

1 MR. SCHMIDTLEIN: Your Honor, can I be heard
2 briefly?

3 THE COURT: Yes. I saw you get upset when I was
4 trying to help you, and I frankly have lost my patience. You
5 keep saying that it's wrong for me to ask questions to the
6 jury. And it's absolutely unobjectionable. My practice is
7 and I don't like to ask questions in front of the jury. I was
8 trying to help you because I did not remember there being
9 testimony about the fact that there was reduced functionality.
10 Mr. Taskier said Mr. Gibbs did so testify. I didn't want the
11 jury's head to be going off the way mine was that they hadn't
12 heard that testimony, which actually would have undermined the
13 testimony of the expert.

14 I was trying to help you. And I'm -- I know there
15 are lawyers in your firm who like to run the courtroom.
16 You're not going to run my courtroom, and I've lost my
17 patience, and I don't want to hear from you.

18 Let's get the jury.

19 (Whereupon, the jury returned to the court
20 proceedings.)

21 THE COURT: Okay. Mr. Jardine.

22 MR. JARDINE: Thank you, Your Honor.

23 Q. BY MR. JARDINE: Dr. Warren-Boulton, in your
24 original expert report, you had a statement that you're
25 assuming or relying on, I'll be careful how I say that, on

1 four anticompetitive acts that Microsoft had directed against
2 Novell. Do you recall that?

3 A. Yes.

4 Q. And as I listened to your testimony today I heard
5 you only reference one of those, which was the withdrawal of
6 documentation of the NameSpace extension APIs. Have you --
7 have you been informed that the other three anticompetitive
8 acts you were asked to assume have either not been mentioned
9 in trial or been mentioned in a very reduced way?

10 A. I think that's roughly my understanding, yes.

11 Q. Does the fact that the number of anticompetitive
12 acts you remember asked to assume in formulating your opinions
13 has shrunk from four to roughly one caused you to change your
14 opinions in any qualitative way?

15 A. No.

16 Q. That hasn't affected your opinions?

17 A. No.

18 Q. All right. Now, I would like to have you look at
19 one -- your description of the NameSpace extension APIs facts
20 that you were asked to assume.

21 If we could turn to, Roger, to Dr. Warren-Boulton's
22 original report, Page 8.

23 And if you could highlight the next-to-last
24 bulletin.

25 Can you see that on your screen,

1 Dr. Warren-Boulton?

2 A. Yes.

3 Q. It reads:

4 De-documenting the NameSpace extension for
5 Windows 95 to give Microsoft Office developers a
6 head start in using them.

7 What did you understand or mean by the phrase a
8 head start?

9 A. I mean to allow Microsoft Office to come out at the
10 same time as Windows 95.

11 Q. Do you have any -- was it your understanding that
12 the Microsoft Office developers have access to the NameSpace
13 extension APIs?

14 A. I have no particular recollection. I think at some
15 point I looked at that, but the dim mists of history.

16 Q. If I told you that the evidence that has been
17 presented at trial is that Microsoft Office suite
18 developers --

19 A. Yes.

20 Q. -- and word developers did not have access to the
21 NameSpace extension APIs during this period, would that affect
22 your opinions in any way?

23 A. No.

24 Q. Wouldn't cause you to correct anything that you've
25 assumed?

1 A. No. It's my understanding that the concern is the
2 effect of withdrawal of the NameSpace extensions on the Novell
3 programmers. Office came out at the same time as Windows 95,
4 so I'm not -- I'm not seeing how it's relevant. My point is
5 what I'm looking at in terms of damages is the effect of the
6 withdrawal of the NameSpace extensions to Novell. That's
7 what's caused the problem which gives rise to the damages.

8 Q. I just wanted to make sure I understood your
9 assumptions. So when you used the words head start, you
10 didn't mean to imply that somehow the Microsoft Office
11 developers had access to the NameSpace extension?

12 A. I have no views on that. The only point that I'm
13 relying on is that Office came out at the same time as
14 Windows 95, and, of course, WordPerfect came out much later.
15 That's the focus of the damage.

16 Q. Let me now turn, if I can, to the four opinions
17 that you've presented today with respect to damages, which I
18 understand you set out on the board in front of us. Is that
19 correct?

20 A. Yes.

21 Q. I just -- I was a little confused, and I want to
22 make sure I understand this correctly. On Line 1 where it
23 says, purchase vs. sale: Financial markets, what is that
24 damage number as of which date? I thought I heard you say
25 March 1996. Do you understand my question?

1 A. No. It would be as of January 1996.

2 Q. January 1996?

3 A. (Witness indicates by nodding head up and down.)

4 Q. And as to the second line purchase vs. sale: Lotus
5 conditional bids, would that be as of January 1996?

6 A. Well, the conditional bid is when the loss and fall
7 of the market value occurred. So what the market is doing is
8 coming up with an estimate of what they expect the loss to
9 Novell will be. That loss was actually I guess taken in
10 January of 1996 when they sold product. So in that sense,
11 these estimates are all, if you like, as of the date of the
12 sale to Corel.

13 Q. That would be true for the third line, October 6,
14 1995?

15 A. Well, yes. In the sense that is the market's
16 estimate of the effect of the actions on Novell. The actual
17 loss was taken presumably in January of 1996. So that would
18 be where they would all come together.

19 Q. So that would be roughly as of January 1996?

20 A. Yes. Not --

21 Q. Your bottom line, forecast of revenue and profits,
22 that's the line on which I'm confused. Is that number as of
23 January 1996 or is that of 2011?

24 A. That's of January 1996.

25 Q. That number is as of January 1996?

1 A. Yes.

2 Q. I thought in your original, the reports you've
3 provided to us, that the numbers you produced for that method
4 as of January 1996 for your -- the first version was
5 440 million, And for the more complicated regression
6 calculation was 378 million. Did I -- is that correct?

7 A. Probably. I have to go back and look.

8 Q. So is your -- is your opinion here today that the
9 number that you calculated in your report is now almost three
10 times higher than you calculated? I'm glad to have you look
11 at your report --

12 A. Yes.

13 Q. -- to see where those numbers are. Would you like
14 to do that?

15 A. Sure. This is in the reply report?

16 Q. I think -- let's start with your -- do you have a
17 copy of your original expert report?

18 A. Yes.

19 THE COURT: It seems pretty long, so give him a
20 page. It would probably help.

21 MR. JARDINE: All right.

22 Q. BY MR. JARDINE: I think the easiest place to go
23 really is Page 3. Do you see that, the third bullet -- the
24 last bullet point on Page 3?

25 A. Yes. 440 as of March 1st, 1996.

1 Q. Or 987 million as of May 1st, 2009. So is your
2 bottom line, in fact, brought forward to 2011?

3 A. Yes. Possibly.

4 Q. And if we were to put it apples to apples to put
5 that number back in 1996 dollars, would it be 440 million?

6 A. Well, we've got a revised report.

7 Q. I want you to take all your time. I think this is
8 an important point, sir.

9 (Time lapse.)

10 THE WITNESS: Okay. Yes. In the original report,
11 I did this in different ways. Let's see. Here we are. In
12 the original report, which is Table G9, you're correct. As it
13 says in the report that's the total. 1996 value is
14 440 million, and the 2009 value is 987 million.

15 Q. BY MR. JARDINE: And I'm just guessing because I
16 hadn't seen this before, that the 1.119 million is simply
17 bringing it forward from 2009 to 2011?

18 A. That's correct. And I can find the parallel number
19 somewhere.

20 Q. I'm less interested in that than I am another
21 point.

22 A. Okay.

23 Q. If we were going to compare apples to apples,
24 shouldn't the bottom line be 440 million?

25 A. I believe you're correct. And let me check it.

1 But if the 1.119 is of 2011, we should be doing apples to
2 apples. We should be using the value of 1996.

3 Q. And that would be 440 million by --

4 A. Well, I think it's changed since then, but it's
5 that order of magnitude, yes.

6 Q. Okay. Well, then, so I'm going to ask the jury to
7 visualize 440 million on the last line instead of 1.119 and
8 understand you might change that, it may have changed a little
9 bit, but it's of that magnitude.

10 A. I think that's correct. But at break or whatever,
11 give me a chance to think it through.

12 Q. No. No. If I've got this wrong --

13 THE COURT: Fine. My guess is you will have plenty
14 of time to look it over.

15 THE WITNESS: Yes. It is a lot of math.

16 Q. BY MR. JARDINE: Unless I'm faster than I believe I
17 believe you'll have time tonight.

18 A. Sure. I can come back with that in the morning.

19 Q. So we don't get bogged down for now, and if we're
20 wrong we'll go back. But let's just assume that that last
21 line is in the order of 440 million.

22 A. Okay.

23 Q. Plus or minus in that range.

24 A. All right.

25 Q. That would suggest that of your methods, you've got

1 one that is somewhere between half and a third lower than the
2 other three. As a matter of economic theory, shouldn't all of
3 these methods yield roughly the same amount?

4 A. Well, I think that the problem is, I tried to
5 describe it before, is that, you know, in the ideal world
6 there exists a number. We don't know what that number is.
7 These are all attempts to get at that number in various
8 different ways. You know, as I said before you made your
9 comment, the one that I would focus on primarily is the 976.
10 I think that if you can look at the issue in various different
11 ways, you're sometimes going to get numbers that are higher,
12 sometimes lower. You know, we're looking for a central
13 tendency here.

14 Q. I just want to make sure that as people have this
15 chart in mind that we have in mind the right numbers. And we
16 can talk about -- and the gap is, I gather from the low of
17 around 440 to the high of about 1.329.

18 A. Let me check those.

19 Q. Okay.

20 A. But I think that's probably not unreasonable.

21 Q. If we're right about the 440 million and we use
22 your mountain analogy, I can't remember whether the bottom is
23 the east or the west when you look at it. Doesn't that look a
24 lot more relative like a foothill than a mountain?

25 A. There's a lot more what?

1 Q. I mean, it's clearly much lower than the others as
2 you get your perspective.

3 A. Oh, in other words, what I now have is I have
4 something below and something above.

5 Q. Right. Now, I'd like to turn to your method one
6 analysis, which was your purchase vs. sale, I understand the
7 method that you have endorsed the most; is that correct?

8 A. Yes.

9 Q. All right. And I think you walked the jury through
10 it. And we didn't know what slide you used, so we have a
11 graphic, too, to remind the jury about the step-by-step
12 process.

13 Could we have number 4?

14 All right. This was sort of modeled after the
15 chart that you have in your report. And does that look
16 familiar to you?

17 A. The numbers look quite familiar.

18 Q. And this was modeled after Exhibit 6 of your
19 original report.

20 A. Yes. At least most of the way down looks quite
21 familiar.

22 Q. And let me just say this, Dr. Warren-Boulton. We
23 may be off a little on the numbers because we took the
24 information provided us on Monday and tried to recreate your
25 Exhibit 6 what we thought was new information. So we may be

1 off here or there.

2 A. I think that's correct.

3 Q. All right. And if I just -- and this is not as
4 easy to follow as the slide you used. But just -- do we have
5 a pointer? I'll be careful with it. But if we look, this
6 just reflects what I think you described to the jury earlier.
7 You start in your method one with the total purchase price of
8 1.55 billion. Do you -- billion, excuse me, right at the top?

