

1 THE COURT: Yes, Mr. Johnson, go ahead.

2 MR. JOHNSON: You would like me to proceed --

3 THE COURT: Yes.

4 MR. JOHNSON: -- on my argument on the motion?

5 THE COURT: Yes. Just pick up where you left off.

6 MR. JOHNSON: All right. Thank you very much, Your
7 Honor.

8 Can we have the first slide up, please?

9 Your Honor, your comments on Friday raised three
10 issues that we would like to try to address directly with you
11 with respect to the evidence of record. One, the meaning of
12 Novell's testimony that Windows 95 was a superior product;
13 second, the evidence that there was an operating system that
14 could compete with Windows 95; and third, the impression that
15 Novell wanted to marry PerfectOffice to Windows 95. And we'll
16 start with the first one.

17 Your Honor, you expressed some uncertainty about
18 the testimony of Novell developers with respect to the
19 technological superiority of Windows 95.

20 THE COURT: I doubt that I expressed an
21 uncertainty, but I certainly am prepared to hear you on the
22 first issue.

23 MR. JOHNSON: Thank you, Your Honor. And we want
24 to today, this afternoon, put that testimony in context and
25 show it to you. The questions they were answering were

1 related to comparing Windows 3.1 to Windows 95, not comparing
2 Windows 95 to all other operating systems. Novell's
3 developers testified that Windows 95 was a technological
4 improvement over Windows 3.1. However, they did not say that
5 Windows 95 was so technologically superior that no other
6 operating system or platform could compete with it.

7 I'd like to first look at the following exchange
8 between Mr. Schmidlein and Mr. Gibb beginning on Page 787
9 Lines 24 through Page 789, Line 1.

10 Question. What was different about Windows 95
11 from past Windows operating system?

12 Answer. Well, from a technology
13 standpoint, Windows 95 was a huge step forward
14 because before that, we had, like I said, Windows
15 3.1, I don't know how many of you remember, but it
16 used to come up to the DOS prompt and you type,
17 start up Windows. It was really old technology.
18 I mean, all the other platforms we were writing in
19 the engine were newer technologies. And Win95
20 was, at least the whole operating system was now,
21 you know, 32-bit. It was multitasking. It was --
22 so Windows 3.1 we viewed as kind of a pretty face
23 on a very poor technology architecture. And
24 Windows 95 was coming up to be, you know, pretty
25 much a part of what everybody else was. So

1 Windows 95 was considered a big step forward.

2 How did you compare that with some of the
3 other operating systems that you had been working
4 on previously?

5 Answer. Windows 95?

6 Question. Uh-huh (affirmative).

7 Answer. Comparable. In a lot of ways, it
8 had -- you know, the technology -- it was not
9 revolutionary in its technology. It was just --
10 but it was a big platform. I mean, it was a very
11 popular platform. A lot of people started on DOS,
12 and they slowly migrated to Windows 3.1. So it
13 was an evolutionary process for people to do. And
14 so it was moving a lot of masses into this new
15 world of 32-bit, multitasking, such that, you
16 know, like I said, that kind of operating
17 system -- it says operation, but I'm sure he meant
18 operating system, Your Honor -- I actually worked
19 on prior back at WICAT. So it had been around for
20 a long time, but it was finally coming around to
21 Windows.

22 So, Your Honor --

23 THE COURT: How about -- you have Mr. Harral's
24 testimony for me, too?

25 MR. JOHNSON: I do.

1 THE COURT: Let me see that.

2 MR. JOHNSON: We can turn to that.

3 THE COURT: It's Mr. Harral who I remember mainly.
4 Mr. Gibb was a lot of derivative, the project manager. But
5 Harral I remember saying that this would -- that Windows
6 improved WordPerfect and WordPerfect improved Windows. There
7 was something to that effect.

8 MR. JOHNSON: Right. And I'm going to address that
9 straightway. But I just want to say that since we are -- we
10 are looking at the question --

11 THE COURT: I understand.

12 MR. JOHNSON: -- of whether it is a matter of law.

13 THE COURT: I'm not going to do it today. We ran
14 out of time. When I ask a question, I want an answer. I want
15 to see Mr. Harral's testimony.

16 MR. JOHNSON: Okay. Mr. Harral's testimony was a
17 little confusing, Your Honor, frankly, but it was consistent
18 with Mr. Gibb's. The topic that I raised with Mr. Harral on
19 direct was the comparison of Windows 3.1 to Windows 95. The
20 substance of Mr. Harral's testimony was that Windows 95 was a
21 significant step forward for the PC and for Microsoft. He
22 also mentioned twice that some of the new Windows 95
23 technology existed already on the MacIntosh. Your Honor's
24 follow-up questions on this topic made reference to his prior
25 testimony.

1 So if we go to Mr. Harral's testimony of
2 October 20th. I was discussing with Mr. Harral the extent of
3 which Windows 95 was the advance over Windows 3.1. Starting
4 with his testimony on Line 22 at Pages 253 to Line 4 on
5 Page 254. This is rather lengthy, Your Honor.

6 Can you bring that up?

7 You may recall Mr. Harral's answers were fairly
8 long. But if I read just a portion of that, obviously, Your
9 Honor, you're welcome to read the very long answers, which I
10 don't want to do today. But the question was asked, do you
11 recall -- can we get that, please, up on the screen?

12 Do you recall generally what type of
13 information Microsoft would be providing to
14 developers looking to produce a product for
15 Windows 95?

16 And Mr. Harral answered: Windows 95 was
17 in my view a significant step forward for the PC
18 and for Microsoft. I talked about MacIntosh
19 before, and there was angst amongst our customers
20 about should they -- was going to a graphical
21 environment, was it a toy or was there real work
22 to be done there?

23 And again, Your Honor, this testimony goes on at
24 some length, and we can just scroll up. I'm not going to --

25 THE COURT: That's fine.

1 MR. JOHNSON: I'm not going to read it all in.

2 THE COURT: That's fine.

3 MR. JOHNSON: But the point he was making there was
4 that their customers were concerned whether this was even
5 going to be as good as MacIntosh, and was this something that
6 they really wanted to do? Was this a toy, or was it going to
7 be something that was forward looking?

8 And then again on Page 254, Lines 14 to 19,
9 Mr. Harral described the features of Windows 95 that improved
10 on the features of 3.1. And starting at the top there.

11 So Windows 95 had a couple of things that were
12 very interesting to us. The first was the
13 graphical environment being placed on top of
14 the -- in place of Windows 3.1. We were seeing
15 full long names coming, so that people could name
16 things that they wanted to help them identify what
17 they had.

18 And I would mention here, Your Honor, too, that
19 long file names were nothing new during this period.
20 MacIntosh had had them for quite sometime. So when he's
21 talking about it being interesting, it was interesting because
22 it was coming to Windows, not because it was special or
23 superior in the context of operating systems that existed at
24 the time.

25 If we now go to, Your Honor, Page 255, Line 9, I

1 asked Mr. Harral specifically to address the differences
2 between Windows 3.1 and Windows 95. Starting with Line 9.

3 Question. Perhaps this will help you talk
4 about the differences between 3.1 and Windows 95.

5 Answer. Okay. So in Windows 3.1, there
6 are programs that I could run, and so file
7 manager, and here is where I would look at files
8 on my machine.

9 And again he goes on in great lengths about the DOS
10 prompts that were still present in Windows 3.1. And as
11 Mr. Gibb said, this was very old technology. So for
12 Microsoft, for Windows this was a big advance. It was not a
13 big advance in the operating system environment generally.

14 Moving forward and continuing to answer questions
15 about the differences between Windows 3.1 and Windows 95,
16 Mr. Harral did express his excitement about Windows 95.

17 And if you could turn to Page, Mr. Goldberg, to
18 Page 256, Lines 2 to 10. He answered, quote:

19 In this view, we talked and I mentioned in
20 WordPerfect that going and getting the files that
21 the user was after was really the focus. That is
22 why all of the features moved into where people
23 lived. We were excited about Windows 95 because
24 the file browser and looking at your files is now
25 in the foreground. This is the desktop up here,

1 and in the background you see my computer and
2 network neighborhood. I could store files right
3 on this desktop.

4 There's more to the rest of this answer, Your
5 Honor, and again, I invite you to look at it all.

6 THE COURT: No, that's fine. I'll read
7 Mr. Harral's. This has been helpful. I understand what
8 you're saying.

9 Did any other operating system have GUI other than
10 MacIntosh? Any of the other Linux, UNIX, OS/2? I just don't
11 know.

12 MR. JOHNSON: GUIs were available at the time.

13 THE COURT: Were there any other operating system
14 using them?

15 MR. JOHNSON: Frankly, Your Honor, that's --

16 THE COURT: You don't know.

17 MR. JOHNSON: I'm sure Steve does.

18 THE COURT: Well, the question is, what does the
19 evidence show?

20 MR. JOHNSON: Your Honor, the point is there were
21 plenty of operating systems that had capabilities and
22 features, and this was not -- this was not a huge leap
23 forward. I think, in fact, even though, even Microsoft's own
24 witnesses, Mr. Allchin in particular, he was asked if
25 Windows 95 was a paradigm shift, he said no. He said it was a

1 big seller, but paradigm shift? No, not at all. In fact, he
2 said, I believe the quote was, it's simply made the -- I'll
3 get the exact -- it simply made GUI work, which was the
4 advance in Windows 95.

