office became very successful right off
2 the bat.

3 And this slide, which is Slide 70, in effect sums
4 up that situation in the suite market. Remember, the
5 NameSpace extension API decision was October of '94. And
6 according to Novell, that might have affected its ability to
7 get out a product in the middle of '95, a suite product, or so
8 they say. The evidence I think will show otherwise.

9 But even before October of '94 and before the
10 middle of 1995, how was Office doing in the market and how was
11 the Novell and WordPerfect suite doing in the market?

12 And here it is. Borland Office 1.0, Borland
13 Office 2.0 and the PerfectOffice product, the Corel release in
14 1996 were never successful. Never. Borland Office came out
15 before the NameSpace extension APIs. It would be irrational
16 to blame Microsoft for the lack of success, and they don't.

17 The truth is that in the market for suites, and we
18 saw earlier that slide that had the orange bar showing that
19 everyone was going to suites real fast, it happened really
20 quickly in the market, as can happen in a high-tech market.
21 When it came to suites, Office as Novell's own documents
22 recognize, Office was the strongest. It had the strongest
23 1-2 combination, Word and Excel.

24 So Microsoft Office was successful from the
25 beginning. It always had high market shares. The Borland

1 WordPerfect, Novell product eventually Corel, was never
2 successful.

3 Here's a case in which, as I told you earlier,
4 Novell contends that it's Microsoft's fault that Novell's
5 products were late. And Novell contends, and Mr. Johnson said
6 earlier today that they would have an expert,
7 Dr. Warren-Boulton to tell you about the damages. And they
8 said that they lost \$1 billion. And I predict to you that
9 Dr. Warren-Boulton, Novell's expert, will offer the opinion
10 that Microsoft should pay Novell \$1 billion or more.

11 We think the evidence will show in trial that the
12 reason Novell was late had nothing to do with the one and only
13 act that Novell says Microsoft committed that was wrongful,
14 Mr. Gates's decision in October of 1994 to withdraw support
15 for those NameSpace extensions. Remember, Microsoft provided
16 Novell and everyone else with the technology in Windows 95
17 that made it really easy for all of Novell's customers to
18 launch WordPerfect or Quattro Pro or a suite from the start
19 button from an icon right on the desktop.

20 And it's not just that Novell made a misjudgment
21 when it paid so much for WordPerfect in 1994. It did make a
22 misjudgment. It paid much too much. The stock market
23 reaction immediately shows that. It's not just that. It's
24 that Novell also made some bad choices along the way.

25 Keep that up there for a minute, Dave. Sorry.

1 Novell made some bad choices along the way. They
2 didn't integrate the two companies well. We saw just a little
3 piece of that. They were having trouble writing Quattro Pro
4 for foreign languages. They recognized that in many ways
5 Microsoft's products were better.

6 And as the world shifted to suites, this was the
7 natural result. Consumers, people across this country and
8 around the world, preferred Microsoft Office. Novell's own
9 documents explained why. Novell's products were slow. They
10 were buggy. They were late to the market, long before the
11 NameSpace extension APIs came out.

12 And Microsoft's strong share is also attributable
13 not just to mistakes by Novell. Nobody's perfect, and
14 business people can make mistakes, for sure. But also to the
15 fact that Microsoft was making the best products it could.
16 And again, the idea that Mr. Gates in 1994 had some obligation
17 to design Windows 95, the product they were working on very
18 hard, to design it in a way that helped Novell instead of
19 design it in a way that was best for Microsoft to make the
20 best Windows 95 that they could, that idea just seems
21 peculiar.

22 Let's look at Slide 2. Yesterday Judge Motz
23 provided you with this instruction, that:

24 In order to prove its claim, Novell must
25 establish among other things that Microsoft

1 willfully maintained its monopoly in the operating
2 system market by engaging in anticompetitive
3 conduct against Novell's products during the time
4 Novell owned those products.