9 A. Yes.

10 Q. And then you make adjustments with the cost of
11 GroupWise?

12 A. (Witness indicates by nodding head up and down.)

13 Q. And estimated overpayment. And I get to a total
14 offset of 537, and you subtract that from the 1.555 billion,
15 and you get to a net cost productivity of application of
16 1,517,000,000. Do you see that?

17 A. Yes.

18 Q. And then when you move it from the current period,
19 which was 1994 over to the right-hand column, that's 1996,
20 that's where you talk -- that's where you talked about
21 application appreciation?

22 A. That looks --

23 Q. Do you see --

24 A. Yes. We've added -- we've added -- I think we
25 added about 10 percent, yes.

1 Q. Okay. But at least that's the calculation you were
2 doing?

3 A. I think so. Yes.

4 Q. And then the next step you took was after those
5 adjustments to subtract the amount of the sale price received
6 from Corel. And that gets you to your damage number of about
7 976 million. Does that lay it out pretty well?

8 A. Yes, I think so.

9 Q. All right. Now, I'd like to just talk about some
10 of the adjustments you made. And I think you went -- we can
11 take that down -- I think you said that the major adjustment
12 you had to make was to address the substantial drop in the
13 market value of Novell in reaction to the announcement of the
14 acquisition.

15 A. That's where I begin, yes.

16 Q. Okay. And I think you also talked about having to
17 make an adjustment to make sure that some part of that drop
18 wasn't just following what was the general market activity.
19 And that's when you addressed you're use of the S&P as an
20 index.

21 A. Yes.

22 Q. Correct?

23 Let me ask you a question about your damage number,
24 just so we can be clear. As I understand it, your opinion is
25 that after you've done that subtraction and you get to the

1 976 million, the entire difference you allocate at the feet of
2 Microsoft as damages?

3 A. Yes.

4 Q. And that the entire difference is attributable to
5 the withdrawal of the documentation, withdrawal of support for
6 the NameSpace extension APIs.

7 A. Yes.

8 Q. All right. Now, let's turn, if we can, to the
9 March 1994 market decline.

10 And if we can put graphic 35 up?

11 And we looked at this. This was a chart the jury
12 saw that shows what happened when Novell announced it was
13 acquiring WordPerfect and Quattro Pro assets.

14 A. Uh-huh (affirmative).

15 Q. And you recall that decline was in excess of
16 20 percent of the total market capitalization of Novell,
17 wasn't it?

18 A. I think that's correct, yes.

19 Q. And that's a very significant drop.

20 A. Yes.

21 Q. Is it fair to say that the stock market's reaction
22 to the Novell announcement was very negative?

23 A. It was certainly negative, yes. 20 percent.

24 Q. Yeah. And if we can look at, I think we talked
25 about the calculation. And if we've got -- I can't remember

1 if I've got a chart. But I think you said that the
2 calculation of the total market cap decrease was between
3 1.8 and 1.9 billion?

4 A. From my memory that seems about right, yeah.

5 Q. And if I refer to it as 1.7, 1.8, we'll know what
6 we're talking about.

7 A. Yes.

8 Q. All right. Does -- do I understand economic theory
9 correctly, and you can help me if I'm wrong, that what the
10 market was saying is that it expected, it thought the present
11 value of future cash flows Novell would experience as a result
12 of this merger acquisition would be reduced by \$1.8 billion?

13 A. I think that's -- that's the normal way that
14 economist think of the stock market value, which is the
15 present value of a cash flow over time, yes.

16 Q. So it's a little hard to understand. But if I
17 understand the theory, and please correct me if I'm wrong, the
18 theory is that the market is saying that Novell as a result of
19 this acquisition is going to with all of the combined assets
20 now earn \$1.8 billion less than it would have in present
21 terms?

22 A. In the present value as of '94.

23 Q. Correct.

24 A. So it has to be discounted back to 1994.

25 Q. Now, if I could see Graphic 8. I'm sorry. That

1 is -- that's not the one I wanted. I apologize. You can take
2 that down.

3 So if I understand, Dr. Warren-Boulton, that as we
4 look at this little picture in time towards the end of March
5 of 1994, they announce this acquisition for 1.55 billion and
6 the market immediately falls 1.8 billion.

7 A. 20 percent, yes.

8 Q. Those numbers are roughly in the same range.

9 A. I'm sorry. Which numbers?

10 Q. 1.55 billion, the purchase price, and the
11 1.8 billion of the market fall.

12 A. Well, I think what I was pointing out is the fact
13 the fall in the market value of Novell seems to actually be
14 significantly higher than the purchase price. I get 1.9, I
15 guess, versus 1.5. About \$400 million.

16 Q. I --

17 A. I don't know how much 400 million is to you, but
18 about 400 million.

19 Q. It's a very lot amount of money.

20 A. Okay.

21 Q. But nevertheless, they're within -- from an
22 economic perspective, did the fact that those two numbers are
23 roughly, you know, they've got a 3- or \$400 million
24 difference, but roughly in the same range, does that have
25 economic significance to you?

1 A. Well, it would mean if the only reason why the
2 value of those assets fell was because of overpayment, then --
3 let's put it this way. They've fallen for a reason. There
4 are multiple potential reasons why that fall could occur. All
5 you really know is that those assets, the present value of
6 those assets have fallen by 20 percent because of something,
7 whatever it is, lack of focus, overpayment, concern about
8 retaliation from Microsoft, these are all things that are
9 mentioned at some point or another. They're all possible
10 explanations for that number.

11 Q. We'll talk about that. But given the fact that
12 this happened in two days, wouldn't economic theory tell us
13 that the probabilities are that that fall was connected to the
14 announcement?

15 A. Oh, yes. Oh, yes. I've assumed that the fall is
16 connected to the announcement, and that's why I do a net of
17 the S&P 500. As far as I can tell, there is no other news
18 that struck during that event window.

19 Q. Now, is it fair to say that Microsoft had nothing
20 to do, at least there's no -- there's no allegation here that
21 Microsoft did anything wrongful that contributed in any way to
22 that stock market fall in those two days?

23 A. I think that's correct in the sense that the stock
24 market fall itself is not the fault of Microsoft. I mean,
25 I've argued that most of that fall was due to the market's

1 belief that NetWare would suffer as a result of the
2 acquisition.

3 Q. If we could see graphic 6 now. Roger, I apologize.

4 This is -- this was a slide I meant to show which
5 shows, and we have a \$1.86 billion market cap decline and a
6 \$1.55 billion purchase price. And this is on a scale of
7 2 billion, but it shows their relationship, at least.

8 If I could see the slide that shows the March to
9 June 1994 stock price change. And I think it may be
10 graphic 9.

11 This shows, I think, what happened to Novell's
12 stock between the announcement of the purchase price and when
13 the transaction finally closed. Are you familiar with that
14 stock price range?

15 A. Well, yes. I assume it's the same as what I put up
16 earlier.

17 Q. So it appears that over the next several months the
18 price of Novell stock fell even further?

19 A. That's correct.

20 Q. And as I understand it, at the time of the actual
21 closing of the transaction, the \$1.4 billion announced
22 purchase price for WordPerfect had fallen to 855 million.

23 A. That's correct.

24 Q. And as I understand it, and I want to be clear
25 because there was something confusing in your report, you

1 don't contend that anything that Microsoft did affected the
2 further fall of that stock between March and June?

3 A. Yes.

4 Q. You do?

5 A. Yes.

6 Q. Can you tell me -- because I'm confused about that.
7 Can you tell me what it is that you think, what conduct of
8 Microsoft you believe affected that stock price between March
9 and June of 1994?

10 A. Well, you have to distinguish between the conduct
11 and the financial market's recognition of the effects of that
12 conduct. The conduct we're talking about here is withdrawal
13 of the NameSpace extensions and that happened when the
14 NameSpace extensions were withdrawn.

15 Q. Do you know the date that occurred?

16 A. October 1994, I believe.

17 Q. And that's after the closing date?

18 A. Yes.

19 Q. So at least that action, which is the focus of
20 Novell's suit, didn't affect the further drop of this stock
21 price leading up to June of 1994, did it?

22 A. Not until '95. I thought your question was, did
23 any of the fall in the stock market price of Novell during
24 this period between the acquisition and the sale --

25 Q. I probably wasn't clear. Let me take a step back.

1 A. We're back in 1994. My apologies.

2 Q. Yeah. This is the closing.

3 A. Okay. Between the opening -- okay. I see. You
4 just have -- I'm sorry, this is a very --

5 Q. I probably was not clear.

6 A. '94, '94. Sorry. Let me just get my head back.
7 We're now talking about the announcement of the acquisition
8 and the actual closing of the acquisition.

9 Q. Yes. And so I'm clear, my question is, you don't
10 contend, do you, that anything, any of the allegations against
11 Microsoft in this case had anything to do with that further
12 decline of the market from March 'til June?

13 A. I just want to make it really clear.

14 Q. That's fine.

15 A. I think the question you're asking me is, when do I
16 think the stock market recognized the effects of the
17 withdrawal of the NameSpace extensions?

18 Q. That wasn't the question I asked, but I'm glad to
19 have you answer that. You can answer that.

20 A. I think as I tried to say is I think the market
21 recognized that primarily in October 6 of 1995, maybe as well
22 as August 23rd, there was another announced delay in
23 August 23rd of 1995. Both of those led to fall in the share
24 value of Novell. We haven't talked about this, but in two
25 days before the release of the Windows 95, Novell also made an

1 announcement and that announcement also had announced
2 something of a delay that they expected in the availability.
3 And the stock price fell by about 10 percent.

4 So some of that 10-percent fall in the price we
5 haven't talked about is a recognition that the product was
6 going to be late. The biggest fall occurred in October 6,
7 1995. That's when they told the market they wouldn't be out
8 until at least early 1996. I don't know by that point how
9 much credibility Novell had.

10 So that's the moment that the market recognizes and
11 that you see in the stock prices, that's when you see the
12 effects of the market's recognition of the effects of
13 Microsoft's actions.

14 Q. And we'll get there.

15 A. Yeah.

16 Q. But for now, just so I'm clear, that's a year after
17 the graph that we're looking at now.

18 A. That's right. The market recognition of the cost
19 of that comes significantly later than the actual act.

20 Q. So let me return to my question.

21 A. Okay.

22 Q. Dr. Warren-Boulton, do you contend that any of the
23 alleged acts against Microsoft in this case had any affect on
24 the stock market price between March of 1994 when the
25 acquisition by Novell was announced and June of '94 when it

1 closed, which is the end of this stock graph?

2 A. No. I don't think you could see it during that
3 time period.

4 Q. Thank you.

5 Now, I'd like to address for a minute, and you've
6 talked about this, but I'd like to spend a little more time on
7 them, the potential reasons why the market reacted so
8 negatively to Novell's announcement that it was acquiring
9 WordPerfect and the Quattro Pro assets. And as I understand
10 your testimony, and your report, there are at least three and
11 maybe four reasons. One, you said that the market may have
12 thought one competing theory is that the market thought that
13 Novell had overpaid for the assets; correct?

14 A. Correct.

15 Q. In your report you said a second possibility was
16 that the acquisition might have sparked a pricing war with
17 Microsoft and Lotus. But as I understand it, you rejected
18 that possibility because there was no accompanying decrease in
19 the stock price of Microsoft or Lotus.