5 THE COURT: I understand. I'm glad you're finally
6 taking the issue I've been telling you about for weeks
7 seriously, because it proves to me it's a serious issue. But
8 I understand your position. It's been helpful for you to tell
9 me that, in fact, the testimony I recall as being
10 technological breakthrough from your point of view was an
11 advantage of Windows 95 over Windows 3.0.

12 MR. JOHNSON: Yes. And just for the record, Your
13 Honor, that testimony of Mr. Allchin, which we actually showed
14 to the jury on Page 56, Lines 10 to 18 I asked the question --
15 I didn't ask the question, whoever was taking the deposition
16 at the time.

17 Let's just jump ahead a couple years in time.
18 Did you consider Windows 95 to have been a
19 paradigm shift?

20 Answer. No.

21 Question. Why is that?

22 Answer. Tremendous success in the
23 marketplace doesn't necessarily mean a paradigm
24 shift to me.

25 Question. Okay. What --

1 Answer. If people had already seen
2 graphical user interface, this sort of just made
3 it work.

4 That was Mr. Allchin's testimony here.

5 THE COURT: That's fine. I understand. But I
6 understand it may or may not become relevant in my ruling on
7 the motion to reopen. I for the life of me don't understand
8 why it first dawned on you that I was serious about this when
9 I questioned you last Friday since I've been raising exactly
10 the same concern for several weeks.

11 MR. JOHNSON: Well, Your Honor, I think in
12 fairness --

13 THE COURT: And maybe I'm not articulate. But you
14 guys, how many lawyers are sitting out there? If you hadn't
15 heard me saying that I was concerned about the lack of
16 evidence of any comparable operating system, you're not half
17 as good of lawyers as I think you are. You've got Williams
18 and Connolly, you've got Dickstein Shapiro, and you've got all
19 these lawyers out there, and I've been trying to raise this
20 issue for a long time. I think I finally articulated it best
21 last Friday. But for you to come in and say you're surprised
22 by this, it is beyond me, because I've been expressing this
23 concern for weeks.

24 MR. JOHNSON: Your Honor, we're not suggesting in
25 the least that we were surprised, although I do agree with

1 Your Honor that you did articulate it best on Friday when we
2 spoke, and that's why we gathered some of this testimony to
3 show you.

4 As you may recall, Your Honor, you first had this
5 reaction upon hearing our first witness, Mr. Harral. And we
6 said at that time, Your Honor, that we thought perhaps you
7 should not stand in judgment yet, that we ought to hear the
8 rest of the testimony.

9 THE COURT: And I still have -- and it may or may
10 not be material, but I understand the issue. I understand you
11 at least now take it seriously, which makes me feel a little
12 bit better. And I also understand you say it's not an issue,
13 but at least you take it seriously.

14 MR. JOHNSON: Absolutely. Anything that concerns
15 Your Honor concerns us.

16 Now, it is fair to say, Your Honor, as you just
17 said, we don't think that it would be dispositive even if the
18 evidence was as Your Honor said. But we think in fairness
19 looking at all the testimony that in giving the inference to
20 Novell, which is obviously required on this type of a motion,
21 that we have sufficient evidence to satisfy the concern that
22 Your Honor has expressed at least for purposes of getting to
23 the jury.

24 THE COURT: That's fair enough.

25 MR. JOHNSON: Thank you, Your Honor.

1 Let's go to issue 2, then. And this is the
2 question of the evidence that there was an operating system
3 that could compete with Windows 95.

4 One of the things we did in response to this
5 concern, Your Honor, and again we do not feel that we need
6 such evidence to prevail on this action or that you could
7 decide as a matter of law that any failure of proof in that
8 regard would not enable us to get to the jury. But having
9 heard your concern we, of course, knew that direct evidence
10 with respect to the subjects that you raised was available
11 readily in the testimony of Mr. Maritz and Mr. Allchin that
12 was given in the government case and, hence, some of my
13 examination today of Mr. Gates with respect to that evidence,
14 which in our view at or sometime around the time of the events
15 in this matter, since it obviously related to the period of
16 time 198- -- 1998 backwards, which is, of course, right after
17 our time period that we were talking about.

18 So to the extent that Your Honor decides that the
19 authority that we have cited with respect to the purpose of a
20 Rule 50 motion is to, in fact, alert a litigant that it might
21 be a hole in its proof that the Court is concerned about and
22 how under the circumstances it is entirely appropriate for the
23 Court to take into account evidence that is readily available,
24 which this is, which isn't going to cause any problem in the
25 scheduling of the trial and which, of course, is important to

1 advance the case of the litigant, the authorities are
2 overwhelming in the regard that such a motion should be
3 granted. And certainly to the extent that Your Honor grants
4 that motion, I think this issue, too, at the very least we
5 survive with the inferences in our favor.

6 With respect to the evidence, some of which you
7 heard today, that, for instance, by 1998 Linux was not only up
8 and running on millions of people's computers, but it was a
9 system that was just as capable --

10 THE COURT: I haven't heard that testimony yet
11 because what I've heard is that Mr. Gates said that he wasn't
12 sure of that, and that is the testimony. Now, it may be in
13 the -- this question an evidentiary matter. Just because you
14 read something to Mr. Gates, I don't remember him saying that
15 he adopted that testimony or that it refreshes his
16 recollection. But I'm just -- I'm not saying it doesn't
17 exist. If it exists, it exists. It exists on the motion
18 to reopen.

19 MR. JOHNSON: Right. And I think, Your Honor,
20 actually he did adopt at least that much --

21 THE COURT: He may have. He may have.

22 MR. JOHNSON: -- of his testimony.

23 THE COURT: He may have.

24 MR. JOHNSON: So, we, of course, argued that we do
25 not need to prove that other operating systems were in

1 existence that had the functional equivalent of Windows 95.
2 Even an operating system that lacked some of Windows 95's
3 functionality could constrain Microsoft's ability to charge a
4 super competitive price. Even a product with fewer features
5 can constrain the price of Windows.

6 For instance, everyone may prefer to stay at the
7 nicest hotel in town, but as Your Honor knows, if the price at
8 the Grand American (as spoken) is just a little too high for
9 your budget, people will choose to stay in a cheaper hotel.

10 THE COURT: There are all kinds of constraints.
11 Budget, where everybody else is staying. Life is full of
12 tradeoffs. But I'm happy where a am.

13 MR. JOHNSON: And, in fact, that phenomena operates
14 in the software market, as well. You may not get all the
15 bells and whistles and a masseuse and everything you can get
16 over at the Grand American (as spoken), but thank you very
17 much, I'll stay over at the Marriott because it fits more with
18 my budget and what I need to do.

19 So as a matter of antitrust law, there does not
20 have to be an operating system that has functionality for
21 Windows 95. The antitrust issue here is the ability of
22 PerfectOffice to foster additional competition in the
23 operating system market through a middleware product that can
24 port applications to different operating systems and a key
25 franchise application that will allow intercommunication and

1 file sharing between PerfectOffice users on multiple operating
2 systems. I think the evidence in the record amply
3 demonstrates enough to create a factual issue regarding both
4 of those propositions.

5 Now, had there not been the anticompetitive acts in
6 this case, had PerfectOffice for Windows 95 been released on
7 time, the but-for world would have produced a level of
8 operating system competition that has now been foreclosed.
9 This does not require that PerfectOffice for Linux or UNIX or
10 OS/2 would have had the exact same level of functionality as
11 PerfectOffice Windows 95. It is that a viable PerfectOffice
12 would help those platforms develop, expand, and compete with
13 Windows 95 and future versions of Windows.

14 This would have provided more choices to consumers.
15 And there will certainly be consumers who will choose an
16 alternative operating system without some bells and whistles
17 in exchange for other functionality for a much lower price.
18 This is especially true for loyal users of PerfectOffice. The
19 idea that other products could constrain Windows pricing is a
20 fear that Microsoft's executives express themselves when they
21 discussed commoditization of the operating system. And we
22 have, of course, numerous exhibits where Microsoft executives
23 talked about their fear of the commoditization of the
24 operating system by middleware and cross-platform products.

25 THE COURT: I hear you. And maybe a final point

1 that one -- and again, frankly, I doubt very seriously I'm
2 going to rely upon this in ruling upon the Rule 50 motion.
3 The one concern a little bit, about skipping the consumer
4 choice and missing the fact that Novell itself -- it seemed to
5 me there is a causation issue. It's simply because your view
6 is that there would be more choice on the consumer market,
7 this assumes that Novell was going to write to other people.
8 And it's just an analytical issue, but I'm not -- it's
9 complex.

10 But what you just said to me seemed to me maybe you
11 skipped a little too closely to consumer choice, because I
12 still have to decide whether or not there's sufficient
13 evidence that Microsoft did not maintain this monopoly in the
14 operating system market during the relevant period by virtue
15 of something other than Windows producing Windows 95.

