

1 THE COURT: Mr. Tulchin.

2 MR. TULCHIN: Thank you, Your Honor. I may have  
3 been a little optimistic about the 20 minutes.

4 THE COURT: We've got plenty of time.

5 MR. TULCHIN: Thank you.

6 THE COURT: You don't have to use five hours.

7 MR. TULCHIN: I just want to go back, one, to  
8 something that we talked about earlier, about Hood Canal,  
9 because I forgot to say -- I meant to, it slipped my mind --  
10 not only is the Hood Canal discussion long before Novell  
11 acquired WordPerfect or entered the business productivity  
12 applications business, but all the discussion in Hood Canal  
13 is about extending the shell, about shell extensibility in  
14 general with whether that would be done in Windows or Office  
15 or -- there were lots of proposals, lots of thinking.

16 There was no mention in any of those documents  
17 about the namespace extension APIs. And furthermore,  
18 ultimately we know what decision was made, the extensibility  
19 was put into Windows, not into Office. There's gobs of  
20 evidence from everybody on that. So the conspiracy theory,  
21 which is very far fetched to begin with, that somehow this  
22 was a plan to deny Novell, as if we would know that Novell  
23 was going in this business, to deny Novell the namespace  
24 extensions, it just doesn't make any sense at all. It was  
25 about extending the shell.

1           So I want to go back to October '94. I showed you  
2 Exhibit 17 from September where Mr. Struss reports that  
3 WordPerfect hasn't begun any work yet on IShellFolder and  
4 IShellView. And then after Mr. Gates makes the decision --  
5 here's Exhibit 3 from October 12th, Mr. Struss to Brad Chase  
6 and others, October 12th, and you will see the first  
7 paragraph -- you've seen this before, Your Honor -- per  
8 Paulma we're now in the process of proactively notifying  
9 ISVs about the namespace API changes, will not document them  
10 and they will go away/change. So far Stac, Lotus, WP --  
11 everyone agrees that means WordPerfect -- Oracle, SCC appear  
12 to be okay with this. Still talking with Symantec, et  
13 cetera.

14           So Mr. Struss, who was the designated contact at  
15 Microsoft, and so Mr. Calkins said in Exhibit 22 -- reports  
16 a few days after the decision that WP appears to be okay  
17 with this. Again, there is no evidence before that Novell  
18 said we have to have these. There is no evidence afterwards  
19 that they complained and said what are you doing to us, this  
20 is going to hurt our business.

21           And then there is Exhibit 2. Again, it's  
22 Mr. Struss. This is written October 21. It's in the middle  
23 of the page -- the first page, from Brad Struss to a long  
24 list of people, Bob Muglia, Brad Chase, Brad Silverberg,  
25 many others, October 21. Firstwave status report and

1 issues. The document is only two pages, and he talks about  
2 WordPerfect on the second page. Right in the middle,  
3 WordPerfect, due to focus on 16-bit product revision this  
4 fall, there are limited resources working on next year's  
5 32-bit release. Given this and the fact that they'd rather  
6 deliver a great product later than a mediocre one sooner,  
7 they currently expect to ship September '95 or around 120  
8 days of Windows 95 ship. Just.

9 Just a footnote here, Your Honor, at that point  
10 Windows was -- Microsoft was hoping Windows would ship much  
11 earlier than August.

12 And Struss then says, last sentence, about  
13 WordPerfect, working with their senior management to see  
14 about getting more focus on the 32-bit release. This is  
15 important for two reasons, but the first may be for the jury  
16 about what Novell was really doing at the time. But what's  
17 important for our motion today again is that there is no  
18 evidence in October. There are these Struss e-mails saying  
19 WordPerfect is okay, we're working with their senior  
20 management. Actually Microsoft is saying here we're trying  
21 to get them focused on writing for Windows 95, which is  
22 consistent with all the evidence about cooperation and help.

23 And the only evidence to the contrary about  
24 cooperation was Mr. Harral's testimony that he made three  
25 calls to Premier Support. He said he made three calls and

1 he got shut down. They wouldn't help him when he raised the  
2 subject of the namespace extensions.

3 Well, number one, I guess I'm glad to see that  
4 Microsoft is being consistent. Mr. Gates says don't get  
5 support for these APIs. The Premier Support people  
6 apparently comply with that. When you call and ask them,  
7 they say I can't do that. You shouldn't be writing to those  
8 APIs. So it's not surprising that Mr. Harral called at all,  
9 that someone on the other end of the phone would say, sorry,  
10 that's out of bounds.

11 But again, there isn't a single internal e-mail at  
12 Novell from Harral or Richardson or Gibb, or anyone else  
13 saying, you know, I told Microsoft it's key, it's essential,  
14 we're Critical Path, we need these APIs, and the guy at  
15 Premier Support wouldn't help me. Not a single internal  
16 e-mail.

17 There is no memorandum. There is nothing  
18 addressed to Mr. Calkins or Mr. Mella or Mr. Rietveld or  
19 Mr. Moon, or even Brereton, who was in charge of the unit  
20 where Harral, Richardson and Gibb worked.

21 THE COURT: I think some questions were asked  
22 where you think he should have -- the problem that Harral  
23 should have gone up the line of command and somebody should  
24 have ended up calling Struss saying, look, we really need  
25 those. I don't know where I came across that. I think it

1 was in your line of questions.

2 MR. TULCHIN: Yes, Your Honor. If this truly was  
3 going to cause delay, if we have an issue that can get to  
4 the jury on whether Microsoft caused delay, then it's  
5 impossible --

6 THE COURT: Based upon Mr. Jardine's question  
7 yesterday, you may only have to prove that they wouldn't  
8 have gotten it out in 60 days. But that's --

9 MR. TULCHIN: At most that's all it is, Your  
10 Honor, and that delay they say is worth billions. I mean I  
11 will just note that Dr. Warren-Boulton says it doesn't  
12 matter. We feed a billion no matter what, no matter what  
13 the delay was. It seems rather extreme.

14 But to go back to these calls to Premier Support,  
15 Your Honor, it's just striking to me that on  
16 cross-examination when I said can you give us the name of  
17 anyone with whom you spoke at Premier Support, Mr. Harral  
18 said, no, I can't. And in a case where this Critical Path,  
19 what has been referred to occasionally as this suicide  
20 decision, which of these three options do I choose,  
21 everything rides on this, our whole business, not of course  
22 NetWare, which was the main business where Frankenberg  
23 needed to go back and focus on that, but the business  
24 application productivity applications -- I'm sorry. I  
25 misspoke. The business applications division's products.

1 If this was so critical, you would think there would be a  
2 name. You would think someone at WordPerfect/Novell would  
3 have written to Microsoft and said, I spoke to Joe Smith of  
4 Premier Support, he wouldn't help me. Can we get to Struss  
5 or Bob Kruger, who had been in contact with Novell, or  
6 should Frankenberg raise this in a meeting with Gates, such  
7 as the January 10th meeting.

8           And I just want to go through briefly -- I will  
9 try to do this quickly, the three options, because this is  
10 not a case like Christy Sports, where the plaintiff lost  
11 anyway, where someone is being thrown out. You know, you  
12 are out of business, you can't use this store anymore to  
13 rent skis.

14           They had choices about getting their products to  
15 market. They made a choice, which turned out to be a very  
16 poor one. I think I know why, and I will come to that.

17           But let's look at some of these slides. I will  
18 try to do it quickly, Your Honor, because some of it is  
19 repetitive. 122, this was Mr. Harral. Although this  
20 contradicts what Struss was told and wrote in his e-mails,  
21 Exhibits 3 and 2, Harral testified that in '94 they had tied  
22 in to the namespace extension APIs. They were actually  
23 being used before Gates made his decision.

24           Let's look at the next slide, 123. And Harral was  
25 asked, page 342 of the transcript, this is on direct, did

1 Novell have any options. And he said one -- sorry. I  
2 misspoke. Answer, quote, one option would be to continue to  
3 use the documentation that we had for the APIs and be relied  
4 upon our ability to ferret out all of the issues we would  
5 have had help from their support to do. So basically we  
6 could do it on our own with something we were told we  
7 shouldn't be doing. That was one option. In fairness, the  
8 answer goes on, it's in the transcript.

9           Let's look at the next slide. And this is on  
10 cross of Richardson, 677. You're telling me that before  
11 October when Novell learned of Gates' decision -- I'm  
12 shorthanding this. And he answers, quote, so, my testimony  
13 is that Steve Giles, in working with the documentation for  
14 Microsoft, had written our own file open dialog that made  
15 use of the interfaces provided by Microsoft necessary to  
16 interact with the namespace extensions.

17           So this option of actually using them, of course  
18 was very risky, and Microsoft advised ISVs not to do it.  
19 Those are true statements. But this was a business decision  
20 for a software company to make. They had three options.

21 Let's look at the next one. Again, the first option, just  
22 use the APIs. They had the documentation. Steve Giles  
23 wrote the code, although they didn't keep it and produce it.

24           Richardson testified, page 687, Steve -- referring  
25 to Steve Giles -- made use not only of this documentation

1 but also extensive support. He indicated that he needed  
2 significant support from Premier Support and through the  
3 CompuServe forum in order to complete the work that he did.  
4 Question: Which he apparently got, right, because he did  
5 it? Answer: That's correct.

6 So this contradicts the idea Microsoft's not being  
7 helpful, that Premier Support shuts you down. Before  
8 Gates's decision, I guess this is between June and October  
9 of '94, Microsoft was helping and Giles wrote the code.

10 THE COURT: I guess this is really a question for  
11 Mr. Johnson, but I will ask you so he knows what's on my  
12 mind. I mean I can understand why, particularly in light  
13 of -- at one point I just thought the warning went out there  
14 wouldn't be any future versions of Windows, the APIs, the  
15 namespace, it also refers to between -- Bill was concerned.  
16 I guess it's really a question for Mr. Johnson. I would  
17 think as a business executive if, in fact, the code had  
18 already been written certainly by August of '95 when Windows  
19 was released, you know, the APIs are there, this really is a  
20 suicide decision, why don't you say, okay, we're going to go  
21 with Giles for the moment until -- and keep -- use that so I  
22 can get the product out quickly, but then continue to have  
23 shared code running.

24 MR. TULCHIN: You read my mind. That was exactly  
25 what I was going to say.



1           Option one wasn't an inalterable decision. They  
2 could have used the namespace extension APIs and kept  
3 working in shared code to do something better -- what they  
4 say was better. So option one was not, you know, it's  
5 either now or never. Of course there was a stopgap  
6 solution. It was risky for them. But did Harral and  
7 Richardson decide to bet the company on this? Because there  
8 is no evidence that the executives, who Frankenberg said  
9 would have been involved, ever were.

10           Let's look at slide 126. This is option two,  
11 which got less attention, Your Honor, in the testimony. But  
12 this is important, because even without the namespace  
13 extension APIs, it's undisputed Novell could have used  
14 Microsoft's common file open dialog. They didn't want to do  
15 it because they said our customers expect more. Our  
16 customers want more. We've got to satisfy our customers.

17           Again, there is not a single document from the  
18 marketing department, Mr. Mella, or any evidence that the  
19 customers wanted more except for these developers. But  
20 let's take it on faith. Let's accept what Richardson and  
21 Harral said.

22           THE COURT: I think the developers and the project  
23 manager. I think Mr. Gibb was --

24           MR. TULCHIN: Gibb too, yes, Your Honor. Yes, I  
25 agree with that.

1           But option two was simply don't use the namespace  
2 extension APIs, use the Windows file open dialog. You get  
3 your product out on August 24th of '95, unless for other  
4 reasons, like Quattro Pro, you couldn't get it out. And  
5 here's Harral testifying at page 502 -- this is our slide  
6 126 -- that was the choice that they had. Novell could have  
7 come out with a product in '95 that utilized Microsoft's  
8 common file open dialog. I mean it couldn't be plainer.

9           You would think the CEO would make this life or  
10 death choice. Harral said, yeah, it was a choice. We could  
11 have had our product out.

12           Of course, I might say, Your Honor, that if the  
13 evidence is overwhelming that Quattro Pro was the problem,  
14 and they couldn't localize Quattro Pro, and Quattro Pro was  
15 way, way late, and that is the evidence, if the evidence was  
16 that, that might explain why the executives didn't have to  
17 get involved in making this choice. It didn't matter.  
18 Whether shared code could solve this problem or not made no  
19 difference to releasing PerfectOffice into the market  
20 because they had nothing ready to go from Quattro Pro.