5 I submit to you that Novell won't be able to do
6 that. It won't be able to show that Microsoft's conduct was
7 anti-competitive. It won't be able to show that any conduct
8 injured the Novell products. Those products were in a decline
9 all the way along and continued. Novell made it worse with
10 their own business choices. And Novell also won't be able to
11 show, we predict, that Microsoft maintained its monopoly by
12 that conduct, that Microsoft kept the monopoly in Windows by
13 virtue of the NameSpace extension APIs, because for Novell to
14 prevail in this case they have to prove to your satisfaction,
15 as the Court instructed you yesterday, that Microsoft's
16 monopoly in operating systems, in Windows, came about because
17 of the conduct they claim was wrong, the decision to withdraw
18 support for the NameSpace extension APIs. Four APIs out of
19 thousands.

20 And to think that the market for operating systems
21 would have been different -- you remember Novell's lawyer
22 showing you that picture of the launch date of Windows 95. He
23 said the Rolling Stones were hired and Jay Leno had something
24 to do with it. I forget what. And millions and millions of
25 people across our country and the world lined up to get

1 Windows 95.

2 And to prevail in this case, Novell is going to
3 have to show you that somehow if WordPerfect had come out
4 earlier, and they have to be able to prove that it would have
5 come out earlier, had the NameSpace extension decision not
6 been made, that that would have changed everything in the
7 market for operating systems, that Windows' popularity would
8 have declined significantly.

9 We don't think there is any evidence, there will be
10 any evidence at the trial that the market for operating
11 systems would have been any different had WordPerfect come out
12 sooner or had the NameSpace extension APIs been fully
13 documented or anything else that Novell lawyer -- Novell's
14 lawyer asserted.

15 So I know you'll be glad to hear I'm almost done.

16 Windows 95 was one of the most significant
17 technology products to be released to the public in the last
18 25 years. It was a huge success. It was a game changer. It
19 provided great functionality for people to use. Microsoft
20 developed it in a way that was best for Microsoft. That's
21 what it's supposed to do. That's called competing in our
22 country. And the Microsoft engineers who worked on it and the
23 executives who supervised including at the very top
24 Bill Gates, had one thing in mind, to make the best product
25 they could, the one that would work best for consumers and be

1 most successful for Microsoft, of course.

2 We don't think there will be any evidence that
3 Mr. Gates withdrew support for the NameSpace extensions to
4 hurt Novell. In fact, Brad Struss, S-T-R-U-S-S, will come
5 testify, he worked for Microsoft then, still does today.
6 Mr. Struss had a relationship with WordPerfect and Novell. He
7 spoke frequently to someone at Novell named Norm Creighton.
8 Mr. Struss was told before Mr. Gates made the decision that
9 Novell was not working on the NameSpace extension APIs. And
10 Mr. Struss wrote an e-mail after Mr. Gates made the decision
11 10 days or two weeks later in October of '94 saying that
12 WordPerfect appears to be okay with the decision to withdraw
13 support for the NameSpace extensions. WordPerfect appears to
14 be okay. No one at WordPerfect said to Microsoft at the time,
15 boy, if you withdraw support for the NameSpace extensions,
16 this is a huge problem for us, for WordPerfect or Novell.
17 Microsoft thought the contrary. And Mr. Struss will come tell
18 you, and you'll see his e-mail.

19 We don't think there will be any evidence, no
20 document from Novell, contemporaneous document written in 1994
21 or 1995, that will indicate that they complained to Microsoft
22 about the decision. The developers at WordPerfect, Novell,
23 may have had work to do to write some source code to give them
24 whatever features in WordPerfect they needed to go sell their
25 product. Of course, if so, they should have done the work.

1 Microsoft's responsibility alone was to write good software
2 for Microsoft and for other users.

3 And as I told you when I started this opening
4 statement way back when, though the decision was made in '94
5 and Novell made no complaint in 1994, the lawsuit was filed
6 10 years later. If this decision had been such a killer for
7 Novell, had made life so impossible, if there was no way for
8 Novell to compete in the market, I ask you, because as a juror
9 you don't have to leave your common sense home, would Novell
10 have remained silent at the time?

11 We think that at the end of the case you will find
12 that there is no liability, that there was no anticompetitive
13 conduct, that Novell wasn't hurt by anything Microsoft did.
14 We also think that you will find that the operating system
15 competition would not have been affected, Windows would have
16 remained just as popular as it was regardless of the NameSpace
17 extension APIs.

18 And lastly, even if you thought that there was some
19 liability, we will ask you at the conclusion to determine that
20 damages are zero because the decline in WordPerfect and
21 Quattro Pro and the suite was a function of Novell's
22 misjudgments and Novell's bad business choices and also of the
23 great products that Microsoft was making. Thank you.