20 A. Yes. I did do the best I could to sort of separate
21 that out. I would have thought that if this was going to lead
22 to a major price war, it would affect the price of Lotus, so I
23 looked for whatever evidence I could find, and I couldn't find
24 an affect on Lotus.

25 Q. And the third --

1 A. This assumes, of course, that the price war would
2 have affected Lotus.

3 Q. Okay. And I was just trying to recite. Did I
4 recite it accurately, your report, on that point?

5 A. I think that's correct. Yes.

6 Q. Thank you. The third possible reason you gave for
7 the very significant stock drop in those two days was the
8 market thought adding new product lines might cause Novell's
9 management to lose focus on its core products, principally
10 NetWare. Did I understand that correctly?

11 A. That's correct.

12 Q. Is there a fourth possibility, which is that the
13 market saw the movement towards suites and the network effects
14 in favor of Microsoft products began, were being seen in the
15 market and the market recognized that that made life harder
16 and harder for WordPerfect?

17 A. Well, I think I've already addressed that question
18 on direct. I'd be happy to revisit it.

19 Q. Well, I just want to know if you think that is a
20 possible explanation for this two-day stock drop.

21 A. No. I think I looked at that and decided that was
22 not an explanation.

23 Q. Okay. Well, let me just go back now to the
24 overpayment point, the first theory, and I can't remember for
25 sure, but I thought I heard you say with respect to these two

1 theories that as a matter of interpretation that your guess is
2 as good as mine. Did I hear you say that?

3 A. I would probably rephrase that. I'm trying to
4 provide an expert opinion as an economist, and I hope it will
5 be taken as such.

6 Q. Would you like to withdraw that statement?

7 A. Well, I think what I was intending to say is the
8 ultimate finder of fact here is the jury, and so it's how they
9 assess my expert opinion and the expert opinion of others.

10 Q. Let me just talk to you about --

11 A. But I certainly don't think any of these things are
12 guesses, so....

13 Q. All right. But there are competing theories, and
14 it's a matter of differing opinions, for instance, between you
15 and Professor Hubbard?

16 A. Yes. I think it's clear that Professor Hubbard and
17 I disagree in a number of ways.

18 Q. When we talk about the first possible theory that
19 the market thought that Novell had overpaid for these assets,
20 I'd like to talk about what that may mean. By overpaying,
21 would it mean that the market thought that the future revenues
22 from WordPerfect, the future earnings would not be as great as
23 Novell was anticipating? Is that one possible way of
24 describing overpayment?

25 A. Well, I think that the simplest way to describe it

1 is the way I understood it from the analysts' reports is
2 specifically that I think at least one analyst mentioned or
3 news report mentioned that Lotus and WordPerfect -- sorry --
4 Lotus and Novell had gotten into a bidding war. And under
5 those circumstances the winner always loses in that sense. So
6 I think that was the genesis of the thought that there was
7 overpayment here, that Novell was reacting excessively to
8 Lotus's \$1.3 billion offer.

9 Q. Roger, would you put up graphic 10.

10 This is -- let me just represent to you,
11 Dr. Warren-Bouton, this is a chart that we prepared. We don't
12 mean to have fine print on our charts, but it's hard -- across
13 the bottom are the sources. WordPerfect was not a public
14 company in this period. But this shows operating income for
15 WordPerfect from 1989 to 1994. I just will tell you that for
16 1994, we only had a half year because Novell's fiscal year --
17 excuse me -- Novell's -- no, it was WordPerfect's fiscal year
18 ended in October, so we only had a half a year's worth of
19 revenue. We didn't adjust them, we just multiplied the half
20 years by two to get the 1994.

21 A. Yeah. Novell's fiscal yearend is October 31st.

22 Q. Anyway, we had a half year for WordPerfect. But if
23 you look at those operating income bars for WordPerfect, it
24 looks like its heyday was fiscal year 1990 and 1991, and by
25 1992 there was a significant, more than a 50-percent decrease

1 in operating income, another decrease in '93 and another
2 decrease in '94. Isn't it possible that the market was aware
3 of the earnings trend for WordPerfect and saw it as a poor bet
4 by Novell?

5 A. Well, I think the answer to that is no, but we may
6 need to explain. We're looking here at data on operating
7 income for WordPerfect. And the question is, how reliable is
8 the data that you're putting up in front of me as some kind of
9 estimate of what earnings look like? And I've looked at this,
10 obviously. And there's two points that I would really like to
11 make with respect to it.

12 First is these aren't as far as I can see adjusted
13 for unusual expenses. If you -- do you want to give me the
14 exhibit?

15 Q. I'm sorry. Yes. Sure. I'll see if I can find it.

16 A. No. No. The underlying S4. Or I can just
17 represent to you what is in it, if that's acceptable.

18 Q. I will confess I don't have the underlying exhibit
19 at hand, but I can get it to you overnight if you want to --

20 A. That's all right. I pretty well recall what it
21 looked like. If you go back to the original document for
22 this, what you'll find is a number of footnotes. And what
23 those footnotes say is that in estimating or coming up with
24 operating income for WordPerfect a number of adjustments have
25 been made. And those adjustments are for, I guess you would

1 call it unusual events. For example, I can't remember if it
2 was '92 or 1993, but WordPerfect would basically write off
3 large amounts because of past acquisitions. So you would get
4 a write-off of an acquisition of \$20 million or something like
5 that that may have occurred later, but they're only recorded
6 on the books and saying 1992 or 1993. So when that happens,
7 when you look at 1992 when they take these large write-offs,
8 it looks like there's quite a drop in income.

9 So one of the things that you really have to do is
10 you can't just look at the data operating income, and I'm sure
11 you understand this. What you have to do is you have to look
12 at data operating income after all these unusual expenditures
13 have been taken out. And it's my recollection, the last time
14 at least that I looked at this, that we're looking at
15 write-offs and things like this on some of these years of 30,
16 35 million. For example, they wrote off 50 million completely
17 when they bought Soft Solutions.

18 It's just -- I think the motive for all of this is
19 taxes, okay. You write stuff off, and you get a tax benefit.
20 I'm not an accountant. But all I can tell you is that if you
21 take these numbers and you take away the unusual numbers
22 events, what you get is you get something which doesn't look
23 as nearly as interesting as this graph.

24 So that's the first point, and I think maybe
25 tomorrow we can go and look at the S4s, and I can pull them up

1 for you and show you what the numbers sort of look like.

2 Q. Well, let me -- to that point --

3 A. That was one --

4 Q. -- we want to be sure that we're accurately
5 representing things.

6 A. -- and two.

7 Q. And I'll let you go to your second point. I won't
8 cut you off.

9 A. Okay.

10 Q. But is it your recollection the trendline is
11 different than this graph shows?

12 A. I think -- you know, my guess is that you saw some
13 declines in operating income in WordPerfect. It's a business
14 that fluctuates. What happens is whenever you introduce a new
15 product, come out with PerfectOffice, for example, Office, for
16 example, you get a bump. In an off year when you're not
17 introducing a new product, they'll come down. So there's
18 movement around. So I don't think you want to take one or two
19 years and bet your life on a trend.

20 MR. TASKIER: I thought he was in the middle of an
21 answer, a two-part answer.

22 THE COURT: No. Mr. Jardine said he was going --
23 he promised him he could do his second part.

24 MR. JARDINE: I promised him he could get to his
25 second issue. I keep my promises.

1 MR. TASKIER: I know you do.

2 Q. BY MR. JARDINE: So, and again, I'm interested in
3 what the market thought was the projected future of
4 WordPerfect, and we want to make sure if there's some
5 adjustment to this chart, I just want to make sure we see the
6 trendline in the way the market would have seen it in March of
7 1994. So I trust that we'll work on that, both of us tonight,
8 and make sure if there are any adjustments that need to be
9 made we'll make it.

10 A. Sure.

11 Q. What was your second point?

12 A. I've actually multiplied it by three. Like
13 Monty Python, there are three.

14 So my first point is, you have to look at the
15 numbers before extraordinary items to get a feel of what's
16 going on here. Otherwise it really does become highly
17 misleading.

18 The second point goes to a question as to why even
19 after adjusting for a change in operating, to correctly
20 adjusting, why you might have expected to see some decline in
21 operating income from WordPerfect over this time period. And
22 the reason if you look at it is not because revenues are going
23 down. The reason is because costs are going up. And
24 specifically the costs that are going up are selling costs,
25 okay. And it's those selling costs that would be subtracted

1 from here that is generating the lower operating income. And
2 it was, indeed, I think as I talked about it earlier, one of
3 the benefits of the goals and purpose of this merger that by
4 shifting from a very, very expensive selling procedure that
5 WordPerfect had direct selling, that by working through the
6 Novell dealership network, we could substantially reduce
7 selling costs and, thus, dramatically increase operating
8 income.

9 So even if you thought that the operating income
10 was coming down here significantly, to the extent you thought
11 the operating income was coming down here was because of this
12 higher selling cost that was clearly going to be reversed once
13 Novell changed its selling pattern.

14 And the third point is the point that I think I
15 tried to make earlier, that, you know, these are reasonably
16 sophisticated people. Everybody knows what the true numbers
17 look like. And if, in fact, to the extent that WordPerfect
18 was having financial problems that would have continued, I'd
19 expect that to be reflected in the purchase price.

20 So that was the point that we made earlier about
21 the transition, that, you know, if WordPerfect was dead on
22 arrival, then the person who would suffer from that would be
23 the persons who own WordPerfect. Unless you can persuade
24 someone not to look in the basement of your house completely,
25 usually if your basement floods and you sell your house,

1 you're the guy that loses the money as a result. So I think
2 that would be sort of my immediate three reactions to this.

3 Q. Let me ask you about your second and third point
4 very quickly.

5 You said that one explanation for this declining
6 trend in operating income may have been that WordPerfect's
7 costs were going up.

8 A. Oh, yes. And, in fact, I can --

9 Q. Let me just --

10 A. I can tell you what they are.

11 Q. I'll let your counsel ask you and have you tell it.
12 I just don't want to lose track of my point, if I can, for a
13 while.

14 You said that one explanation for the shrinking
15 operating income was that WordPerfect's costs were going up;
16 correct?

17 A. What I said is that, yes, because sales and
18 marketing expenses from '91 to '93 went from \$110 million to
19 \$240 million, it was a big increase in sales and marketing
20 expenses here.

21 Q. Isn't it also true in this period, fiscal years
22 '91, '92, '93, that price competition for business
23 applications products was intensifying with the release of
24 suites, and pricing was going down?

25 A. Well, a couple points. First of all, when suites

1 are introduced, it tends to really intensify price
2 competition. You're quite correct about that. It's the one
3 great thing about suites. You basically get three for the
4 price of two or three for the price of one and a half. And I
5 think in this -- other markets, not just here, we've noticed
6 that the introduction of bundling has continued to result in
7 more vigorous price competition. So you're correct about
8 that.

9 But the point is, of course, is that Novell's
10 revenue -- I'm sorry -- WordPerfect's revenue during this
11 period continued to increase, went from 621 million to
12 707 million. So even though, you know, prices were coming
13 down and competition was vigorous, they were still increasing
14 their revenue base. And, you know, competition and lower
15 prices are great. What was going on is the prices were
16 falling, but the amount of sales were going up even faster.
17 So you've got a business that is growing very, very rapidly.
18 And, you know, in this business, as in nearly all software
19 business and hardware, as well, prices tend to fall very
20 rapidly. There's been a huge benefit from competition in this
21 industry.