21           And when I asked Frankenberg about that, and I  
22 know this is a subject that Your Honor thinks is for the  
23 jury, I don't -- under Rule 50, Your Honor, I don't. But  
24 when I asked Frankenberg -- what's the number of that  
25 document? It's from December of 1995. 227, do I remember

1 that right? Can we put that up?

2 I asked Mr. Frankenberg, looking at 227, doesn't  
3 this show, December '94 -- sorry. The wrong document.

4 This one does say, Your Honor, in December '94, we  
5 initially targeted October '95, but due to Quattro Pro's  
6 localization delays, we moved the date back to December '95.  
7 It doesn't say they moved the date back. This was written  
8 to Bob Frankenberg. It doesn't say they moved the date back  
9 because of Harral and Richardson because of shared code, or  
10 Mr. Gibb. They couldn't get the product out anyway.

11 I'm going to come back to Novell's three options.

12 THE COURT: All the people that left Quattro Pro  
13 but still split up.

14 MR. TULCHIN: Well, yes, I know, Harral and  
15 Richardson.

16 THE COURT: Went to Oracle or somewhere.

17 MR. TULCHIN: Maybe Gibb said, yes, they were  
18 always conservative. There is no evidence of that, other  
19 than what they have said.

20 What was the number of that document with  
21 Frankenberg? The one from December of '95 where all the  
22 Quattro Pro people are leaving, only two left. They have  
23 all left to go to work at Oracle.

24 230. Let's try that. I'm sorry to delay this,  
25 Your Honor.

1 THE COURT: Addition by subtraction.

2 MR. TULCHIN: December 23rd, '95, Bruce Brereton,  
3 who hasn't been heard from as a witness in this case, on  
4 this past Thursday, about 15 additional people -- you've got  
5 to go down a little bit -- submitted their resignation.  
6 This leaves us with just two people.

7 When I asked Frankenberg -- number three, number  
8 three, item three -- we have now assigned a developing  
9 manager in Orem. We're putting together a team, the  
10 Oracle/Quattro Pro team. This is December 23rd, '95. From  
11 there we'll need to work out the testing. Once the original  
12 set of developers are more up to speed, we'll probably need  
13 to assign a few additional members to the team. And  
14 Frankenberg said, I agree with you, it's correct.

15 This implies Quattro Pro wasn't ready yet. So no  
16 matter what the developers say, Mr. Gibb says, here's the  
17 evidence that they couldn't be ready in December. If there  
18 was a delay caused by the namespace extensions -- I mean  
19 it's stunning that an antitrust lawsuit under Section 2  
20 seeking billions of dollars for a delay would be brought  
21 without the evidence that here applies to Quattro Pro of why  
22 the delay occurred.

23 So let me go back to the --

24 THE COURT: This is -- I didn't remember this one.

25 MR. TULCHIN: I will give you Mr. Frankenberg's

1 testimony --

2 THE COURT: This is December of '95?

3 MR. TULCHIN: Yes, December 23rd, '95.

4 THE COURT: So what I focused on before was a long  
5 memo, and then there's a follow-up that says we're extending  
6 it to December. But this is actually written in December of  
7 '95?

8 MR. TULCHIN: It is, Your Honor, December 23rd.  
9 It was written by Mr. Brereton.

10 Mr. Frankenberg's testimony about this document is  
11 page 1145 of the transcript. I asked him, doesn't this tell  
12 you, Exhibit 230, Mr. Frankenberg, that the Quattro Pro team  
13 was not ready even then in December of '95. Answer: It  
14 would imply that it wasn't released. Certainly saying it  
15 wasn't released to manufacture, but -- so having the ability  
16 to fix bugs from home implies that they could respond to  
17 further testing. So clearly the product wasn't complete.  
18 It just doesn't say how far from completion it was.

19 THE COURT: What exhibit is it? I'm sorry.

20 MR. TULCHIN: 230, Your Honor.

21 THE COURT: I didn't remember that.

22 MR. TULCHIN: 230, Your Honor. I know the Court  
23 wants to go on to middleware, which is an important topic,  
24 but I would like to refer the Court, as long as we're at it,  
25 to Exhibit 211.

1 THE COURT: If you can combine this plus the  
2 testimony there is no damage -- as I understand it, there is  
3 no damage proved beyond 60 days?

4 MR. TULCHIN: Exactly right, because everything  
5 that Warren-Boulton said was premised on his assumption that  
6 the product would have been out shortly after -- he fudged a  
7 couple of times and wasn't exactly clear, but the essence of  
8 his testimony was within 60 days of the release of Windows  
9 95. That would mean September or October of '95. And  
10 Frankenberg says in Exhibit 230 the product wasn't complete  
11 in December.

12 THE COURT: No. No. I'm sorry. Obviously I'll  
13 ask Mr. Johnson about this. When I kept saying it was a  
14 jury question, I thought -- the only evidence I remembered  
15 was this long memo about Quattro Pro, and I think it then  
16 has September, and then there's the one that was just shown  
17 to me which extended to December. I thought that that was  
18 the perspective and I thought that Harral and/or Richardson,  
19 or both, testified that by the time that came along, in  
20 fact, Quattro Pro had caught up. I didn't remember it.

21 MR. TULCHIN: They said, if I remember correctly,  
22 Your Honor, that the Quattro Pro people were always very  
23 pessimistic, and they'd deliver it sooner than they said  
24 they would deliver it.

25 THE COURT: That's right.

1 MR. TULCHIN: In contradiction to that,  
2 Mr. Frankenberg said the product wasn't ready at the end of  
3 '95. And then he says, it just doesn't say when -- I'm  
4 sorry, how far from completion it was. Again, page 1145 of  
5 November 7.

6 There are other exhibits, Your Honor. I mean, for  
7 example, Exhibit 226, at the page ending with 535, says that  
8 even as of May 1995, the highest overall risk for the  
9 PerfectOffice for Windows project, the highest one is  
10 Quattro Pro delivering late. And you will see it says table  
11 is ordered by overall risk. Ms. Nelles showed this to  
12 Mr. Gibb. The very first thing -- the biggest risk in the  
13 project is Quattro Pro.

14 It's also true, Your Honor, that there is strong  
15 evidence that Quattro Pro was delayed several times from  
16 what had been anticipated. Exhibits 219 and 221 and 223 are  
17 a series of documents, one in February, one in March, and  
18 one in May '95, which show that as time goes on, Quattro Pro  
19 keeps getting pushed back.

20 Let's just look briefly at 221.

21 THE COURT: Gibb testified to the contrary. He  
22 said that by the time this all happened, Critical Path had  
23 become shared code.

24 MR. TULCHIN: He did, Your Honor, I agree with  
25 that. But it can't be under Rule 50 that you get to a jury

1 based on one or two sentences from Mr. Gibb when the  
2 documentary evidence from the company is overwhelming and  
3 the CEO says on the witness stand Exhibit 230 shows the  
4 product wasn't ready in December of '95.

5 THE COURT: That is a different question. I agree  
6 with you.

7 MR. TULCHIN: Thank you, Your Honor.

8 Now I want to go back to the three options because  
9 I sort of was in the middle of them. Let's look at slide  
10 127. This includes at the top what I showed you a moment  
11 ago in slide 126, Your Honor. And here we just add the  
12 testimony of Mr. Gibb, page 847. Question: Novell's  
13 developers could have had the applications in PerfectOffice  
14 for the Windows 95 common file open dialog, right? Answer:  
15 It would have been painful, but we could have done that,  
16 yes. Question: Actually it would have been quite easy  
17 physically? Answer: It is easy to call. We thought it  
18 would be a huge step backwards for our customers.

19 This option of just getting your product out using  
20 Windows, you are not improving Windows, you're adding the  
21 super-duper functionality that you say your customers want.  
22 It's sort of like the Christy Sports case with this huge  
23 neon sign that the Deer Valley people think is garish and  
24 inappropriate. You say my customers love that. That's what  
25 they want. That's how I'm thriving in business. They see



1 it all over the mountain and it reminds them that I do a  
2 great job. But if you choose not to renew your lease --  
3 that's all they did, it would have been painful, but we  
4 could have done it. If you choose, if you're Christy Sports  
5 and you choose not to renew your lease, because you need  
6 that neon sign, that's a business decision which does not  
7 implicate antitrust concerns.

8           So let's look at option three. This is what they  
9 chose. Slide 128. Here's Mr. Gibb again. He says on  
10 cross, yes, we wanted to write -- we thought we wanted to  
11 exceed what was the default stuff. That was the stuff in  
12 Windows.

13           Slide 129. This is what they decided to do,  
14 Mr. Gibb, Mr. Harral, Mr. Richardson, apparently. There is  
15 no evidence anyone else was involved. Gibb says -- I just  
16 read you the part from Gibb. Here's Harral at page 503 to  
17 504 on October 24. At the time, we could have made the  
18 choice to use the common open dialog in '94 so to ship '95,  
19 but that also would have been a choice to have  
20 disenfranchised our customer base and apparently they -- he  
21 never said who the they were -- they were not willing to  
22 make that choice at that time. Which goes right back to  
23 Your Honor's question, if this is business suicide, if it's  
24 going to cost your business a billion dollars in what  
25 Warren-Boulton's says --

1 THE COURT: I have never heard an economist not  
2 bring damages up to the current value, but that's a whole  
3 different question. I understand. I respect the decision  
4 that was made.

5 MR. JOHNSON: Your Honor, you can't do that under  
6 the antitrust laws.

7 THE COURT: You can't?

8 MR. JOHNSON: No.

9 THE COURT: Thank you.

10 MR. TULCHIN: They want it -- they want it brought  
11 up to present value.

12 THE COURT: No. No. No. I appreciate that.  
13 Thank you. I was wrong.

14 MR. JOHNSON: You can't do that.

15 THE COURT: I appreciate that.

16 MR. JOHNSON: That's one of the reasons you get  
17 treble damages.

18 THE COURT: Thank you. I didn't know that.

19 MR. TULCHIN: Okay. So just to end this section  
20 about the choices, Your Honor was right, they could have  
21 chosen option one and use the namespace extensions. They  
22 could have said to stopgap thing. We'll get the shared code  
23 people to do all this fancy, great work so we can put in  
24 these super-duper products that make Windows better. And  
25 while they are taking a while to do that, we'll at least

1 have something out there.

2           And they could have chosen option two to get  
3 something out there as well, just using what Windows gave to  
4 all ISVs, the same file open dialog that Office used, and  
5 Word, and Excel, and every other ISV in the world used, the  
6 same functionality that Microsoft created and owned and gave  
7 to all ISVs for free. They had the three choices.

8           With all respect to the plaintiff's case --

9           THE COURT: I guess now I think about it, there  
10 was also a fourth choice. The customer who already had  
11 this, you could have sent out your technical people saying,  
12 we're not going to be ready with Windows product until  
13 sometime in '96. I mean from a marketing standpoint, this  
14 might not work, but there were -- I guess, if I was an  
15 executive, can we persuade our enterprise customers who are  
16 relying upon a full functionality to continue to use that  
17 until we come out with our Windows product in '96? I'm just  
18 trying to think as a Novell executive. That would have been  
19 an option, I think, if, in fact, the concern was that this  
20 was a step backwards, say, stay where you are, but don't  
21 worry because we're going to -- in a couple of months we're  
22 going to be out with a product that will enable you to use  
23 Windows 95. But I guess that's not -- there is no evidence  
24 of that. I'm just thinking.

25           If they had a good relationship with their

1 customers and their customers are not the kind to go out in  
2 the market right now because they're making business  
3 decisions they are going to change, that Novell could have  
4 gone out and said, look, we don't have the Windows 95  
5 product yet, but stay where you are. We know it's a step  
6 backwards, but we're going to step forward with you two  
7 months from now.

8 MR. TULCHIN: Your Honor, absolutely right. This  
9 is just an ordinary business choice.

10 We have a lot of evidence from Frankenberg and  
11 Noll, and also in Exhibit 380, the annual report, 10-K of  
12 Novell, that this is what software companies are faced with  
13 every day, that writing software is difficult, it's complex.  
14 Delays are occasioned oftentimes through the unexpected,  
15 through just human frailty. People sometimes don't get it  
16 right. These kinds of trade-offs of delays are exactly what  
17 executives of companies like Novell and, indeed, Microsoft  
18 have to confront on an almost daily basis. The evidence  
19 there is quite clear.

20 And if you make a choice and it turns out that  
21 shared code can't produce what they were hoping to within a  
22 short period of time, that's just a business decision that  
23 you have made, apparently without any backup, like using the  
24 common file open dialog. Again, one might ask, if there is  
25 no backup plan, is that because Quattro Pro is not out there

1 anyway.