16 I'm not arguing with you. And, frankly, you don't
17 have to worry about it. I don't think I'm going to base my
18 Rule 50 motion on this. But I'm not sure you're not skipping
19 a little too quickly to ignore the causation factor, which is
20 you're alleging, you're relying, claiming certain specific
21 things, and I think there's got to be sufficient evidence that
22 Novell would have acted differently but for certain things
23 happening. There may be sufficient evidence. I'm not
24 quarreling with that, either. But that is to me an issue.

25 MR. JOHNSON: And again, Your Honor, this is a

1 question of would the evidence support it, could a reasonable
2 juror so decide, giving all inferences, all credibility
3 determination and all weighing of the evidence in Novell's
4 favor? And as Your Honor knows, you know, that is an
5 extremely high bar.

6 THE COURT: No. No. I think so. And I'm just
7 starting to write these jury instructions. I'm just alerting
8 now I'm not sure you can argue because there was less consumer
9 choice that that is what you're going to be able to argue.
10 But I think you're going to have to say various things, for
11 example, that they didn't maintain a monopoly because they
12 didn't -- you proved they didn't have a superior product or
13 they did it by deception or by not having substantial business
14 justification.

15 But that's down the line. I'm not going to base my
16 Rule 50 motion upon this, my ruling on the Rule 50 motion.

17 MR. JOHNSON: Yes. And just to bring this section
18 to a close, we think there's extension record here,
19 particularly with respect to the findings of fact, with
20 respect to cross-platform middleware like Netscape and JAVA
21 and with respect to Novell, an overwhelming amount of evidence
22 that Novell, WordPerfect was cross-platformed during the
23 entire period, was cross-platformed during the period
24 following the acts which occurred here, which was, in fact,
25 porting to Linux during the period we're talking here, and, in

1 fact, we can see from the evidence we want to put in that even
2 when Corel got it, Corel continued to make WordPerfect
3 cross-platformed. And, in fact, Mr. Maritz talks about it in
4 his testimony that Corel's WordPerfect suite was available on
5 Linux at the time and was one of those major applications that
6 had come -- had become available on Linux. And the sad part
7 about it is had WordPerfect survived with Novell and been this
8 huge splash when Windows 95 came out, can you imagine the
9 competition which would have risen if all that base, that user
10 base that WordPerfect had and those people would have said, I
11 don't want to learn a new word processor, I want my
12 WordPerfect, and WordPerfect had been on the shelf at the time
13 Windows 95 came out we would have a very different world
14 today. And that is the harm to competition to which Dr. Noll
15 testified.

16 And specifically, Your Honor, we would refer Your
17 Honor to Mr. Noll's trial testimony at 1781 Lines 14 through
18 23.

19 Do we have that slide?

20 Here Professor Noll testified that UNIX, Linux and
21 OS2 were competing operating systems at the time. He
22 testified that the combination of UNIX, Linux and OS/2 in
23 combination with WordPerfect and Novell's application and
24 middleware product as well as other products would have been
25 more effective competitors with Windows had they been

1 available in the market but for the anticompetitive conduct of
2 Microsoft. Again, Professor Noll's testimony also addressed
3 how the market would have looked had Novell released
4 PerfectOffice on time.

5 Let's go to the next slide, which is Dr. Noll's
6 testimony at Page 1931, Line 25 to 1932, Line 4.

7 Here Professor Noll explains that Linux would have
8 done better had PerfectOffice for Windows 95 been released in
9 a timely fashion. Linux might not have acquired much market
10 share if Microsoft cut the price of Windows, but would have
11 increased its market share if Microsoft kept the prices of
12 Windows high.

13 But in either event, that means that the various
14 entry being lower, that means consumers are getting a better
15 deal. That is what the antitrust laws are all about, getting
16 the people on the playing field, and enabling there to be some
17 constraint to the monopolist behavior in the market. In
18 either situation, the applications barrier to entry would have
19 been weakened.

20 Here again, Mr. Noll's testimony goes on at
21 Page 1933, Lines 9 through 21. Here the testimony is that
22 Linux would have been more competitive had PerfectOffice for
23 Windows 95 been released on time. Consumers would have been
24 better off.

25 With respect to the existence of additional

1 operating systems you may recall that Mr. Alepin also
2 testified with respect to this issue from a technical
3 perspective. And turning your attention to Mr. Alepin's
4 testimony at 1438, Line 25 to 1439 Line 14, he testified from
5 a technical point of view that other operating systems were on
6 the market including OS2.

7 You may remember, Your Honor, and I bring this up
8 just for your consideration in connection with our motion to
9 add this additional testimony, and Mr. Schmidtlein sought to
10 use Microsoft's proposed findings of facts in the government
11 case and put that into evidence, and Your Honor denied the
12 motion at the time but said that we could use it in
13 cross-examination. I don't think Your Honor's view as to
14 whether it was appropriate only in cross-examination or in
15 respect to Mr. Alepin's direct should govern the question of
16 whether or not that evidence was available to the Court and
17 should be admitted into evidence with respect to this Rule 50
18 motion. Certainly that decision by Your Honor may have been
19 appropriate, but then to say that such evidence doesn't count
20 I think would be manifestly unfair.

21 And, of course, those proposed findings of fact
22 that Mr. Schmidtlein was trying to use with Mr. Alepin are, in
23 fact, the exact proposed findings of fact that is based upon
24 the testimony of Mr. Maritz and Mr. Allchin that we were
25 offering to Your Honor on our motion.

1 And, Your Honor, I'm not going to go through those
2 proposed findings of fact. You're going to see them in the
3 motion. They directly answer the questions that you have
4 answered and, in fact, are totally contrary to everything
5 Microsoft is telling you now about what it takes to be a
6 threat to Microsoft's operating system during the relevant
7 time period. They completely -- that you will find no mention
8 in either the proposed findings or in Mr. Maritz' or
9 Mr. Allchin's testimony of the notion that middleware had to
10 support full featured applications at that time in order to
11 constrain Microsoft's behavior. In fact, they say just the
12 opposite. They acknowledge what Professor Noll testified to
13 that middleware, cross-platformed middleware of the type we're
14 discussing here, even though it was not able to run
15 full-fledge applications at the time, in fact, and this is
16 their testimony, admissions in that case, in fact, acted as a
17 constraint upon them. And as Dr. Noll testified, a constraint
18 can work in two ways; either they lower price to try to
19 maintain, or they leave the price high and you get more
20 competition.

21 THE COURT: So how in this case on your middleware
22 aspect of the theory as opposed to the WordPerfect going to be
23 so popular it's going to be written on an operating system,
24 forget the government's case for a minute -- doesn't your
25 claim depend upon the middleware exposing sufficient APIs to

1 constitute a competitive threat in this case? I mean, I'm
2 just -- again, I'm thinking out loud, but I'm not sure that I
3 quite understood what you said. It seems to me that in this
4 case as opposed to the government's case is a perfectly
5 appropriate inquiry is to say, look, none of the Novell
6 products were anything close to being comparable to an
7 operating system, as I understand your middleware theory, it
8 was because they were, at least in the Nassen stages
9 comparable to middleware proposed a threat to Microsoft.

10 Now, I realize there's a whole other theory, which
11 is WordPerfect would have been such a popular application it
12 would have been written to other operating systems. It's just
13 whatever general marriage you just said, passed to me, I don't
14 see how in this case, it seems to me that Microsoft's position
15 is correct, that you have to prove in order to sustain the
16 middleware aspect of your theory that, in fact, sufficient
17 APIs would have been exposed to constitute a threat to the
18 operating system.

19 MR. JOHNSON: And no, Your Honor, that's not what
20 we have to show. And what we have to show is that middleware
21 would have had the result of reducing the applications of
22 barrier to entry. We don't have to be a replacement. We
23 don't have to be a full operating system. We don't have to be
24 ubiquitous. We don't have to be any of those things. What we
25 do have to show, and we have shown through the evidence,

1 frankly, most of it out of the mouths of Microsoft's own
2 executives, you may recall that Mr. Silverberg said that
3 AppWare, which as you may recall was bundled with
4 PerfectOffice and was part of the pled case with respect to
5 the middleware threat, he said that AppWare was an operating
6 system. Mr. Maritz said that AppWare was definitely an
7 attempt by Novell to have applications write to it instead of
8 to the underlying operating systems.

9 And the point here is is that had PerfectOffice
10 survived with its PerfectFit technologies and the AppWare
11 technologies, that would have acted as a restraint on
12 Microsoft, a constraint, just exactly as they so testified in
13 the government case with respect to middleware, that the
14 existence of such middleware, whether it was, you know, nobody
15 ever said it was going to topple Windows tomorrow. Nobody
16 ever said that Microsoft was going to go down. But what
17 Microsoft said and the case concluded was that these
18 middleware products could constrain Microsoft's behavior.
19 It's all about constraining the behavior of monopolists,
20 opening the gate to allow some other players on the field so
21 that when Microsoft -- you remember what a monopolist has if
22 he's got it all is the power to exclude or the power to set
23 prices wherever he wants. If their middleware products in the
24 field such as AppWare and PerfectFit and OpenDoc
25 and the technologies that we're talking about, this would have

1 constrained Microsoft's behavior in the market. In addition,
2 WordPerfect and all these technologies that we're talking
3 about, not only were middleware, but they were
4 cross-platformed so that people would have choices.

