

1 THE COURT: Let's get the jury.

2 (Jury present)

3 MR. TULCHIN: Thank you, Your Honor.

4 BY MR. TULCHIN:

5 Q Mr. Frankenberg, on direct I think you indicated that
6 when the announcement was made in March of 1994 that Novell
7 had a contract to buy WordPerfect, Novell's stock fell by
8 20 percent. Do you recall that?

9 A I said yes, by approximately 20 percent. I don't
10 remember exactly.

11 Q Do you remember that the fall was from a price a little
12 bit under \$24 to, a couple days later, \$19?

13 A Again, I don't remember the exact numbers, but I do
14 recall that it dropped about 20 percent.

15 Q It was certainly very unusual, was it not, at the time,
16 Mr. Frankenberg -- the stock market I think is a little more
17 volatile these days, but it was very unusual at the time for
18 the stock of a big public company to fall in a two-day
19 period by something like 20 percent?

20 A That was a significant drop, yes.

21 Q It was very unusual, particularly back in those days?

22 A I have no way of judging whether it was -- how unusual
23 it was. I'm sure it wasn't a common occurrence.

24 Q Do you recall that this had ever happened at Hewlett
25 Packard when you were there, a drop of 20 percent a day or

1 two on the stock market?

2 A I think it may have come close to that, but I don't
3 recall any specifics.

4 Q Maybe it came close to that, and there was a crash in
5 1986, the crash of the market in general?

6 MR. JOHNSON: Objection --

7 THE COURT: I think he answered your question,
8 unless you want to qualify him as an investment banker.

9 MR. TULCHIN: No.

10 THE WITNESS: Please don't do that.

11 MR. TULCHIN: I wouldn't do that to you, I
12 promise.

13 THE WITNESS: Thank you.

14 MR. TULCHIN: Could we show slide 35-C from
15 Microsoft's opening statement in this case.

16 BY MR. TULCHIN:

17 Q And, Mr. Frankenberg, what I'm about to inquire has to
18 do with the loss in value or market capitalization for
19 Novell. Assuming these numbers are right, that on March 21,
20 '94, Novell's stock, which was traded on the NASDAQ, closed
21 at 23.75, and then closed at \$19 two days later. Do you see
22 those numbers?

23 A Yes, I do.

24 Q Are they pretty much in accord with your memory?

25 A Again, I will say, I don't remember those specific

1 numbers, but the drop was approximately what I do recall,
2 yes.

3 Q Fair enough.

4 The market capitalization of a company is simply a
5 matter of how many shares there are outstanding multiplied
6 by the price on the stock market, right?

7 A Correct.

8 Q And if you do the math -- and I won't try to do it with
9 you, but if you do the math and you do 23.75 times the
10 number of Novell's shares, which was then more than 309
11 million, then you do 19 times the number of shares, the loss
12 in value -- the loss in market capitalization for Novell in
13 two days was the number you see there in red, 1,467,000,000,
14 et cetera. Do you see that?

15 A I do, yes.

16 Q That's an extraordinary drop, isn't it?

17 A It's a very significant drop, yes.

18 Q If you added together the costs to Novell of buying
19 WordPerfect Corporation and also buying the Quattro Pro
20 spreadsheet, the cost wasn't very much different than that,
21 just over 1.5 billion. Is that in accord with your memory?

22 A I think that's in the right neighborhood. I don't
23 remember this number of decimal points, but, yes.

24 Q Would you say, Mr. Frankenberg, that the stock market
25 reaction indicated that the market, shareholders of Novell,

1 the market believed that the value to Novell for buying
2 WordPerfect and Quattro Pro was close to zero?

3 MR. JOHNSON: Objection, Your Honor.

4 THE COURT: Sustained.

5 Again, you can argue it.

6 MR. TULCHIN: Thank you, Your Honor. Your Honor,
7 thank you.

8 BY MR. TULCHIN:

9 Q Do you recall there being discussions at board meetings
10 about this decline in value of the stock?

11 A There may well have been, but I don't recall any
12 specifically, no.

13 Q And you made the decision shortly after you took
14 over -- which was just within a week or ten days of this,
15 right?

16 A Yes.

17 Q You made a decision to cut expenses?

18 A Not immediately upon entering the company, no.

19 Q I didn't mean to imply immediately, but within two or
20 three months of taking charge at Novell, you were out there
21 cutting expenses, as I think you testified earlier?

22 A Yes, but the decision wasn't made within days of this
23 occurrence. It was made later --

24 Q I understand.

25 A -- after an opportunity to look at the situation and

1 talk with people and see what was required.

2 Q I'm handing you, Mr. Frankenberg, Defendant's Exhibit
3 15. This is a document that was prepared in August of 1994,
4 correct?

5 A Correct.

6 Q And it was from Joe Marengi and Paul Cook. They were
7 trusted officers of Novell, correct?

8 A Joe Marengi was the sales vice president and Paul Cook
9 was his HR representative.

10 Q Right. And this memo is being written to you and also
11 to Tim Harris?

12 A Correct.

13 Q And this is in August. And the subject matter is
14 Novell/WordPerfect integration, something we talked about a
15 little bit earlier. And you will see on the first page
16 under Roman II, notes, there is reference to 378 reduction
17 in headcount. Do you see that?

18 A Yes.

19 Q And what Exhibit 15 reflects is that as of August you
20 made a decision to lay off, to reduce 378 employees,
21 correct?

22 A That's correct.

23 Q And is it also your recollection, Mr. Frankenberg, that
24 of the 378 that were laid off, or let go, that the vast
25 majority of those came from WordPerfect Corporation?

1 A A significant majority were from WordPerfect
2 previously, yes.

3 Q And do you remember at deposition looking at Exhibit 15
4 with me and I think we calculated together that 93 percent
5 of the 378 people who were being let go in August of '94,
6 93 percent were people who had come from WordPerfect? Do
7 you recall that?

8 A I do. I think if you looked in the back it would
9 verify something in that range, yes.

10 Q All right. That had a significant impact at
11 WordPerfect among those who remained when it came to morale;
12 did it not?

13 A Whenever there are layoffs, there is impact on morale,
14 so --

15 Q More than 90 percent of these 378 people who were being
16 laid off were WordPerfect people. The remaining WordPerfect
17 people in many cases were upset to see their friends and
18 colleagues and neighbors get laid off. Is that fair?

19 A Well, they weren't all neighbors. I'm sure some of
20 them were friends. I'm sure it was hard for them, as it was
21 for all of us.

22 Q So you don't disagree that this had an impact on morale
23 at the company?

24 A I believe it did have an impact on morale, but also I
25 believe it was necessary.

1 Q Am I right, Mr. Frankenberg, that you decided that
2 Novell should sell WordPerfect and Quattro Pro and the
3 PerfectOffice Suite sometime within about a year after you
4 joined Novell?

5 A The decision was made in October -- late October of
6 1995, so that would have been close to a year and a half.

7 Q Well, I did hear you say that on direct, but am I
8 right, sir, that you have testified in another case that you
9 made the decision that WordPerfect and Quattro Pro and
10 PerfectOffice should be sold during the winter of 1994 to
11 '95?

12 A No, that's not correct.

13 Q It's not right that you so testified?

14 A That's not when the decision was made.

15 Q Well, let me back up one step. You did testify for
16 Novell last year in this courthouse, I think on the first
17 floor, in another case, correct?

18 A Yes.

19 Q A case having nothing to do with Microsoft, correct?

20 A Correct.

21 Q And you were called by Novell as a witness -- I think
22 the first witness in the case; is that right?

23 A That's correct.

24 Q You do recall testifying about your decision to sell
25 WordPerfect; do you not?

1 A I don't recall that, but that could well have been the
2 subject, yes.

3 Q Do you recall being asked this question and giving this
4 answer? This is in the SCO against Novell case last year.
5 Question -- I will bring this to you in a moment, sir.

6 Question --

7 THE COURT: What page are you on?

8 MR. TULCHIN: I'm on page I think 88 or 89. Let
9 me just get it up, Your Honor. I'm sorry.

10 MS. NELLES: Eighty-eight.

11 THE COURT: What page are you on?

12 MS. NELLES: Eighty-eight.

13 MR. TULCHIN: Page 88, Your Honor. Thank you.

14 It's actually 89, lines 14 to 18.

15 BY MR. TULCHIN:

16 Q Do you recall being asked this question and giving this
17 answer? When did you come to the view that these businesses
18 should be sold? Answer: That would have been in late '94
19 or early '95. I remember having made the decision and
20 driving through a blinding snowstorm to get home. So it was
21 mid winter.

22 MR. JOHNSON: Your Honor, I request that -- I can
23 do it on redirect, but the prior answer shows that he was
24 talking about any number of products.

25 THE COURT: Why don't you provide the context.

1 MR. TULCHIN: Let me provide him with the
2 transcript, Your Honor.

3 BY MR. TULCHIN:

4 Q Mr. Frankenberg, I have my thumb right there. There
5 you go.

6 A I'm running out of room.

7 Q I'm sorry, sir?

8 A I'm running out of room.

9 Q Do you need a paperclip?

10 A No.

11 Q I was just trying to be helpful.

12 Let's start, Mr. Frankenberg, just so we can put some
13 context to this.

14 MR. JOHNSON: Your Honor, I would like to give him
15 a chance to read what he said on this page and the prior
16 page.