2           And one other thing that's very important on this  
3 subject is that you will remember that Ms. Nelles asked  
4 Mr. Gibb on cross, because Mr. Gibb had gone to Corel, as  
5 did Harral and Richardson, after the company was sold, early  
6 in 1995. And Ms. Nelles asked Mr. Gibb, do you remember an  
7 incident where Mr. Johnson, who had been Harral's boss at  
8 Novell and had also gone to Novell, was ordered by  
9 Mr. Skillen, the vice president of Corel, to use the Windows  
10 common file open dialog --

11           THE COURT: I do remember that. It was that  
12 question -- again, maybe I misunderstood the evidence, and  
13 Mr. Johnson can correct me. In fact, Corel comes out with a  
14 new shared code. I do remember the question.

15           MR. TULCHIN: Your Honor, we don't have to get  
16 into it. It was just a tiny bit different from the common  
17 file open dialog, and it wasn't the functionality that  
18 Harral and Richardson say they dreamed of to improve on  
19 Windows.

20           THE COURT: I understand that too.

21           MR. TULCHIN: It doesn't matter. I don't think it  
22 affects this motion at all.

23           What Gibb said is that Johnson, who had been at  
24 Novell, was ordered by Skillen to use the Windows file open  
25 dialog just to get the product out finally, and Johnson

1 refused, and he was fired by Corel for refusing to follow  
2 instructions.

3 Can someone get me that page? I've lost my  
4 reference to it.

5 It's a small piece of evidence, Your Honor, but it  
6 goes directly to the point of the options that Novell had.  
7 How could they place this enormous decision about what to  
8 do, which option to choose, in the hands, apparently, of the  
9 three people who testified in this courtroom. No executive  
10 ever was involved. Frankenberg said that's not even  
11 surprising to me. Certainly I didn't know about it. And  
12 then walk into court and say the delay is attributable to  
13 Microsoft when they had these choices. Mr. Skillen fired  
14 Johnson for not choosing option two, you've got to get the  
15 product out.

16 Now let me turn to middleware.

17 THE COURT: Again, Mr. Johnson, I apologize, but I  
18 think I now recall. I think I drew the inference that  
19 Johnson was fired, they did do that, but I know in May of  
20 '96 they released the product with the shared code.

21 MR. JOHNSON: Custom file open dialog, yes, Your  
22 Honor.

23 MR. TULCHIN: Before I get to middleware, Your  
24 Honor, I just want to say there isn't evidence sufficient to  
25 get to the jury on whether the act itself, the one and only

1 act of which Novell complains, is anticompetitive. There is  
2 no evidence on which you could get to the jury on that.

3           The justification included that an application --  
4 a third-party application running on the namespace  
5 extensions could crash the whole system. Now Ronald Alepin  
6 was the technical expert who was called to the stand to  
7 dispute that decision, and here's what he testified to on  
8 cross.

9           He testified that an application that called the  
10 namespace extension APIs would run in the same process as  
11 the Windows 95 shell -- exactly what we say -- and, quote,  
12 had the potential to make the system unresponsive, unquote,  
13 if it crashed. That's at 1588 to 1589. I'll come back to  
14 Alepin in a moment.

15           Dr. Noll said, at 1872, if APIs are unstable, then  
16 that alone would be, quote, a valid reason not to document,  
17 unquote, those APIs. That's at 1872.

18           So, yes, Mr. Alepin disputed the sufficiency of  
19 the reasons. He argued that he would have made the decision  
20 otherwise. He actually even argued that there were other  
21 possible reasons that Windows 95 would crash. So why would  
22 you solve this potential problem that could cause a crash if  
23 you are not going to solve all of the others as if you can't  
24 try to do this one at a time, as if there's one issue you  
25 can't solve it without solving all?

1 I don't think Alepin did anything more, when push  
2 comes to shove, than to argue that his business judgment  
3 would have differed from Mr. Gates'. The law on this  
4 subject, Bell against Dow Chemical, 847 F.2d 1179, at page  
5 1186, it's the Fifth Circuit, 1988.

6 THE COURT: I hear you on that, but I can't  
7 remember, they've got five reasons -- or six reasons he  
8 listed why he thought there was no legitimate business  
9 justification, one of which was that the following year  
10 Microsoft did document the APIs. I understand that  
11 Microsoft's position is going to be it could very well prove  
12 that, in fact, when it came out with documentation of the  
13 namespace extensions, by that time it was no longer, quote,  
14 running and processing. It sounds like I know what I'm  
15 talking about, but I don't.

16 But, in any event, if there no longer was the risk  
17 that Windows 95 was delayed because of a bug in the app, and  
18 I understand that now, if, in fact, Microsoft proves that,  
19 maybe dependent upon the strength of its proof, I  
20 understand, but as of right now that is why I think this is  
21 a jury question. But I could be wrong.

22 The other things, as I say, I don't remember them  
23 all, there were some things that -- I happen to agree with  
24 you, the fact that that's why you're a consultant, not a  
25 business executive, the fact you can't solve all the



1 problems. Life is a trade-off. You're a business executive  
2 and you try to minimize the possibilities of a crash. You  
3 also might be more willing to accept -- I remember some of  
4 the things were other Microsoft products were using it. And  
5 as I indicated yesterday, I see a distinction between making  
6 people in your company responsible in case there's a crash  
7 as opposed to independent service vendors. According to, as  
8 I understood Mr. Alepin's testimony, which, if it's true,  
9 they'd rather not have their programs crash. On the other  
10 hand, if I'm Bill Gates, I'd much rather be able to fire  
11 somebody if there was a bug in the application as opposed to  
12 the ISV over who I have no control, and even evangelize  
13 Mr. Gates. I don't like to use that term.

14 MR. TULCHIN: Yes, Your Honor, Windows 95, I think  
15 it's safe to say, was the biggest and most important project  
16 that Microsoft had ever released as of that time. It was  
17 enormously successful. It was stunningly successful.

18 Mr. Gibb complained that he was too far down the  
19 road from the Jay Leno tent, and that somehow that was  
20 unfair to Novell. But what happened, of course, is that --  
21 and it does happen. Apple has had some of these products  
22 recently where this same phenomena occurs. The whole  
23 country and beyond gets swept up in the excitement of a new  
24 technological product. Hear, hear for the company who does  
25 it, that's great.

1           But the idea that Alepin said that the market  
2 would discipline some ISV, could be a very small company  
3 that makes an application, because if they cause Windows to  
4 crash, they will be go out of business, and I agree with  
5 that, they will. But the idea that Microsoft is helpless to  
6 try to protect its own product, which turned out to be, you  
7 know, a super-duper success -- I mean that's just silly, and  
8 that's the level at which the debate is taking place.

9           Alepin said I'm the technical expert. Now we  
10 won't debate that right here, but you would think he would  
11 have technical reasons why the decision was not legitimate.  
12 The Bell case that I had just started to refer to, and I've  
13 lost my -- I'm sorry, Your Honor. Just give me a moment.  
14 I've lost my place in my notes.

15           It's cited in the brief we submitted yesterday,  
16 Your Honor.

17           THE COURT: An expert can't substitute for the  
18 business judgment or the acumen.

19           MR. TULCHIN: Correct. You don't weigh the  
20 sufficiency of a business judgment on technical issues like  
21 that. The only question is is there a legitimate business  
22 or technical reason, not do we weigh which side we might  
23 come out on, which is all Alepin did.

24           So let's get to middleware.

25           THE COURT: Certainly not the next level, which

1 would be weighing the ability -- the business justification  
2 against potential anticompetitive effect.

3 MR. TULCHIN: Right. Professor Noll said there  
4 were three things that are necessary before you can have the  
5 kind of middleware that could threaten the applications  
6 barrier to entry, that could imperil Windows monopoly. He  
7 said you need ubiquity, the product has to be almost  
8 everywhere. It has to be on all or almost all PCs. That  
9 was his testimony. He said the product had to be  
10 cross-platform. And lastly he said that it had to be  
11 middleware that exposed a sufficient number of APIs for  
12 general purpose productivity applications to be written to  
13 that middleware product itself as opposed to being written  
14 to the APIs exposed by Windows, the operating system.

15 We don't have evidence that comes anywhere close  
16 to satisfying any one of the three. First on ubiquity,  
17 there was no market study or data or market share  
18 information that was submitted during plaintiff's case on  
19 the extent to which WordPerfect was ubiquitous. It wasn't.  
20 It had an install base -- but this is plaintiff's burden to  
21 put in the evidence. It had an install base on DOS. DOS,  
22 of course, was yesterday's news. No one was buying DOS  
23 anymore.

24 But to be ubiquitous, we would have to have some  
25 evidence that WordPerfect was everywhere, because the nature

1 of the middleware theory is if you have something that other  
2 applications write to, they write to the APIs of that  
3 middleware, you could spark competition in the operating  
4 system business if WordPerfect, in this case, is ubiquitous,  
5 and if it's also on other platforms, because then people who  
6 are using applications might easily switch over to these  
7 other operating systems.

8           There is no evidence that any other operating  
9 system was a viable and effective competitor at the time.  
10 Noll didn't say that any was, neither did any other witness.

11           There is some theory that Novell offers in the  
12 brief they submitted last night. It's the same theory they  
13 offered on summary judgment. It's the same theory in their  
14 complaint. But it's time for proof.

15           And Your Honor asked at page 2,060 of the  
16 transcript, I think it was two or three days ago, here's  
17 your question to Mr. Johnson: Is what you're saying, the  
18 record really is silent as to whether or not what Harral and  
19 Richardson developed could have been easily ported to  
20 another platform? Mr. Johnson: I agree with that, Your  
21 Honor. That's on the issue of cross-platform.

22           Let me just go through a few of the other pieces  
23 of information. We have a lot of this in our brief, Your  
24 Honor, and I'm going to try to finish soon.

25           Here's slide 105. Now, Your Honor, sometimes you

1 have to be careful what you ask for. Novell asked that this  
2 finding from the government case be preclusive or, as  
3 Mr. Johnson said in his direct of Noll, binding. And Your  
4 Honor granted his application to make it so. It is binding  
5 in this case. It is binding on Novell.

6 And Judge Jackson said, in November of 1999,  
7 quote, currently no middleware product exposes enough APIs  
8 to allow ISVs profitably to write full-featured personal  
9 productivity applications that rely solely on those APIs,  
10 unquote. So this is one of the three criteria that Noll  
11 has.

12 THE COURT: I agree with you that that's  
13 important. But if -- and again, I'm not arguing with  
14 Mr. Johnson about this, I don't think there is any evidence.  
15 I mean there's evidence of other Microsoft bad acts. But  
16 one could say that is true in 1999. But the reason that  
17 there was no middleware product exposing enough APIs to  
18 allow ISVs properly to write full-featured personal  
19 productivity applications that rely solely on APIs was  
20 because of Microsoft's anticompetitive conduct. I don't  
21 think there is any evidence of that at all, that in the  
22 alternative universe there is evidence -- and I appreciate  
23 Mr. Johnson's position on that because of other bad conduct,  
24 but I don't think there is any evidence of what that  
25 alternative universe would have been. But that would be a

1 way to get away from it by saying, yes, it's true, in 1999  
2 that's the way things were, but they wouldn't have been that  
3 way if it hadn't been for the antitrust laws.

4 MR. TULCHIN: Your Honor, I think I agree with  
5 what you just said about Novell's position. And I also  
6 agree that the Court allowed Novell to put in evidence  
7 through Dr. Noll and through the findings about other  
8 so-called bad acts. What's missing is exactly what the  
9 Court said is missing, any evidence that an economist would  
10 submit about what the world would have looked like in the  
11 absence --

12 THE COURT: Or technical person. I don't know  
13 what the area of expertise --

14 MR. TULCHIN: Correct. There is nothing in  
15 Novell's files that if WordPerfect turns out to be  
16 middleware, this can spark some competition in the operating  
17 system market. Of course there isn't. It's a bizarre  
18 notion.

19 THE COURT: It's not a bizarre notion. But it's  
20 what I've always said, the theory may conflict with fact.  
21 There is no evidence that I know of that that was the  
22 intent. Indeed, what I've heard was absolutely contrary,  
23 was that we wanted the marriage of Windows 95 and  
24 WordPerfect.

25 MR. TULCHIN: We've cited this in our brief.

1 Noll's testimony on this subject conforms to the findings.  
2 I want to look briefly at a couple of them. Slide 106. It  
3 Remains to be seen whether there will ever be a sustained  
4 stream of full-featured applications written solely to  
5 middleware APIs.