24 THE COURT: Thank you, Mr. Tulchin.

25 Now we're going to begin the evidence, which is

1 going to begin with a reading by Mr. Taskier. And he's going
2 to read the estoppel findings. We'll stop -- I think because
3 of the schedule, we'll probably only get about halfway
4 through.

5 Pick a time around or before 1:30, Mr. Taskier.

6 Let me just make a couple of remarks before we
7 begin. Number one, it was mentioned to you during opening
8 statement by one of the lawyers. You may be feeling
9 overwhelmed right now. There's an awful lot of information.
10 I mean, I've learned a lot of information, and I've been
11 working on this case for a while. You are going to learn more
12 about the case. Don't feel overwhelmed, as you have an
13 outline of what the evidence is going to show, and you're
14 going to be living with the case for a long time, and you'll
15 come to understand it as it goes along.

16 Secondly, let me just say that I don't know if you
17 all realize this, but I do. I've been around the system for a
18 long time. I just want to comment on it. Even though a lot
19 of information was imparted upon you which may be
20 overwhelming, you are very fortunate in having very good
21 lawyers on both sides of this case. I mean, bad lawyers could
22 have made this go on for days and days and days. They really
23 were able to summarize on both sides what the case is all
24 about. And I think you'll find this true throughout the case.
25 I mean, they work very hard preparing their witnesses and

1 preparing opening statements, and there are all kinds of legal
2 issues which when you all go home sometimes they work out
3 among themselves. Sometimes I have a pretty small part, it is
4 a pretty small because they work out things so that I don't
5 have to make a decision on it.

6 Fourth, the collateral estoppel is not exciting,
7 and everybody here knows it's not going to be exciting for
8 you. But let me mention that because this -- these binding
9 facts, I've used the term collateral estoppel, which is a
10 legal term, by having these facts read to you it is saving you
11 a lot of time. You would have had a lot of witnesses come in
12 and testify. So even though these findings have a binding
13 effect here may be a little boring for you to hear it really
14 is a big timesaver.

15 So with that, Mr. Taskier. I'm sorry I used the
16 word collateral estoppel.

17 MR. SCHMIDTLEIN: You were going to give I think --

18 THE COURT: Oh, yes. Excuse me. I certainly was.

19 Now there was also mentioned in the opening
20 statement the previous litigation in 1999 in the District of
21 Columbia certain factual findings were made that were binding
22 in this case. As you will hear these findings were somewhat
23 lengthy, but they will now be read to you. Thanks.

24 MR. TASKIER: Thank you, Your Honor.

25 Ladies and gentlemen.

1 An operating system is a software program that
2 controls the allocation and use of computer resources such as
3 central processing unit time, main memory space, disk space
4 and input/output channels. The operating systems also
5 supports the function of software programs called application
6 that perform specific user oriented tasks. The operating
7 system supports the function of application by exposing
8 interfaces called application programming interfaces or APIs.
9 These are synapses at which the developer of an application
10 can connect to invoke prefabricated blocks of code in the
11 operating system. These blocks of code in turn perform
12 crucial tasks, such as displaying text on the computer screen.
13 Because it supports applications while interacting more
14 closely with the PC system's hardware, the operating system is
15 said to serve as a platform.

16 An operating system designed to run on an
17 Intel-compatible PC will not function on a
18 non-Intel-compatible PC, nor will an operating system designed
19 for a non-Intel-compatible PC function on an Intel-compatible
20 one. Similarly, an application that relies on APIs specific
21 to one operating system will not generally speaking function
22 on another operating system unless it is first adapted or
23 ported, to the APIs of the other operating systems.

24 In 1981, Microsoft released the first version of
25 its Microsoft disk operating system commonly known as MS-DOS.

1 The system had a character-based user interface that required
2 the user to type specific instructions at a command prompt in
3 order to perform tasks such as launching applications and
4 copying files. When the International Business Machines
5 Corporation, IBM, selected MS-DOS for pre-installation on its
6 first generation of PCs, Microsoft's product became the
7 predominate operating system sold for Intel-compatible PCs.