17 THE COURT: That's fine. Go ahead. I think
18 that's what Mr. Tulchin was doing, but go ahead.

19 MR. TULCHIN: I would be happy to do that. And
20 any time you want to read, let me know and I will stop and
21 you can read.

22 THE COURT: I think he wants you to stop right
23 now.

24 THE WITNESS: If I may --

25 //

1 BY MR. TULCHIN:

2 Q Maybe I can suggest that you start reading at page 87,
3 line 18.

4 A Okay.

5 Q All right. Maybe what we should do, Mr. Frankenberg,
6 is start at page 88, line 9, and you are welcome to look at
7 anything before that, anything after. You were asked, did
8 there come a time when you decided as chief executive
9 officer that it would be in the best interest of Novell to
10 sell one or more of those businesses. And you will see that
11 just above that you describe a number of Novell's
12 businesses, correct?

13 A Yes.

14 Q And at line 18 -- I'm sorry, 12, you say, yes, we did
15 come to that conclusion. We did a very careful study,
16 beginning shortly after I arrived, looking at all of the
17 businesses that Novell was involved in.

18 Now skipping a sentence, feel free to read it, but then
19 at line 18 it says -- this is your answer, we came to the
20 conclusion that we were trying to do too much and that we
21 were not properly funding the products that we felt we could
22 be successful with, and so we came to the conclusion that we
23 should sell several of those businesses, find good homes for
24 them and find jobs for as many of the people involved with
25 it as possible, and then focus on our networking product

1 area.

2 Line 25, on page 88, you were asked this question, so
3 what businesses did you decide to sell? Page 89, line 1, we
4 decided to sell WordPerfect, the WordPerfect product, not
5 the company.

6 Now you can go on and read as much of the rest as you
7 want to line 13.

8 MR. JOHNSON: I would like to have them read out
9 loud, Your Honor, to provide some context to his next
10 answer, which he's trying to use.

11 THE COURT: That's fine. Go ahead.

12 BY MR. TULCHIN:

13 Q Do you want to read the whole thing out loud, this
14 answer, Mr. Frankenberg, or do you want me to?

15 A Now I'm lost guys.

16 Q The very bottom of page 88, line 25, you were asked, so
17 what businesses did you decide to sell. And then your
18 answer starts on page 89, line 1, we decided to sell
19 WordPerfect, the WordPerfect product, not the company. It
20 had already been integrated into Novell, and a suite that we
21 called PerfectOffice, which combined it with the other
22 elements that I mentioned that had just been purchased
23 before I got there.

24 MR. JOHNSON: It doesn't say just.

25 MR. TULCHIN: That had just been purchased before

1 I got there.

2 MR. JOHNSON: I see where you are.

3 MR. TULCHIN: Your Honor, may I continue?

4 THE COURT: Go ahead.

5 BY MR. TULCHIN:

6 Q Going to line 6, Mr. Frankenberg, we decided to sell
7 Unix and UnixWare. Unix was and still is a very popular
8 operating system. UnixWare was that same operating system
9 but with networking capabilities built in consistent with
10 NetWare, Novell's product. We also decided to sell Tuxedo,
11 which was another product that we had purchased at the same
12 time. That had been purchased, I should say, and I was not
13 there, but at the same time that Unix was purchased from
14 AT&T.

15 Now I just want to stop there. Your answer goes from
16 line 1 to line 13, and in your answer you say, we decided to
17 sell WordPerfect, we decided to sell Unix and UnixWare, we
18 also decided to sell Tuxedo. Correct?

19 A Yes.

20 Q Those are the things you said that you had decided to
21 sell. The very next question on line 14 was, when did you
22 come to the view that these businesses, plural, should be
23 sold? Answer: That would have been in late '94 or early
24 '95. I remember having made the decision and driving
25 through a blinding snowstorm to get home. So it was mid

1 winter.

2 Now, Mr. Frankenberg, not trying to be unfair or take
3 anything out of context, isn't it the case, sir, that your
4 testimony in the SCO v. Novell case, last year, 2010, was
5 that you decided to sell WordPerfect, among other things, in
6 late '94 or early '95?

7 A And I was mistaken.

8 Q Fair enough. Your testimony --

9 A It would have been late '95, early '96. In fact, the
10 other sales occurred in late '95 and into early '96. So I
11 made an error in my testimony.

12 Q Okay. Fair enough.

13 Your testimony today is that this is incorrect, it was
14 not in late '94 or early '95?

15 A It was one year later, in late '95 or early '96.

16 Q On direct you said it was October of '95, correct?

17 A Yes.

18 Q All right. Now the reason that you decided to sell
19 WordPerfect was so that Novell could sharpen its focus, its
20 focus on its network product, NetWare; isn't that right?

21 A The reason we sold WordPerfect was that it had become
22 very clear that we could not compete in that market, that it
23 was a tilted playing field, and that no matter what we did,
24 we would not be able to succeed. So, of course, we
25 refocused our efforts on those areas where we thought we

1 could do the best, and that was in networking and network
2 operating systems.

3 Q Did you not tell the Securities and Exchange Commission
4 in your form 10-K of the reason that you sold WordPerfect?

5 A I'm sure we did, yes.

6 Q Let me hand you Exhibit 621. This is Novell's form
7 10-K for the year ending October 28th, 1995. Of course, we
8 looked at Exhibit 380 earlier. That was the 10-K for the
9 prior year. Do you remember this?

10 A Yes, I do.

11 Q And this form 10-K, like the other one, was signed by
12 you?

13 A I'm sure it was, yes.

14 Q You were the principal executive officer, correct?

15 A Yes, I was.

16 Q It was your obligation to make sure that the statements
17 in this form 10-K filed publicly so that your shareholders
18 and others could evaluate Novell as a public company, it was
19 your obligation to make sure that the statements were true?

20 A Yes.

21 Q Correct?

22 A Yes.

23 Q You read them before you signed -- you read the
24 contents of this document?

25 A Yes, I did.

1 Q Could you look at page 8, please, sir.

2 Sorry. I'm running out of room too, I think.

3 Just before the heading halfway down the page, there is
4 a paragraph which begins, as the company sharpened its
5 focus. Do you see that, Mr. Frankenberg?

6 A Yes, I do.

7 Q What it says is, as the company sharpened its focus, it
8 decided to sell two lines of business, UnixWare and the
9 WordPerfect personal productivity applications, which did
10 not contribute to Novell's network focus. That was the
11 reason you gave for the sell of WordPerfect in your 10-K,
12 correct?

13 A Yes, but not quite correct. We sharpened our focus to
14 networking because that's what we could succeed with. We
15 couldn't succeed in the personal productivity applications.

16 Q Well, I hear you, but, of course, that's not stated
17 here, is it? Feel free to look elsewhere or anywhere you
18 want, anywhere you think you might find it.

19 A What is stated here is that we sharpened our focus to a
20 particular area, our networking business, and that's what we
21 did.

22 Q That was the reason for selling WordPerfect, was it
23 not, to sharpen your focus, to return the company's focus to
24 its most important product, NetWare?

25 MR. JOHNSON: Objection, asked and answered.

1 THE COURT: Sustained.

2 BY MR. TULCHIN:

3 Q Let me show you Exhibit 353, if I may, Mr. Frankenberg.
4 This is Defendant's 353, and this is from October 1995. It
5 says on the front page, Novell, Inc. Board of Directors
6 Meeting. Do you see that, sir?

7 A Yes, I do.

8 Q October 20th proposed fiscal year '96 budget. And Jim
9 Tolonen -- am I pronouncing his name correct?

10 A Tolonen.

11 Q Tolonen, was then the CFO, the chief financial officer,
12 correct?

13 A Yes, he was.

14 Q If you look about four pages in, the page has a
15 production number that ends with 852.

16 A I'm there, yes.

17 Q I'm sorry. Just give me a moment.

18 Right at the bottom, last sentence, we wish to get the
19 remaining 65 percent of the company refocused, morale
20 improved, and on to moving the core business forward.

21 That's what Mr. Tolonen says to the board of directors,
22 correct?

23 A Correct.

24 Q And what he's describing here -- we can go through it
25 in more detail if you would like, but what he's describing

1 here is the question of whether WordPerfect should be sold,
2 right?

3 A Yes.

4 Q There were various options laid out. You will see
5 higher on the page there's an option three, an option four,
6 an option five, and on earlier pages options one and two I
7 believe appear. These were options for what to do with the
8 WordPerfect business, correct?

9 A As well as Unix, yes.

10 Q Unix too. Thank you, sir.

11 In this report to the board of directors Mr. Tolonen is
12 recommending a sale of WordPerfect?

13 A Yes.

14 Q And what he says at the very bottom of this page is
15 that one of the good reasons to sell is to get the remaining
16 65 percent of the company refocused. He also refers to
17 improving morale, and to moving the core business forward.
18 Do you see that?

19 A Yes, I do.

20 Q You were the chairman of the board of directors at the
21 time, right?

22 A Yes, I was.

23 Q And you agreed with that; did you not?

24 A Yes, I did.

25 Q When we talked earlier today on cross I asked you a

1 question about the core business, c-o-r-e. The core
2 business is a reference to NetWare?