5 I don't have to stay at the Grand American (as
6 spoken). That's not the only game in town. I've got other
7 opportunities here. And that applies not only with respect to
8 the consumers that can make the choice to stay at the
9 Marriott, but it applies to the ISVs who no longer are tied,
10 no longer are necessarily on Microsoft's treadmill of writing
11 only to Microsoft's APIs. We suddenly have a world where the
12 ISV can say, hey, I can write to WordPerfect's middleware, and
13 I will run on five different operating system including
14 Windows. And suddenly the world becomes a different place,
15 Your Honor.

16 THE COURT: But I think --

17 MR. JOHNSON: And what the evidence --

18 THE COURT: I think, and again I'm not --I'm
19 thinking out loud, which is always dangerous. But the ISV has
20 to write the Novell product. That's the only way it
21 constrains Microsoft.

22 MR. JOHNSON: Oh, no, Your Honor.

23 THE COURT: I mean, so it has to be the functional
24 or equivalent of the operating system. What it does, as
25 Mr. Gates explains, simply produce the ability to improve the

1 WordPerfect by the box score, that's a whole -- I don't see
2 how there's any constraint upon Microsoft if, in fact,
3 vis-a-vis the ISVs, unless the ISVs are able to write to the
4 Novell product as the functional equivalent to the operating
5 system.

6 MR. JOHNSON: No, Your Honor. You're missing the
7 point again. Don't think about middleware as though it has to
8 be able to support a full-fledged application. In fact, it
9 did, PerfectFit according to WordPerfect and all these other
10 applications.

11 But the fact of the matter is we're talking about
12 providing choice in the marketplace. We're not talking about
13 supplanting Windows. We're talking about the ability of a
14 consumer to say, no thank you, Windows 95, at whatever price
15 they had it at. My applications that I want to use including
16 WordPerfect work fine on Intel-based UNIX operating system,
17 which is very inexpensive. Shortly after this period, that
18 consumer could say, no thank you, Microsoft. I can get Linux
19 free. I don't have to pay anything for that operating system,
20 and I can run WordPerfect's very popular, very productive
21 applications and pay nothing to the monopolist Microsoft.

22 THE COURT: Well, you're getting far afield. I
23 mean, if all you're talking about is WordPerfect, they could
24 have done it, anyway.

25 MR. JOHNSON: Your Honor, remember again we're

1 talking about harm to competition. Try not to think only
2 about WordPerfect and its products.

3 THE COURT: Well, no. No. No. You just told me
4 to think about WordPerfect.

5 MR. JOHNSON: Well, you've got to think about all
6 of the products that were out there in the market at the time.
7 This is all about why you said in your opinion that
8 Dr. Noll was right to consider the state of other ISVs and
9 applications at the time.

10 THE COURT: And I'm comfortable with that. I
11 understand. This is getting -- I may have gone far afield.
12 But it seems to me that if you're saying that WordPerfect -- I
13 still think there is a problem. I'm still not sure how you
14 can constrain Microsoft's behavior unless the middleware
15 provides somewhere close to comparable functionality of its
16 operating system saying that it maintains monopoly, that's all
17 I'm saying, in the operating system. I understand everything
18 you've said. But unless there is some comparable
19 functionality between the exposed -- between the exposed APIs
20 by middleware and the operating system market, to use your
21 words, I don't see how there's any constraint upon Microsoft's
22 conduct at all. But that -- but if that's becomes an issue,
23 I'll give you a chance to argue.

24 MR. JOHNSON: Your Honor, in fairness, I think
25 you're a lawyer. You're not an antitrust economic --

1 THE COURT: And this is a courtroom, not a
2 classroom.

3 MR. JOHNSON: Of course, Your Honor. But my point
4 is if you read the testimony of Microsoft's own employees in
5 the government case, you will understand --

6 THE COURT: I'm deciding -- I'm not going to accept
7 that. I absolutely reject that lawyers are no longer --
8 judges and lawyers no longer control what goes on in the
9 courtroom because of what antitrust experts say. Now, I
10 happen to respect Dr. Noll a lot. I don't think he's a
11 Christmas tree. I disagree with Mr. Tulchin about that. And
12 certainly in terms of what I decide as a matter of integrity
13 of the judicial process, I will not accept that I am a lawyer
14 and I'm a judge and somehow I have to listen to antitrust
15 experts. I think it's exactly a problem that antitrust
16 professors make, a lot of antitrust people make, and I'm not
17 going to accept that. And filing an antitrust case, like any
18 other case, has to be proved in the courtroom.

19 MR. JOHNSON: Your Honor, Professor Noll will
20 appreciate that, that you don't think he's a Christmas tree.

21 THE COURT: I respect Dr. Noll.

22 MR. JOHNSON: Thank you. I appreciate that very
23 much.

24 Your Honor, on the question of obviously the state
25 of the evidence, again putting aside our motion, we introduced

1 today and talked about some of Microsoft's own 10K filings.
2 And, of course, as Your Honor knows, the courts routinely take
3 judicial notice of such filings. And there's a lot of law on
4 that. So even if Your Honor was disinclined to grant the
5 motion to reopen and add that testimony --

6 THE COURT: I'm going to -- I hear you on that
7 certainly.

8 MR. JOHNSON: All right. Thank you, Your Honor.
9 I'm not going to go through what those said because we covered
10 that.

11 Let me go to issue 3, which is something that you
12 have repeated many times.

13 THE COURT: And I don't think, Mister -- I don't
14 think anybody ever used the word married. I think I'm the
15 only one who said that.

16 MR. JOHNSON: I think it's a favorite term we've
17 used.

18 THE COURT: No. It was because WordPerfect is
19 going to make Windows better and Windows is going to make
20 WordPerfect better. That's how I came up with the term.

21 MR. JOHNSON: Right. And we want to address that,
22 because it is reflected in many of your comments. So
23 obviously you made it known that it was a concern of yours and
24 something that you thought was in the record, and we want to
25 address it.

1 It's certainly true that the developers at Novell
2 wanted to build a great PerfectOffice for Windows 95, and
3 there's no question of that. And, frankly, that would have
4 led to increased sales of Windows 95. The developers also
5 testify, however, that they wanted to port PerfectOffice to
6 other operating systems and, in fact, did so during this
7 entire --

8 THE COURT: My recollection could just be
9 incorrect. Didn't Mr. Harral or somebody else who testified
10 that they thought Windows 95 was going to make PerfectOffice
11 or WordPerfect a better product? I could be wrong.

12 MR. JOHNSON: I think absolutely you heard some of
13 that testimony, Your Honor, and no question about it. I think
14 frankly some of Your Honor's questioning of Mr. Harral if you
15 look at it carefully, with him sitting down in that well and
16 you up here, he was trying to give you more, and you were
17 intent upon your questions.

18 THE COURT: I won't accept that, either. He was
19 under oath. He was asked questions. If he said -- the
20 problem I have in everything he said, if he said that Windows
21 was going to make WordPerfect a better product, how you can
22 then find comparable functionality with any other operating
23 system is a problem for you.

24 MR. JOHNSON: If you actually look at the
25 testimony --

1 THE COURT: I don't know what he said.

2 MR. JOHNSON: If you actually look at the
3 testimony, Your Honor, you'll see when you asked him about his
4 second issue, he said the operating system, and then he got
5 cut off. And then another answer he said a MacIntosh, and he
6 got cut off. So I --

7 THE COURT: That's fine. I'm not -- I will read
8 the testimony when I have to.

9 MR. JOHNSON: And we certainly think that apart
10 from that there is loads and loads of testimony where if the
11 inference goes our way, as it should on this motion, that that
12 is simply not an issue in this case.

13 Now, as I said, the developers testify that they
14 wanted to port PerfectOffice and did import WordPerfect to
15 many other operating system. To torture the analogy, they
16 didn't want to marry Windows in the sense that it would be
17 their one and only, but they wanted to date Windows 95. It
18 was a good product, but they wanted to continue to date other
19 operating systems, as well. And the evidence is fairly
20 replete with respect to that subject.

21 THE COURT: If and when this becomes an issue, it
22 will take a very close reading of the testimony.

23 MR. JOHNSON: Now, naturally Novell's witnesses
24 testify that they wanted PerfectOffice for Windows 95 to be
25 the best it could on that platform. They would certainly

1 never want to make a bad product for any operating system.
2 They also wanted to meet the expectations of PerfectOffice
3 customers on whatever operating system those customers would
4 choose. Building great applications for an operating system
5 is going to help sell the operating system be that Windows,
6 MacIntosh, Linux, UNIX, and it's exactly that process of what
7 WordPerfect was doing that fosters competition in the
8 operating system's market. Windows was the most popular
9 operating system during the time that Novell owned these
10 applications. To have a successful product on Windows was
11 necessary to stay alive.

12 So certainly WordPerfect had no choice but to date
13 Windows. And, of course, once you have to date somebody,
14 you're going to make the best of a situation and try to
15 produce the best relationship that you can in doing so.