8 In 1985, Microsoft began shipping a software
9 package called Windows. The product included a graphical user
10 interface which enabled users to perform tasks by selecting
11 icons and words on the screen using a mouse. Although
12 originally just a user interface or shell, sitting on top of
13 MS-DOS, Windows took on more operating system functionality
14 over time.

15 In 1995, Windows introduced a software package
16 called Windows 95 which announced itself as the first
17 operating system for Intel-compatible PCs that exhibited the
18 same sort of integrated features as the Mac OS running PCs
19 manufactured by Apple Computer Company, Inc., Apple.
20 Windows 95 enjoyed unprecedented popularity with consumers,
21 and in June 1998, Microsoft released its successor Windows 98.

22 Microsoft is the leading supplier of operating
23 systems for PC. The company transacts business in all 50 of
24 the United States and in most countries around the world.

25 Microsoft licenses copies of its software programs

1 directly to consumers. The largest part of its MS-DOS and
2 Windows sales, however, consists of licensing the products to
3 manufacturers of PCs known as original equipment manufacturers
4 or EOMs, such as the IBM PC company and the Compaq Computer
5 Corporation Company. An OEM typically installs a copy of the
6 Windows onto one of its PCs before selling the package to a
7 consumer under a single price.

8 Although certain Web browsers provided graphical
9 user interfaces as far back as 1993, the first widely popular
10 graphical browser distributed for profit called Navigator was
11 brought to market by the Netscape Communications Corporations,
12 Netscape, in December of 1994. Microsoft introduced its
13 browser called Internet Explorer in July 1995.

14 Currently there are no products, nor are there
15 likely to be any in the near future, that a significant
16 percentage of consumers worldwide could substitute for
17 Intel-compatible PC operating systems without incurring
18 substantial costs. Furthermore --

19 THE COURT: Let interrupt you. Just a reminder.
20 As you were told before, these findings were made in 1999. So
21 when you hear the word "currently" it's referring to the time
22 period, refers to in 1999. Excuse me.

23 MR. TASKIER: Thank you, Your Honor.

24 Furthermore -- now it works -- no firm that does
25 not currently market Intel-compatible PC operating systems

1 could start to doing so in a way that would, within a
2 reasonably short period of time, present a significant
3 percentage of consumers with a viable alternative to existing
4 Intel-compatible PC operating system. It follows that if one
5 firm controlled the financing licensing of all
6 Intel-compatible PC operating systems worldwide, it could set
7 the price of a license substantially above that which would be
8 charged in a competitive market and leave the price there for
9 a significant period of time without losing so many customers
10 as to make the action unprofitable. Therefore, in determining
11 the level of Microsoft's market power, the relevant market is
12 the licensing of all Intel-compatible PC operating systems
13 worldwide.

14 Since only Intel-compatible PC operating systems
15 will work with Intel-compatible PCs, a consumer cannot opt for
16 a non-Intel-compatible PC operating system without obtaining a
17 non-Intel-compatible PC. Thus, for consumers who already own
18 an Intel-compatible PC system, the cost of switching to a
19 non-Intel-compatible PC operating system includes the price of
20 not only a new operating system, but also a new PC and new
21 peripheral devices. It also includes the effort of learning
22 to use the new system, the cost of acquiring a new set of
23 compatible applications and the work of replacing files and
24 documents that were associated with the old applications.
25 Very few consumers would incur these costs in response to the

1 trivial increase in the price of an Intel-compatible PC system
2 that would result from even a substantial increase in the
3 price of an Intel-compatible PC operating system. For
4 example, users of Intel-compatible PC operating systems would
5 not switch in large numbers to the Mac OS in response to even
6 a substantial, sustained increase in the price of an
7 Intel-compatible PC operating system.

8 Operating systems are not the only software
9 programs that expose APIs to application developers.
10 Netscape's Web browser and Sun Microsystems, Inc.'s Java class
11 libraries are examples of nonoperating system software that do
12 likewise. Such software is often called middleware because it
13 relies on the interfaces provided by the underlying operating
14 system while simultaneously exposing its only APIs to
15 developers. Currently no middleware product exposes enough
16 APIs to allow independent software vendors, ISVs, profitably
17 to write full-featured personal productivity applications that
18 rely solely on those APIs.