6 By the way, as a footnote, Your Honor, in the  
7 brief they submitted last night, they quote testimony from  
8 Harral, Richardson, and I think Gibb too, which says that  
9 WordPerfect is middleware. Those were questions about  
10 whether WordPerfect ran in the middle of an operating system  
11 and other applications that could be written on top of that,  
12 not whether it was middleware in the sense used in the  
13 government case. Because that's the only way competition  
14 could be sparked in the operating system market is if you  
15 have a sustained stream of full-featured applications  
16 written solely to middleware APIs.

17 THE COURT: Frankly, I can't remember who the  
18 witness was, but I remember the cross-examination, which I  
19 think established affirmatively that WordPerfect --  
20 WordPerfect Office did not expose sufficient APIs to be  
21 portable to an operating system. I, frankly, don't remember  
22 who answered the question.

23 MR. TULCHIN: Alepin said that, and I think  
24 Professor Noll agreed.

25 By the way, one hole that I left earlier, the

1 testimony from Gibb about Skillen firing Johnson for not  
2 just putting in the common file open dialog is on page 850.  
3 I didn't want to forget that.

4           Let's look at finding 32. Again, it remains to be  
5 seen whether server- or middleware-based development will  
6 flourish at all. There is no evidence that it ever has,  
7 even 17 years now after the namespace decision was made.

8           Judge Jackson says, even if it were beginning to  
9 flourish, already flourishing, it would still be several  
10 years before the barrier could be eroded enough to clear the  
11 way for the relatively rapid emergence of a viable  
12 alternative to incumbent operating systems. It's never  
13 happened.

14           Finding 77, also binding on Novell. These  
15 middleware technologies have a long way to go before they  
16 might imperil the applications barrier to entry.

17           Let's look at what Noll says, slide 142. This is  
18 sort of a preface, Your Honor, because, yes, their theory  
19 is, and the Court allowed them to try to prove it, that you  
20 have to combine acts against Novell with acts against  
21 Netscape. And here's Noll admitting that there was no  
22 significant effect from anything Microsoft did to Netscape  
23 until after Novell sold the products.

24           I mean I don't want to get into a long debate  
25 about time period, but it's just illogical to say that



1 Novell was harmed by the namespace extension decision when  
2 in order to find that harm you have to combine it with  
3 something which had no impact until after Novell sold the  
4 products.

5 THE COURT: I'm not sure I agree with you on that.  
6 I think it's a debatable point. If the harm occurred during  
7 the period because of things which were reasonably  
8 foreseeable in the future, that's where I'm not as -- I am  
9 not quite as willing to, to use Mr. Johnson's term, cabin  
10 the time into the precise time period. But on the other  
11 hand, I think, realistically, if it's not going to happen  
12 within -- well, there's no evidence it's going to happen  
13 anytime. And certainly it's not going to happen in the  
14 foreseeable future where there is a nexus between the  
15 alleged damage and what happened. I am less clear on that  
16 that there's an exact cutoff date at the time of the sale.  
17 But I'm also not prepared to say exactly what the cutoff  
18 date is. It's just a question of evidence. I'll ask  
19 Mr. Johnson what evidence there is.

20 If in 1999 Judge Jackson is still saying it's a  
21 long, long time to go before this could ever be done, it  
22 would be very hard to construct an alternative universe at  
23 anytime in the foreseeable future after '96, this middleware  
24 threat really was going to develop. I am not quite sure --  
25 I want to make it clear, I am not clear that you cut off the

1 date at the sale. I just don't know.

2 MR. TULCHIN: Well, in thinking about that, Your  
3 Honor, I would just ask that you consider the testimony that  
4 WordPerfect was not cross-platform to begin with. Here's  
5 Frankenberg at 1169. Question: From the time that Novell  
6 acquired WordPerfect in June of '94 until the time Novell  
7 sold WordPerfect to Corel in '96, Novell never released a  
8 version of PerfectOffice that was written for any other  
9 platform except Windows 3.1? Answer: That is true. Later  
10 on in 1169, in other words, WordPerfect was not  
11 cross-platform. It was written specifically to Windows.

12 THE COURT: It did have a history of having been  
13 cross-platform. There was DOS. There was -- somebody  
14 testified there were a variety of operating systems.

15 MR. TULCHIN: Correct. We think that's helpful  
16 because it never sparked competition like it was  
17 cross-platform.

18 THE COURT: I understand. That's from the other  
19 theory.

20 MR. TULCHIN: My question to Frankenberg was in  
21 the period that Novell owned WordPerfect, from June of '94  
22 until it's sold, in that period WordPerfect was only written  
23 to Windows. He said yes. And then I said, as far as you  
24 know, Corel never released any version of PerfectOffice for  
25 any other platform except Windows. He said, I don't know

1 what they did, sir, beyond releasing it for Windows.

2 So, you know, there are three conditions Noll  
3 says, ubiquity, there is no evidence about ubiquity;  
4 cross-platform, there is no evidence that it was  
5 cross-platform.

6 THE COURT: Let's stop a minute so the court  
7 reporter can --

8 THE COURT REPORTER: I'm so sorry.

9 THE COURT: No, it's no problem.

10 THE COURT REPORTER: I'm so embarrassed.

11 THE COURT: No. Don't feel embarrassed. It's a  
12 pretty sound.

13 MR. TULCHIN: I'm really almost done.

14 THE COURT REPORTER: I'm so sorry.

15 THE COURT: Nothing to be sorry for.

16 MR. TULCHIN: You okay?

17 THE COURT: Any emergency that you need to pay  
18 attention to?

19 THE COURT REPORTER: No. No. I meant to have it  
20 off.

21 MR. TULCHIN: Here's slide 143, Your Honor, from  
22 Dr. Noll. Even Netscape alone posed no threat to Microsoft.  
23 It had to be in conjunction with Java. Remember the impact  
24 on Netscape wasn't until after the time period. Question:  
25 Quattro Pro by itself posed no threat? Answer: It's true

1 that in and of itself, had nothing happened to any other  
2 product, there is no single product out there that  
3 threatened Microsoft's monopoly. That would include  
4 WordPerfect? Yes. And PerfectOffice? That is correct.

5 And Noll was very careful never to contend that  
6 even those three products together, WordPerfect, Quattro  
7 Pro, and PerfectOffice, could have threatened the monopoly.  
8 There is no evidence that that could have been so.

9 Now let's look at slide 144. I'm going backwards  
10 a little bit. I'm sorry this is a little out of order. But  
11 Professor Noll was asked, there are two conditions, and he  
12 said, I said this alternative could be attractive if two  
13 conditions are met. I said, fair enough. I'm with you.  
14 The first of the two conditions is if the middleware program  
15 has to be present on all or nearly all of the PCs that use  
16 the operating system to which the application otherwise  
17 would be written, correct? Answer: That is right. No  
18 evidence that that ever occurred.

19 And I want to look at 120 -- slide 120, and 121.

20 This is a chart prepared from Dr. Noll's data of  
21 Microsoft's market share of the market that Novell contends  
22 was adversely affected by the namespace extension APIs  
23 decision. Microsoft had above 80 percent all the way  
24 through the period, from 1991 to 2001. Once Windows 95  
25 comes out, the market share is way above 90 percent.

1           And finding 35 from the government case says it  
2 even stronger, this is binding, every year for the last  
3 decade -- again, written in 1999 -- Microsoft's share of the  
4 market for Intel compatible PC operating systems has stood  
5 above 90 percent. For the last couple of years, the figure  
6 has been at least 95 percent.

7           Frankenberg said had the namespace extension  
8 decision come out the other way, those numbers would be even  
9 higher. And the whole theory of their complaint, the theory  
10 that allowed them to evade the statute of limitations  
11 because they filed suit ten years after this decision was  
12 made, the whole theory stands in complete contrast to this  
13 data and to Frankenberg's testimony.

14           And Noll said, at page 1920 of the transcript, as  
15 of 1999, there had never been any middleware that could  
16 imperil the applications barrier to entry, agreed? Answer:  
17 That is right. Question: That was true from '94 through  
18 '99, right? Answer: Absolutely true.

19           Now he never addressed any period after '99.  
20 There is a complete absence of proof there. But what we do  
21 know --

22           THE COURT: I think he said something about in the  
23 present something could have been done, but I don't know  
24 enough about it. I don't know what it is.

25           MR. TULCHIN: Well, it may have been an offhand

1 comment or muttering of some sort, Your Honor, but no  
2 economic proof --

3 THE COURT: I didn't think it was a Christmas tree  
4 anyway.

5 MR. TULCHIN: All right, Your Honor, one more  
6 slide, and it's number 141. These are the reasons, at least  
7 among them, that we think judgment should be entered now  
8 under Rule 50. As a matter of law, this case cannot, should  
9 not go to the jury.

10 Novell has no answer to the first point. They  
11 don't even cite Four Corners. The Intergraph against Intel  
12 case is stunningly close on its facts. I think the only  
13 thing they said about it is it's from a different circuit.  
14 They have no case, at least they have cited none so far, and  
15 we have been going at this for four or five weeks of trial,  
16 that stands in contrast to the law, as we've stated it.

17 Secondly, we have no Aspen Skiing case, nothing  
18 was terminated, unless the argument is that once a beta is  
19 released, it can't be changed, when Frankenberg says exactly  
20 the opposite and says that the whole industry and he in  
21 particular knew that.

22 I also submit that Alepin's testimony does not  
23 stand for the proposition that the decision to withdraw  
24 support for the namespace extension APIs was not justified  
25 as a technical matter. He argues with Mr. Gates, and that's

1 all.

2 Thirdly, there was no harm to competition in the  
3 market. This argument was designed, as the Court said long  
4 ago, ingeniously to get around the statute of limitations.  
5 It was time to submit some proof that the argument is more  
6 than the theory of the lawyers. No one from Novell  
7 supported it. They said instead we wanted to marry Windows  
8 and make it better. We have cited a lot of that in our  
9 brief, Your Honor.

10 There is no evidence that WordPerfect or  
11 PerfectOffice was cross-platform. All they wanted was to  
12 write it to Windows, because as Harral and Richardson and  
13 Gibb and Frankenberg all said, we saw this huge  
14 technological advance coming. We wanted to be there. They  
15 simply made a poor business choice, or maybe the Quattro Pro  
16 group was the real reason the executives needed to make no  
17 choice, it couldn't happen anyway.

18 The middleware theory makes no sense. The product  
19 wasn't ubiquitous. All the evidence -- Alepin said it  
20 clearly, Noll did too -- is that WordPerfect and  
21 PerfectOffice were never middleware in the way that the  
22 government case refers to middleware or Noll referred to it  
23 himself. It has to be software that exposes enough APIs so  
24 that popular productivity applications could be written to  
25 that software instead of the underlying operating system.

1 That's the only theory for how competition gets sparked in  
2 the market, and some other alternative operating system  
3 becomes more popular.

4 On that subject, there has never been a word from  
5 a witness about what other operating system could possibly  
6 have competed with Windows 95.

7 Lastly, Your Honor, I do believe there is  
8 insufficient evidence about causation. Exhibit 230 is  
9 devastating to them. In December '95, according to  
10 Frankenberg, Quattro Pro wasn't ready.

11 THE COURT: Let me ask you a question on that.  
12 Suppose they get nominal damages. Do they get attorneys'  
13 fees?

14 MR. TULCHIN: I hope I'm remembering this right.  
15 I believe that question is for the Court, but I may be  
16 wrong.

17 I don't think they can get to the jury, Your  
18 Honor. I think it's a question you should wrestle with if  
19 and when the Court denies our motion. Your Honor, I know --

20 THE COURT: Again, I don't know the significance  
21 of this, Mr. Johnson does, but there was still a delay  
22 between December and May. Now I'm not sure that in light of  
23 Mr. Jardine's question there is any proof of actual damages  
24 beyond the 60 days. But on the other hand, I think you  
25 proposed an instruction for nominal damages of \$1. I don't



1 know whether -- I just don't know, but I'll ask Mr. Johnson.

2 MR. TULCHIN: That's one from another case, I  
3 think, Your Honor. I had one where the plaintiff got \$1.  
4 It was trebled.

5 THE COURT: For \$3, even I'm not going to --

6 MR. TULCHIN: Let me close on this note, Your  
7 Honor. Again, I hope I haven't tested the Court's patience.  
8 I thought that everything that we said here was needed and  
9 necessary, and I hope it was helpful.