16 And Professor Noll again addressed this topic from
17 an economic perspective. And this is Professor Noll's
18 testimony at 1934, Lines 14 through 21. He states here the
19 software vendors had little choice but to write to Windows.
20 And, Mr. Frankenberg, in fact, explained to Novell's thinking
21 with respect -- I asked him flat out, why the heck would you
22 bother with these other operating systems since Microsoft had
23 this monopoly an Intel-compatible operating systems? And he
24 said, of course we want to satisfy our customer base. But the
25 second reason was to provide some real competition in the

1 operating systems environment.

2 These guys -- none of these ISVs, Novell, Linux and
3 all these others, they're not friends with Microsoft. They
4 want some competition here. The fact that Windows is a
5 monopolist and has the entire field themselves, can increase
6 prices or exclude competition is not a good thing for them.
7 And, of course, the antitrust laws, they don't care about the
8 competitors. They're not picking winners or losers. But the
9 antitrust laws say, hey, be fair in the competitive process.
10 You can't take actions that take out potential competitors.
11 And, in fact, close the field for the players that are trying
12 to get on the playing field to compete for Windows.

13 THE COURT: I think you can, actually, if you don't
14 hurt competition. But that's --

15 MR. JOHNSON: Well, if you don't engage in any
16 anticompetitive conduct, yes, Your Honor. But, of course,
17 that's what the jury is hear to decide.

18 I'd like to talk about, take a look at what
19 Mr. Gibb said on the same subject. And this is Mr. Gibb's
20 testimony at 781, Line 14 through 782, Line 2. And Mr. Gibb
21 testified Novell did not simply develop WordPerfect for Linux.
22 Mr. Gibb testified that WordPerfect was developed for use on
23 multiple operating systems including DOS, OS/2 and UNIX.

24 Again, Mr. Harral on this same point, his testimony
25 at 371-15 through 372-7. Novell certainly wanted and needed

1 to date Windows 95. But it certainly wasn't getting married
2 to any single operating system.

3 THE COURT: As I said, I'll take a close -- I'll
4 take a close look at the testimony, if Mr. Harral and
5 Mr. Richardson went down primrose path for an hour because
6 they were in love with Microsoft, that may be a whole
7 different -- I'll read the testimony.

8 MR. JOHNSON: And I will ask you to look at
9 Mr. Frankenberg and Mr. Gibb for the same reason.

10 THE COURT: Well, yeah. But Mr. Frankenberg didn't
11 know anything, we established that. That was established.
12 And Mr. Gibb's knowledge was all -- I mean, the fact of the
13 matter is you produced two software developers, two associates
14 went off and did a research project without any guidance from
15 the senior partner. Now, maybe the junior partner, Mr. Gibb
16 was a junior partner, had some idea and let it go. But the
17 fact of the matter is in terms of management, but the evidence
18 clearly shows that the two -- the functional equivalent of
19 associates went off and researched an issue for years, for a
20 year. Maybe a junior partner knew about it, but the senior
21 partner was never consulted. That's the state of the record.

22 MR. JOHNSON: Your Honor, the answer to the three
23 questions we have tried to address here, Novell testified that
24 Windows 95 was superior to Windows 3.1 and certainly that
25 Windows 95 was a significant technological achievement.

1 However, they did not testify that Windows 95 was so advanced
2 that no other operating system could compete. And, in fact,
3 Mr. Gibb testified at some length that frankly, Microsoft was
4 just catching up with other operating systems that existed at
5 the time.

6 Second, the evidence including Microsoft's own
7 witnesses shows that there were operating systems which
8 presented competitive alternatives to Windows 95 --

9 THE COURT: I understand. And this has been
10 helpful. I understand it.

11 MR. JOHNSON: And finally, as I just explained, I
12 don't think Novell wanted to get married.

13 Your Honor, I'd like to conclude with just a couple
14 of practical observations. And you have said on more than one
15 occasion you were a practical man. I've heard you say on
16 numerous occasions that these issues are very difficult --

17 THE COURT: I understand your position. Let me
18 hear from Mr. Tulchin.

19 MR. TULCHIN: Good afternoon, Your Honor. Thank
20 you.

21 I do have a number of points, Your Honor. I think
22 there were five legal reasons why it's not even close that
23 Novell should get to the jury. Under Rule 50, I just want to
24 start with this, contrary to what Mr. Johnson said, the
25 standard is:

1 If the Court finds that a reasonable jury
2 would not have a legally sufficient evidentiary
3 basis to find for the party, then, of course,
4 judgment may be granted as a matter of law.

5 Much of what Mr. Johnson just said consisted of, I
6 guess testimony that he would have liked to have had, but
7 never got in his case. He even said at one point, can you
8 imagine what the state of competition would be if X or Y had
9 occurred? I think it's notable, Your Honor, it betrays
10 exactly what's going on.

11 This is not any longer a theory. He came in here,
12 and we started this trial on October 17th with a burden to
13 prove what he has in his complaint, and I will get to that.
14 He even mentioned today whether Microsoft was trying to catch
15 up with Apple, with the Mac operating system. Again, I think
16 very revealing because his own complaint defines the market to
17 exclude Mac. It's Intel-base PC operating systems and the
18 MacIntosh was not Intel-based during the years in question.

19 He put up a slide from Professor Noll at Page 1781
20 where the Professor says, if these middleware products had
21 succeeded, then X and Y would have occurred, without any
22 evidence that they did.

23 And, Your Honor, most fundamentally, and this has
24 not been addressed by counsel for Novell today, the very clear
25 statement that counsel made last Friday that Novell now agrees

1 that Microsoft had no duty to provide us with anything, at
2 Page 2587 of the transcript last Friday, that the case is only
3 about deception has to put an end to this for two reasons,
4 Your Honor, one is legal and one is factual. The legal reason
5 first is that the Brooke Group against Brown & Williamson,
6 that is the Supreme Court case that I couldn't remember of
7 last Friday, 509 US 209 at 2225, 1993, says that:

8 The antitrust law, it's the federal antitrust
9 laws, do not create a federal law of unfair
10 competition or purport to afford remedies for
11 all torts committed by or against persons engaged
12 in interstate commerce.

13 THE COURT: That's true. But the theory has got to
14 be that the monopoly in the operating system market, as I
15 understand the final analysis when all is said and done, and
16 frankly, I think the jury can understand this. I still
17 think the analysis, I'll still tell you where my head is. I
18 still think the theory is a fundamental question which is
19 whether or not Microsoft had to do anything at all in terms of
20 the APIs of the Windows 95 and that it could arbitrarily, it
21 could do anything that it wanted, and even assuming every
22 possible bad motive for Microsoft. And I could be wrong about
23 this --

24 MR. TULCHIN: You're not.

25 THE COURT: -- which I'm still inclined to think

1 that since it's its own work product it could do anything it
2 wanted, and that is where the line of cases that there's not a
3 federal law of unfair competition. I think that is an issue.
4 I think if a jury were to return a verdict against you there's
5 a legal issue as to whether or not, you know, Microsoft until
6 the very last minute could have, whoever I think was
7 documenting the APIs, could have said, instead of a beta
8 release saying, we are not committed, we are committed to
9 these, because it's Microsoft's product, I think there is an
10 underlying legal issue of whether or not it's deceit in so
11 doing. And let's assume they knew all along that they were
12 going to pull the APIs, I'm not sure that's an antitrust
13 issue. I'm just not.

14 MR. TULCHIN: It's not.

15 THE COURT: And in the cases you've cited, I think
16 that is very -- I think the second issue as to whether or not
17 there's a comparable product, I think some of the things that
18 Mr. Johnson has said and certainly his motion to reopen and
19 certainly the scope of the cross-examination, if I don't
20 strike it, raises questions. I'm still not sure that he's
21 there. But I think that, too, is a legal issue of
22 sufficiency.

23 I would -- on the other issues, it seems -- I don't
24 see why I don't submit this to a jury, Mr. Tulchin, to find
25 out whether or not, if they come out and they say -- I mean,

1 what they have to do is they have to find that the monopoly
2 was maintained by the deceptive conduct even if I'm wrong --
3 if I'm wrong on the first point, they still have to find this
4 is how the monopoly was maintained. And it would seem to me
5 that would depend upon them finding that somehow if you hadn't
6 engaged in this deception Microsoft would not have been
7 involved, which I'm prepared to say up to 1999, would not have
8 been maintained.

9 I think that even if deception enters the case, I
10 think they have to prove that that is what caused a
11 maintenance of monopoly. I also think they have to find that
12 there was no legitimate justification for what Microsoft did.
13 And I suspect, I mean, I think I've already heard, I think I'm
14 going to hear a lot more, there was plenty of justification
15 for the Microsoft did.

16 If the jury -- and then they have to find out
17 whether or not even assuming that the deception caused the
18 maintenance of the monopoly or there was no substantial
19 justification, they still have to find that Microsoft's
20 conduct caused the delay in the issuance of the WordPerfect
21 product.

22 Why -- and this is why I cut Mr. Johnson off. Why
23 don't I, since we've been through this for a month, since the
24 case has been pending since, what, 2004? We're talking about
25 a case that goes back to 1997. Why don't I get answers to

1 those questions?