19 Even if middleware deployed enough APIs to support
20 full-featured applications, it would not function on a
21 computer without an operating system to perform tasks such as
22 managing hardware resources and controlling peripheral
23 devices. But to the extent the array of applications relying
24 solely on middleware comes to satisfy all of the user's needs,
25 the user will not care whether there exists a large number of

1 other applications that are directly compatible with the
2 underlying operating system. Thus, the growth of
3 middleware-based applications could lower the costs to users
4 of choosing a non-Intel-compatible PC operating system like
5 the Mac OS. It remains to be seen, though, whether there will
6 ever be a sustained stream of full-featured applications
7 written solely to middleware APIs. In any event, it would
8 take several years for middleware and the applications it
9 supports to evolve from the status quo to a point at which the
10 cost to the average consumer of choosing a
11 non-Intel-compatible PC operating system over an
12 Intel-compatible one falls so low as to constrain the pricing
13 of the latter systems.

14 Firms that do not currently produce
15 Intel-compatible PC operating system could do so. What is
16 more, once a firm had written the necessary software code, it
17 could produce millions of copies of its operating system at
18 relatively low cost. The ability to meet a large demand is
19 useless, however, if the demands for the product is small and
20 signs do not indicate large demand for a new Intel-compatible
21 PC operating system. To the contrary, they indicate that the
22 demand for a new Intel-compatible PC operating system would be
23 severely constrained by an intractable chicken-and-egg
24 problem. The overwhelming majority of consumers will only use
25 a PC operating system for which there already exists a large

1 and varied set of high quality, full-featured applications and
2 for which it seems relatively certain that new types of
3 applications and new versions of existing applications will
4 continue to be marketed at pace with those written for other
5 operating systems. Unfortunately, for firms whose products do
6 not fit that bill, the porting of applications from one
7 operating system to another is a costly process.

8 Consequently, software developers generally write applications
9 first and often exclusively for the operating system that is
10 already used by a dominate share of all PC users. Users do
11 not want to invest in an operating system unless it is clear
12 that the system will support generations of applications that
13 will meet their needs, and developers do not want to invest in
14 writing or quickly porting applications for an operating
15 system until it is clear that there will be a sizable and
16 stable market for it. What is more, consumers who already use
17 one Intel-compatible PC operating system are even less likely
18 than first-time buyers to choose a newcomer to the field, for
19 switching to a new system would require those users to scrap
20 the investment they have made in applications, training and
21 certain hardware.

22 The chicken-and-egg problem notwithstanding, a firm
23 might reasonably expect to make a profit by introducing an
24 Intel-compatible PC operating system designed to support a
25 type of application that satisfies the special interests of a

1 particular subset of users. For example, Be, Inc., Be, market
2 an Intel-compatible PC operating system called BeOS that
3 offers superior support for multimedia applications, and the
4 operating system enjoys a certain amount of success with the
5 segment of the consumer population that has a special interest
6 in creating and playing multimedia content with a PC system.
7 Still, while a niche operating system might turn a profit, the
8 chicken-and-egg problem hereinafter referred to as the
9 applications barrier to entry, would make it prohibitively
10 expensive for a new Intel-compatible operating system to
11 attract enough developers and consumers to become a viable
12 alternative to a dominant incumbent in less than a few years.

13 To the extent that the developers begin writing
14 attractive applications that rely solely on servers or
15 middleware instead of PC operating systems, the applications
16 barrier to entry could erode. As the Court finds above,
17 however, it remains to be seen whether server- or
18 middleware-based development will flourish at all. Even if
19 such development were already flourishing, it would still be
20 several years before the applications barrier eroded enough to
21 clear the way for the relatively rapid emergence of a
22 viability alternative to --

23 THE COURT: Just a minute.

24 Thank you.

25 MR. TASKIER: Even if such developments were

1 already flourishing it would be several years before the
2 applications barrier eroded enough to clear the way for the
3 relatively rapid emergence of a viable alternative to
4 incumbent Intel-compatible PC operating systems. It is highly
5 unlikely then that a firm not already marketing an
6 Intel-compatible PC operating system could begin marketing one
7 that would in less than a few years present a significant
8 percentage of consumers with a viable alternative to
9 incumbents.