10 The case law here, Aspen Skiing and Four Corners,  
11 and of course Christy Sports, is absolutely devastating to  
12 Novell. And if you combine that with Intergraph against  
13 Intel on the duty to share intellectual property where the  
14 facts are so close to ours, there is absolutely no way, no  
15 matter what credibility you give to Harral, Richardson and  
16 Gibb, no matter whether you think that their testimony can  
17 somehow blow away all the internal Novell documents, that  
18 there is absolutely no way that this motion should be  
19 anything but granted.

20 Thank you, Your Honor. I appreciate your  
21 patience.

22 THE COURT: Thank you.

23 In fairness to Mr. Johnson, let's take a short  
24 recess. I am ready any time that Novell is ready.

25 (Recess)

1 THE COURT: All set, Mr. Johnson?

2 MR. JOHNSON: Thanks very much, Your Honor.

3 May it please the Court, I would like to start  
4 with some general remarks about antitrust law. Antitrust  
5 law is not about picking winners or losers. Antitrust laws  
6 are about the competitive process. To use a sports analogy,  
7 it's about ensuring that the players are able to get on the  
8 field. It's not about who wins or who loses.

9 Now the field we are talking about is the  
10 operating system field, and this field may have had six  
11 gates. Unfortunately, Microsoft controlled five of those  
12 gates. During the relevant time period, they had monopoly  
13 power in that market. That means they had the power  
14 unilaterally to raise prices and unilaterally to exclude  
15 competition.

16 The issue in this case is whether Microsoft is  
17 permitted to close that last gate by taking the  
18 anticompetitive actions against the remaining teams on the  
19 field.

20 Your Honor, you have commented on numerous  
21 occasions, today included, about this so-called marriage  
22 point, that you were -- I don't know if you were surprised  
23 or it had some sort of great meaning to you that Novell and  
24 WordPerfect certainly wanted to do well on Chicago,  
25 certainly wanted to produce an application that not only

1 made WordPerfect great, but made Windows 95 great.

2 THE COURT: I was struck -- I understood that it  
3 had to because of the position that Microsoft held in the  
4 market, and I was struck by the enthusiasm for the quality  
5 of the product.

6 MR. JOHNSON: And in Mr. Tulchin's words, these  
7 were the developers. I wouldn't refer to them as low level.  
8 I think they are pretty smart guys. They knew what they  
9 were doing. I wouldn't consider Mr. Gibb a low level. He  
10 was a manager of the entire PerfectOffice suite development.  
11 He was certainly a lot higher in that org chart, and I  
12 noticed Mr. Tulchin never did go to Mr. Gibb on that org  
13 chart.

14 But the marriage point is really not the issue.  
15 All the teams in the game needed to be on Windows in order  
16 to compete. You have to be on the field in order to run a  
17 play. Just as Netscape and Sun had to on the Windows  
18 platform in order to succeed, so did WordPerfect have to be  
19 on the Windows platform. But make no mistake, the evidence  
20 shows that Novell/WordPerfect's intentions towards Microsoft  
21 were anything but benign.

22 Can we bring up PX-127, please. And turning down  
23 to the paragraph marked middleware, if we could bring that  
24 up.

25 Mr. Silverberg described it well here.

1           Excuse me. It's the next one down. That one is  
2 good too, but it's the next one down. Thank you.

3           Novell, number six, third sentence, their strategy  
4 with AppWare will be an incremental, insidious one. Get  
5 developers using AppWare step by baby step at each turn of  
6 the crank, requiring the ISV to use a bit more of AppWare  
7 framework to access the new service. They are not going  
8 head to head with Windows. In fact, they say they want to  
9 have great Chicago support. Thus, they appear  
10 nonthreatening to their customer while getting on the inside  
11 and in a position to assert control step by step. Couldn't  
12 have said it better.

13           Our goal, WordPerfect's goal, Novell's goal was to  
14 get inside, to begin setting standards that other  
15 application developers could use to write to that did not  
16 depend upon the monopolist operating system. That is  
17 precisely what we want to do.

18           Mr. Maritz said the same thing. Plaintiff's  
19 Exhibit 33, please. Page Bates stamp 648. I believe it's  
20 the last page of the exhibit. Next to the last page, then,  
21 yes. Double-sided exhibit.

22           If you look down under general competition,  
23 there's a reference to Novell further down -- further down  
24 there is a reference to Novell -- yes. Getting more  
25 insidious all the time. They will be making strong

1 cross-platform API push, as well as pushing enterprise  
2 solutions based on NetWare 4.0.

3           So make no mistake about it -- and that's just a  
4 sample -- there are dozens -- literally dozens of such  
5 e-mails in the record of Microsoft recognizing the strategy  
6 of WordPerfect/Novell, of Microsoft recognizing the strategy  
7 of Netscape, of Microsoft recognizing the strategy of Java,  
8 all had to be on the Windows platform in order to compete,  
9 all were seeking to undermine the applications barrier to  
10 entry protecting Windows monopoly.

11           Mr. Frankenberg was asked, why didn't you even  
12 bother writing for other platforms with Microsoft having the  
13 monopoly position in Intel compatible operating systems?  
14 Mr. Frankenberg responded, in order to provide some  
15 competition to Microsoft in the operating systems market.  
16 That is of record in this case. That was the goal, that was  
17 the purpose of WordPerfect/Novell in being a cross-platform  
18 application.

19           Now Mr. Tulchin took a little shot -- I thought it  
20 was misdirection on his part -- in citing some testimony of  
21 Harral that WordPerfect, the engine, didn't actually call  
22 the namespace extensions. That's true, because they didn't  
23 have to. The shared code sitting beneath the engine of the  
24 WordPerfect Word processor of course called the namespace  
25 extensions and did so -- or intended to call the namespace

1 extensions, and did so in every product within the suite.  
2 So it's misdirection to suggest that WordPerfect, the Word  
3 processor, didn't need the namespace extensions.

4           Much of what we've heard this morning was  
5 Mr. Tulchin arguing factual issues. I thought we were going  
6 to spend some time on legal issues, which is really what the  
7 focus of this Court needs to be with respect to the present  
8 motion. I had not planned to get into a lot of that, but  
9 given that Mr. Tulchin spent two and three-quarters hours --  
10 three hours, I don't know what it was -- three hours on,  
11 frankly, almost exclusively factual issues, I need to  
12 address a little bit of this.

13           When Microsoft made the decision, when Mr. Gates  
14 made the decision for the reasons stated in Plaintiff's  
15 Exhibit 1, not for all of the reasons that Microsoft wants  
16 to give you now as excuses, those excuses don't appear  
17 anywhere in Mr. Gates' e-mail, certainly Novell had no  
18 reason to know that Microsoft was not being honest about the  
19 namespace extensions. Certainly Novell's developers didn't  
20 have any reason to know that Mr. Gates had withdrawn them  
21 for the predatory purpose of assuring that WordPerfect and  
22 Notes would fall behind in the integration battles going on  
23 at the time. Certainly they did not know that Mr. Gates  
24 held them back for the purpose of benefiting not Office 95,  
25 like they like to talk about all the time, but if you read

1 PX1, it says Office 96. The purpose was to hold the shell  
2 extensibility for Office 96, which was going to come down  
3 the road. Why? Because the apps developers at Microsoft,  
4 the guys Mr. Cole referred to as being ho-hum about Chicago,  
5 hadn't gotten it together, frankly, to use these namespace  
6 extensions in time for Windows 95. So the goal was we'll  
7 hold that extensibility to Windows 96 coming down the road.

8 Back to the developers at Novell. They didn't  
9 know about any of that. They just knew they had a problem.

10 THE COURT: Excuse me, I think you said Windows  
11 96. Did you mean Office 96?

12 MR. JOHNSON: Office 96. I'm sorry, Your Honor.

13 THE COURT: I'm not quarreling. I just want to  
14 make sure my head's on right.

15 MR. JOHNSON: Again, I think you have to  
16 understand the nature of Novell's perspective. They had a  
17 history of cooperation with Microsoft, at least at a certain  
18 level. They had had very good meetings with Microsoft  
19 executives about these namespace extensions. They had no  
20 reason to know at that time that Microsoft was going to stop  
21 cooperating not only with respect to the namespace  
22 extensions, but with respect to all the other extensibility  
23 within the shell.

24 Mr. Harral and Mr. Richardson testified that even  
25 information with respect to the other shell extensibility

1 was withdrawn from them, that Microsoft's Premier Support --  
2 and you've got to assume, I think there is a fair inference,  
3 that the order came down from above that you are not to talk  
4 to ISVs about shell extensibility anymore and we will not  
5 provide any help in that regard. That is the state of the  
6 record.

7           Novell did not raise a huge red flag immediately,  
8 although I think it's unfair to say that we were okay with  
9 the decision, but we'll get to some of that. Mr. Creighton  
10 said there would be hell to pay. The evidence actually  
11 reflects, and we'll get to it, that Mr. Gates, two days  
12 after a decision, was told by Mr. Silverberg that  
13 WordPerfect was using the extensions.

14           Are we to sit here and believe that Mr. Gates made  
15 the decision to de-document these namespace extensions, that  
16 he didn't already know from Mr. Cole and the other top  
17 executives that they had already documented them, that they  
18 were already being used by ISVs out in the field?

19           In fact, Mr. Silverberg says, two days later to  
20 him, you really need to make these extensions public. This  
21 is not good. These have already been out and documented.  
22 Did Mr. Gates change his mind? No, because Mr. Gates didn't  
23 care. In fact, he wanted to hurt WordPerfect and Notes with  
24 that decision. He wanted to deny them the extensibility  
25 that would have made them a player in the field.



1 I would like to bring up exhibit -- this is  
2 Defendant's Exhibit, I believe, 636. It's the one --  
3 perhaps you can help me, Mr. Tulchin. The one where you  
4 think it was meaningful that they didn't discuss the  
5 namespace extension problem.

6 MR. TULCHIN: I think it is 636, Your Honor.

7 MR. JOHNSON: Could you bring that up. Thank you.

8 Now this memo, Mr. Tulchin tried to draw a great  
9 weight about the fact that there is no mention of the  
10 problem with namespace extensions in this particular memo.  
11 Well, this memo is all about NetWare. The persons listed in  
12 this memo have nothing to do with applications. The fact  
13 that there is no mention of the namespace extensions problem  
14 is hardly surprising. And, again, I think this is an effort  
15 at misdirection.

16 Again, with respect to betas, Mr. Tulchin showed  
17 some testimony of Mr. Frankenberg with respect to the issues  
18 of betas and said that I never came back on  
19 cross-examination about that issue.

20 Can we go to page 1267 of Mr. Frankenberg's  
21 testimony.

22 THE COURT: I think you mean -- again, I'm not  
23 quarreling, you mean redirect.

24 MR. JOHNSON: Redirect. Of course, Your Honor.  
25 It would have been redirect.

1           Down at the bottom there, starting at line 16, if  
2 you could bring that up. Question: There were a number of  
3 questions directed to you with respect to Novell's NetWare  
4 and with respect to beta versions of Novell's NetWare.  
5 During your tenure with Novell, do you ever recall a time  
6 when Novell withdrew significant functionality, withdrew  
7 APIs that had previously been published? Answer: No. I  
8 don't recall us ever doing that. Question: In fact, do you  
9 ever recall that, period, in your history in the industry by  
10 any company other than Microsoft? Answer: I don't recall  
11 that, no. Not that it might not have happened, but I don't  
12 recall.

13           So for Mr. Tulchin to stand up here and to suggest  
14 that there is not countervailing evidence with respect to  
15 industry standards and with respect to the meaning of  
16 publishing and documenting APIs in beta agreements is  
17 disingenuous. We're going to get to some further testimony  
18 to that subject since he spent so much time on it.

19           Mr. Tulchin also talked about, and mentioned this  
20 a moment ago, the fact that Office 95 allegedly didn't use  
21 the extensions. I think that's fair as a statement of the  
22 record. I'm still not sure it's true. We certainly see in  
23 the record substantial evidence that at the time of their  
24 withdrawal, Office was using the extensions and planned to  
25 use the extensions at the time. Whether somehow they went

1 under the covers in using the extensions, we will never  
2 know, not in this proceeding at least.

3 But the fact of the matter is that was Mr. Gates'  
4 plan. Mr. Gates' plan was not to use the extensions with  
5 respect to Office 95, but rather to reserve them for Office  
6 96 down the road.

7 There is, of course, lots of evidence that other  
8 Microsoft applications continued to use the extensions.  
9 They want to tell you, oh, Microsoft Network was a part of  
10 Windows. You may recall the testimony from the Microsoft  
11 executive who said it's in the same box. It's not integral  
12 at all. It was an application.