3 A The networking business, NetWare and other networking
4 products, yes.

5 Q Fair enough.

6 You understood that in this memo at the time in 1995
7 that what Mr. Tolonen was recommending is that the company
8 move the core business, the networking business forward --

9 A Correct.

10 Q -- isn't that right?

11 A Yes.

12 Q Thank you, sir.

13 Now you testified on direct that GroupWise, from a
14 revenue standpoint, thinking about 1994 -- and I'm not sure
15 if you were thinking March or June, but it doesn't matter,
16 somewhere in that period in 1994, GroupWise was only -- I
17 think you said four percent -- is that what you said -- of
18 the total revenues of WordPerfect Corporation?

19 A For the year 1993, GroupWise and its associated
20 products were approximately \$25 million, which amounted to a
21 little less than four percent of the total, yes.

22 Q I think I remembered it about right, but thank you. It
23 was 1993 you were talking about?

24 A Yes.

25 Q Thank you.

1 And it's correct, is it not, though, Mr. Frankenberg,
2 that regardless of what GroupWise's revenues had been in the
3 past, you thought in 1994 that GroupWise represented half
4 the value of what Novell was buying when it was buying
5 WordPerfect Corporation?

6 A I thought it represented a very significant strategic
7 opportunity for us and that was an important part of what we
8 came to call pervasive computing, and it was a wide open
9 field, unlike some of the other areas, including the office
10 suite.

11 Q You've testified, haven't you, Mr. Frankenberg, that at
12 least half the value of WordPerfect Corporation was in the
13 product that became known as GroupWise?

14 MR. JOHNSON: Could we have a time period for that
15 question, Your Honor?

16 MR. TULCHIN: Yes. Yes. I'm happy to pull out
17 the transcript, Your Honor, if we want to take the time.

18 BY MR. TULCHIN:

19 Q It was when Novell bought WordPerfect Corporation. Do
20 you want to see the testimony, Mr. Frankenberg?

21 A Yes.

22 Q Do you have that transcript of the deposition in 2009?

23 A Somewhere. I think I have all of your documents.

24 Q I'm sorry for all the papers.

25 A Is this the one?

1 Q It looks like it.

2 Could I ask you first, Mr. Frankenberg, to turn to page
3 176. This is the deposition taken on March 25, 2009.

4 MR. TULCHIN: Mr. Johnson, do you have a copy?

5 MR. JOHNSON: I do. Thank you.

6 Do you have a page reference?

7 MR. TULCHIN: Yes. 176, line 1.

8 BY MR. TULCHIN:

9 Q You can look at 175, if you want, where my question
10 starts. I say, tell me if this is accurate. Your testimony
11 at the time -- and I was referring to testimony you gave in
12 1998 in the Caldera case -- was that, depending on how you
13 calculated it, Novell bought WordPerfect Corporation for
14 \$855 million? And you answered yes.

15 Do you see that, sir?

16 A Yes.

17 Q And then on 176 we talked a little bit about the sale,
18 and feel free to read that, but I want to direct your
19 attention to 177.

20 A Okay.

21 Q This gets a little complicated because what I'm doing
22 is reading your testimony from 1998 during this part of the
23 2009 deposition. But what I'm reading is your statement,
24 page 177, line 13, quote, so my view had always been that at
25 least half the value of WordPerfect was in the product that

1 became known as GroupWise. Answer: Yes. I then said,
2 unquote. You said, yeah. That was your testimony in 1998?
3 Answer: Yes. Question: That was your view in 1998?
4 Answer: Yes. Question: Your testimony here is accurate
5 and truthful? Answer: Yes.

6 And then we can go over to 178 -- sorry to take so much
7 time -- line 1, question, now sitting here today in 2009, is
8 it still your view that at least half the value of what
9 Novell bought when it acquired WordPerfect Corporation was
10 in the product that became known as GroupWise? Answer: It
11 was my opinion that on a going forward basis that GroupWise
12 held the most promise for us. And if you go further on in
13 the testimony, it says, so, yes, some deterioration,
14 probably in the neighborhood of 50 percent or so of the
15 value was due to the reduction in value of the personal
16 productivity part of the application.

17 Those were your answers to my questions two years ago
18 in deposition, correct?

19 A Those are my answers, yes.

20 Q So I hope this isn't repetitive, but to summarize, when
21 Novell bought WordPerfect, you thought that at least half
22 the value of the WordPerfect Corporation was represented by
23 the product that eventually was called GroupWise?

24 MR. JOHNSON: Objection, Your Honor, those answers
25 clearly show that that's at the time of sale, not at the

1 time of purchase.

2 MR. TULCHIN: I think he can answer, Your Honor.

3 THE COURT: You can answer.

4 THE WITNESS: Thank you, Your Honor.

5 Can you repeat the question?

6 MR. TULCHIN: Yes, sir.

7 THE WITNESS: Just trying to be accurate.

8 MR. TULCHIN: I am too.

9 THE WITNESS: Good.

10 BY MR. TULCHIN:

11 Q It was your view in 1994, at the time that Novell
12 bought WordPerfect, that at least half the value of the
13 WordPerfect Corporation was represented by the product that
14 later became known as GroupWise; is that correct?

15 A On a go forward basis, yes.

16 Q Thank you, sir.

17 A But not when they bought it.

18 Q Well, of course, when you buy something as a business,
19 you are looking to future profits?

20 A This was a strategic -- to me it was the most valuable
21 strategic asset in the purchase. And it had gotten to the
22 point by the time we sold it, that by the time we sold
23 PerfectOffice that the others had deteriorated
24 significantly, so a big part of the value going forward was
25 GroupWise.

1 Q Just so that the jury is clear on this, when Novell
2 sold WordPerfect and Quattro Pro to Corel in 1996, Novell
3 did not sell GroupWise, it kept GroupWise?

4 A That's correct.

5 Q Thank you, sir.

6 Now on direct you made some reference -- it was about
7 ten minutes of 10:00 -- to undocumented APIs. Do you
8 remember that, sir?

9 A Yes, I do.

10 Q And I think what you did -- tell me if I have this
11 right -- is that you defined that phrase, undocumented APIs,
12 to mean cases where APIs were not made available to ISVs, to
13 companies outside Microsoft, but were available to
14 Microsoft; is that right?

15 A That's right.

16 Q Do you have any information at all, one way or another,
17 Mr. Frankenberg, as to whether or not Microsoft Office, the
18 version of Microsoft Office released in 1995 to run with
19 Windows 95 or any subsequent version of Microsoft Office,
20 utilized or called the namespace extension APIs?

21 A I do not.

22 Q Do you know one way or another as to whether or not
23 Word, Microsoft's word processing software, whether Word,
24 either the version released in 1995 or any subsequent
25 version, ever utilized the namespace extension APIs?

1 A I do not personally know that, no.

2 Q Same question for Excel, Microsoft's spreadsheet?

3 A I do not.

4 Q So it's not your testimony to this jury that Microsoft
5 itself ever used those APIs when it released products that
6 competed with PerfectOffice or WordPerfect or Quattro Pro?

7 MR. JOHNSON: Objection, Your Honor. He said he
8 didn't know.

9 THE COURT: Overruled.

10 You may answer.

11 THE WITNESS: I do not know.

12 BY MR. TULCHIN:

13 Q So you weren't -- when you used the phrase undocumented
14 APIs, you weren't implying that somehow Novell was
15 prohibited from using these APIs but Microsoft used them
16 itself?

17 A I was not implying that. I don't know whether that was
18 true or not.

19 Q Thank you, sir.

20 Now I think you said that it was sometime in 1995 when
21 either Mr. Calkins -- and I think the second name was
22 Mr. Waxman; am I right?

23 A Yes.

24 Q Either Mr. Calkins or Mr. Waxman informed you that
25 Microsoft had decided to withdraw support for certain APIs.

1 Do you recall that testimony?

2 A Yes, I do.

3 Q Did you get that information from them in writing?

4 A No, I did not.

5 Q So that was something they told you?

6 A Best of my recollection, yes.

7 Q You don't know when you were so told. Sometime in '95
8 is all we have?

9 A Sometime in the first part of '95. I don't have an
10 exact date.

11 Q As far as you know, there is no writing, no piece of
12 paper that was ever provided to you with that information;
13 is that true?

14 A That's true. I'm sure given all the paper you have
15 that you would have found it, if it existed.

16 THE COURT: Don't make assumptions.

17 THE WITNESS: Sorry. I'll behave, Your Honor.

18 BY MR. TULCHIN:

19 Q In preparing for your testimony here with the lawyers,
20 you certainly didn't see something like that, did you?

21 MR. JOHNSON: Objection, what he saw with the
22 lawyers.

23 THE COURT: He hasn't seen any.

24 BY MR. TULCHIN:

25 Q You also said on direct that there were occasions when

1 you complained to Mr. Gates about undocumented APIs. Do you
2 remember that testimony?