10 Microsoft enjoys so much power in the market for
11 Intel-compatible PC operating systems that if it wished to
12 exercise this power slowly in terms of price, it could charge
13 a price for Windows substantially above that which could be
14 charged in a competitive market. Moreover, it could do so for
15 a significant period of time without losing an unacceptable
16 amount of business to competitors. In other words, Microsoft
17 enjoys monopoly power in the relevant market.

18 Viewed together, three main facts indicate that
19 Microsoft enjoys monopoly power. First, Microsoft's share of
20 the market for Intel-compatible PC operating system is
21 extremely large and stable. Second, Microsoft dominant market
22 share is protected by a high barrier to entry. Third, and
23 largely as a result of that barrier, Microsoft's customers
24 lack a commercially viable alternative to Windows.

25 Microsoft possesses a dominate persistent and

1 increasing share of the worldwide market for Intel-compatible
2 PC operating systems. Every year for the last decade,
3 Microsoft's share of the market for Intel-compatible PC
4 operating systems has stood above 90 percent. For the last
5 couple of years, the figure has been at least 95 percent. And
6 analysts project that the share will climb even higher over
7 the next few year. Even if Apple's Mac OS were included in
8 the relevant market, Microsoft's share would still stand well
9 above 80 percent.

10 Microsoft's dominate market share is protected by
11 the same barrier that helps define the market for
12 Intel-compatible PC operating systems. As explained above,
13 the applications barrier would prevent an aspiring entrant
14 into the relevant market from drawing a significant number of
15 customers away from a dominant incumbent even if the incumbent
16 priced its product substantially above competitive levels for
17 a significant period of time. Because Microsoft's market
18 share is so dominate, the barrier has a similar effect within
19 the market. It prevents Intel-compatible PC operating systems
20 other than Windows from attracting significant consumer
21 demand, and it would continue to do so even if Microsoft held
22 its prices substantially above the competitive level.

23 Consumer interest in a PC operating system derives
24 primarily from the ability of that system to run applications.
25 The consumer wants an operating system that runs not only

1 types of applications that he knows he will want to use, but
2 also those types in which he might develop an interest later.
3 Also, the consumer knows that if he chooses an operating
4 system with enough demand to support multiple applications in
5 each product category, he will be less likely to find himself
6 straitened later by having to use an application whose
7 features disappoint him. Finally, the average user knows that
8 generally speaking, applications improve through successive
9 versions. He thus wants an operating system for which
10 successive versions of his favorite applications will be
11 released promptly at that. The fact that a vastly larger
12 number of applications are written for Windows than for other
13 PC operating systems attracts consumers to Windows because it
14 reassures them that their interests will be met as long as
15 they use Microsoft's product.

16 Software development is characterized by
17 substantially economies scale. The fixed costs of producing
18 software including application is very high. By contrast
19 marginal costs are very low. Moreover, the cost of developing
20 software are sunk, once extended to develop software,
21 resources so devoted cannot be used for another purpose. The
22 result of economies of scale and sunk costs is that
23 application developers seek to sell as many copies of their
24 applications as possible. An application that is written for
25 one PC operating system will operate on another PC operating

1 system only if it is ported to that system. And porting
2 applications is both time consuming and expensive. Therefore,
3 application developers tend to write first in the operating
4 system with the most users -- system with the most users
5 Windows. Developers might then port their applications to the
6 other operating systems, but only to the extent that the
7 marginal added sales justify the cost of porting. In order to
8 recover the cost of ISVs that do go to the effort of porting
9 frequently set the price of ported application considerably
10 higher than that of the original versions written for Windows.

11 Consumer demand for Windows enjoys positive network
12 effects. A positive network effect is a phenomenon by which
13 the attractiveness of a product increases with the number of
14 people using it. The fact that there is a multitude of people
15 using Windows makes the product more attractive to consumers.
16 The large installed base attracts corporate customers who want
17 to use an operating system that new employees are already
18 likely to know how to use, and it attracts academic consumers
19 who want to use software that will allow them to share files
20 easily with colleagues at other institutions. The main reason
21 that demand for Windows experiences positive network effect,
22 however, is that the size of Windows' installed base impels
23 ISVs to write applications first and foremost to Windows
24 thereby ensuring a large body of applications from which the
25 consumers can choose. The large body of applications thus

1 reinforces demands for Windows, augmenting Microsoft's
2 dominate position and thereby perpetuating ISVs incentives to
3 write applications principally for Windows. This
4 self-reinforcing cycle is often referred to as a positive
5 feedback loop.