13 What Mr. Gates was fond of doing is saying we'll  
14 put something in Windows so we can say we don't have to give  
15 that technology to any other ISV at the time. They did the  
16 same thing, Your Honor may recall, with Internet Explorer,  
17 in fact, going so far as to commingle the code of Internet  
18 Explorer with Windows so that consumers, which is supposed  
19 to be the focus of the antitrust laws, consumers could not  
20 remove it if they wanted to use, for instance, Netscape, the  
21 popular browser at the time.

22 Again, we saw evidence that Mr. Gates said, and it  
23 was in an e-mail from another executive, saying that the  
24 only reason Capone was in Chicago was to dominate the mail  
25 market. Another Gates trick, we'll say this e-mail

1 application, which has nothing to do with Windows, we'll say  
2 this e-mail application is part of Windows, and therefore we  
3 will dominate the e-mail market. We'll eliminate all those  
4 other e-mail applications, like CC Mail, and there were many  
5 others at the time, who, frankly, got stabbed in the back by  
6 Mr. Gates' decision to put that stuff directly into Windows  
7 and make it so why would a person buy another e-mail  
8 application once they had bought Windows.

9           There was a great deal of argument by Mr. Tulchin  
10 that there were no complaints with respect to  
11 Mr. Frankenberg complaining to Mr. Gates. That is not the  
12 record in the case. The complaints from Mr. Frankenberg,  
13 which he testified were both oral and in writing, came after  
14 the de-documentation. To him -- and this is the highest  
15 executive in the company. He is at 30,000 feet. He's not a  
16 developer on the ground with namespace extensions. This was  
17 nothing more than another instance of Microsoft having  
18 undocumented APIs in interfaces that Microsoft's own  
19 applications were using. And he complained bitterly to  
20 Mr. Gates about these matters at the time over and over  
21 again, both orally and in writing. And Mr. Gates' response  
22 was we're not going to talk about that.

23           THE COURT: Where is the evidence in writing?

24           MR. JOHNSON: That's according to  
25 Mr. Frankenberg's testimony at 1241, 1242, please.

1 THE COURT: Let me be more precise. It might save  
2 time. Where is the evidence in writing other than  
3 Mr. Frankenberg's testimony?

4 MR. JOHNSON: Only Mr. Frankenberg's testimony.  
5 It was interesting, Your Honor, neither side chose to put  
6 those letters into evidence. They do exist, we do have  
7 them, but neither side chose to use those letters.

8 THE COURT: No. No. We're on a Rule 50 motion.  
9 Where is the evidence?

10 MR. JOHNSON: The evidence comes from  
11 Mr. Frankenberg. The evidence of Mr. Frankenberg is --

12 THE COURT: As far as I'm concerned, there is no  
13 evidence other than his testimony contemporaneous with that.  
14 I mean he said there were documents, and I was struck by the  
15 fact that I didn't see one.

16 MR. JOHNSON: I understand, Your Honor, but the  
17 evidence is -- and we certainly, in this proceeding --

18 THE COURT: I'm not sure in a Rule 50 motion where  
19 it would be a Novell document, I think Mr. -- I think  
20 Mr. Tulchin takes too liberal a view of what I should be  
21 doing on a Rule 50, but I'm surprised that Mr. Frankenberg  
22 says there is a writing, and you then show to him documents  
23 saying is this the writing to which you refer. He doesn't  
24 have it.

25 MR. JOHNSON: Your Honor, in fairness, and this is

1 a Rule 50 motion, as you reflect, and the law is very  
2 consistent that the Court is not to be making credibility  
3 determinations with respect to the evidence. And the  
4 evidence is uncontradicted -- I mean it's testimony, I  
5 acknowledge that, but it's uncontradicted testimony that  
6 Mr. Frankenberg complained to Mr. Gates repeatedly about  
7 this problem.

8           And here we have on pages 1241 and 1242, and I  
9 say, question, let's go back to the first page. Going down  
10 to the next -- we're on the first page of this e-mail.  
11 Going down to the next to the last paragraph, it states,  
12 quote, as we've covered in our last -- at our meeting last  
13 Friday, we were faced with the challenge of going to our  
14 ISVs and telling them about Bill G's recent decision to  
15 return the namespace extensions APIs to their original  
16 system level status. Notice the wording. Let's try not to  
17 use the word undocumented or private APIs. That has a  
18 negative connotation to most ISVs. Apparently,  
19 Mr. Frankenberg, these Microsoft employees were told not to  
20 use the word undocumented. But isn't it a fact,  
21 Mr. Frankenberg, that that's how you understood the decision  
22 should be characterized as undocumented APIs? Answer: Yes.  
23 And that is precisely what you complained about repeatedly  
24 to Mr. Gates? Answer: Yes, it is.

25           Now that's testimony, but it's unrebutted on this

1 record. Certainly I don't think the Court would be  
2 interested in making a credibility determination with  
3 respect to that.

4 THE COURT: I'm interested in the integrity of the  
5 proceedings if there's a document I should have been shown.

6 MR. JOHNSON: Well, your Honor, there were a lot  
7 of documents that we tried to get in --

8 THE COURT: I'm talking about this particular --  
9 where were the letters, where are the e-mails, where is  
10 anything. I mean -- I'm sorry. I mean I realize I'm not  
11 going to see them now, but if you're telling me -- you just  
12 told me that there were letters and documents and you didn't  
13 put them in. What? Excuse me.

14 MR. JOHNSON: Your Honor, if I may explain, I will  
15 tell you why we did not put them in. They were lawyers'  
16 letters. They were not really written by Mr. Frankenberg or  
17 Mr. Gates. They included large discussions of antitrust  
18 issues, settlement positions and the like.

19 THE COURT: That's okay.

20 MR. JOHNSON: That's the reason why they are not  
21 before you, at least from our perspective. That might be  
22 different from Microsoft's perspective.

23 THE COURT: That's a fair answer.

24 MR. JOHNSON: That's why we didn't put them in.  
25 Frankly, we thought you would object to us putting them in.

1 THE COURT: I might have.

2 MR. JOHNSON: Given it's --

3 THE COURT: I think they might have been.

4 MR. JOHNSON: Certainly it was not an attempt to  
5 hide anything.

6 THE COURT: I understand.

7 MR. JOHNSON: If you would like to see them --

8 THE COURT: No. No. You've answered my question.

9 MR. JOHNSON: -- we would be happy to show them to  
10 you.

11 Your Honor, you had said that your understanding  
12 was somehow different from the record on summary judgment  
13 with respect to whether WordPerfect could run --

14 THE COURT: Is your position that whenever a Court  
15 denies a summary judgment motion, that there cannot then be  
16 a Rule 50 motion?

17 MR. JOHNSON: No. There's three exceptions to  
18 essentially the law of the case doctrine. One would be  
19 manifest injustice. I certainly don't think we have that  
20 here. One would be change in the law. I certainly don't  
21 think we have that here. And the other requires  
22 incontrovertible evidence that cannot be rebutted and came  
23 from a disinterested witness. And that standard, we think,  
24 Your Honor, is not met here with respect to the issues that  
25 we're dealing with. So, of course not. There are



1 reasons --

2 THE COURT: I understand this case a lot better  
3 now than I did.

4 MR. JOHNSON: Of course you do, Your Honor.

5 THE COURT: That's a lot more evidence in the case  
6 now.

7 MR. JOHNSON: But I just want the Court to -- I  
8 don't want the Court thinking that the record below on  
9 summary judgment was anything other than how we presented it  
10 here. And I refer -- I would refer Your Honor to actually  
11 our memorandum in opposition to Microsoft's motion for  
12 summary judgment, and specifically with respect to -- on  
13 page 2 we talked about the withholding of the namespace  
14 extension functionality and what Mr. Gates had done. And we  
15 stated that, quote, the strategic manipulation of technology  
16 fatally delayed Novell's products to decrease their  
17 functionality and made them commercially less appealing.  
18 That is what we said with respect to the withdrawal of the  
19 namespace extensions.

20 We never suggested -- and we could go back and get  
21 chapter and verse on this from Alepin's expert reports which  
22 were before you at the time. We never suggested that we  
23 were never able to run WordPerfect on Windows 95, just that  
24 these acts destroyed our ability to make the critical time  
25 to market, it delayed us having reduced functionality at the

1 time. I don't think you will find anything in the record  
2 before you on summary judgment that stated or even implied  
3 that this meant that we couldn't run on Windows 95.

4 THE COURT: How about the complaint that was  
5 quoted by Mr. Tulchin?

6 MR. JOHNSON: Your Honor, I don't think that  
7 complaint, if you read the entire thing, suggests that we  
8 were never able to get a product. I mean the facts, of  
9 course, are that a product did come out with Corel in 1996.  
10 So to suggest that we were somehow completely shut out here  
11 is not what we were complaining about. What we were  
12 complaining about, the damages were from the delay.

13 In fact, what we stated, again in our memorandum  
14 in opposition to the motion for summary judgment, at page  
15 13, quote, Novell's developers had to recreate from scratch  
16 the lost functionality of the withdrawn extensions. The  
17 work became Critical Path on the schedule for delivering  
18 PerfectOffice for Windows 95. Novell expended 11.5  
19 developer years on that work, which caused the fatal delay  
20 in launching PerfectOffice for Windows 95 and left  
21 PerfectOffice lacking 40 percent of its plan functionality.

22 So again, Your Honor, I just wanted to make  
23 clear -- and you may have gotten an impression at the time  
24 that somehow we were stating that WordPerfect was never able  
25 to run on Windows 95 because of this. But that was not

1 certainly what we presented in our opposition to Microsoft's  
2 motion.

3 THE COURT: I'm sure you're planning to reach it,  
4 but it is on my mind, talking about the fatal delay. What  
5 about Exhibit 230? Doesn't that show that as of December  
6 '95, Quattro Pro was, in fact, at that time behind the eight  
7 ball?

8 MR. JOHNSON: No. I don't think it does. I think  
9 it's a contested issue of fact.

10 THE COURT: Let's take a look at the memo and you  
11 tell me why.

12 MR. JOHNSON: Well let me turn to --

13 THE COURT: I mean, frankly, I have not focused on  
14 that until Mr. Tulchin's argument at all. And to me it was  
15 a big issue. As I said before, the reason I thought it was  
16 a jury determination, everything I had seen before was  
17 before, which I thought was contradicted by live testimony  
18 and therefore became a jury issue.

19 MR. JOHNSON: If we could bring up first so we see  
20 this is a disputed issue of fact, do we have the Gibb's  
21 testimony on a slide with respect to Quattro Pro? I believe  
22 we did.

23 THE COURT: Let's go on. We can reach that later  
24 on. I'm sorry, I didn't mean to get you off.

25 MR. JOHNSON: We'll come back to, Your Honor. I

1 know I've covered it somewhere.

2 THE COURT: That's fine.

3 MR. JOHNSON: I just don't have at my fingertips.

4 THE COURT: That's perfectly okay. We'll just  
5 wait until you get there.

6 MR. JOHNSON: I just want to touch very briefly on  
7 the cases that Mr. Tulchin talked about being on all fours  
8 and the like, and how we didn't even comment on these cases.  
9 Well, we only got their brief yesterday. So we haven't been  
10 able to really file an opposition. We didn't have the time  
11 to rewrite our brief in four hours last night when we  
12 delivered our brief to you. So that's the only reason we  
13 didn't cite to cases that, frankly, aren't even close to  
14 being on all fours.

15 The Intel case, which they cited at some length in  
16 their papers, Intel was being sued by the plaintiff for  
17 patent infringement. Intel appropriately took exception to  
18 that and decided to stop cooperating with that entity at the  
19 time it was suing them for patent infringement. The case  
20 actually turned on the fact that there was no harm to  
21 competition in a definable market. In other words, they  
22 failed both the test of relevant market and they failed the  
23 test of harm to competition.

24 It was, frankly, Your Honor, just a tort case.  
25 The antitrust laws protect competition, not competitors.

1 And the discussion in Intel with respect to Aspen Ski and  
2 the like is, frankly, only dicta and not the basis of the  
3 holding in that case.

4           So too the Four Corners Nephrology Associates PC  
5 case. This was about a single doctor in a market who wanted  
6 to get cooperation to run a practice that a hospital had  
7 decided they needed a doctor there in that area to serve the  
8 Indian tribes in that area, and they brought in another  
9 doctor and set him up and told the plaintiff doctor, who  
10 lived far away, that they were going to give all their  
11 business to this new doctor. Again, in that case, there was  
12 no showing of harm to competition in any relevant market,  
13 and there was no market definition that passed the relevant  
14 market test.