22 Q. So if I understood your answer, you agree with me
23 that there were at least two things going on that can explain
24 this decrease in operating income. One was costs, selling
25 costs in particular were going up, and prices were going down?

1 A. Well, I wouldn't agree that prices going down,
2 because if quantity is going up fast enough, even if prices
3 are going down, the relevant question is, what's happened to
4 sales and revenues? What we've seen here, and I think we can
5 go back and look at it again, is revenues were just going up
6 very, very rapidly during this entire period. I think we've
7 seen that in two or three charts. What you're picking up
8 there is despite the reduction of prices, you had such a large
9 increase in quantity. So you can't say, gee, if operating
10 income declines because prices went down, you'd have to say
11 operating income would go down because revenue goes down.
12 Revenue didn't go down. Revenue didn't go down because even
13 though prices were going down, those fall in prices and
14 increase in demand generated such an explosion in quantity
15 that revenue actually rose.

16 Q. If I understand what you just told me, that you're
17 willing to say that operating income went down because in your
18 view costs went up, but not willing to concede that it went
19 down because pricing for product pricing went down? Did I
20 understand you correctly?

21 A. No. I'm making what I think is an arithmetical
22 statement. The arithmetical statement is that operating
23 income is revenue, minus costs, okay. If revenue is going up,
24 then you can't explain a reduction in operating income because
25 of the revenue change. The revenue was going up. The only

1 way to get a reduction in operating income is if your costs go
2 up.

3 Now, the question is revenue is going up and I
4 think what you might be asking me is, gee, if they sold the
5 same amount without -- the same amount without the -- at the
6 same prices would revenue have gone up by even more? And the
7 answer is, I suppose yes as a hypothetical. But as an
8 economist what I'm saying it's because the prices are falling
9 that output and demand is going way up. And demand for this
10 product in economist terms is pretty elastic. If I drop the
11 price by 10 percent and I get 20 percent more sales, my
12 revenue goes up by 10 percent. So I can't look at that and
13 say, gee, is there a problem because my price has gone down?
14 The prices going down are what generates the higher revenue.

15 So prices falling are not a problem. Prices
16 falling are a good thing, not a bad thing.

17 Q. We've probably spent too much on this topic. But
18 just so we leave and I can understand your position and the
19 jury can, your position is that decline in operating income
20 was not affected by price reductions as a result of
21 competition for suites. Is that your position?

22 A. I'm saying you have to look at revenue. There's a
23 quantity, and I can't tell you how much revenue went up
24 because of the price cuts.

25 Q. I was searching for a simple yes or no, but it

1 doesn't sound like I'll get it.

2 A. This is the old joke about, you know, the
3 economist, I think it was Truman once said, God, give me a
4 one-arm economist because it's on the one hand this and one
5 hand that.

6 Q. I'm a lawyer, and I just like yeses and nos.

7 A. I'm afraid I do yes buts and no buts.

8 Q. All right. Let me just turn to your third point
9 very briefly. You said that the Novell people who looked at
10 this were sophisticated people, and you wanted to give them
11 credit for their sophistication. Did I understand that
12 correctly?

13 A. Well, Novell is the local boys. I'm not going to
14 knock their financial sophistication.

15 Q. Isn't the market also full of very sophisticated
16 people who would have looked at this and, in fact, boded
17 differently?

18 A. Well, I think the market, the market is full of
19 sophisticated people who are betting their own money. And
20 I've gone to some length to say as an economist I believe all
21 else be equal that financial markets do a pretty good job. If
22 you're asking me the general question how well have they done
23 in the last few years, I don't think anybody looking at their
24 stock portfolio over the last three years probably has a great
25 deal of confidence in the stock market's ability to value the

1 US since we seem to be up 5 percent, down 5 percent.

2 But let's put it this way. They're betting with
3 their own money. Unfortunately they lost a lot of it, too.
4 But they're betting with their own money, and it gives them a
5 strong incentive to be correct.

6 Q. So we're in agreement that there are sophisticated
7 people betting with their own money who voted on the two days
8 after the announcement.

9 A. That's right. There's also a lot of sophisticated
10 people who are betting with your money. That didn't turn out
11 too well.

12 Q. Not much of mine.

13 Let me just talk a minutes, if I can, about the
14 third, the other competing explanation for this fall, which
15 you said was the market thinking that the NetWare product was
16 going to be harmed because of what we'll call loss of focus by
17 Novell management.

18 A. Okay.

19 Q. Does that mean that the 1.8 billion -- that the
20 market was saying that NetWare revenues were going to reduce
21 by \$1.8 billion in current terms or some portion of that?

22 A. I'm saying that one possible explanation that I
23 find reasonable is that I've tried to parse it into an
24 overpayment component and a lost future revenue profits from
25 NetWare component. I think I'm down to about a billion. And

1 what I'm saying is that one explanation is the one that I find
2 most credible is that investors looked at Novell and said,
3 you're really good at doing NetWare. You make a lot of money
4 doing NetWare. You really don't want to get into a business
5 that you don't know anything about. And that's going to
6 distract you from your core functionality.

7 And in thinking about, you know, would that be
8 reasonable? Would that significantly reduce their
9 expectations of Microsoft -- sorry -- of Novell's earnings in
10 NetWare? As you say, they're sophisticated investors, and
11 that's what they reported their concern was. We weren't there
12 at the time, so I have to rely on the news reports of what
13 those sophisticated investors thought was going on.

14 Q. Let's just see if I can graphically show what I
15 think is the difference between you and Professor Hubbard on
16 this. And we'll use this more than once.

17 Could we see graphic number 12.

18 As I understand the outcome of how to allocate, and
19 we've used about \$1.8 billion, I think if we look, you're on
20 the right, and you allocate as you told us today \$421 million
21 to overpayment; is that correct?

22 A. That's right.

23 Q. And so as I understand it, you are allocating
24 \$1.44 billion to loss of focus out of the \$1.86 billion that
25 was the market profit; is that correct?

1 A. If that's the other alternative explanation, yes.

2 Q. To contrast that, Professor Hubbard allocates
3 \$431 million to the loss of focus and \$1.34 billion to the
4 overpayment. That's the difference between you two?

5 A. As best I can see, yes. This is the parallel,
6 yeah.

7 Q. All right. So to paraphrase my question -- or to
8 repeat it, I guess, does your loss of focus number mean in
9 your view that the market was saying that Novell was going to
10 lose or experience a reduction of \$1.4 billion in NetWare
11 sales because of loss of focus?

12 A. I'm saying that at the time of the acquisition, the
13 market, as I understand the analysts reports, the market was
14 concerned that there would be a loss of focus and that
15 certainly if it was not reversed there would eventually be as
16 best you can estimate out in the future that the NetWare
17 business would suffer, and that the present value in our
18 terms, or I think you used different terms, the effect of that
19 in the terms of valuation of Novell was something in the order
20 of -- what do I have -- of \$1.4 billion. And the answer is
21 yes.

22 Q. All right. Thank you.

23 A. But can I just make a comment?

24 Q. I paused too long.

25 A. You paused too long. You left me with an opening,

1 and it's, you know, like being a fullback. I just can't
2 resist.

3 You know, the question is, did this actually ever
4 happen? And, you know, part of the story here is that it may
5 well have never happened. In fact, probably never did happen
6 because this went on for a period of around less than two
7 years. And so, you know, what we see is when they get out of
8 this business, you know, it gets reversed. The market takes a
9 look at it and says, great, you're going back to your core
10 competency. And that's, of course, what Mr. Frankenberg
11 discussed.

12 So you can say that that \$1.4 billion was never
13 lost. It's what the market thought was going to happen as a
14 result of that decision if it were not reversed. But it was
15 reversed.

16 Q. Well, and we'll fortunately -- as you said, there
17 are competing theories, and we'll get to hear what the
18 competing theory is to that explanation.

19 A. Yes.

20 Q. But for purposes of this slide, and I want to hold
21 onto that "yes" you gave me.

22 A. I forgot the question.

23 Q. The \$1.44 billion that you have allocated to loss
24 of focus, was the market saying it expected according to you
25 that NetWare, the present value of decreased NetWare sales in

1 the future was \$1.4 billion?

2 A. I think that's the most reasonable explanation for
3 that, yes.

4 Q. Now, I would like to just turn, if we can, as I
5 understood your advanced study, which is method one, you start
6 with the March stock drop, and then you look at the
7 October 30, 1995, announcement; correct?

8 A. Yes.

9 Q. As sort of where you said this was reversed.

10 A. Yes.

11 Q. All right. Could we look at Plaintiff's
12 Exhibit 341?

13 And this is the announcement. Let me -- I can't
14 read that on the screen, so I've got to -- if you look at that
15 announcement, could we highlight the first paragraph?

16 Announced today -- excuse me. Do you have a copy
17 of that? Would you like one?

18 May I approach the witness?

19 THE COURT: Of course.

20 THE WITNESS: Thank you.

21 MR. TASKIER: Thank you.

22 Q. BY MR. JARDINE: The first paragraph reads:

23 Novell announced today that it has decided to
24 exit the personal productivity applications
25 business and is in discussions to sell its

1 business applications division.

2 As I understand it, your belief is, in fact, the
3 evidence is the market liked that news; correct?

4 A. Yes.

5 Q. All right.

6 A. If it's possible go back to my slide. But, yes.

7 Q. All right. And then if you look down to the
8 fourth -- third paragraph, do you see "these actions"?

9 These actions do not affect Novell's GroupWise
10 division whose networked applications are among
11 the company's fastest growing products.

12 A. Correct.

13 Q. Have you done any study to see how the NetWare
14 products did during the period between March of 1994 when the
15 announcement was made and October 30th, 1995, the date of this
16 press release?

17 A. I think they did very well. In fact, I think I put
18 up some -- if you look back at my slides, I think you can
19 actually see what happened to sales of --

20 Q. I will -- I've got a slide that will show that. So
21 you've done analysis of that.

22 A. Yes. Went from 26 million in 1993 to 41 million in
23 1994.

24 Q. So Novell's -- if you subscribe to the theory that
25 the stock drop in March of '94 was due to loss of focus, the

1 actual evidence of how Novell managed NetWare is to the
2 contrary, it managed it well, apparently, at least sales
3 increased?

4 A. Well, this is a very, very, very small part of
5 NetWare. This is GroupWise -- I mean NetWare.

6 Q. I'm talking about NetWare.

7 A. Oh. Oh, I see. Not all its NetWare products. Oh,
8 okay. So, yes. Yes. I think Mr. Frankenberg also stated
9 this, as well, is that he had very high expectations, he
10 wasn't there at the purchase, but he had very high
11 expectations for GroupWise.

12 Q. I've probably asked this question in a confusing
13 way. I'm talking about -- okay. And I'm sorry. This is
14 GroupWise. I apologize.

15 A. Yes. You said groupware, so I got a little
16 confused.

17 Q. You've got the right quote, and I've got the wrong
18 product. I apologize for that.

19 A. Between the two of us I think we had it right.

20 Q. No. My fault.

21 Let me have you look at the next paragraph.

22 In addition, the Novell board of directors
23 authorized the stock repurchase program. Under
24 this program, up to 10 percent or approximately
25 37 million shares of outstanding Novell common

1 stock, may be acquired through open market or
2 private transactions over the next 12 months.