3 A Yes, I do.

4 Q Now Microsoft Windows had thousands of APIs in it,
5 correct?

6 A I don't know the exact count, but I'm sure there were
7 many.

8 Q Would you take my representation that Windows 95 had
9 thousands of APIs?

10 A I'm sure you would know better than I would.

11 Q Okay. In any of these conversations with Mr. Gates,
12 did you specify which APIs you were talking about?

13 A No, I did not.

14 Q So you never said to Mr. Gates the problem is the
15 namespace extension APIs?

16 A I don't recall ever saying that, no.

17 Q You never said something about IShellBrowser, one of
18 the specific APIs?

19 A I don't remember saying that either, no.

20 Q Did you ever say anything to Mr. Gates about any APIs
21 that permitted an ISV to extend the shell?

22 A No, I don't recall doing that either.

23 Q So your only testimony is that whatever these
24 conversations were with Mr. Gates had to do with
25 undocumented APIs as a general matter?

1 A Yes.

2 Q And do you happen to recall any letter that you sent to
3 Mr. Gates which mentions the namespace extension APIs?

4 A No, not specifically.

5 Q Have you seen any such letter?

6 A No.

7 Q How about an e-mail?

8 A Would you repeat the question?

9 Q Yes. Sorry. It was too cryptic.

10 Have you seen any e-mail that you ever sent to
11 Mr. Gates which made reference to his decision to withdraw
12 support for the namespace extension APIs?

13 A No, I have not seen an e-mail from me. I saw an e-mail
14 from Bill Gates to a number of his people, but not from me.

15 Q That was the e-mail that Mr. Johnson showed you today?

16 A Correct.

17 Q You didn't see that at the time, of course?

18 A No. I didn't see it until 2009.

19 Q Okay. So let me back up. Do you have any way of
20 specifying to the jury or the Court when it was that these
21 conversations with Mr. Gates took place, the conversations
22 about undocumented APIs?

23 A In the documents that I have reviewed prior to trial,
24 there are letters and references to meeting dates where
25 those things were discussed. Perhaps that would help pin

1 down the dates of those discussions.

2 Q Mr. Frankenberg, there were some occasions where you
3 and Mr. Gates got together and met face-to-face, correct?

4 A Correct.

5 Q And it wasn't necessarily just the two of you, there
6 may have been some other Novell people, there may have been
7 some other Microsoft people, correct?

8 A All of those happened, other Microsoft people, other
9 Novell people, and also the two of us face-to-face, just the
10 two of us.

11 Q Let me show you Exhibit 636.

12 Would it help if I took any of this away, or do you
13 want to leave it there?

14 A Is there some of it you are not going to go back to?

15 I was beginning to wonder if I was going to be like
16 that window over there.

17 MR. TULCHIN: Don't put it up yet. Sorry.

18 MR. JOHNSON: I've not seen this exhibit before.

19 BY MR. TULCHIN:

20 Q Mr. Frankenberg, Exhibit 636 was a memorandum prepared
21 by Dave Miller of Novell; is that right?

22 A Yes, that's what it says.

23 Q It's a memorandum about a meeting on January 10th,
24 1995, correct?

25 A Yes.

1 Q And it was sent to a number of people, including you?

2 A Yes.

3 Q And it was prepared in the ordinary course of business
4 at Novell, correct?

5 A I'm sure that's the case.

6 MR. JOHNSON: We have no objection.

7 MR. TULCHIN: We offer this, Your Honor.

8 THE COURT: No objection.

9 (Defendant's Exhibit 636 was received into
10 evidence.)

11 MR. TULCHIN: Now we can show it. Thank you.

12 BY MR. TULCHIN:

13 Q Mr. Frankenberg, do you recall that there was a meeting
14 attended by a number of people from both companies on
15 January 10th, '95?

16 A Yes, I do.

17 Q And this was three months after Mr. Gates had decided
18 to withdraw support for the namespace extension APIs,
19 correct?

20 A That's correct.

21 Q And certainly people at Novell were aware of that by
22 January?

23 A Some people at Novell would have been aware of that,
24 yes.

25 Q Now I have looked through Exhibit -- let me first ask

1 this question. Exhibit 636 are notes that were taken by
2 Dave Miller of Novell of the meeting, correct?

3 A Yes, that's what it says.

4 Q Starting at page 4 at the top, it says, the following
5 transcript was obtained. I tried to be as accurate as
6 possible. However, because of the speed of the
7 conversations and my lack of typing skills, some of the
8 information has been interpreted. And it goes on. The
9 whole document is a total of eight pages. But looking
10 further on page 4, you will see there are initials. BG is
11 Bill Gates, correct?

12 A I believe that relates back to --

13 Q And BF is you?

14 A -- the attendees on the list, yes.

15 Q So one of your people at Novell, Mr. Miller, took notes
16 of this meeting with Microsoft. The meeting went on for
17 some hours, correct?

18 A I don't recall how long the meeting was. Sorry.

19 Q Was it up in the State of Washington at Redmond,
20 Washington where Microsoft's headquarters are?

21 A I believe that was the case, yes.

22 Q Do you recall if there was any mention at this meeting
23 in January about the namespace extension APIs?

24 A I don't recall any discussion.

25 Q I have looked through Exhibit 636, sir, and I hope I'm

1 getting this right, but I don't see any reference to that
2 topic. I'm happy to have you look at this document
3 overnight, if you want. I will try to be quick and get you
4 out of here as soon as I can, but if you see it, maybe
5 tomorrow morning you could point it out to me.

6 MR. JOHNSON: I guess that means we're not going
7 to finish today, Your Honor.

8 MR. TULCHIN: I'm going to try to get as far as I
9 can, Your Honor.

10 THE COURT: We'll see how it goes.

11 BY MR. TULCHIN:

12 Q Now, Mr. Frankenberg, am I correct that at the Agenda
13 '95 Conference that you have testified about on direct, that
14 was in September, correct?

15 A Yes.

16 Q September of '94, you presented a demo of Corsair?

17 A Yes.

18 Q And it was just a demonstration, there was no
19 functioning product yet; am I right?

20 A It was a product under development. It wasn't one that
21 was released, if that's what you mean.

22 Q Okay. There was a product under development, it hadn't
23 yet been released to the market, and you testified it never
24 was released?

25 A That's also true, yes.

1 Q And the demo was of a nonfinal product. You were
2 showing what you hoped could be achieved. It was something
3 that was never actually achieved in a functioning product
4 that was offered for sale?

5 A That's true.

6 Q And at Agenda '95 in September of 1994, did you have
7 occasion to speak to Mr. Gates?

8 A I may have, but I don't recall if I did.

9 Q Do you recall ever telling Mr. Gates, before
10 October 3rd, 1994, that Novell or WordPerfect was planning
11 in any way to use the namespace extension APIs in developing
12 WordPerfect or PerfectOffice?

13 A No, I don't recall ever saying that to Bill Gates.

14 Q As far as you know, did anyone else ever tell Mr. Gates
15 that?

16 A I don't know of anybody who did that, no.

17 Q Then you also talked on direct about the COMDEX meeting
18 in November of '94, correct?

19 A Yes.

20 Q And I think you said that you made a speech at COMDEX?

21 A I did, yes.

22 Q Mr. Gates made his own speech at COMDEX in November
23 '94, right?

24 A Could well be. Bill did that frequently, as I did.

25 Q Did you have occasion to speak face-to-face with

1 Mr. Gates at the COMDEX meeting in Las Vegas in November of
2 1994?

3 THE COURT: The question isn't whether he had a
4 chance to but whether he did.

5 MR. TULCHIN: That's correct, Your Honor. That's
6 a better question.

7 THE WITNESS: We may have talked. But if we did,
8 I don't recall.

9 BY MR. TULCHIN:

10 Q Were you aware, sir, that Microsoft had designated
11 someone to be the contact man for Novell concerning
12 Windows 95 issues?

13 A I'm sure there was a person who had that
14 responsibility, yes.

15 Q Do you know who that person was?

16 A I'm not sure. I think it may have been Bob Kruger, but
17 I'm not sure of that.

18 Q Have you ever before today heard of the name Brad
19 Struss, S-t-r-u-s-s?

20 A Sounds vaguely familiar, but I don't recall
21 specifically.

22 Q Do you recall ever getting any reports from Norm
23 Creighton of Novell about his conversations with Mr. Struss?

24 A I may have, but I don't remember.

25 Q Do you recall ever being told that Mr. Struss had asked

1 Novell/WordPerfect whether they were okay with Mr. Gates's
2 decision to withdraw support for the namespace extension
3 APIs?

4 MR. JOHNSON: Can we identify an individual where
5 this alleged conversation took place?

6 THE COURT: You mean the conversation between
7 Mr. Struss and somebody at Novell?

8 MR. TULCHIN: No. I was asking -- sorry, Your
9 Honor.

10 THE COURT: I'm not sure what the alleged
11 conversation is he's asking him. I just don't remember.

12 BY MR. TULCHIN:

13 Q I'm asking you whether anyone at Novell ever told you
14 of a conversation that he or she had with Mr. Struss in
15 which Mr. Struss inquired, are you okay with withdrawal of
16 support for these namespace extension APIs?

17 A I don't remember any such conversation.

18 Q Let me hand you what we've marked as Defendant's
19 Exhibit 3.

20 Now, Mr. Frankenberg, just to be clear, Defendant's
21 Exhibit 3 is some internal e-mails at Microsoft. One of
22 them on the first page is from Brad Struss, Wednesday,
23 October 12, 1994.