15           So there is discussion in Four Corners with  
16 respect to the issues of Aspen Ski, but I think if you'll  
17 read it, Your Honor, it doesn't add anything to the  
18 discussion that we haven't already seen in all the other  
19 cases that have discussed those matters.

20           THE COURT: I understand your position on the  
21 deception issue, but do you have any case where the refusal  
22 to share one's intellectual property with a competitor  
23 constitutes an antitrust violation?

24           MR. JOHNSON: Your Honor, I remember this issue  
25 came up before. I told you to look at Novell vs. Microsoft,

1 and we will address that issue. I'm going to get to it very  
2 closely, Your Honor.

3 THE COURT: Fine.

4 MR. JOHNSON: You know, we agree, frankly, with  
5 your first level of analysis, that Microsoft doesn't have a  
6 duty to provide us with anything. The question here is not  
7 whether they have that duty or not. We're not talking about  
8 Microsoft's rights. We're talking about Microsoft's  
9 conduct. The question here is not whether they have the  
10 duty, but whether they had the right to deceive us. So  
11 that, frankly, is the distinguishing feature which Your  
12 Honor said took us out of the Aspen Ski paradigm, and we  
13 will get to that.

14 I would like to bring up Defendant's Exhibit 172  
15 briefly. Again, Mr. Tulchin looked at this, and I think he  
16 liked the center paragraph. It's the one where we said we  
17 were getting along great with Microsoft. Is that the one?  
18 Can you bring that up?

19 The good news is that the cooperation between  
20 Microsoft and Novell has been very good. This, of course,  
21 was an e-mail to a customer by a bunch of marketing guys,  
22 not by the developers, not by anybody relevant to this case,  
23 who were telling their customers don't worry, you are going  
24 to be all right, the 16-bit versions of PerfectOffice will  
25 run just fine under Windows 95. They are trying to assure a

1 customer that everything is okay between Microsoft and  
2 Novell. Please don't worry.

3           So to put this up and to suggest that this adds  
4 anything to the record with respect to what Microsoft was  
5 doing with the namespace extensions is, frankly, again, in  
6 my view, misdirection.

7           Mr. Tulchin had quite a bit of discussion about  
8 the state of the record and he said that the state of the  
9 record was that Mr. Gates didn't know anything about the  
10 fact that WordPerfect was using the extensions. Well, I  
11 find that interesting. If he didn't know anything about the  
12 fact that WordPerfect was using the extensions, why did he  
13 call us out by name in the memo making the decision and tell  
14 all his executives that the reason that he was deciding to  
15 pull these namespace extensions was so that Microsoft could  
16 achieve a high level of integration that the likes of  
17 WordPerfect and Novell will not be able to achieve and which  
18 will advantage Office, which was -- as I said, states in his  
19 memo, Office 96.

20           So calling us by name suggests that he knew that  
21 we were using it. And, in fact, the record evidence is that  
22 Mr. Henson and Mr. Struss had actually conducted a survey  
23 prior to his decision in which it was revealed that  
24 WordPerfect, and a host of other companies, were using the  
25 extensions at the time, and that's the same exhibit in which

1 Mr. Tom Creighton of Novell said there's going to be hell to  
2 pay if you pull these extensions.

3           Then further -- so to state that the state of the  
4 record is that Mr. Gates didn't know anything about this, I  
5 think I have got plenty of evidence to argue the inference  
6 that Mr. Gates knew all about this.

7           In fact, if we turn to Exhibit 220, Plaintiff's  
8 Exhibit 220, and if we can just highlight that whole top --  
9 yeah, just bring that out.

10           This is two days after Mr. Gates' decision,  
11 October 5th, 1994. Mr. Silverberg, the head of Chicago  
12 development, is begging with Mr. Gates and Mr. Maritz, we  
13 should do one -- that was Mr. Siegelman's first option with  
14 respect to MSN -- make the extensions public. I'm afraid  
15 that when we tell our ISVs, there will be a firestorm of  
16 protest. I have heard today that the outside-in people,  
17 SCC, from whom we've licensed our viewers, are building  
18 their business based on the shell extensions. In addition,  
19 we know that Stac is doing the same. Oh, great, another war  
20 with Stac. Other ISVs using the extensions are WordPerfect,  
21 Lotus, Symantec and Oracle.

22           Now you will note, Your Honor, Mr. Gates is cc'd  
23 on this exhibit. Mr. Gates knew full well that WordPerfect  
24 was using these extensions, yet he did nothing to reverse  
25 his decision because his purpose was anticompetitive. His



1 purpose was to deny the likes of WordPerfect and Lotus,  
2 Symantec and Oracle these extensions, and he specifically  
3 called out WordPerfect and Notes in his decision e-mail, in  
4 order to disadvantage those entities and to advantage Office  
5 96.

6           Furthermore, this e-mail also reveals to  
7 Mr. Gates, if he didn't already know it, and I, frankly,  
8 will have no problem arguing that Mr. Gates knew quite well  
9 that these extensions were already documented, but if you  
10 see in the third paragraph, we have not yet figured out how  
11 to really take them out, as the shell needs them itself. We  
12 can't just not document because the doc is already out and  
13 they will just get reverse engineered.

14           So if Mr. Gates didn't know at the date of this  
15 memo, he certainly knew two days later that the  
16 documentation with respect to these extensions was already  
17 out.

18           I would like to turn briefly to Defendant's  
19 Exhibit 2, please. I would like to go to the -- I think  
20 it's on the second page where they actually discuss  
21 WordPerfect. And this e-mail, I don't have the date but I  
22 think it's in September of 1993 -- is it? If we can get  
23 that in a moment. October -- I'm sorry. October 25th,  
24 1994. Okay. So this is just after the decision.

25           So if we turn down to WordPerfect, I thought this

1 was, in fact, rather revealing. The evidence is that  
2 Mr. Giles had been working with the namespace extensions  
3 and, in fact, had gone 80 percent on that process. And of  
4 course they had been working on it for some time, going back  
5 to at least the June beta, and the evidence is, from  
6 Mr. Harral and Mr. Richardson, even before, because after  
7 they were told that the namespace extensions would be  
8 documented, they started to plan their products around those  
9 extensions.

10 But what's interesting here is that in October of  
11 1994, they said we currently expect to ship in  
12 September 1995. Well, the impact of Mr. Gates' decision  
13 obviously wasn't known to these developers at that time.  
14 And, in fact, had we been able to continue to use the  
15 namespace extensions, and we will get to that testimony in a  
16 bit, Your Honor, the evidence is that WordPerfect/Novell was  
17 currently in a position to ship in September of 1995. Gee,  
18 that would have been nice. That would have been exactly  
19 within the critical time to market. That would have been  
20 exactly where we needed to be at the time.

21 THE COURT: Apparently they didn't think they had  
22 to be because it's 120 days after the anticipated date of  
23 release of Windows.

24 MR. JOHNSON: No, Your Honor, you have to  
25 understand this. The anticipated date of the release of

1 Windows had moved many, many times. And at that time, at  
2 the time of this memo, Microsoft was saying it was going to  
3 be much earlier. But, in fact, it wasn't.

4 The point I'm making here -- the point I'm making  
5 here --

6 THE COURT: I understand your point, but the memo  
7 also seems to suggest to WordPerfect people it was within  
8 120 days.

9 MR. JOHNSON: No, I don't think that's true, Your  
10 Honor. I think if Microsoft -- frankly, their credibility  
11 with respect to their ship dates is not very high. Windows  
12 95, I don't remember exactly how many different ship dates  
13 they had, but the whole project slipped for years. So that  
14 was certainly nothing surprising to developers at  
15 Novell/WordPerfect.

16 Let's talk a little bit about the options  
17 testimony that they have. And Your Honor will recall their  
18 first option which they tried to pursue was to continue to  
19 use the undocumented namespace extensions, and they tried  
20 that for some period of time. I think Mr. Harral testified  
21 that for a couple of months, at least into December, they  
22 tried that option. And, of course, what they found is that  
23 Microsoft cut them off from any information about the shell  
24 so that they could not use the extensions or duplicate what  
25 Microsoft was doing within the shell because Microsoft

1 refused to cooperate with them on that.

2 THE COURT: I realize it's factual, but as a  
3 matter of common sense, if you are a developer and you're  
4 not getting the answers from Premier Support, and report it  
5 up the line, which ultimately led to a conversation with  
6 Brad Struss. I mean obviously Premier Support -- obviously  
7 they are not going to do something. It was a well run  
8 company. If Microsoft -- if Bill Gates just said to them  
9 don't do it. If it really is a suicide for Novell, for the  
10 life of me, and I don't understand why Harral wouldn't  
11 report that up the line and ultimately result in a  
12 conversation between somebody with Novell and Brad Struss.  
13 What would happen, I have no idea. But I don't understand  
14 why it didn't happen.

15 MR. JOHNSON: Well, Your Honor, I think there were  
16 two things that maybe we ought to apply a little common  
17 sense to. One is these developers didn't know at the time  
18 that this was going to be a real problem. They are, after  
19 all, developers. When they get a problem, they tackle it.  
20 That's what they do. And, second, they certainly didn't  
21 have any reason to believe that Microsoft wasn't being  
22 honest about the reasons for the de-documentation. Again,  
23 they didn't know what was going on behind the curtain.

24 The evidence is, of course, that this was a real  
25 problem within Novell, and within WordPerfect. And, you

1 know, I say it with some trepidation, Your Honor, because  
2 the documents are not in the record. But as Your Honor  
3 knows, Mr. Brereton was fully aware of this problem. In  
4 fact, his name appears on the e-mails with respect to the  
5 complaints about this precise issue to the Department of  
6 Justice when the Department of Justice came to us in 1995 to  
7 ask what is the bully in the classroom doing to you with  
8 respect to applications.

9           Now Your Honor didn't allow that evidence in, but  
10 I think it is the height of hypocrisy for Mr. Tulchin to at  
11 least argue to you -- maybe he can argue it to the jury  
12 because they don't know, they are not going to know -- that  
13 Mr. Brereton didn't know anything about this, and apparently  
14 wasn't involved in any of the decisions involving this,  
15 because the record, which Your Honor would not let us put  
16 in, was Mr. Brereton, the highest person in this stack, was  
17 fully aware of this problem and was, in fact, complaining to  
18 the Department of Justice at the time.

19           Now turning to the second option, which was the  
20 common file open dialog, this was not about the inability to  
21 provide new whizbang stuff. This was not about making  
22 improvements to the existing products. Rather this was  
23 about if we use the common file dialog, we take another  
24 giant step backward. We can't even achieve the  
25 functionality that we've had in WordPerfect back on DOS.

1 And Professor Noll properly referred to it as just another  
2 method of suicide.

3 THE COURT: Would you just explain to me, because  
4 I don't -- it's important, what that functionality was.

5 MR. JOHNSON: The functionality of what, Your  
6 Honor?

7 THE COURT: What was -- I just don't -- I've heard  
8 the evidence and I haven't absorbed it. What was the step  
9 back? What was it that enterprise customers could do  
10 that --

11 MR. JOHNSON: The common file open dialog had very  
12 limited extensibility. There was very little you could do  
13 with it if you used the common file open dialog. Even  
14 Microsoft's applications don't use the common file open  
15 dialog of Windows. They too have custom file open dialogs.  
16 This is a very simple file open dialog for simple  
17 applications that is not very extensible.

18 So all of this stuff that WordPerfect had  
19 historically put into their common file open -- into their  
20 custom open file dialog could not be achieved with  
21 Microsoft's common file open dialog. It would have been,  
22 frankly, Your Honor, a piece of junk, and they would have  
23 gone down the tubes just as fast as they did with the delay.

24 THE COURT: Functionally, what is it that I may  
25 use or what is it -- I still don't understand what it is

1 that -- what it is that I, as a consumer, whether it's a  
2 business consumer or individual, I don't understand what it  
3 was.

4 MR. JOHNSON: It had to do with viewers. It had  
5 to do with the QuickFinder technologies. It had to do with  
6 all the things that WordPerfect had traditionally done in  
7 file management that were not available, could not be built  
8 into the common file open dialog. In other words, the  
9 application has one common -- has one file open dialog.  
10 That's what you go to to do everything you want to do within  
11 the application.

12 If you choose this lowest common denominator  
13 dialog provided by Microsoft, you lose all of the  
14 functionality that you have had for years and years in  
15 WordPerfect. It was just unacceptable. I think we actually  
16 have some testimony on this.