3 A. Yes.

4 Q. And you believe the market liked that news?

5 A. Well, you know, I tried to take in every account.
6 This is where we talked before. I don't have my little plan,
7 but can I waive this? It's the little green bit on top of the
8 blue bit on the one with the star.

9 Q. Great. And so you do believe that was part of what
10 the market liked?

11 A. Well, yes. I mean, what I was trying to do is to
12 say I look at this announcement and it seems to have two
13 pieces of news in it. And one piece of news is that there's a
14 stock repurchase announced. And I think I remember reading,
15 for example, a board of directors discussion between the
16 people and somebody said, well, look, let's see if we can make
17 this a little better, and let's announce the stock repurchase
18 at the same time.

19 My problem, of course, is it's very hard for me to
20 know exactly what the effect of a stock repurchase was in the
21 stock. And so what I did is and I think Dr. Hubbard did is we
22 basically looked at the literature. It's all over the map. I
23 think I basically adopted, if I recollect correctly,
24 Dr. Hubbard's estimate was that the average effect would be
25 2 percent.

1 And when I wrote my original report, I said, look,
2 you really have a choice here. If you really don't think that
3 the stock repurchase had any effect, then you come up with
4 this number of damages because that would be in there. If you
5 thought it had a 2-percent effect, here's another number.

6 So I presented both of them as I recall in the
7 original report. And what I've done today is basically said,
8 look, let's accept Dr. Hubbard's estimate of the 2-percent
9 increase, and let's subtract that from damages.

10 Q. And you answered the point I wanted to make, which
11 is, that in your original report and reply you didn't credit
12 any of the stock price to the stock repurchase, but you have
13 since this week adopted what Professor Hubbard recommends?

14 A. Yeah. I think in the reply report to Dr. Hubbard,
15 I said, it's very, very difficult to come up with an accurate
16 number, you know. And so we're going to take the average of a
17 wide span, but let's make some kind of adjustment. I don't
18 really know if 2 percent is right. Frankly none of us know if
19 2 percent is right. But let's just -- it just takes some
20 account of what might be happening. And I think that was one
21 of several comments that Dr. Hubbard made that I thought were
22 actually accurate, and I incorporated them. I'm always
23 willing to be corrected at least by other economists.

24 Q. Well, I hope that will continue.

25 Let me --

1 A. I didn't say by opposing counsel.

2 Q. Let me ask, Mr. Goldberg, if you would put up the
3 slide we looked at earlier.

4 You remember this slide that you sponsored?

5 A. Yes.

6 Q. Do you see your arrow that points to the
7 October 30, 1995, intent to sell?

8 A. Yes.

9 Q. All right. Just really three weeks earlier, isn't
10 there an almost equal decline in the stock price of Novell and
11 over \$1 billion decline in response to the October 6th
12 announcement?

13 A. Didn't we -- don't we have it in color,
14 October 6th?

15 Q. Yes. It's one that has the two colors on it. It's
16 near the end. That's fine. That one.

17 A. There's the October 6th.

18 Q. All right. And if you look at those, isn't there a
19 general downward trend, and all of a sudden there's a spike
20 down three weeks earlier and three weeks later a spike up that
21 are almost equal?

22 A. There are lots of them that have that same the
23 characteristic. It's a very -- there's a lot of what we call
24 like random movement.

25 Q. We talked about the October 6th announcement in

1 connection with method two. But I just want to ask, and we'll
2 follow this up probably tomorrow, isn't the proximity of a
3 \$1 billion market, in excess of \$1 billion, \$1.1 billion
4 market decrease on October 6 when Novell announces that it's
5 going to miss its earnings because of lower than expected
6 sales in its WordPerfect set of assets and the \$1 billion rise
7 three weeks later when it announced it's going to exit that
8 business, aren't those two related?

9 A. I don't see. Perhaps you could explain it.

10 MR. JARDINE: Your Honor, this might be a good
11 point to end.

12 THE COURT: Good. All right. We'll accept that.

13 And there's one legal issue which I don't think we
14 want to address today, but I'll stay in case you do. Thank
15 you very much. See you at 8 o'clock in the morning.

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

17 THE COURT: I believe that -- I think it was
18 Mr. Johnson, somebody at Novell's counsel, submitted a letter
19 this morning relating to the Belfiore e-mails.

20 Do you want time to respond before I address it?

21 MR. TULCHIN: No, Your Honor. We're ready to
22 respond. Ms. Gao, who was in front of you yesterday, is
23 prepared to address this. If it's convenient for the Court to
24 do it now, that would be great.

25 THE COURT: I'll hear from Ms. Gao, and then I'll

1 here back from Mr. Johnson.

2 MR. TULCHIN: And I think, as well, Your Honor,
3 there may be one or two small other issues that Ms. Bradley
4 has custody of.

5 Where's Ms. Bradley? There is she is.

6 THE COURT: Looking forward to it.

7 Ms. Gao?

8 MR. JOHNSON: Excuse me. Before we go --

9 THE COURT: Oh, yeah. I'm sorry. You're free to
10 go.

11 THE WITNESS: Free at last.

12 THE COURT: Temporarily. Temporarily.

13 MR. TASKIER: This is just parole.

14 THE WITNESS: Now they tell me.

15 THE COURT: Yes, Ms. Gao?

16 MS. GAO: Okay. Your Honor, Mr. Johnson made three
17 points in his letter last night. He said that PX131A is
18 hearsay under Federal Rule of Evidence 801. We actually have
19 never disputed that. Our argument was that PX131A qualifies
20 as a business record under Rule of Evidence 803. And as he
21 stated yesterday, this is an e-mail from June to Mr. Belfiore,
22 a Microsoft employee. He testified at his deposition that he
23 recalled writing this e-mail and having this communication
24 with Mr. Shulman.

25 We've established a foundation for this as a

1 business record. We are not relying upon the business records
2 stipulation, as Mr. Johnson has asserted, so whether or not
3 the document has a Bates number is irrelevant.

4 I think that's pretty -- that's all we have to say
5 about the PX131. I can also address separately the other
6 documents that Novell wants to seek to have admitted, which is
7 PX252, PX280, PX301, 309, 313 and PX 551.

8 THE COURT: Go ahead.

9 MS. GAO: Okay. These are all posts from
10 CompuServe forum. I actually brought them. And there's
11 actually I think over 1700 pages of forum posts, some of which
12 purportedly may be communications -- postings by Microsoft
13 employees. Unlike the Belfiore e-mail PX131A, which we have
14 established a foundation for, these documents I don't believe
15 have ever been introduced at any deposition. No Microsoft
16 employee has ever testified that they wrote these postings.
17 And so these are completely different from the exhibit that
18 we've asked, we've sought to have admitted.

19 THE COURT: I take it you do not plan to call
20 Mr. Belfiore.

21 MS. GAO: We do plan to call Mr. Belfiore.

22 THE COURT: Why not wait to admit the document
23 then?

24 MS. GAO: We'd like to have them, the document
25 admitted now because Mr. Alepin has already testified about

1 the document. And, you know, it qualifies as a business
2 record under the hearsay exception.

3 THE COURT: As a practical matter, why -- that
4 document can't possibly affect any ruling I'm going to make on
5 your motion.

6 MR. JOHNSON: I would hope not, Your Honor.

7 MS. GAO: Well, Your Honor --

8 MR. JOHNSON: I think all inferences go our way.

9 THE COURT: I think they do, too.

10 MS. GAO: Your Honor, as we talked about yesterday,
11 this document is highly relevant because it goes to establish
12 one of the technical justifications, and it refutes one of the
13 points that Mr. Alepin made during his testimony --

14 THE COURT: I understand that. But that's still
15 going to be a fact issue for the jury. That particular
16 question is clearly a fact issue for the jury. I cannot rule
17 on a motion for whatever it's called these days and draw the
18 inference that because that was written that there were
19 legitimate justifications. I've sort of tried to peel the
20 skin on the onion as to what's legal and what's factual.

21 Anyway, I'll hear from Mr. Johnson. As a practical
22 matter, why do you care if Mr. Belfiore is going to be here?

23 MR. JOHNSON: Jim, do you want to get your stuff?
24 I don't want to be looking at your notes here.

25 MR. JARDINE: You're free to look at it.

1 MR. JOHNSON: I really don't want to do that.

2 Thank you.

3 Good afternoon, Your Honor. I think Your Honor has
4 the point exactly. Mr. Belfiore is supposed to be a live
5 witness here. I look forward to the cross-examination. But
6 right now this is inadmissible hearsay. And also it is no
7 different than the -- it's something from CompuServe. It's an
8 Internet-based communication. And we have piles of them that
9 are responded to by Microsoft employees in these documents
10 that were produced in this action talking about the NameSpace
11 extensions and, frankly, a tremendous amount of anger among
12 developers. These are not just WordPerfect folks, but a
13 tremendous amount of anger among developers about Microsoft's
14 decision. I think in that sense they are relevant since the
15 working premise of Microsoft seems to be this was no big deal.
16 This was a big deal.

17 So to the extent that this hearsay document comes
18 in, I think in fairness, the same things from the same source
19 involving Microsoft employees, just like Mr. Belfiore, should
20 also come in.

21 MS. GAO: Can I just make one quick response to
22 that, Your Honor?

23 THE COURT: You can. But it seems to me, the easy
24 way -- the easiest thing for me to do is to not let it in yet
25 and not let Mr. Johnson's in on what's good for the -- you

1 know, the fairness theory, and for me to go home.

2 MS. GAO: Just one quick response.

3 THE COURT: If not home, at least the Marriott
4 Downtown.

5 MS. GAO: Your Honor, I think you said at the very
6 beginning of this trial that your rule was going to be that if
7 a document was used with a witness you would let it in so long
8 as the other party does not have a valid objection to it. And
9 we've already explained why this doesn't -- this qualifies as
10 a business record under the hearsay exception, and so we think
11 it should come for that reason.

12 THE COURT: And if for some reason Mr. Belfiore
13 doesn't appear and this becomes an issue, I will revisit the
14 issue. As of right now, it seems to me the easiest thing to
15 do is have it come in through Mr. Belfiore.

16 MR. JOHNSON: Thank you.

17 THE COURT: And then as far as the other documents
18 are concerned, if there's a ground other than, look, if you've
19 got yours in without, I want mine in, I don't have to rule
20 upon that right now. Okay.

21 Now, I've got here, and I'm a little reluctant to
22 hand it out for you all because it's not very well worded.
23 And, indeed, I think -- Theresa, if you could give five copies
24 to each side, I think the very first thing is wrong because it
25 applies Aspen Ski says there's a duty to cooperate, which it

1 may or may not. This again is for no reason, it is not -- I
2 don't have views on these, or if I do I'm going to suspend
3 them or wait to hear from you all. Like I say, this case has
4 all kinds of different levels of complexity. And my purpose
5 in giving this to you is to let you know where my head is.

6 As I say, I think Number 1 and Number 2 are
7 probably worded incorrectly because I don't think Aspen Ski
8 does say that there is a duty to cooperate, but I think we all
9 know what I'm talking about here. What I've tried to do is
10 to -- yesterday afternoon and last night I've been thinking
11 about this, and I typed this out this morning, as to, as I
12 say, try to peel the skins on the onions as to what the levels
13 of analysis are. And I've tried to show in anticipation of
14 what I assume is a motion is forthcoming from Microsoft what I
15 consider in the final analysis to be a legal issue and what I
16 consider to be a factual issue, and I put that in parens.