2 And frankly, there's another question, which is
3 not -- I think we need to know the answer to. Even if
4 Microsoft caused the delay, caused some delay, when would the
5 WordPerfect product have gotten on the market? That seems to
6 me is an issue which may relate to damages, because if it was
7 after 60 days, if they say, yeah, they caused delay but the
8 product would not have been issued until December anyway, I've
9 got real problems with that. And I realize there's a voucher
10 period. I've got nothing from a marketing expert to say that
11 getting out of a voucher is the functional equivalent of
12 putting the suite on the market.

13 So it would seem to me as a practical matter, you
14 may very well be right. But I think the one thing, and I also
15 understand your issue on the deception. There can be no
16 deception because of what's in the beta release. The fact of
17 the matter is, it seems to me looking at case, you know,
18 most -- you know, in giving the plaintiff every benefit of the
19 doubt, it is -- I absolutely -- I've read -- in fact, I've
20 looked at the testimony. I've looked at what's in the beta
21 release which basically says, we're not committed to this.
22 But it seems to me that the jury could find that what that
23 means in context to anybody in the industry is, yes, we're not
24 going to withdraw. We're not committed to this. But there's
25 an implicit assumption that is only bugs which are found

1 during the course of the beta process which is going to cause
2 us to withdraw documentation which has already been issued.

3 And it seems to me that is a fair inference at this
4 point. I understand you take a contrary view, and it's a fair
5 question. But it seems to me that one could view the evidence
6 as saying, look, what it means in context is, we're not
7 committed to this. We're not committed, and we're not going
8 to withdraw this. But it's implicit within the industry
9 understanding that that means, we may withdraw it, if somehow
10 something comes up during the process of the beta process,
11 which causes us to withdraw.

12 It seems to me, and I understand you disagree with
13 me, and you've got a fair point. But it seems to me why don't
14 I submit the deception issue to the jury? They have to find
15 deception. As far as I'm concerned, they have to find that
16 deception caused the maintenance --

17 MR. TULCHIN: Of course.

18 THE COURT: -- of the monopoly --

19 MR. TULCHIN: Of course.

20 THE COURT: -- which itself is a question. It
21 seems to me they have to find that there's no substantial
22 justification which you're going to have plenty of evidence
23 that was a substantial justification.

24 Thirdly, they're going to have to find your conduct
25 caused the delay of the issuance. And then a next question

1 is, to me I think we need to know the answer for purposes of
2 legal analysis, even if Microsoft caused the delay when would
3 the product have been issued? And if it's December, that's a
4 problem for the plaintiff.

5 MR. TULCHIN: There are no damages.

6 THE COURT: And then if we -- and then if they
7 decide that the monopoly is caused by anticompetitive conduct
8 and that there was a delay, it seems to me then we get to the
9 issue of damages. And then as -- the reason I cut
10 Mr. Johnson off, it seems to me that to preserve the issue,
11 the first issue, which is a legal issue, whether -- since
12 we're talking about intellectual work product this could ever
13 be an antitrust violation, which I still think is in the case,
14 and I preserve ruling on that; and the second and the one that
15 still causes me trouble, but I think Mr. Johnson made some
16 points to the extent that he wants to cross-examine Mr. Gates
17 and others about it, it may be an issue I'm going to have to
18 come to grips with one way or the other.

19 But the fact of the matter is whether I allow the
20 reopening. The fact of the matter is I think it is
21 reasonable, probably reasonable to allow cross-examination of
22 Bill Gates of the Microsoft securities statements, anyway. So
23 he may get it in the backdoor, but I won't let him in the
24 front door and may let it in the front door. I just don't
25 know.

1 It seems to me that this is how it all shakes out.
2 We've been here for a month. It's going to take another
3 month. But the case was filed in 2004. It's already been on
4 appeal twice. And as a practical matter, one of my cases
5 settled. The one I really wanted to try it got postponed; the
6 other, one of my colleagues agreed to take, so I can be here.
7 And so my -- I understand your position. And I understand the
8 inconvenience to Microsoft of pursuing this. Why don't I let
9 this go to the jury?

10 MR. TULCHIN: Well, there are several reasons, Your
11 Honor, and I don't want to try the Court's patience.

12 THE COURT: No. No.

13 MR. TULCHIN: One is there's 12 good citizens who
14 are here who are spending day after day, week after week, two
15 of whom, if I remember correctly, are from substantial
16 distances away and staying at a hotel. And, yes, it is an
17 obligation of citizenship to serve on a jury. I've done it
18 myself. But, no, they shouldn't serve if no reasonable jury
19 could find for plaintiff here. Their time should now be up.

20 There are other practical reasons, as well, Your
21 Honor, including the expense to the defendant of having a team
22 of people here, the inconvenience to witnesses who are coming
23 from long distances to testify over the next several weeks
24 including people who were non-Microsoft employees who we've
25 either served with subpoenas because they live in Utah or have

1 convinced to come voluntarily. So there are some very good
2 practical reasons why judgment should be entered.

3 Let me just address a couple of the Court's points
4 because I think, Your Honor, you covered five or six legal
5 reasons why Novell cannot possibly prevail, one of which we
6 spoke about last week just briefly, and that is the very clear
7 point that Dr. Warren-Boulton assumed in his calculations that
8 PerfectOffice would have been released within 60 days of the
9 release of Windows 95. He said it three or four times. I'll
10 show you the testimony if you'd like.

11 And Exhibit 230, can we show that, please?

12 This was according to Mr. Johnson last week, your
13 Honor, I didn't get a chance to respond to this. You remember
14 this is the document that I showed Mr. Frankenberg. And
15 Mr. Frankenberg, and this is at Page 1145, that clearly the
16 product wasn't complete on December 23rd, '95. Clearly the
17 product wasn't complete. He goes on to say:

18 It just doesn't say how far from completion it
19 was.

20 And if you look at point 3 here, I was asking
21 Mr. Frankenberg, the former CEO, to make a fair inference from
22 this, and he completely agreed. Page 1145.

23 Dr. Warren-Boulton -- let's look at Slide -- sorry. Let's
24 look at Slide 149 first. This is Frankenberg's full answer to
25 this question about Exhibit 230.

1 It would imply that it wasn't released;
2 certainly -- wasn't released to manufacturing.

3 So having the ability to fix bugs from home implies
4 that they could respond to further testing. So clearly the
5 product wasn't complete. It just doesn't say how far from
6 completion it was.

7 THE COURT: The problem is you had very effectively
8 established in my judgment that Mr. Frankenberg didn't know
9 anything about this. So I'm not sure what the testimony adds
10 to the memorandum itself.

11 MR. TULCHIN: Well, the testimony, Your Honor --

12 THE COURT: I understand Mr. Gibb contradicted --

13 MR. TULCHIN: This is what I wanted to point out to
14 the Court, Your Honor. Exhibit 230 was addressed to
15 Mr. Frankenberg, as I showed him when we looked at the
16 document. It's written by Bruce Brereton, and it's to BFRANK.
17 And you'll remember Mr. Frankenberg making a little sort of
18 joke about his e-mail alias being BFRANK.

19 THE COURT: I did remember that.

20 MR. TULCHIN: Well, he said something like, I'm
21 always frank or something along those lines. I've forgotten
22 exactly.

23 So this memo was not addressed to low level
24 developers, the junior associates or law students that you
25 were referring to. It was addressed to the CEO of the

1 company.

2 THE COURT: And I think I said associates. I think
3 I at least gave Mr. Gibb the status of junior partner.

4 MR. TULCHIN: That could be, Your Honor. That may
5 well be.

6 In any event, I don't think it's fair to say that
7 Mr. Frankenberg necessarily knew nothing about this. This
8 memo was addressed to him at the time. He said the product
9 wasn't complete. Warren-Boulton said, Slide 153:

10 Since my damage calculation assumes that in
11 the but-for world they would have gotten this out
12 within a reasonable time period, if you somehow
13 present me with the fact that says they are not
14 out until, you know, January 1st in the but-for
15 world, I would say, yes, and I can do this if
16 necessary, then I have to adjust my damages for a
17 different but-for world.

18 And I won't go on with --

19 THE COURT: Let's go back to -- Defendant's 230
20 clearly indicates it's not going to be out until January at
21 the earliest because the mention of a manager coming on board
22 on January 2nd.

23 MR. TULCHIN: Correct, Your Honor.

24 THE COURT: Let's look back at on that.

25 MR. TULCHIN: And what Warren-Boulton says,

1 Slide 150, that his damage calculation depends on the
2 assumption that Novell would have had its product in the
3 market within a sufficiently short time period so that there
4 would not have been a significant effect on its sales.
5 And he goes on to say, something in the order of August,
6 September, October.

7 Now, the case law on this, Your Honor, is actually
8 quite clear. It isn't always. But let's look at -- start
9 with Slide 155. This is the ABA model instruction on damages
10 in --

11 THE COURT: Before we go to this, because I did not
12 remember the testimony, what about the testimony on voucher,
13 the Quattro Pro? There could have been a voucher for Quattro
14 Pro. And at least --

15 MR. JOHNSON: Judge, I showed you all this on
16 Friday. And Mr. Gibb testified directly to the contrary. I
17 know he likes this, but this is a factual issue.