17 If we could turn to Mr. Harral's testimony at page  
18 513. And, boy, excuse me, I have a tough time seeing that.  
19 Let me take a look at the whole page, please.

20 This is Mr. Harral's testimony. If you go from  
21 line 13 down, and he talks about -- you asked about one of  
22 the technical issues with using the common file open dialog,  
23 and he says that because of the de-documentation of the  
24 namespace extensions, it actually, at the bottom, directly  
25 affected our ability to tie into the common dialog and

1 leverage it with what we were trying to do in the shared  
2 code. So the impact of de-documenting the APIs also  
3 impacted their ability to even use the common dialog  
4 provided by Microsoft.

5           There is further testimony, and I believe it's  
6 from Mr. Richardson, that essentially had we gone that  
7 route, it would have been a giant step backwards, and we  
8 would not have provided a commercially successful product.  
9 Frankly, it would have failed immediately. The first review  
10 would say this doesn't even give you the functionality that  
11 WordPerfect historically provided. What is WordPerfect  
12 doing? That would have been just as much suicide as what  
13 occurred.

14           THE COURT: Just so I understand your legal  
15 position, if there had not been deception, which I  
16 understand you say that there has been, was Microsoft under  
17 any obligation to provide you with access so that you could  
18 write your own custom open file dialog?

19           MR. JOHNSON: Again, Your Honor, I don't argue  
20 with the proposition that if in the first instance back in  
21 November of 1993 when Mr. Cole came to WordPerfect to visit  
22 them about making a great Chicago app, and he told the  
23 Novell people sitting around that table, sorry, guys, we're  
24 saving that for us, you don't get that shell  
25 extensibility --



1 THE COURT: So I realize the deception.

2 MR. JOHNSON: -- not actionable. I completely  
3 agree. Because as venal as I think that would be, I don't  
4 think under the antitrust laws, certainly as we have them  
5 today, that that would have been actionable. In fact, Your  
6 Honor, if that's what had happened, we would have been able  
7 to build a product to be timely on Windows 95. We would  
8 have had the time to do our own custom file dialog, to  
9 create the functionality that we had to have, and perhaps  
10 whizbang more. But because of the decision to give it to  
11 us, because of the decision to evangelize it to us, we spent  
12 a year planning our product around that and building code to  
13 that, so when October of 1994 came around, and Mr. Gates  
14 says, if you look at his e-mail, Plaintiff's Exhibit 1, it  
15 is very late in the date, he said, to be making these  
16 changes. Couldn't have said it better myself. It was  
17 extremely late in the day, and it killed us.

18 It's up on the board here, if you would like to  
19 see it, Your Honor. It's very late in the day to be making  
20 changes to Chicago and Capone.

21 THE COURT: But you agree that but for the  
22 deception which occurred from the evangelization and the  
23 decision to withdraw, that Microsoft was not under -- was  
24 not under an obligation to provide Novell with access to the  
25 APIs so that Novell didn't have to take a step backwards, so

1 that it could use -- maintain the same level of  
2 functionality with its clients -- Novell's clients that it  
3 had before.

4 MR. JOHNSON: I don't think a technology company  
5 has any duty to share. I think they have a duty not to  
6 deceive. I think they have the duty to be honest. I also  
7 think, Your Honor -- by the way, I think that takes us out  
8 of the purview of Aspen Ski, but there is a level of  
9 analysis where I think if you get to Aspen Ski, I think we  
10 come within its term. I will get to that.

11 THE COURT: We'll get to that, but I think what  
12 you just told me is that you agree that by withdrawing the  
13 APIs -- I think in my summary judgment opinion I referred to  
14 the deception and I also referred to destroying an existing  
15 profitable relationship. I think you have just told me that  
16 to the extent that profitable relationship arises from the  
17 fact that Novell had established with its own clients so  
18 that vis-a-vis Novell and its clients, the status quo ante  
19 is being able to use the custom open file dialog. By  
20 withdrawing the APIs, you know, that -- the deception is the  
21 deception. But in terms of Microsoft was under no  
22 obligation to extend the APIs in order to enable Novell to  
23 maintain the same level of functionality that it had  
24 developed with its own clients.

25 MR. JOHNSON: You mean to give us something else,

1 you mean after they withdrew? I mean that's obviously a  
2 hypothetical.

3 THE COURT: As I understand it, the reason it was  
4 a step back was simply access to the common open file  
5 dialog, Novell could not provide its customers, its clients  
6 with what they had come to expect. Either on the  
7 predecessor Windows application or on other operating  
8 systems, it was able to access more.

9 MR. JOHNSON: Not only couldn't use the common  
10 file open dialog because of its historical -- what it did.  
11 Also as Mr. Harral just testified right there, in fact, the  
12 de-documentation of the namespace extensions impacted their  
13 ability to even try to use the common open file dialog.

14 So we have two levels here of problems with the  
15 common file open dialog that made it an unacceptable choice.  
16 In fact, of course, you know, you heard the testimony about  
17 allegedly somebody getting fired at Corel because they  
18 didn't use the common open file dialog. Frankly, that was  
19 not testimony. That was the statements of counsel to the  
20 witness who said I don't know anything about that. But in  
21 any event, whoever made the decision apparently made the  
22 right one because Corel, when it came out, certainly did not  
23 use the common file open dialog.

24 We do have that Richardson testimony. Might as  
25 well put it up there. Slide 39.

1           Here's how Mr. Richardson characterized it, lack  
2 of those namespaces, it seemed to us to be an insurmountable  
3 problem. We wouldn't have a Windows 95 product. If we  
4 didn't have access to those, it would be functional enough  
5 to be considered -- it wouldn't be functional enough to be  
6 considered a reasonable product in Windows 95. That's how  
7 Mr. Richardson expressed it in his testimony.

8           The ultimate choice made was again to try to  
9 recreate the functionality that had been taken away from us  
10 by Microsoft through deception we say, and we'll get to  
11 that. Obviously that process turned out to be a lot more  
12 difficult than anybody would have known at the time, and  
13 fatally delayed the release of our product.

14           All this stuff, Your Honor, and I apologize for  
15 getting into it, but Mr. Tulchin did, I think this is all  
16 factual. The discussion of Novell's options, whether they  
17 could have done something or couldn't have done something, I  
18 guess goes to issues of mitigation, you know, how Novell  
19 responded to Microsoft's anticompetitive conduct. It  
20 doesn't absolve Microsoft for the conduct. But in  
21 hindsight, maybe the jury will think that this goes to some  
22 issue of damages. But it's certainly a factual issue with  
23 respect to whether Novell's response, and I call this the  
24 blame the victim category of evidence, as to whether  
25 Novell's response was appropriate.

1 I am not going to belabor the point. I think Your  
2 Honor understands that Mr. Gibb's testimony with respect to  
3 Quattro Pro was that was not the problem. And, in fact,  
4 that Defendant's Exhibit 226, which you looked at -- why  
5 don't we bring it up, very briefly. Can we go to the  
6 column -- they only showed you the top two, but it's got the  
7 list codes on it. Is this the one? Yeah. Here we go.  
8 Let's show the top four rather than just the -- well, go  
9 down a little further, and let's bring that up.

10 You know, Quattro Pro delivering late, was that a  
11 risk? Yes, it was the number one risk. But if you see  
12 here, number five, PerfectFit delivers late. That was also  
13 a number one risk. And so these were both issues at the  
14 time, and PerfectFit was certainly there. These aren't  
15 numbered in any order. Each one that had a risk of one had  
16 a high level of risk. So it's not just Quattro Pro here.

17 And, of course, Mr. Gibb testified at some length  
18 that Quattro Pro was not the problem. In fact, you may  
19 remember, Your Honor, that Mr. Gibb testified we had a  
20 backup plan on that. If Quattro Pro is really a problem, we  
21 were going to issue a coupon with the product that you would  
22 be able to get the update of Quattro Pro when and if it came  
23 out. Believe me, particularly these localization issues,  
24 having Quattro Pro in different languages, you think that  
25 was going to hold up our product for Windows 95? Hardly,

1 Your Honor. Those kind of issues are just not serious  
2 enough. In fact, it is quite common in the industry for the  
3 product to come out in different languages further down the  
4 road. Mr. Gibb testified that Quattro Pro was not the  
5 issue.

6 THE COURT: I have not understood that was the  
7 issue. I thought they were trying to get the existing  
8 Quattro Pro to localize it in different languages, not the  
9 new product, and the problem was that's where they were  
10 devoting their resources.

11 MR. JOHNSON: They may have been devoting some  
12 resources to that, but remember, Your Honor, Quattro Pro,  
13 the engine, which has nothing to do with applications,  
14 Quattro Pro, the engine, already existed. It was an  
15 existing product that Novell had.

16 So the problem was in shared code. If we can't  
17 put shared code on the bottom of WordPerfect and the bottom  
18 of Quattro Pro, this stuff is not going to run on Windows  
19 95. The problem was not that Quattro Pro was Critical Path.  
20 The problem was shared code, and it had been from the moment  
21 that Microsoft took these extensions away from them, and  
22 that became apparent. It did not become apparent in Italy.  
23 It did not become apparent until early 1995 when you start  
24 to see in March and April the slips in delay -- the slips in  
25 dates that were occurring during that time period right up

1 to the July -- I forget the date -- panic mode memo where  
2 they throw up their hands in the air and say, we're not  
3 going to make the namespace browser code, we're not going to  
4 be able to do it by August 22. This is a real problem, but  
5 we cannot not have this functionality. That's what that  
6 exhibit says.

7 Let's talk a little generally about middleware.  
8 We'll get into the evidence with respect to middleware.

9 THE COURT: Now would seem to be an appropriate  
10 time to discuss Exhibit 230.

11 MR. JOHNSON: Defendant's or plaintiff's, Your  
12 Honor?

13 THE COURT: I don't know. I assume it's  
14 defendant's.

15 MR. JOHNSON: Can we get the date on this, first?

16 THE COURT: December of '95.

17 MR. JOHNSON: Yeah, December of '95. This is, of  
18 course, long after Microsoft has already shipped windows 95.  
19 And this article -- I mean this e-mail states that a bunch  
20 of people from Quattro Pro had apparently submitted their  
21 resignations. But, again, Mr. Gibb testified that their  
22 work was done, that this --

23 THE COURT: Mr. Tulchin, as I understood, you said  
24 this memo reflected that Quattro Pro itself was not ready?

25 MR. TULCHIN: That's what Mr. Frankenberg said,

1 the CEO. I quoted his testimony. I will find the pages, if  
2 you would like.

3 THE COURT: We'll argue it.

4 MR. JOHNSON: Your Honor, frankly, was  
5 Mr. Frankenberg the right man to ask whether Quattro Pro was  
6 the problem? You remember when we had this discussion with  
7 Mr. Frankenberg I actually objected, and I said Mr. Gibb,  
8 who was the person to know, he was the person in charge of  
9 the PerfectOffice suite, testified about this point and  
10 stated repeatedly that Quattro Pro was not the problem.

11 Again, Your Honor, I am not here to win this with  
12 you.

13 THE COURT: This is a huge issue because if, in  
14 fact, Quattro Pro was not ready by December 30th, you don't  
15 have any damages claims. It's as simple as that. Because  
16 that's more than 60 days after the release of Windows. It  
17 is a huge -- and it wasn't one I focused on, but if, in  
18 fact -- clearly the doctor yesterday testified -- I think it  
19 was yesterday, maybe the day before, that his damage  
20 calculation was based upon the product coming out -- the  
21 application product coming out. There was a lot of blowing  
22 whistles, but I think Mr. Tulchin is right, apparently it  
23 was 60 days after the release of Windows. That, and we'll  
24 get another 30 days. If, in fact, by December there is no  
25 product ready to be shipped, you don't have -- you have no



1 expert testimony as to what the damages would be.

2 MR. JOHNSON: Your Honor, I was told by  
3 Mr. Taskier, Your Honor, that's not really what he said.  
4 But I don't think, again, that this is an issue.

5 THE COURT: I thought he did. Then he tried to  
6 backtrack and was going to have some mathematical  
7 calculation to do it by hindsight in light of the fact that  
8 everybody has told me that there is a marketing decision  
9 involved. I am not going to allow such a simplistic way,  
10 even from an expert economist.

11 MR. JOHNSON: Your Honor, could we take a short  
12 break?

13 THE COURT: Sure. I was going to break at 12:30  
14 for lunch, and we'll come back at one o'clock.

15 MR. JOHNSON: One o'clock is fine. Thank you,  
16 Your Honor.

17 (Recess)

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