17 For example, and it seems to me there is a clear
18 underlying legal issue in this case as to whether -- and I'll
19 go over these one by one -- if Microsoft was under any
20 obligation whatsoever to share its work product with Novell.
21 That is an issue, and I'm not ruling upon that. That seems to
22 me that is an issue that is in the case that there really
23 isn't anything for the jury to decide. I decide -- if I
24 decide in the final analysis Microsoft didn't have to give
25 anything over, then that's the end of the case because as far

1 as I'm concerned the focus of the case is the withdrawal of
2 the documentation of API.

3 The second is, assuming there was a duty to
4 cooperate, and again I'm not sure if I've got everything, but
5 according to my prior opinion and I think what Aspen Ski does
6 say is, look, you can't destroy a preexisting relationship and
7 you can't engage in deceptive practices. There's business
8 justification that may cut through a lot of this, but that is
9 separate at the bottom. It seems to me that probably is a
10 jury determination, but there may be factual issues, and there
11 may be an issue for me to decide whether or not there was any
12 preexisting fact -- any preexisting profitable relationship
13 which would withdraw the documentation did destroy, and that
14 gets very complicated. I understand Novell's position, yes,
15 there was because it was a step backward for us not to be able
16 to view Windows 95. On the other hand, clearly Novell wanted
17 something more than what it had already, or it would have been
18 perfectly satisfied to -- since WordPerfect was going to be
19 available as a word processing application on Windows 95 and
20 since it was already being used with this enhanced retrievable
21 capability, as I understand, on other platforms, it's not
22 clear to me. But it seems to me it's probably a jury issue,
23 and there may be underlying legal issues. And again, I don't
24 know -- and that's why I say factual, maybe legal.

25 In terms of the deceptive practice, I understand

1 that really the alleged deceptive practices that Microsoft
2 pulled the rug out from under Novell by withdrawing
3 documentation, that it knew all along, that Bill Gates knew
4 all along that he was not going to allow the documentation,
5 that -- there may be a sufficiency of the evidence issue on
6 that, so there may be a legal aspect concerning that. But
7 essentially it's factual. But it could become legal if I
8 decide, look, there's simply no evidence that Mr. Gates in
9 October -- excuse me -- in June -- in December of 1993 and in
10 June of 1994 through October of '94 knew that he was going to
11 withdraw documentation. That may be a legal issue, I don't
12 know. But essentially that to me seems to be certainly it may
13 very well be a jury issue, I don't know.

14 The third thing is reverse, and that is the thing
15 that I have a very difficult time with. It's the hardest
16 issue for me in the case as to whether or not -- again, I'm
17 not making any decision. Nobody should -- as to this issue as
18 to whether or not -- really the evidence shows only that the
19 reason that Microsoft's monopoly in the operating system
20 market was maintained during the relevant period, which I take
21 it in the 1996, I don't want to make a snapshot, but sometime
22 reasonably in the future, look, what caused it to maintain its
23 monopoly during that period is the fact that everybody agreed
24 that Windows 95 was a terrific technological breakthrough, big
25 deal. And if that's the case, that to me is an issue,

1 particularly if there's no evidence, as I understand there is
2 none, that there was any realistic possibility of
3 cross-platforming by Novell because there is no comparable
4 operating system then even under development. So that to me
5 probably is primarily a legal issue, although there may be
6 factual issues.

7 The last three to me are clearly, they're issues,
8 but it seems to me that clearly they are factual in nature for
9 the jury to determine from. What I now know, one, Microsoft
10 is going to take the position, and it may affect at least some
11 of the first three issues, that it had plenty of justification
12 for withdrawing documentation. Stability concerns, things of
13 that nature. Stability concerns which have been expressed I
14 think by the NT people, maybe by others. Mr. Gates finally
15 made the decision that he did because he was concerned about
16 among other things Windows crashing by a third-party vendor,
17 by a third-party's application system. And he said, I'm not
18 going to allow that to happen. And that gets very much into
19 the very memorandum we were just discussing.

20 It seems to me for clarity's sake that is clearly
21 going to be a factual issue. That Mr. Alepin stated why he
22 thought the justifications were false. I know from the
23 cross-examination that the Microsoft challenges that in
24 various respects and is going to say, no, Mr. Alepin is wrong,
25 that, in fact, there was plenty of justification, that there

1 was substantial justification. That may cut through a lot of
2 these issues, but it certainly itself would be an independent
3 ground, look, it was perfectly proper to withdraw the
4 documentation.

5 The fourth issue, it seems to me Mr. Tulchin has
6 steadfastly maintained from the opening statement on that any
7 delay that occurred was not due to the withdrawal. Novell
8 says, yes, it has. You know, and that has to do with
9 translating Quattro Pro in other languages, Quattro Pro not
10 being ready until I think December, anyway. But intervening
11 events changed that. Did Quattro Pro, was it overly
12 conservative in its assessment, the Quattro Pro people? In
13 fact, in any event, did the critical path change so that it
14 really was the withdrawal of the APIs? That to me is a
15 factual issue. It's not something which I ought to be called
16 upon me to decide. And the very thing we're now hearing is
17 something which in the final analysis, if the jury gets that
18 far, which is the amount of damages is going to be
19 quintessentially factored. It's going to be deciding between
20 whether Professor Hubbard is right, Dr. Warren-Boulton is
21 right or there's somewhere in-between.

22 So the purpose of this is not to express views on
23 any of these. It's just trying to show what as of now I think
24 is clearly an issue which may be dispositive -- well, what the
25 issues are and the various levels of complexities. They may

1 or may not -- I could be wrong, but it's letting you get into
2 my head. And secondly, if there are other -- if there are
3 other tissues to the onion peel, let me know about them. But
4 these are the ones I've been thinking about, and I've tried to
5 let you all know and let you all know what I think is clearly
6 for a jury findings as opposed to things that I would have to
7 rule upon as a matter law.

8 And the last three I understand are issues from
9 Microsoft's point of view, these are all three issues. I
10 don't think they're for me to decide. I think they were for
11 the jury to decide.

12 The first one I really do think is a big, big issue
13 which the 10th Circuit or Supreme Court may have to decide.
14 The second issue I think is probably factual, but I'm not
15 sure, because there may be a sufficiency of the evidence
16 issue. The third I think is probably legal, but there may be
17 some factual returns. I mean, it could very well be the thing
18 to do is to give the model instruction about maintaining
19 monopolies which brings into account all kinds of things,
20 including substantial justifications. So that would enter
21 into three and see what the jury does with it. It could be
22 that if the jury returns a verdict in Novell's favor, if I
23 decide, look, there simply wasn't -- in a matter of antitrust
24 theory, Novell was absolutely right. But in terms of evidence
25 there's no evidence to suggest that anything was done through

1 the time of the sale by Novell of the product or reasonably
2 thereafter, there's simply no evidence that there's going to
3 be a right to anything other than Windows. So therefore, the
4 effect of the withdrawal of the API was actually, if anything,
5 to potentially decrease market share. If I decide that is a
6 dispositive matter, which I may or may not do, that to me
7 becomes a legal issue.

8 So that's the purpose of my giving it to you. It's
9 letting you get into my head and help you -- to the extent
10 that it helps you prepare your arguments.

11 MR. JOHNSON: Well, we appreciate getting into your
12 head, Your Honor.

13 MR. TULCHIN: Your Honor, could I say two very
14 quick things? I know it's getting late. One, thank you for
15 this. It is very helpful to have the Court's thinking. It
16 will inform and maybe shorten the arguments that we have later
17 in the week.

18 Secondly, there are a couple of small items that
19 Ms. Bradley wanted to address.

20 THE COURT: I want to hear that. And before we get
21 to that, I'm sorry after lunch I was impatient. The fact of
22 the matter is I did -- reaction from Novell's side. I
23 honestly was trying to -- it was, the second thing was that
24 there was delay in that -- when in March of '96 when the
25 product was finally introduced there was a reduction in

1 functionality. I did not remember that, and it made me think,
2 look, there's something wrong with the doctor's testimony.

3 At the bench, I mentioned that. Mr. Taskier
4 represented that, and I had -- as I told the jury, I had no
5 reason to doubt that he is wrong. I think Mr. Gibbs did
6 testify about that. I was afraid that the jury was going to
7 be where I was, which was somehow discounting the expert's
8 testimony because he was, the slide showed something which
9 hadn't been admitted into evidence. I was really trying to
10 help by saying, I don't remember that. It must have come in
11 pretty quick because I've been trying to pay attention. I was
12 afraid that the jury might be in the same frame of mind that I
13 was. And I just wanted to say, look, it's your recollection
14 that controls, which of course is the law. And by the way,
15 Mr. Taskier reminded me that it was mentioned during
16 testimony. And I just wanted to -- I think I said, look, I
17 have no reason to doubt Mr. Taskier's representation on this.

18 So I was really trying to keep the jury's head on
19 the expert report and not tell them it hadn't been introduced,
20 and that's why I said what I said.

21 MR. JOHNSON: Your Honor, we appreciate that. Our
22 concern is that when you say things, obviously it comes with a
23 lot of weight. And so when you say something like, I think
24 that's inconsistent with the evidence, or, that's not my
25 recollection, or anything like that, it has an enormous impact

1 on the jury.

2 THE COURT: I really think what I said was, I
3 honestly don't recall. But the jury's, your recollection is
4 going to control on that. And by the way, Mr. Taskier has
5 just told me I have no reason to doubt that it was said.

6 Now, I understand, and I really I was -- you know,
7 God knows I make mistakes as well as anybody else does. I
8 really was trying to help because I was afraid that they may
9 not remember it, either, and that somehow they would say, what
10 in God's name is Dr. Warren-Boulton talking about? There was
11 no evidence of that, and that's why I mentioned that.

12 MR. JOHNSON: And I appreciate that. And our
13 problem is again, even when you say, I don't remember that,
14 that can have a huge significance on the jury who obviously
15 don't have the transcripts.

16 THE COURT: Yeah. But you'll be able to prove to
17 them.

18 MR. JOHNSON: And what we're going to do is, with
19 your permission, Your Honor, just to make sure there's no
20 ambiguity about that, is we're going to show the testimony on
21 redirect.

22 THE COURT: Fine. I mean, that's fine.

23 MR. JOHNSON: Thank you.

24 THE COURT: The whole idea was to clear up a
25 potential misunderstanding, which I really thought it was

1 where their head might be, because it was passing, because I
2 was listening to the doctor, and he was making sense in his
3 presentation. And I was like, where did that come from?

4 MR. TULCHIN: Your Honor, if they're going to show
5 this on redirect, I don't know what they've been complaining
6 about. And this constant complaining to the Court about what
7 the Court does is just way out of line. And let them fix it
8 if they can fix it.

9 THE COURT: Well, the fact of the matter is this
10 also came on top of there is absolutely nothing wrong with me
11 asking questions of the jury.

12 MR. TULCHIN: Agreed.

13 THE COURT: And in front of the -- asking questions
14 of the witness, I don't want to have any implication, any
15 inference that it is wrong. I say every time, don't draw any
16 weight from the fact that I'm asking a question. The fact of
17 the matter is I happen to prefer not to do that.