18 THE COURT: Well, I don't quite see how
19 Mr. Gibb -- I do have a job. And I don't quite see how
20 Mr. Gibb can contradict what's in a memo that says that as of
21 January 2nd, we're going -- Mr. Gibb can't come on and say the
22 world is flat, and Dr. Noll or somebody said there comes a
23 point where you don't accept anymore.

24 But I still -- but before we get to that, the
25 question I have is what about -- there was testimony which I

1 frankly missed about the voucher.

2 MR. TULCHIN: Well, I think that may have been for
3 Mr. Johnson. But can I show you Exhibit 227 first?

4 THE COURT: Of course.

5 MR. JOHNSON: It was Mr. Gibb, Your Honor.

6 MR. TULCHIN: Can I show you Exhibit 227, Your
7 Honor? This was a timeline addressed to Bob, presumably
8 Frankenberg. It's not dated. But you can see that it must
9 have been prepared in or after March 1995. And item 2 recites
10 that in December of '94:

11 We all determined that after we ship
12 PerfectOffice 3.0, which was shipped in December
13 of '94, our number one goal is to get
14 PerfectOffice on Windows 95 ASAP. We initially
15 targeted October '95, but due to Quattro Pro
16 localization delays, we moved the date back to
17 December 1995.

18 Now, Your Honor, there isn't a date on this
19 document, but this is as clear as a bell. It was due to
20 Quattro Pro that the date was moved back to December. And
21 Exhibit 230, which we just looked at addressed to
22 Mr. Frankenberg says they couldn't even get it out in
23 December, that almost all of the programmers had quit. They
24 were in a bit of a tizzy about what they were going to do.

25 Antitrust damages cannot be awarded, Your Honor,

1 under clear case law if the only damage model presented by an
2 expert makes an assumption about the facts which is
3 counter-factual. The model instruction says it.

4 THE COURT: Yeah. It was up there before. I'm
5 sorry. Can we take a look at it?

6 MR. TULCHIN: Yes. That's Slide 155. And I want
7 to just show you a couple other clear statements in the case
8 law. This is ABA model instruction. There's no reasonable
9 basis for determining damages because no one testified other
10 than Warren-Boulton about damages at all. Not a mention by
11 any other witness.

12 So here's Slide 156. This is a Seventh Circuit
13 case. And this is spot on.

14 When a plaintiff improperly attributes all
15 losses due to a defendant's illegal acts, despite
16 the presence of significant other factors, like
17 Exhibits 227 and 230 show, the evidence does not
18 permit a jury to make a reasonable and principled
19 estimate of the amount of damage. This is
20 precisely the type of speculation or guesswork not
21 permitted for antitrust jury verdicts.

22 And let's look at what Areeda says. This is 157.
23 Again:

24 The plaintiff's damages calculations must
25 control for exogenous factors.

1 And among the factors listed is plaintiff's own
2 mismanagement, recessionary economy, et cetera.

3 THE COURT: What does exogenous mean? I've learned
4 to words. The other is toothless and--

5 MR. TULCHIN: Exogenous means --

6 THE COURT: Outside of.

7 MR. TULCHIN: -- outside the boundaries.

8 One more slide on this, Your Honor, a Ninth Circuit
9 case from 1997, Image Technical Services against Kodak,
10 125 F3d, 1195 at 1224. That's Slide 158. It's the same
11 point, Your Honor.

12 Antitrust plaintiffs must --

13 This isn't anything unknown to the lawyers at
14 Dickstein Shapiro or Williams and Connolly. They have said
15 they're antitrust experts themselves.

16 Antitrust plaintiffs must segregate damages
17 attributable to lawful competition from damages
18 attributable to monopolizing conduct.

19 And the evidence here makes it impossible for a
20 reasonable jury to attribute the delay in the release of
21 PerfectOffice to withdrawal of support for the NameSpace
22 extensions. There is no evidence that can act as a
23 counter-weight.

24 THE COURT: But you don't even have to go that far.
25 You can see that even if you infer -- all you have to do is

1 prove that it wouldn't have been released until January,
2 December of 95 --

3 MR. TULCHIN: Correct.

4 THE COURT: -- or January. I mean, for the present
5 argument, you don't have to prove -- a jury might be able to
6 find, yes, that's true. But because of the critical path, it
7 got delayed from January to May because of Microsoft. But you
8 would say that doesn't make any difference because they
9 haven't proved damages.

10 MR. TULCHIN: Well, there's complete absence of
11 evidence that any delay from January to May could have
12 possibly sparked some competition in the operating system
13 business. I don't think Professor Noll even provided even a
14 sufficient basis for thinking that if the product had come out
15 in August. But he assumed that it would have come out around
16 the time that Windows 95 had issued. And to call experts to
17 the stand in the face of these documents, there were 10
18 others, Your Honor, to the same effect, that it was
19 Quattro Pro which was, you know, may be the chair co couldn't
20 get their work done. That's what Harral and Richardson said.
21 And that could be. One doesn't have to question the
22 credibility of their testimony. But if they couldn't get
23 Quattro Pro out, they had no suite. And as Professor Noll
24 said, no one was buying standalone applications by 1995 and
25 '6. The whole market had gone to suites.

1 THE COURT: But that does bring up -- are you
2 familiar with -- and honestly it's just like I missed the
3 testimony about that I didn't recall. Are you familiar -- I
4 just don't remember the testimony about the chip --

5 MR. TULCHIN: About what, Your Honor?

6 THE COURT: About the -- chip is what I said.

7 MR. TULCHIN: This is the only testimony. It's
8 Pages 865 to 866. This is Ms. Nellis on cross:

9 You would agree with me, wouldn't you, sir --
10 this is to Mr. Gibb -- that PerfectOffice for
11 Windows 95 could not ship without Quattro Pro?

12 Answer. Actually we had a contingency
13 plan to coupon Quattro Pro, but we didn't want to.

14 And Your Honor said:

15 A sort-of-sort-of suite.

16 And he said, yeah, we didn't want to do
17 that.

18 And then just below Line 11 at 866, Ms. Nellis
19 said:

20 You referred to that as a contingency plan.

21 Yeah. I was being a little facetious.

22 I probably shouldn't. It was if all else fails.

23 And the CEO was here, offered his recollection as
24 best he had it and never mentioned any contingency plan. The
25 idea that you would ship a suite without one of the two

1 critical pieces, the functionality of the spreadsheet, is a
2 bit bizarre. Professor Noll would have to say that that would
3 have been such a huge seller to have become ubiquitous and
4 also cross-platformed and also exposed enough APIs, so that
5 general purpose, full functional applications would have been
6 written to it. And he never did. He never addressed the
7 possibility of the suite.

8 THE COURT: It does seem to me to be a significant
9 marketing issue. Again, my recollection could be, you know,
10 could be wrong. And again, I think the absence of marketing
11 testimony causes me concern. But as a practical matter, I
12 could see a coupon working with an installed base if people
13 were very unsatisfied with WordPerfect and they're told. But
14 my recollection of Dr. Noll's testimony, although installed
15 base was here and port, I could be wrong, this was also the
16 period in which people were buying a lot of computers and
17 software for the first time because the Internet was very much
18 becoming popular. And I think it was in the context you just
19 can't look at historical figures. You have to realize what
20 was happening in the market. It looked like Microsoft was
21 selling a lot more because people were buying more, and it
22 seems to me that in the context of people of first-time
23 buyers, home users, I mean, it would not seem to me a coupon
24 would be very widely accepted.

25 MR. TULCHIN: And, Your Honor, you're right about

1 Noll's testimony. But he didn't offer any view about how
2 competition might have been ignited in the operating system
3 market had there been some sort-of-sort-of suite with a coupon
4 for a spreadsheet. That was not part of his testimony at all.

5 And this testimony from Gibb, I was sort of being
6 facetious, when he talks about the coupon. With all respect,
7 Your Honor, I don't think you get to a jury on this theory if
8 that's all you have, when the counter-weight to that are the
9 documents that we talked about, Frankenberg's testimony that
10 Exhibit 230 shows that Quattro Pro wasn't complete and a
11 complete absence of a single document, not one from Novell,
12 this isn't the only subject matter on which it is true, not a
13 single document from Novell which mentions even in passing in
14 a footnote or a parenthetical some contingency plan to sell
15 PerfectOffice with a coupon for Quattro Pro. At least I'm not
16 aware of any such document, Your Honor, and I think I would
17 have seen it had it existed.

18 And, Your Honor, if I may, go back to deception
19 because I think this is really important.

20 THE COURT: Who was the witness who testified, was
21 it Dr. Noll, I was struck that there wasn't anything such as a
22 suite market?

23 MR. TULCHIN: Yes, he did, Your Honor. He did. He
24 said there was no such thing as a suite market. I'm going to
25 withhold comment on that for a moment.

1 But, Your Honor, to go back to deception, one point
2 that I want to make to the Court which is important. At
3 present Mr. Johnson says, we agree with the Court, Microsoft
4 had no obligation to cooperate, no obligation to provide us
5 with anything. Our claim is deception, that Microsoft
6 promised us something and then withdrew it. It's not a viable
7 claim in the face of the beta agreement. In the face of the
8 reviewer's guides that is PX388.