24 A I see that, yes.

25 Q Did you ever talk to Brad Chase of Microsoft?

1 A I'm sure I did at one or more meetings, but I don't
2 recall any particular conversation.

3 Q You don't recall talking to him about the namespace
4 extension APIs?

5 A No.

6 Q Is it true to say that in 1994 and 1995, throughout
7 that entire period, you didn't know what the namespace
8 extension APIs were?

9 MR. JOHNSON: Objection, Your Honor. He already
10 testified he learned in early 1995 about this.

11 THE COURT: Overruled.

12 THE WITNESS: I knew that there were extensions to
13 the APIs that we were using for PerfectOffice for
14 Windows 95. And those, as it turns out, are the namespace
15 extensions, amongst others.

16 BY MR. TULCHIN:

17 Q I know you say as it turns out, but I'm asking back in
18 '94 and '95, did you know what the namespace extension APIs
19 were, what functionality they provided?

20 A No, I did not.

21 Q Okay. Returning to Exhibit 3, Exhibit 3 says -- this
22 is Mr. Struss's e-mail to Brad Chase and others, subject,
23 namespace extension decision, per Paulma -- and there's been
24 evidence in this case that refers to Paul Maritz of
25 Microsoft -- we're now in the process of proactively

1 notifying ISVs about the namespace API changes, paren, will
2 not document them and they'll go away/change, close paren.
3 So far Stac, Lotus, WP -- that was a common abbreviation for
4 WordPerfect, correct?

5 A Correct.

6 Q WP, Oracle, SCC appear to be okay with this.

7 My question, Mr. Frankenberg, is whether you remember
8 being told by anyone at Novell in 1994 or '95 that they,
9 that person at Novell, had told Microsoft we're okay with
10 the namespace extension decision?

11 A No, I don't recall anybody telling me that.

12 Q Do you recall around the same time in the fall of 1994
13 that WordPerfect -- Novell/WordPerfect were focusing their
14 attention on the 16-bit version of the products, for
15 instance, PerfectOffice 3.0?

16 A There was a team of people working on what became
17 PerfectOffice 3.0. There was a team working on the next
18 generation, which became -- which was to become
19 PerfectOffice for Windows 95.

20 Q But am I right that the attention -- most of the
21 attention was being focused on the 16-bit products?

22 A Depends on which team you are talking about. The team
23 working on the Windows 95 version had intense attention on
24 that. The team working on the one for Windows gave it a lot
25 of attention.

1 Q I wasn't really trying to compare the amount of
2 attention that given people were paying. Let me ask you
3 another question.

4 MR. JOHNSON: Your Honor, I might add, we've been
5 through this. This is repetitive.

6 THE COURT: I'm going to let -- we have been
7 through it to some extent, but Mr. Tulchin can get into it
8 again. It's a slightly different angle.

9 BY MR. TULCHIN:

10 Q Do you recall in the fall of 1994 that there were far
11 more developers, software develops working on the 16-bit
12 version of your products than there were working on the
13 Windows 95 versions?

14 A I'm sure that was the case.

15 Q Let me show you Exhibit 2 -- sorry. Yes, 2,
16 Defendant's Exhibit 2.

17 Now again, just to be clear, this is an internal
18 Microsoft e-mail, and you will see just a little ways down
19 the first page there is an e-mail from Brad Struss again,
20 and he's writing to Bob Muglia, Brad Chase, Brad Silverberg,
21 and a number of other people.

22 Do you see that?

23 A I do, yes.

24 Q And he's writing about first wave status report and
25 issues. That's the subject. Do you see that?

1 A Yes.

2 Q And, Mr. Frankenberg, did you know at the time about
3 Microsoft's first wave program?

4 A I did not, no.

5 Q Fair enough.

6 If you look at the second page, this is still
7 Mr. Struss's e-mail, October 21, '94, right in the middle of
8 the page there is a paragraph about WordPerfect. And
9 Mr. Struss writes to his superiors at Microsoft as follows:
10 WordPerfect, due to focus on 16-bit product revision this
11 fall, there are limited resources working on next year's
12 32-bit release. Given this and the fact that they'd rather
13 deliver a great product later than a mediocre one sooner,
14 they currently expect to ship September '95 or around 120
15 days of Windows 95 ship. Working with their senior
16 management to see about getting more focus on their 32-bit
17 release.

18 Were you aware in around October 1994, that people at
19 Microsoft were working with senior management at WordPerfect
20 to see if WordPerfect would put more focus on the products
21 for Windows 95?

22 A I was not aware of that, no.

23 Q Well, it was certainly the case, Mr. Frankenberg,
24 wasn't it, that Microsoft was trying to help WordPerfect,
25 trying to help Novell come out with a good product for

1 Windows 95? Is that fair?

2 A It doesn't say that here.

3 Q No, I'm asking you from your recollection.

4 A From my recollection, I don't recall that conversation
5 where they were trying to help us, but they may well have
6 been.

7 Q I mean isn't it the case, Mr. Frankenberg, that people
8 in the systems group at Microsoft -- the systems group was
9 Microsoft's name for the group that was developing operating
10 systems. Do you recall that?

11 A Yes.

12 Q And isn't it true that people in the systems group at
13 Microsoft were trying to help WordPerfect/Novell produce a
14 great application for Windows 95?

15 A I'm sure they were, but I did not personally witness
16 that. That's what you asked me earlier.

17 Q I'm just asking for your general recollection.
18 Microsoft was trying to help. That's fair?

19 A Yes.

20 Q Okay. Do you recall any other face-to-face meetings,
21 let's say in the period from October 1, '94 to June 1, '95,
22 that's eight months, October, November, December of '94 and
23 the first five months of '95, do you recall any other
24 meetings that you had with Mr. Gates other than the COMDEX
25 meeting in November and the January 10th meeting about which

1 we spoke earlier?

2 A I think I said that I didn't recall whether we met with
3 Mr. Gates at the meeting -- at the COMDEX meeting. I do
4 recall the November 10th meeting. I do not recall any
5 meetings in between then and -- I think your question was
6 June of '95. I don't recall any. There may have been
7 meetings, but I don't recall.

8 Q Did anyone from the shared code group ever, in 1994 or
9 1995, present you with any written document setting forth
10 the three choices that they were faced with?

11 A No.

12 Q Do you know whether anyone from the shared code group
13 ever prepared any written document to set forth the three
14 choices to Mr. Rietveld or Dave Moon or Mr. Brereton?

15 A They may well have done that, but I don't recall ever
16 seeing anything like that, no.

17 Q You certainly have seen no such document?

18 A Not to my recollection, no. It's a long time ago.

19 Q Are you aware of the testimony that was given in this
20 courtroom by Mr. Harral, Mr. Richardson and Mr. Gibb about
21 the three choices, the three options that were presented to
22 them after the decision to withdraw support for the
23 namespace extension APIs?

24 A I know that those three gentlemen testified here. I
25 don't know the content of their testimony, no.

1 MR. JOHNSON: Which by the way, Your Honor, would
2 be improper under the rule of witnesses. I don't know why
3 he asked such a question.

4 THE COURT: The answer is what it is.

5 BY MR. TULCHIN:

6 Q Mr. Frankenberg, are you aware that one of the choices
7 that the shared code group had in 1994 and 1995 was to write
8 their code to the namespace extension APIs?

9 A I know one of the options that they had was to write
10 their code to interfaces that were extended. I don't know
11 if it was the namespace extensions.

12 Q What you do know is that one choice was to keep using
13 the APIs for which the support was being withdrawn, correct?

14 A Correct.

15 Q And that was a choice that had some risk because in
16 later versions of Windows those APIs might not even appear,
17 right?

18 A That was the nature of undocumented APIs, yes.

19 Q Well, I want to be clear about something. These APIs
20 had been documented to Novell, correct?

21 A I believe that's true, yes.

22 Q I'm sorry? I couldn't hear you.

23 A I believe that's true, yes.

24 Q So when you say undocumented, the APIs in question,
25 Microsoft had provided documentation for; is that right?

1 A I believe that's true, yes.

2 Q So they weren't undocumented. They were documented,
3 true?

4 A Yes.

5 Q And one of the choices that the shared code group had
6 was to write code to those APIs and to make a business
7 decision about whether or not it was more important to get
8 these products out to market really fast than it was to take
9 the risk that the APIs might not be supported in future
10 versions of Windows, right?

11 A I didn't know that at the time. Obviously if that was
12 a choice, it would have been a poor choice.

13 Q If you had been asked to make the decision at the time,
14 you would have chosen to get the products out fast, correct?

15 A I wasn't asked to make the decision at the time.

16 Q I appreciate that. I heard you say that. I am asking
17 you now, testifying today in 2011, if you had been asked to
18 make the decision in 1994 or '95 about whether or not to get
19 PerfectOffice and WordPerfect out to market at around the
20 time Windows 95 came out or to choose some third path, some
21 difficult and complicated path of adding functionality to
22 Windows, you would have chosen -- you would have made the
23 decision to go for getting the products out quickly?

24 MR. JOHNSON: Objection, lacks foundation.

25 THE COURT: He can answer. Overruled.

1 THE WITNESS: I would have to have a lot more
2 facts than just the couple things that you have stated in
3 order to make such a decision.