18 So I think what you all said is perfectly fair. It
19 coincides with what I generally think. I try not to do it. I
20 did do it once only because it was in terms of where we were
21 on the trial, and I didn't want to excuse the jury. But I
22 absolutely am sympathetic to Novell's point of view because I
23 don't think judges ought to ask questions, either. Some
24 judges ask a lot of questions.

25 But clearly as a matter of law, I can ask

1 questions. You know, this -- it's a lot harder to try a case
2 as a lawyer than it is as a judge, but it's not real easy to
3 sit up here when you're trying to sort through difficult
4 evidence and through difficult issues, and there comes a point
5 where, just let me be.

6 Ms. Bradley?

7 MR. JOHNSON: Your Honor, we do have a couple of
8 housekeeping items.

9 THE COURT: Sure. Let me hear -- in fairness, let
10 me hear from Ms. Bradley.

11 MR. JOHNSON: Okay.

12 MS. BRADLEY: Just a housekeeping item. And that
13 is that we prepared, Microsoft has prepared a version of the
14 court form trial exhibit list of defendant's exhibits listing
15 on which date each of the defendant's exhibits was admitted
16 into evidence, if it's been admitted, or conversely, marked
17 for identification. And I'll hand a copy up to Theresa.

18 THE CLERK: Thank you. Thanks.

19 THE COURT: And, Ms. Bradley, he wants to check the
20 dates.

21 MS. BRADLEY: I'm happy to give you a copy of that.

22 MR. JOHNSON: Thank you.

23 MS. BRADLEY: And Microsoft will also go ahead and
24 file a version of this, just so that it's in the record.

25 THE COURT: Why don't you wait until Mr. Johnson

1 has seen it.

2 MS. BRADLEY: Yes.

3 THE COURT: And then you can probably file it as an
4 agreed-upon exhibit.

5 MS. BRADLEY: Sounds good. We also are prepared,
6 if Novell is, or at the Court's convenience to take up the
7 four MAPI exhibits that Novell has sought admission of.

8 THE COURT: I had let that pass by. Thank you for
9 raising it, Ms. Bradley. I'd hope that had become part of the
10 dims of --

11 MR. JARDINE: Mists of history.

12 MS. BRADLEY: So did we, Your Honor.

13 MR. JOHNSON: I'm handing up, Your Honor, a list of
14 22 exhibits that were actually passed up before, but
15 Microsoft, of course, wanted to have a chance to check the
16 record. They now agreed that these are all cleared, so we'll
17 pass that up. I think the idea of the form is probably a good
18 idea. We'll try to do the same thing for the plaintiff's
19 exhibits.

20 As you know, Your Honor, we're expecting to close
21 tomorrow, and there are going to be a couple of things we're
22 going to need to do. One is the MAPI exhibits that were
23 referenced by Ms. Bradley. We're also filing today, is
24 probably in the process of being filed right now, it takes a
25 while because unfortunately it's fairly long, there are a

1 fairly large number of exhibits that the parties despite
2 diligent effort have been unable to agree upon their
3 admission. And obviously from the plaintiff's perspective we
4 need to get these in prior to our close or at least have a
5 reservation with respect to those exhibits prior to our close.
6 So we're going to file a brief today on those remaining
7 exhibits. I'm sure Microsoft will want to respond, so I'm
8 just seeking your guidance. Perhaps a reservation would be
9 the best way to do it.

10 THE COURT: I'd be glad to -- if you all -- I would
11 prefer a reservation, unless there's a particular document
12 that you think is going to be material to Microsoft's
13 anticipated motion that needs to be in order for rebuttal,
14 then a strict reservation wouldn't work because I'd have to
15 decide whether or not to consider it in deciding Microsoft's
16 motion.

17 But there are different ways of handling that. I
18 mean, a general reservation could work subject to the proviso
19 that if you need something in, that you think something may
20 have to be in in order to respond to the motion for judgment
21 as a matter of law, then I would say let's reserve everything.
22 But you're resting, but with the exception that if you -- that
23 if something comes up in Microsoft's motion that you think is
24 answered by an exhibit, obviously I would give -- I would make
25 the decision on the exhibit before ruling upon your motion.

1 MR. JOHNSON: Okay.

2 THE COURT: My general inclination would be, unless
3 it's material to the motion, let's reserve and sort it out.
4 We'll have plenty of afternoons beginning next Monday. But if
5 you think you're being prejudiced in some way that, in fact,
6 it is a very important document that you want in that you want
7 to be focused upon in the motion of judgment as a matter of
8 law, then we probably ought to take it up first.

9 MR. JOHNSON: Okay.

10 MR. TULCHIN: Sounds fine to us, Your Honor.

11 MR. JOHNSON: We'll take a look at that. That's
12 good. That will help if we don't have to get through that.

13 THE COURT: My guess is there aren't such
14 documents, but there may be.

15 MR. JOHNSON: The other thing we're going to be
16 doing, Your Honor, is with your permission we're going to be
17 making a formal proffer with respect to portions of Dr. Noll's
18 testimony that you decided we couldn't get into. And we'll do
19 that in writing. We'll submit it. I don't think it's
20 necessary for me to stand up here and spout off.

21 THE COURT: And one thing along those, the things I
22 did let in, and I'm not making any ruling one way or the
23 other, I think I may have said that I'm letting them in only
24 to provide basically as 404(b) to explain why Microsoft did
25 what it did. Looking -- it could be that I will let them in

1 for a substantive purpose of also allowing -- this isn't the
2 scope, but the things I did let in, Netscape and Sun, that I
3 will allow them in substantively, not simply as 404(b) to show
4 Microsoft's intent so that what was done can be considered in
5 the context of other actions that Microsoft took, which Novell
6 alleges to be anticompetitive.

7 MR. JOHNSON: Sure.

8 THE COURT: But the very subtle distinction, by
9 looking forward to the final instructions, if we get there --

10 MR. JOHNSON: Right.

11 THE COURT: -- I would think the easiest way to
12 handle all of this is to say the focus of the case upon the
13 APIs where you should consider that in context of other
14 conduct which Novell alleges to be anticompetitive.

15 MR. JOHNSON: And from our point of view --

16 THE COURT: And I will -- it's a subtle distinction
17 whether I'm letting it in substantively or simply to reflect
18 upon Microsoft's intent. I'm not ruling upon that now. I
19 think Microsoft may very well say, I should only let it in for
20 404(b) purposes, if at all. But that is -- that's an issue
21 which I have identified.

22 MR. JOHNSON: And, Your Honor, it may be a subtle
23 distinction, but it's a very important one legally, and it
24 would have great consequences on appeal with respect to this
25 action if some of this evidence in our view doesn't come in

1 substantively.

2 THE COURT: Well, that's different from -- and I'll
3 hear the proffer if there are things that -- I'm talking about
4 the things that I did let in, I think I might have said that
5 (unintelligible) 404(b). That's one question. The other
6 question is, should I have let other things in, which the
7 proffer addresses.

8 MR. JOHNSON: Sure. I understand that.

9 MR. TULCHIN: If I could just say, we, of course,
10 would like to be heard on this issue if we get to the point
11 where final instructions are going to be given. I think I can
12 say with some confidence that our motion for judgment as a
13 matter of law will not depend on the distinction that we're
14 talking about.

15 THE COURT: I don't think so. In fact, at some
16 point I've got to be clear, and I'm not even clear when
17 actions were taken. I know there was cross-examination of the
18 doctor, but he didn't assign specific dates to some of the
19 actions. I'm still not sure what was done vis-a-vis Netscape,
20 what was done vis-a-vis Sun. It may be in, I just don't know.

21 MR. TULCHIN: Your Honor, can I answer one
22 question, Your Honor, quite clearly, which was that everything
23 vis-a-vis Netscape was after March 1st, '96.

24 MR. JOHNSON: Your Honor, I don't believe that
25 would be factually the case, and we'd be happy to address

1 that. As you may know, there must be, I don't know, eight, 10
2 briefs on the question of when events took place. Microsoft
3 has been telling courts for years that those events took place
4 between 1995 and 1998. Here they've suddenly switched to 1996
5 to 1998.

6 MR. TULCHIN: The question was about --

7 MR. JOHNSON: I think, Your Honor, that frankly, we
8 shouldn't even be having this debate because all of this is
9 relevant under the antitrust laws with respect to Microsoft's
10 anticompetitive conduct in the operating system market. But
11 we can have that discussion when we argue the motion.

12 MR. TULCHIN: I thought I was answering the Court's
13 factual question about Dr. Noll's testimony. I don't want to
14 argue with Mr. Johnson now about the legal issues. We'll be
15 prepared to do that later in the week whenever it's convenient
16 for the Court.

17 I do remember a question and answer to Dr. Noll
18 where he gave a very plain and simple answer which was yes.
19 And I think it was my question. I may be misremembering it.
20 Sometimes you do when you're asking the questions. But I
21 think my question was, did all the action against Netscape
22 take place after March 1, '96? Again, I think he just said
23 yes. I'll go get the transcript.

24 THE COURT: That's fine. We'll go see. And this
25 obviously -- I mean, this is an issue which when I reread the

1 memoranda about the instructions, it is my understanding that
2 Novell at least in terms of the proposed instructions takes
3 the position that it need not prove that the withdrawal of the
4 APIs essentially is the anticompetitive conduct that caused
5 the maintenance of the monopoly, that it can rely upon other
6 things. Clearly the focus of the --

7 MR. JOHNSON: Frankly, Your Honor, it's just as you
8 said in your opinion that we must show some harm with respect
9 to what they did to Novell, but that the question of
10 anticompetitive conduct in the market is a broader question
11 involving all of Microsoft's conduct during this period.

12 THE COURT: And I'll hear here this tomorrow, and
13 this may come up, it may come up on the motions, it certainly
14 will come up in the instructions. It seems to me that the
15 best -- frankly, the best answer may be by simply saying
16 consider -- the focus of this case is on the APIs. Everybody
17 knows that. Whether that considered in the context of other
18 things which occur and which Novell alleges the
19 anti-competitor caused them. But we'll take that up at the
20 appropriate time.

21 MR. JOHNSON: We should, Your Honor, because
22 respectfully this is a Section 2 case. And the
23 anticompetitive harm within the operating system market is an
24 element that we must prove that it's not a matter of just
25 considering the context, it's a matter of looking at all the

1 conduct during the period.

2 THE COURT: And what is the period?

3 MR. JOHNSON: The period is during this mid 1990s
4 period. And I think that the case law is very uniform that we
5 are permitted to take into account these actions. But,
6 look --

7 THE COURT: No. No. No. No. No.

8 MR. JOHNSON: We've had dozens of briefs.

9 THE COURT: No. Can you help me? What is 1994 to
10 '96? That's mid 1990?

11 MR. JOHNSON: I don't think there is a cutoff date.
12 I don't think the but-for rule has a cutoff date. And I think
13 as I told you, I don't think there's a case in the world that
14 would impose such a cutoff date with respect to evaluating the
15 impact of anticompetitive conduct on the relevant market.

16 THE COURT: Well, that's --

17 MR. JOHNSON: And Microsoft may prove me wrong.

18 MR. HOLLEY: We will, yes.

19 THE COURT: They can prove you wrong on the
20 antitrust law. And I'm still -- I'm still -- I still have the
21 problem of antitrust theory in evidence. And that to me is
22 also be an issue. Thank you all.