6 Microsoft continually releases new and improved
7 versions of its PC operating system. Each time it does,
8 Microsoft must convince ISVs to write applications that take
9 advantage of new APIs so that existing Windows users will have
10 incentive to buy an upgrade. Since ISVs are usually still
11 earning substantial revenue from applications written for the
12 last version of Windows, Microsoft must convince them to write
13 for the new version. Even if ISVs are slow to take advantage
14 of the new APIs, though, no applications barrier stands in the
15 way of consumers adopting the new system for Microsoft ensures
16 that successive versions of Windows retain the ability to run
17 applications developed for earlier versions. In fact, since
18 ISVs know that consumers do not feel locked into their old
19 versions of Windows and that new versions have historically
20 attracted substantial consumer demand, ISVs will generally
21 write to new APIs as long as the interfaces enable attractive
22 innovative features. Microsoft supplements developers'
23 incentives by extending various seals of approval, visible to
24 consumers, investors and industry analysts, to those ISVs that
25 promptly develop new versions of their applications adapted to

1 the newest version of Windows. In addition, Microsoft works
2 closely with ISVs to help them adapt their applications to the
3 newest version of the operating system, a process that is in
4 any event far easier than porting an application from one
5 vendor's PC operating system to another's. In sum, despite
6 the substantial resources Microsoft expends inducing ISVs to
7 develop applications for new versions of Windows, the company
8 does not face any obstacles nearly as imposing as the barrier
9 to entry that vendors and would-be vendors of other PC
10 operating systems must overcome.

11 Do you want me to stop here, Your Honor?

12 THE COURT: It's up to you. If you want to go for
13 more five minutes. Stop?

14 MR. TASKIER: I think it's a natural place to stop.

15 THE COURT: Okay. Thank you.

16 We'll resume tomorrow at 8:30. I'm going to ask
17 you something now which I have not cleared with the lawyers, I
18 haven't cleared with the court staff, and any of you can say
19 no. I was just talking to another judge here who said he
20 sometimes starts earlier than 8:30 and sometimes goes to 2:30
21 rather than 1:30. The lawyers may not be able to do it, the
22 court staff may not be able to do it. But if you say no, say
23 8:15 to 2 o'clock, that's the end of it. If any one of you
24 says no because this is not a bait and switch. But I'm
25 getting sort of used to the pace around here, and people do

1 get here earlier. And to the extent that we'd spend a little
2 more time in a day, the sooner the case will be over, which
3 may be a benefit to you, also. So I'm only asking that just
4 for you, also.

5 Don't tell me now. Talk to one another about it.
6 Tell Theresa. As I say, if one or certainly if one just says,
7 I can't do it, that's fine, because you all were picked as
8 jurors on the basis of the 8:30 to 1:30 schedule. But if we
9 pick up, you know, 45 minutes a day, that's 45 minutes a day
10 and it comes off the back end. So I'm asking for your
11 benefit, so just let me know.

12 And have a nice afternoon. I'm going to forget to
13 tell you this every day. In fact, I'm not going to tell you
14 every day on purpose because I don't like to hear myself talk.
15 But now that we're in the trial, please don't talk about the
16 case in anyone. More importantly make sure you don't read
17 anything about it. And most importantly, particularly because
18 what you all were asked to absorb today was overwhelming. You
19 might want to think, look, to really understand this, I have
20 to learn a little bit more on my own, do a little research,
21 particularly on the Internet or everywhere.

22 Don't do that. You will learn the case during the
23 course of the coming weeks, and don't try to -- your verdict
24 has got to be based upon what you hear here in the courtroom,
25 and, please, don't do any independent research.

1 Most importantly of all have a very, very nice
2 afternoon, and see you tomorrow at 8:30 tomorrow. I'll stay
3 here with counsel.

4 (Whereupon, the jury left the court proceedings.)

5 THE COURT: Please be seated. Just a couple
6 things, and then I'm going to ask you if there is anything you
7 should take up with me about tomorrow. Number one, if you all
8 can't do it, you let me know, too. I mean, just say it's not
9 going to work. I saw everybody was here around 8:15 this
10 morning or 8:00. So if you can do it and they can do it,
11 we'll pick up some time.