4 MR. TULCHIN: Well, let me go through some of the
5 facts.

6 If we could have slide 83.

7 BY MR. TULCHIN:

8 Q If this isn't enough for you to answer the question,
9 I'm sure you will tell me, Mr. Frankenberg. But we've
10 excerpted some of the testimony from the prior three live
11 witnesses in this case. And I would also be happy to have
12 you see --

13 MR. TULCHIN: Can we put up Plaintiff's
14 Demonstrative Exhibit 15?

15 MR. JOHNSON: Can we have a copy of this, please?

16 MR. TULCHIN: Yes.

17 BY MR. TULCHIN:

18 Q This is a slide that Mr. Johnson used, I believe with
19 Mr. Harral, the first witness.

20 THE COURT: It could have been the first witness.
21 I thought it was the second or third one.

22 MR. TULCHIN: It could have been. I'm losing
23 track, Your Honor.

24 BY MR. TULCHIN:

25 Q In any event, I know this was Novell's slide, and it

1 talks here about the three options. The first one would be
2 to continue to use the documentation that they had for the
3 APIs. Do you see that?

4 A I see that, yes.

5 Q The second would be to see if they could avoid using
6 the APIs and use the Windows common file open dialog,
7 which --

8 A It doesn't say that.

9 Q No, it doesn't, but I think that's a fair summary. The
10 witnesses said we could have used the Windows common open
11 file dialog. It wouldn't have given us as much
12 functionality as we wanted to put into PerfectOffice.

13 And the third option was to try and recreate what was
14 missing or what we did not yet have. That was the option
15 that Mr. Harral, Mr. Gibb and Mr. Richardson testified was
16 chosen to engage in a job that they say took as much as a
17 year to try to get this extra functionality into Novell's
18 products.

19 Are you with me so far?

20 A Yes.

21 MR. JOHNSON: Your Honor, this is so far beyond
22 the scope of direct. He's asking the CEO about developers'
23 choices.

24 THE COURT: I don't see these as just developers'
25 choices or we wouldn't be here.

1 MR. TULCHIN: Thank you, Your Honor.

2 BY MR. TULCHIN:

3 Q Then slide 83, which I showed you a moment ago, has
4 some of the testimony about the first option. Mr. Harral
5 said that a developer, given a month, should be able to work
6 out the issues of tying into the namespace extension APIs.
7 Mr. Richardson says that Steve Giles, one of the developers
8 at Novell, had written a file open dialog that made use of
9 the namespace extension APIs.

10 Do you see that, sir?

11 A Yes, I do.

12 Q And I represent to you that these witnesses said that
13 had they used the namespace extension APIs, there would not
14 necessarily have been any delay in the shared code group's
15 work?

16 MR. JOHNSON: Objection, that's a total
17 mischaracterization. Your Honor, they said they couldn't
18 use this option because Microsoft Premier Support shut them
19 down on any information about the shell.

20 MR. TULCHIN: This is just argument, Your Honor.

21 THE COURT: Approach the bench. This has
22 something to do with what I asked you all the other day, I
23 think.

24 (Side-bar conference held)

25 THE COURT: I think what I was asking, I never

1 understood why they didn't consider the first option, which
2 was to use the documented APIs if they wanted to
3 simultaneously pursue the third option. But the problem --
4 because the problem, as I understood it before, it was in
5 the future versions of Windows 95. APIs may not be there.
6 You could temporarily use the APIs as were there. And if
7 you were really worried about time, you could do what they
8 did by the time the year had past.

9 MR. TULCHIN: That was the testimony, Your Honor.

10 MR. JOHNSON: That was not the testimony. We'll
11 bring up the testimony to you tomorrow so you can see it
12 again. But the testimony was that was the first option to
13 pursue -- you're right, had they been able to pursue that
14 option, maybe they could have done exactly what you have
15 said. But what happened was when they called Premier
16 Support to get the answers for how to tie into network
17 neighborhood, recycle bin, all the other things that were
18 required to use these APIs, Premier Support shut them down
19 and no information about the shell. So they couldn't,
20 therefore, use the APIs.

21 THE COURT: I understand what you are saying.

22 MR. JOHNSON: So it's completely incorrect to
23 suggest --

24 THE COURT: Wait. Wait. Just testimony. It's
25 the combination of the shut down of Premier Support and

1 the -- I had come into this thinking that that was an
2 incidental matter, but the fact of the matter is they had
3 documentation.

4 MR. JOHNSON: It wasn't incidental at all.

5 MR. TULCHIN: Your Honor, if I could respond just
6 for a moment?

7 MR. JOHNSON: There was a great risk as they could
8 change them at any moment. It wasn't future applications,
9 as you said. Nonetheless, our people were prepared to take
10 that risk if they could have gotten support that allowed
11 them to use these APIs.

12 THE COURT: I hear him.

13 MR. TULCHIN: If I may just respond to this, Your
14 Honor? Number one, strangest antitrust case I've ever heard
15 of based on a lack of support from people on a telephone, on
16 the line. When Mr. Kruger and Mr. Struss and lots of people
17 at Microsoft were available to help Novell, the Premier
18 Support was a telephone help line for developers. And we're
19 now into the duty to build Novell's products for it.

20 THE COURT: That's a different question. I will
21 sustain the objection on the ground this is a somewhat murky
22 area as to what any of this witness's knowledge would be.
23 We can have argument later. I will sustain the objection.

24 (Side-bar conference concluded.)

25 //

1 BY MR. TULCHIN:

2 Q Mr. Frankenberg, let me try it this way. Had you been
3 asked in 1994 or 1995 which course of action you preferred,
4 to get the products out to market in a timely way or to
5 spend a year trying to write an advanced file open dialog,
6 which choice would you, as CEO, have made?

7 MR. JOHNSON: Objection, calls for speculation.

8 THE COURT: Overruled.

9 THE WITNESS: Well, I would have to have a lot
10 more information before I could answer your question. And
11 the developers had that information, so that would have been
12 a choice that they and direct management would make. It
13 wouldn't have been me.

14 BY MR. TULCHIN:

15 Q Is it not your testimony, Mr. Frankenberg, that the
16 choice that was made to spend a year to write an advanced
17 file open dialog had serious negative consequences for
18 Novell?

19 A The way that it turned out, yes.

20 Q And is it also your testimony that a business decision
21 that could cost the company many millions of dollars with
22 very serious negative consequences was left to developers
23 like Adam Harral and Greg Richardson?

24 A It was -- as I testified earlier, that we put the
25 business applications in its own division and group so that

1 it could act and react to the market and to things as they
2 progressed. That decision would have been made by the
3 development team, the marketing team, and the executives of
4 that group.

5 Q The executives were Mr. Rietveld, right?

6 A He may still have been there, yes.

7 Q Mr. Moon?

8 A Yes.

9 Q Was Mr. Brereton considered an executive?

10 A I don't recall his exact position.

11 Q Do you remember Mr. Brereton at all?

12 A I remember the name, yes.

13 Q Were there other executives in that group besides
14 Adrian Rietveld and Dave Moon?

15 A Mark Calkins, who was the division manager responsible
16 for business applications, would have been central to any
17 such division.

18 Q Maybe Glen Mella?

19 A Glen was the person responsible for marketing, and he
20 certainly would have had an input into that process.

21 Q So is it your testimony today that it would have been
22 your expectation at the time that a decision about what
23 choice to make to spend a year writing the advanced file
24 open dialog or to get the product out fast using the
25 namespace extension APIs, that that decision would have been

1 entrusted to the executives, the people we just mentioned,
2 Rietveld, Moon, Calkins and Mella?

3 A It may have been Mr. Waxman in place of Mr. Rietveld
4 because he may have left by then. But, yes, of course.

5 Q And that decision --

6 A You keep saying spend a year. I don't know that it was
7 going to take a year. I have no way of knowing that, so --

8 Q Let me amend my question to ask, spend a considerable
9 period of time. That decision would have been made by the
10 executives, correct? That was your expectation?

11 A That's correct.

12 Q The decision would not have been made by individual
13 developers within the shared code group; is that right?

14 A I believe that's true, yes.

15 Q Now am I right, Mr. Frankenberg, that when the
16 announcement was made in October that Novell intended to
17 sell WordPerfect and PerfectOffice, that that announcement
18 in and of itself had an adverse impact on the efforts to
19 develop these products?

20 A I don't believe that it did. I believe that the team
21 continued forward.

22 Q Do you recall, Mr. Frankenberg, that a couple months
23 later, less than two months later, there were mass
24 resignations among the developers in Scotts Valley, the
25 Quattro Pro team?

1 A I don't know about mass resignations. I'm sure there
2 were resignations, yes.

3 Q Let me ask you this question. In order to get
4 PerfectOffice out to market, you needed to have Quattro Pro
5 ready to go, right?

6 A Yes.

7 Q That was an essential element of your suite?

8 A Yes.

9 Q Let me show you Exhibit 230. This is an e-mail,
10 Mr. Frankenberg, dated December 23rd, 1995. It's written by
11 Bruce Brereton, whose name I mentioned earlier?

12 A Yes.

13 Q On the to line, it says -- it's hard for me to read,
14 but I think it might be orm-corp.bfrank. Do you see that?

15 A Yes.

16 Q Is that you?

17 A That's me.

18 Q That was your sort of alias or e-mail name at Novell?

19 A Ask me and I'll always be frank.

20 Q I appreciate that. I thank you for it.

21 Now Exhibit 230, Mr. Brereton's e-mail in December,
22 says, Glen asked me to give you all an update on the
23 situation in Scotts Valley and also report what our plan of
24 action is. One, on this past Thursday/Friday, about 15
25 additional people submitted their resignations, all except

1 one going to Oracle. From a development standpoint, this
2 leaves us with just two people.