23 MR. JOHNSON: Thank you. I'm sorry. I'm very
24 sorry to bring this up. But unfortunately, despite again
25 many, many rounds between some younger members of both teams,

1 we have been unable to resolve some deposition designations
2 for the deposition of Mr. Cole, which we would like to play.
3 But amazingly enough, Microsoft continues to think that they
4 can get in their case through our designations which are
5 completely unrelated to what we picked out of the deposition.
6 So I need to resolve this because we want to close tomorrow.

7 THE COURT: Sure. What are the issues?

8 MR. JOHNSON: Essentially with respect --

9 THE COURT: I know the last time this came up you
10 resolved it. But maybe not.

11 MR. JOHNSON: Well, essentially what you said last
12 time, and we took some guidance from that, was that if it
13 involved the same document, then it was going to come in. But
14 if it involved different documents, it wasn't going to come
15 in. So we took that to heart. And what we did with Mr. Cole
16 is we basically reduced -- you may not remember, but Mr. Cole
17 was actually one of the guys that came to WordPerfect to tell
18 them about the decision to publish these NameSpace extensions.
19 So he was one of the fellows that appeared there. And he's a
20 fairly high Microsoft executive.

21 THE COURT: Is he a DRG guy?

22 MR. HOLLEY: Well, he was one of the lead
23 programmers in charge of Windows 95. And when he went to see
24 WordPerfect he wasn't talking about the NameSpace extensions,
25 he was talking about the shell extensibility mechanisms in

1 Windows 95, which the evidence --

2 THE COURT: Let me hear from Mr. Johnson.

3 MR. HOLLEY : Huge superset here, Your Honor.

4 MR. JOHNSON: Okay. So anyway, we limited his
5 testimony that we wanted to show to that document going
6 through what he recalled with respect to his trip to
7 WordPerfect. We included one exhibit that talks about the
8 internal Microsoft discussion involving the inventor of the
9 NameSpace extensions, who was actually at this same time
10 period right after the decision was made to document, he was
11 assigned the task of going to make these extensions compatible
12 for both Cairo and Chicago. And we have an exhibit to that
13 effect, that during this time period he was so assigned. And,
14 in fact, we have lots of evidence that he did that. But
15 that's one little thing.

16 THE COURT: When you say "he," Mr. Cole or the
17 inventor?

18 MR. JOHNSON: No. The inventor, Mr. Nakajima. And
19 we only asked Mr. Cole about that. And then -- and that was
20 really it. That's the total we have, the two subject areas.

21 THE COURT: And what do they want to put in?

22 MR. JOHNSON: And they want to put in a whole bunch
23 of stuff about Mr. Cole, frankly, offering his opinions and
24 speculation with respect to speculation regarding reasons
25 Microsoft might have de-documented the NameSpace APIs without

1 even knowing the reasons one way or the other, and a whole
2 bunch of stuff about the benefits of extensibility and
3 recollection of what iShellView was and extending the Chicago
4 shell and the Windows Explorer and the treeview. Certainly
5 these are all subjects that they're going to have live
6 witnesses on. And they don't need to put in our case in chief
7 the stuff that we are not even addressing at all in our
8 designations.

9 So if we could get these taken out and we could
10 show what is not going to be a very long clip of Mr. Cole,
11 then they can put on their case starting Monday.

12 THE COURT: Yeah.

13 MS. GAO: Your Honor, we'll just briefly respond to
14 that. As you know, under the rule of completeness, the
15 Court -- we should be allowed to place into evidence stuff
16 that would put the evidence that they're presenting in
17 context. What Mr. Johnson just described to you was a visit
18 that Mr. Cole made to WordPerfect where he discussed their
19 decision to document shell extensions. He was asked by the
20 attorney in Novell's affirmative designations what shell
21 extensions they were talking about. And he said he didn't
22 recall. In general it was the shell extensions we discussed
23 earlier, but I don't know specifically which ones those refer
24 to.

25 One of the cross-designations that we put in is

1 about what shell extensibility is, what benefits it provides,
2 what Microsoft was telling ISVs about the Chicago shell
3 extension during development. So I don't see how that's
4 beyond the scope of the affirmative designations.

5 The second point is that they had also designated
6 some deposition testimony about an e-mail that Mr. Cole wrote
7 which discusses the great shell extension debate and what
8 Mr. Nakajima was doing, which was rewriting the interfaces in
9 Chicago so they could support the Cairo team Ole design. And
10 this debate about the Cairo team and the Chicago team in their
11 shell extensions' ability to run on Ole goes to the very heart
12 of the issue why Microsoft decided not to continue to support
13 the NameSpace extension APIs. And we've only cross-designated
14 a very short portion of Mr. Cole's testimony about why
15 Microsoft would choose not to document an API.

16 And the two reasons that Mr. Cole states are, one,
17 it would allow Microsoft to change an API in the future and
18 not to worry about having to make it compatible on future
19 versions of the operating system, which is exactly this point
20 that was being made in PX114, which is the exhibit that was
21 referred to in the affirmative designation. Also, the second
22 reason he stated was that the APIs that interact with the
23 operating system at a fairly deep level and so a misbehaved
24 application have called that APIs could raise significant
25 robustness issues. And, of course, this also bears on the

1 shell, the great shell extension debate and the decision to
2 document the shell extensions.

3 MR. JOHNSON: Your Honor, I think the easy way to
4 cut through this is for you to look at the transcript.

5 THE COURT: Thank you.

6 MR. JOHNSON: Because you don't even have to read
7 it. I'll hand it up to you.

8 THE COURT: How can I not read it?

9 MR. JOHNSON: Because the colors will tell you
10 everything you need to know. In the first 70 pages all you
11 see is red. That's Microsoft's cross-designations. These are
12 cross-designations, and it's only their designations. There's
13 nothing that we've designated in this area of the transcript
14 at all. You don't get to our first designation, which is the
15 meeting with Mr. Cole had with WordPerfect, until
16 Page 70-something. And then we both have some designations
17 and cross-designations which are appropriate under the rule of
18 completeness.

19 And then you go a whole bunch more pages, and all
20 you'll see is a bunch of red at the end that they've
21 designated that has nothing to do with the discussions we've
22 had earlier.

23 MR. HOLLEY: Your Honor --

24 MR. JOHNSON: They are going to have a chance to
25 present their case. They are going to have Mr. Belfiore,

1 apparently, and some of these people come in, the inventors
2 coming in. They can put on what they want in their case.
3 Don't be cross-designating stuff in our case.

4 THE COURT: The blue is what they designate?

5 MR. JOHNSON: Red is the objectionable
6 cross-designations. Yellow is our designations, blue is
7 their --

8 THE COURT: Unobjectionable.

9 MR. JOHNSON: -- their contra-designations that we
10 accepted, that we --

11 MS. GAO: Your Honor, just because the designations
12 are not adjacent to each other does not mean that they are not
13 providing additional context. What I described to you is
14 exactly what our cross-designations are about. And
15 Mr. Johnson doesn't rebut what I've said about our
16 cross-designations and the content of them. I think what
17 Mr. Johnson was referring to at the very end on Pages 102
18 through 103 are cross-designations last night at 1:00 a.m.
19 we've already withdrawn. So everything else we still stand
20 upon.

21 MR. JOHNSON: Your Honor, we've got a very little
22 section of discussing two exhibits starting at Page 78 --

23 THE COURT: Okay.

24 MR. JOHNSON: -- 97.

25 THE COURT: I'm going to go read this. So 102 to

1 103 got withdrawn at 1:00 o'clock last night?

2 MS. GAO: Yes. We withdrew those designations, and
3 everything else we're standing on.

4 MR. HOLLEY: And, Your Honor, just so it's clear,
5 and the only reason I'm interfering, which I shouldn't do, is
6 because I was actually defending this deposition so I know
7 what happened.

8 A question was asked roughly Page 70, which
9 incorporated by reference an entire earlier discussion. So I
10 appreciate that it may seem odd that the counter-designation
11 occurred before the question. But that was the way Mr. Martin
12 at Dickstein Shapiro chose to conduct the examination. He
13 asked a question that asked Mr. Cole to incorporate by
14 reference an entire earlier colloquy that the two of them had
15 been having. So I think as Ms. Gao said, it's fair in that
16 sort of circumstance for the earlier conversation to be part
17 of the cross-designation.

18 MR. JOHNSON: Your Honor, I must say --

19 Did you say Page 70? Because we don't have any
20 designations on Page 70.

21 MR. HOLLEY: Well, Mr. Johnson, you know I wasn't
22 being precise. I don't have it in front of me. I do remember
23 what happened. Whatever page he asked him, he said, as we
24 were discussing before, that's what happened.

25 MR. JOHNSON: Well, if you could point me to that

1 that might help the discussion some.

2 THE COURT: I'll read. Mr. Holley, you point that
3 out to him and I'll read it.

4 MR. HOLLEY: I will, if I could see the transcript.

5 MR. JOHNSON: This shouldn't be so hard, Your
6 Honor, when they're bringing in these people.

7 MS. GAO: We're not bringing Mr. Cole.

8 MR. HOLLEY: We're not bringing in Mr. Cole. He
9 retired from Microsoft. He lives beyond the subpoena power of
10 this court. We do not have a power to require him to --

11 THE COURT: So you can read his deposition.

12 MR. HOLLEY: We could do that, Your Honor, but it
13 seems silly to split it into bits when we're talking about the
14 same topics.

15 MS. GAO: Right. We would have to play it twice,
16 Your Honor.

17 MR. JOHNSON: Your Honor, you can read it. It's
18 not the same topics, not at all. One is a meeting, and one
19 e-mail with respect to what Mr. Nakajima was doing. The rest
20 is all his spouting off about undocumented APIs and his views
21 as to why Microsoft might --

22 THE COURT: Someone give me a telephone number.
23 I'll go read it. I know it has got to be done this afternoon.
24 It's just something I can't tell --

25 MR. SCHMIDTLEIN: I think if you let us know

1 tomorrow morning.

2 THE COURT: You'd have time? Are you sure?

3 MR. SCHMIDTLEIN: If you can get it to us this
4 afternoon, great. But I think we can probably --

5 THE COURT: Are you sure? Mr. Goldberg?

6 MR. GOLDBERG: No problem.

7 MR. JOHNSON: He can do it.

8 THE COURT: Give me a phone number in case I do it.
9 I'm not going to do it right now.

10 MR. JOHNSON: Okay. (Telephone number given.)
11 That's me.

12 THE COURT: Do you mind if I -- do I have
13 authorization to make a -- give me a telephone number, so I'll
14 let you know what the decision is.

15 MR. HOLLEY: Yes.

16 MS. GAO: (Telephone number given.)

17 THE COURT: I'm going to have --

18 MR. JOHNSON: And if I get calls at 4 o'clock in
19 the morning, we're going to be asking some questions.

20 THE COURT: If you get a call from me it's not
21 going to be at 4:00 in the morning.

22 (Telephone numbers given.) And I will violate the
23 rules twice by having two but successive ex-parte
24 conversations.

25 (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 November 16, 2011, and thereat
8 reported in Stenotype all of the testimony and proceedings
9 had, and caused said notes to be transcribed into typewriting;
10 and the foregoing pages number from 2215 through 2292
11 constitute a full, 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