12 MR. TULCHIN: We're happy to start earlier, Your
13 Honor.

14 MR. JOHNSON: The same, Your Honor.

15 THE COURT: We'll see what they say, and also the
16 Court staff.

17 Secondly, totally selfish. If any of you know of
18 any particularly interesting witness that's going to come up,
19 please let me know so I can connect my office. Just like they
20 wanted to hear the opening statement, I'm sure they want to
21 hear from Bill Gates. But if there is anyone that you think
22 is particularly interesting let me know so I can let them know
23 who it is and we can connect them. That's fine.

24 Thirdly, and, Mr. Taskier, you're doing a wonderful
25 job, a wonderful terrible job. This is not as a criticism to

1 you. I have no objection, and I don't know if anyone does, I
2 have no objection if you want to call a live witness and then
3 use some of these things as fillers from time to time, that is
4 fine with me. It's also fine with me if you just finish it up
5 right now. But I just want to let you know that I don't stand
6 on ceremony. So if you think it would be good to change the
7 pace a little and have a live witness and resume, that's fine
8 with me. But it's entirely up to you, unless what does
9 Microsoft think.

10 MR. TULCHIN: I wasn't sure I understood you.

11 THE COURT: No. I said instead of reading all of
12 the collateral estoppel findings at the same time maybe split
13 them up between witnesses.

14 And I'm not saying you should. I'm just letting
15 you know I'm not opposed to it.

16 Okay. What, if anything, should I have to think
17 about? Hopefully nothing. Is there anything I should
18 consider for tomorrow?

19 MR. SCHMIDTLEIN: I think we're all set for
20 tomorrow.

21 MR. TULCHIN: I understood tomorrow, Your Honor,
22 that Novell would be playing videotapes of two depositions.

23 THE COURT: Fine.

24 MR. SCHMIDTLEIN: I think we've resolved all the
25 objections.

1 MR. TULCHIN: Yes.

2 THE COURT: Have a nice evening. See you all in
3 the morning.

4 Do you want the court reporters here while the
5 depositions are being taken? Or since you already have
6 copies, do you just want to maybe have an official court
7 reporter here just to say the videotapes are being taken
8 and then --

9 MR. SCHMIDTLEIN: We can just provide the
10 transcripts.

11 THE COURT: And provide the transcripts.

12 MR. JOHNSON: Yeah. No need to be here at the
13 start. But once we turn on the tape, I don't see any reason
14 for them --

15 THE COURT: Sure.

16 MR. TASKIER: -- to record what has been recorded.

17 MR. TULCHIN: I agree with have that, Your Honor.
18 It might be a good idea to have someone here in case.
19 Sometimes a juror says something.

20 THE COURT: Sure.

21 MR. TULCHIN: Or there's some unanticipated
22 commotion.

23 THE COURT: Someone will be available to be here
24 the whole time. And so at the beginning to say what's
25 happening. In case, you know, you all think of something.

1 And I will be around the courthouse at 8:15, so if something
2 over night comes up that you think needs my attention, just
3 find me and I'll come here, and so when the jury gets here at
4 8:30, we'll get started. Thank you all.

5 MS. NELLES: Your Honor, do you want a copy of the
6 testimony that's being played? The parties can provide that
7 if you want it.

8 THE COURT: I'll have it for my office, just as a
9 courtesy. I think they wanted to hear the opening statements.
10 Just they're interested.

11 MR. SCHMIDTLEIN: Judge, we're going to e-mail your
12 clerk with that streaming information, if you want.

13 THE COURT: That's terrific. Thanks a lot.

14 (Whereupon, the court proceedings were concluded.)

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1 STATE OF UTAH)

2) ss.

3 COUNTY OF SALT LAKE)

4 I, KELLY BROWN HICKEN, do hereby certify that I am
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of
7 the foregoing matter on October 18, 2011, and thereat reported
8 in Stenotype all of the testimony and proceedings had, and
9 caused said notes to be transcribed into typewriting; and the
10 foregoing pages number from 125 through 162 constitute a full,
11 true and correct report of the same.

12 That I am not of kin to any of the parties and have
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this ____ day of
15 _____ 2011.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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