3 I know it's a long time ago, we're in 2011, but do you
4 recall this at the end of '95 that 15 developers submitted
5 resignations and that left Quattro Pro with only two people?

6 A I don't remember those specific numbers, but I do
7 remember there were resignations, yes.

8 Q Certainly if there weren't any software developers in
9 Scotts Valley, people at Quattro Pro working on the product,
10 you would have a hard time getting your suite out, correct?

11 A I guess that depends on how far along the project was
12 at the time of the resignations, and I have no way of
13 remembering that.

14 Q Well, what it says is that -- item three certainly
15 implies that the project wasn't ready. It says, we've now
16 assigned a development manager in Orem. Do you see that?

17 A Yes.

18 Q And we're putting together a team. Two to three of
19 these people will be on-site at SV. That was Scotts Valley,
20 SV?

21 A I would assume so, yes.

22 Q On Tuesday, January 2. Then it says what the Orem team
23 will be initially made up of one manager, two from the old
24 PlanPerfect, three to four other top-notch developers, and
25 it goes on.

1 Item four says they will be working closely with
2 whoever is left at the Quattro Pro group. Do you see that?

3 A Yes.

4 Q And it goes on to say, we feel that it is essential
5 that these key people have a full development environment at
6 home, such that they can fix bugs.

7 Doesn't this tell you, Exhibit 230, Mr. Frankenberg,
8 that the Quattro Pro team was not ready even then in
9 December of '95?

10 A It would imply that it wasn't released -- certainly
11 saying it wasn't released to manufacturing, but -- so having
12 the ability to fix bugs from home implies that they could
13 respond to further testing. So clearly the product wasn't
14 complete. It just doesn't say how far from completion it
15 was.

16 THE COURT: It's after 1:30. Let's break for the
17 day. I'm afraid you will have to come back tomorrow,
18 Mr. Frankenberg. I'll sit here with counsel for a minute.

19 (Jury excused)

20 MR. JOHNSON: Can Mr. Frankenberg be excused?

21 THE COURT: You can leave.

22 THE COURT: I'm a little worried that you are
23 getting now into, with Mr. Frankenberg, things that were
24 covered by other people. I think you have established what
25 he knew, but we can't get in the whole critical path issue

1 now. There's going to be times when you aren't going to
2 want people on the other side repeating things that are in
3 evidence. I am just wondering whether this is a fruitful
4 line of examination.

5 MR. TULCHIN: I'll take that to heart, Your Honor.

6 THE COURT: I understand your point, but the fact
7 of the matter is you have got plenty of arguments, things
8 wouldn't have happened anyway, as I understood the testimony
9 of one of the witnesses that talked about the critical path,
10 this became irrelevant because of the delay, catching up. I
11 don't think Mr. Frankenberg knew that.

12 MR. JOHNSON: Of course, he doesn't. I mean we
13 seem to be having a trial --

14 MR. TULCHIN: Your Honor, I am going to try not to
15 respond to Mr. Johnson's constant criticisms. I'm sure
16 we'll hold him to the same thing. But I do want to respond
17 to the Court and I'm taking this to heart. If there's been
18 repetition, I apologize.

19 THE COURT: It's not repetition. I'm just not
20 sure it's going to be fruitful.

21 MR. TULCHIN: I understand. I think I have about
22 another half an hour. If it turns out to be slightly more,
23 I hope you will forgive me.

24 THE COURT: That's not the issue. I wanted to
25 stop because it's seemed to me that you've clearly

1 established Mr. Frankenberg really was not involved in the
2 ins and outs of this decision. We did hear the testimony
3 about the critical path, which, according to Novell, you can
4 certainly argue to the contrary, but according to the
5 testimony of Mr. -- I think it was the fellow who
6 testified --

7 MR. JOHNSON: Mr. Gibb.

8 THE COURT: Mr. Gibb, that it became immaterial
9 because of the timing on the --

10 MR. TULCHIN: But, Your Honor, I think it's very
11 important for the jury to hear and also for the Court that
12 in a case brought seeking billions of dollars in damages --

13 THE COURT: That's a whole different issue, Mr.
14 Tulchin. I've heard you loud and clear.

15 MR. TULCHIN: If I may? I just want to -- I hope
16 by way of an apology for taking so long. It's very
17 important to note, this is the only live witness who they
18 are calling, or so I now infer, other than these three low
19 level developers. He was the CEO. And I think it's
20 important for the jury to understand that when Novell is
21 seeking billions of dollars in damages, the case turns on
22 the testimony of three low level developers about choices
23 that they make. Business people apparently never made this
24 choice. We don't have a single document from any executive
25 within the business applications group at Novell indicating

1 here is the decision we're going to make. In lieu of
2 getting the product out quickly, let's try for the super
3 duper advanced file open dialog. It was a decision that
4 Harral and Richardson say that they made, although both of
5 them frequently used the word we without defining who else
6 they were talking to.

7 So again --

8 THE COURT: I hear you loud and clear. I think
9 you have made that point. I'm just suggesting that getting
10 into whether or not -- and you make your own decision, but
11 getting into issues about whether the delay in Quattro Pro,
12 because people left, impacted upon what ultimately happened,
13 that does not seem to me to get you anywhere. I think you
14 have established, and I heard you loud and clear at least,
15 it's mind boggling to me, to tell you the truth, that
16 Mr. Frankenberg was not intimately involved in this
17 decision. I can't imagine -- I mean you did establish the
18 executives, not the three we heard from. That's a point
19 too. But, frankly, it's mind boggling to me that you have a
20 decision made of this magnitude without Mr. Frankenberg
21 having been involved. It's beyond anything I can
22 comprehend.

23 MR. JOHNSON: May I respond, Your Honor?

24 THE COURT: Yes, please do.

25 MR. JOHNSON: Thank you.

1 First of all, Mr. Gibb was not some low level
2 developer. He was the project manager for the PerfectOffice
3 suite.

4 THE COURT: You are telling me that you would let
5 a junior partner -- never mind. Go ahead.

6 MR. JOHNSON: And Mr. Gibb testified that they had
7 weekly meetings with the entire team and a number of
8 executives with the company. These choices were not being
9 made randomly. Because you don't bring the CEO to make a
10 decision -- and what I think here is that Your Honor, once
11 again, is focusing on the notion that they could have made
12 the decision to use these interfaces, and the testimony is
13 to the contrary.

14 THE COURT: That may or may not be the case. I
15 hear you.

16 MR. JOHNSON: I think it's very important.

17 THE COURT: No. That's a whole different issue.
18 Your clients chose not to keep any documents. Your clients
19 chose to talk to their lawyers a long, long time ago about
20 bringing an antitrust case. And Mr. Frankenberg, the
21 president of the company, is not even involved in the
22 decision as to whether -- you know, maybe the decision was
23 right. Maybe it was wrong. As far as I'm concerned, it's
24 mind boggling to me that somebody didn't say, Bob, this is
25 the situation. We have two ways to go. We can either get

1 this product out within a short period of time with
2 Windows 95 coming out, but it may have problems. It could
3 be they are going to withdraw the APIs or it could be we're
4 using their functionality, which our client base is not
5 going to be happy with because it's a step backwards. Or we
6 can wait a year and bring it out.

7 Frankly, it is to me mind boggling -- it may have
8 nothing to do with the law. It's having to do with
9 business. Why the chief executive officer and the chairman
10 of the board is not involved in that decision is just
11 shocking to me.

12 MR. JOHNSON: Your Honor, if I may. Certainly at
13 the time these decisions were being made -- and I must say
14 they didn't have the choice to use the extensions. That's
15 what the testimony is. Okay. Certainly at the time the
16 choice was being made, they did not know it was going to
17 take over a year to do this. So it's not like you had the
18 stark decision of saying either we do A or we're going to be
19 in 1996. This is something that you find out over time.
20 This is something that is brought to Mr. Frankenberg's
21 attention in early 1995, hey, we have a real problem here.
22 The developers have a real problem. They don't know at that
23 point in time it's going to cost them a year to get to home.
24 They don't know how difficult the problem is going to
25 become.

1 So to say that there was some choice to be made in
2 1995 that, oh, okay, if we go that route, we're going to
3 miss the time to market, we're going to be somewhere off in
4 1996, and we're doomed. They did not have that information.
5 They did not know that. What they knew --

6 THE COURT: I've said what I've said. It may not
7 have anything to do with the lawsuit. I'm telling you that
8 if I was a chief executive and chairman of the board of a
9 company and this decision was not put on my plate -- forget
10 the first option, because maybe I'm wrong about my
11 recollection, which is perfectly possible. But the choice
12 between using Microsoft's open face dialog, which may
13 decrease the functionality that your clients have come to
14 expect or going off on some uncertain path, whether it's a
15 year or whatever -- what I know from -- clearly one thing,
16 this is an industry in which people can't predict what's
17 going to happen, I would want to make the decision as the
18 chairman of the board and the CEO, and I am not -- I'm
19 sorry, I'm just telling you what I'm thinking. It may have
20 nothing to do with -- if responsible people made the
21 decision, it may have nothing to do with the lawsuit. It
22 may make a big difference.

23 MR. TULCHIN: It actually doesn't help Novell to
24 say we didn't know it would take a year, because three
25 months in, or four, or four and a half, or five, or six,

1 when they hadn't solved the problem yet, and they could get
2 the product out in a moment's notice, according to all the
3 testimony, we'll collect it, I will be happy to show it to
4 you.

5 THE COURT: Somebody knew something that year.
6 These people -- two or three people, they didn't want to
7 hire people. A bunch of associates researching a project.

8 MR. TULCHIN: That executives made a decision,
9 there is not a single document --

10 THE COURT: This is my fault. This is my fault.
11 All I'm saying is that I did not think that this speaks well
12 of Novell management that Bob Frankenberg was not involved
13 in the decision. That's all I'm saying. It got us here. I
14 think you've made that point, Mr. Tulchin. I think it's
15 something the jury may or may not consider. But I don't
16 think that pursuing the issue of whether the file -- or
17 whether the resignation of the Quattro Pro people made a
18 difference is to going to impact it. That's how we got
19 here. That's all I'm saying.

20 MR. JOHNSON: Your Honor, may I say, all of this
21 is under the category of blame the victim without reference
22 to the fact of what Mr. Gates did and the reasons he --

23 THE COURT: Mr. Gates was, according to -- I
24 understand. The answer is that he was involved in a highly
25 competitive industry in which he was worried about paradigm

1 shifts in a minute, and he didn't want his product to be
2 used by somebody who he saw as a major competitor that might
3 be used against him and completely wipe out what he had
4 accomplished.

5 MR. JOHNSON: If that was the case, they never
6 should have evangelized that stuff to us. They shouldn't
7 have given it to us. They shouldn't have told us this is
8 what you should do to develop your product and we might not
9 be here today. But he took a calculated I'm taking that
10 away from them in order to advantage my suite and to hurt
11 WordPerfect and Lotus, and he did so, frankly, with malice.

12 THE COURT: That's what I will be hearing on a
13 motion for judgment as a matter of law.

14 MR. JOHNSON: Thank you, Your Honor.

15 THE COURT: What's tomorrow in addition to we have
16 Mr. Frankenberg?

17 MR. JOHNSON: Well, Your Honor, obviously I didn't
18 know -- I am going to have to --

19 THE COURT: No. No. No. I just want to --

20 MR. JOHNSON: -- do quite a bit of redirect.
21 We're going -- we had wanted to put on Mr. Alepin tomorrow,
22 but clearly we're going to take at least half the day
23 finishing up the cross, then I have to do a fair amount of
24 redirect because of the length of the cross. We do have
25 some film, still have videos to show, Your Honor. So I

1 think we'll go back and take a look at it and decide --
2 clearly I think we can either show film, or if we did
3 Mr. Alepin, it would only be the very start of his
4 testimony.

5 THE COURT: Okay. Fair enough.

6 Look, I understand. If I'm wrong, the first
7 option, I could very well -- it could be it's the lack of
8 documentation, plus what the people on the phone refused to
9 say. It could also be -- and, frankly, it's the first time
10 today as I realized it, I guess, that the APIs could have
11 been withdrawn in the first release of Windows 95. Frankly,
12 I had just gotten the impression that everybody was talking
13 about were the APIs being withdrawn in future versions of
14 Windows. That is what prompted my original question of last
15 week, which is why didn't somebody consider using the
16 documented APIs, at least simultaneously while the house was
17 being built, to which you said there are two answers.
18 Number one, they couldn't even use the existing APIs because
19 they were getting stonewalled by whatever --

20 MR. JOHNSON: Premier Support, Your Honor, which,
21 by the way, wasn't some hotline. It was a paid service that
22 cost a lot of money, and you had direct excess to
23 Microsoft's developers.

24 THE COURT: I understand.

25 MR. TULCHIN: Your Honor, it's not an antitrust

1 claim that unnamed people at Premier Support, who they have
2 never identified, somehow didn't help them enough because
3 they weren't competent enough to write their own product.

4 THE COURT: It's your fault because you don't have
5 the records of Premier Support.

6 MR. TULCHIN: Yes, we had the duty to collect
7 those documents. They knew they were going to sue us. They
8 had the duty. Of course, we don't have those records.

9 MR. JOHNSON: There were lawsuits against
10 Microsoft at the time. They had an equal amount of duty at
11 the time. There were all kinds of documents.

12 THE COURT: I think --

13 MR. TULCHIN: No one else has had the nerve to sue
14 about calls to Premier Support.

15 THE COURT: I still want to know -- I am going to
16 want to know at some point whether there's any other -- any
17 case anywhere, including those against Microsoft, where a
18 competitor, the duty of the competitor requires you -- and
19 you said the only -- the only case you cited to me was my
20 own decision in Novell v --

21 MR. JOHNSON: Well, Your Honor, I pointed that out
22 as a fine example that you wrote --

23 THE COURT: I don't know of any other -- any other
24 where -- as far as I know the other cases involving
25 Microsoft had to do with objective business practices, for

1 example, which clearly could have an impact upon -- but what
2 was done to Sun and Netscape perceived as really hurting --
3 being active products that might destroy the operating
4 system. Here the more I hear, it is that Novell was
5 complaining that Microsoft did not share its own enhanced
6 product, which is Windows 95, with Novell so that Novell
7 could write its program -- its suite the way it wanted to.
8 That to me is a substantial antitrust issue, particularly
9 against a background of what clearly was a competitive
10 industry.

11 If Raikes's e-mail didn't establish it, these sure
12 establish it, because all they talk about is how competitive
13 and dynamic the software industry is. So according to
14 contemporaneous evidence from your own client, this was a
15 highly competitive industry. I know from Mr. Raikes's memo
16 and what the concern is there is a paradigm shift. Assuming
17 Mr. Gates made the most deliberate, intentional decision at
18 all, the most that I see was he saw Novell as a major
19 competitor and he wasn't going to allow, after that
20 presentation of the product of Corsair, which was never
21 marketed -- he was scared, and he didn't want to give to
22 Novell things that he had developed that could be used
23 against them. That to me, as I understand Microsoft's
24 position, I understand your position, but I will have to
25 decide this.

1 MR. JOHNSON: The problem was it wasn't just a
2 matter of withholding it, it was a matter of giving it to us
3 and then jobbing us by yanking them away. That is the
4 difference and that is the difference you identified in your
5 opinion as making a difference in this case.

6 MR. TULCHIN: At the risk of stating the obvious,
7 no police officer came to Novell and took anything away.
8 They had the beta. They had the documentation. The
9 testimony was clear they could have used the namespace
10 extensions if they wanted to. Mr. Johnson even played
11 Maritz's testimony that any ISV faced with the withdrawal of
12 support for any API, any API had a difficult business
13 decision. Either use them at your own risk, use them if you
14 think it's worthwhile using them because it can save you
15 time to get the product out to market, or follow a new path,
16 build a road around the mountain, good luck. It's not
17 Microsoft's job to build that road for Novell.

18 THE COURT: Another problem I have, which is a
19 related issue which I mentioned before, I thought, frankly,
20 Mr. Frankenberg had gotten there when he talked about how
21 WordPerfect was being used for other 32-bit systems. I see
22 absolutely no evidence -- and I am not going to allow an
23 expert to make it up. I see absolutely no evidence that
24 contemporaneously your client was trying to write, was
25 trying to develop something that would have allowed it to

1 reach all of the sources of information that it wanted on
2 Unix or on anything else. It wanted to use Windows 95, and
3 it seems to me that absent some evidence that -- not
4 speculative evidence, but some real evidence that, in fact,
5 what Microsoft did prevented you all from writing to other
6 operating systems is a problem in your case. That's
7 something we'll talk about at the appropriate time.

8 MR. WHEELER: Your Honor, could I raise a less
9 contentious issue? I'm trying to maintain a practice and I
10 have scheduled meetings on Friday when we're not in session.
11 You indicated this morning you may change that. If that's
12 the case, I need to change some meetings that I have
13 scheduled. When will I know when --

14 THE COURT: Tomorrow I'm going talk to my office.
15 I think, based upon what I've been told, I am going to sit
16 next Friday.

17 MR. JOHNSON: Next Friday, Your Honor, not this
18 Friday?

19 THE COURT: This Friday is a holiday, I think.

20 MR. JOHNSON: Right.

21 MR. WHEELER: We'll not be sitting this coming
22 Friday, but --

23 THE COURT: Next Friday, unless I tell you to the
24 contrary. Based upon what I told you all this morning, I
25 would mess you all up terribly. This is my practice too --

1 who volunteered for this?

2 I'm just telling you -- I'm just telling you what
3 I see as a potential issue. I've not made up my mind. If
4 I'm wrong -- I absolutely understand I might be wrong about
5 that first option. But I absolutely understand if -- it
6 just came to mind, look, it's going to be withdrawn from
7 future Windows, you could use it for the present Windows,
8 why didn't somebody consider the fourth alternative, which
9 is use the undocumented APIs temporarily while you recreate
10 the system. You tell me there isn't. I understand.

11 (Whereupon, the trial was continued to Tuesday,
12 November 8, 2011 at 8:00 a.m.)

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