9 THE COURT: What -- what -- what --

10 MR. TULCHIN: And in the face of Frankenberg's
11 testimony --

12 THE COURT: But I know all these things, and what
13 you say, I don't mean to argue with you. But viewing the
14 evidence most favorable to the plaintiff, why isn't it fair to
15 say that Frankenberg's testimony, that beta documents,
16 everything -- and again, looking at the evidence, a fair
17 reading of the evidence is that everybody understood that to
18 mean that, we're not going to withdraw these things
19 arbitrarily. The whole purpose of the beta process is to
20 determine whether there's bugs. Is there something in this
21 document that's going to cause a problem? That really
22 everybody understood that those statements must be read in the
23 context of, we're not going to withdraw this if something
24 comes up in the beta -- excuse me -- we are going to withdraw
25 these if something comes up in the course of the beta process

1 which requires them to be withdrawn.

2 MR. TULCHIN: Well, there are two reasons, Your
3 Honor, two reasons why it's not fair to draw that inference.
4 One is that Mr. Frankenberg did not. And if you want to know
5 what Novell's understanding was and the industry's
6 understanding, he said it. I showed it to the Court last
7 Friday. I'm happy to do it again, if you want. But he said
8 it was Novell's understanding and the industry's understanding
9 that the product can change. Now that was testimony he gave
10 on cross.

11 If counsel wanted to go back on redirect and just
12 say, are there any qualifications there? Is it necessary to
13 have some independent review committee, for example, to find
14 out whether the operating system vendor has --

15 THE COURT: But didn't Mr. Johnson show me
16 testimony at the end of redirect which covers this generally,
17 maybe not quite the way you wanted it, but didn't it cover it
18 generally? I forget exactly what it was.

19 MR. JOHNSON: Yes. And we're arguing the same
20 factual issues.

21 MR. TULCHIN: No.

22 MR. JOHNSON: And if Mr. Tulchin wants to see
23 coupon is in writing on a document, he can refer to
24 Defendant's Exhibit 226 on the page Bate stamped 535. And
25 that's coupon QP or slip date right here.

1 MR. TULCHIN: And that's in evidence?

2 MR. JOHNSON: It is in evidence, Your Honor. So
3 we're just arguing factual issues here.

4 MR. TULCHIN: No, we're not.

5 THE COURT: We're arguing more than factual.

6 MR. TULCHIN: On deception, Your Honor, Christy
7 Sports is a full answer to the current claim on deception. If
8 it's true, as Mr. Johnson said on Friday, and now we all agree
9 I guess for the first time, that Microsoft had no obligation
10 to provide something, no obligation to cooperate. But once
11 you send out the beta, you are stuck forever with whatever
12 features and APIs are in the beta. You cannot make changes
13 without being subjected to a deception claim. Then Christy
14 Sports gets turned on its head. Christy Sports involves the
15 same facts, Your Honor, so does Intel Intergraph, which I
16 pointed to last week. But you'll remember in Christy Sports,
17 555 F3d at Page 1197:

18 The Deer Valley, according to the 10th
19 Circuit, had informed its competitors from the
20 beginning that the relationship could change any
21 time.

22 Now the 10th Circuit said that because of the
23 restrictive covenant in the lease, it said:

24 Christy knew from the beginning that it could
25 operate a ski rental business only by permission

1 of Deer Valley on a year-to-year basis. It cannot
2 claim unfair surprise.

3 And on Page 1196, the Tenth Circuit noted that:

4 The plaintiff argues that having allowed the
5 plaintiff to engage in the ski rental business for
6 almost 15 years Deer Valley violated Section 2
7 when it revoked that permission and took over the
8 ski rental business for itself.

9 Of course, here Microsoft didn't take over
10 anything. It didn't take over Novell's business. All it did
11 was to act in complete conformity with the contract, the
12 industry understanding and Frankenberg's testimony that Novell
13 itself understood that the final version of a product could
14 differ from the beta.

15 And, in fact, Your Honor, if the law were anything
16 else, the software business would come to a screeching halt.
17 No operating system vendor including Novell with NetWare could
18 send out a beta to ISVs asking for feedback from thousands of
19 ISVs around the world if the law were that you cannot change
20 it. You would have to wait --

21 THE COURT: The law -- wait. You would have to be
22 a monopolist.

23 MR. TULCHIN: Well, Your Honor, even Novell back in
24 the old days Frankenberg said, I don't want to use the D word,
25 but back in the period of time had a 70-percent market share.

1 But it can't be right, Your Honor, that the law would permit
2 that result, that even a monopolist sending out a beta is
3 stuck forever with this prerelease version in the face of a
4 contract saying otherwise, industry practice, the CEO's
5 testimony that he understood. And, yes, there was one
6 developer who said, in my 31 years I've never seen any change
7 as significant as this one. I will concede that he did. But
8 I don't think that gives the jury a reasonable basis here.

9 If it's not unlawful to refuse in the first place
10 to provide the NameSpace extension APIs, and we've all come to
11 that conclusion, and it's not unlawful to decide not to
12 cooperate, after all Microsoft shouldn't be required to give
13 Novell for free all this functionality so that Novell can make
14 a product that it hoped would be better than Microsoft's
15 competing products, I don't see how it can be unlawful under
16 the state of the evidence here for Microsoft to make a change,
17 and, in fact, a small change to the product.

18 Your Honor, I also want to go to the subject that
19 you and Mr. Johnson were addressing a short period of time
20 ago, which is middleware. Mr. Johnson I think said that he
21 was now abandoning the theory of the government case that
22 middleware has to expose sufficient APIs so that full-featured
23 applications can be written to the middleware itself. His
24 complaint adopts that theory, Your Honor, and, in fact, the
25 findings of fact that are binding on both sides adopt that

1 theory.

2 So the notion now that there's some other kind of
3 middleware is a retreat from what we've had in seven years of
4 litigation just as Paragraph 70 and 75.

5 Can we show those now, those slides?

6 Your Honor, this is important on the law of the
7 case, and I know you don't want to hear about that on the
8 other side. But their complaint did say that the consequence
9 of the withdrawal of the support for the NameSpace extension
10 APIs was that their product could not work at all, could not
11 work at all. And you wanted to know, Your Honor, where you
12 got that notion on summary judgment. I'm sorry. I lost the
13 slide number. But here we go. This is Paragraph 70 of
14 Novell's complaint.

15 Some applications written for earlier
16 versions in Windows and WordPerfect in particular
17 would not be compatible with Windows 95.

18 From Mr. Harral onward, every witness in this
19 courtroom who's been asked the question has conceded that this
20 is wrong. So we talk about evidence being different now than
21 it was on summary judgment, here we are.

22 And 75. This is the one I think I referred to last
23 week, Your Honor, Paragraph 75, where:

24 Again Novell alleged that it was suddenly
25 unable to provide basic file management functions

1 in WordPerfect; in many cases, a user literally
2 could not open a document he previously created
3 and saved.

4 Well, not only is there no testimony to support
5 that, and one might ask the question under Rule 11 whether it
6 should have been here in the first place, but everyone has
7 said exactly the reverse.

8 So there is no evidence, Your Honor, about
9 middleware that would be sufficient to spark competition. And
10 Professor Noll didn't fill this hole. All he said, talking
11 about operating systems, Page 1911, were that Windows 3.0 and
12 Windows 95 were the two biggest advances in personal computer
13 technology. He also went on to say --

14 THE COURT: He said -- what years? '95 and '98?

15 MR. TULCHIN: Windows 3.0 and Windows 95 --

16 THE COURT: Oh.

17 MR. TULCHIN: --were the two biggies, he said.

18 THE COURT: Thank goodness. When Mr. Gates said
19 that '98 wasn't a big breakthrough, I recall somebody else's
20 who's opinion counted had testified to the contrary. But he
21 didn't testify to the contrary. What he said was 3.0 and 95.

22 MR. TULCHIN: Correct.

23 And, Your Honor, I spoke about this earlier last
24 Friday, but I don't think Novell has any answer to it.

25 Mr. Frankenberg's testimony on this subject was absolutely

1 unambiguous. Slide 113 at Page 1227 to 1228 of the
2 transcript.

3 If they had gotten PerfectOffice out on time it
4 would have increased sales of Windows 95. It would have made
5 Windows 95 have an even higher market share than what it
6 turned out to get. Higher than the 95 percent that it got,
7 Your Honor and that Professor Noll had in his Table 3.

8 Now, if the CEO says, if we had gotten our product
9 out on time and it had been good, I gave him both of those
10 things, assume both, that they would have come out on time and
11 it would have been good, the consequence would have been
12 Windows would have been even stronger. How a reasonable jury
13 could find causation here, Your Honor, is impossible.

14 So there's a lot in our brief, Your Honor --

15 THE COURT: Well, that does raise an issue that is
16 a difficult one is what your view is a reasonable, what you
17 determine to be the relevant time frame. I mean, if you look
18 at the relevant time frame until when WordPerfect was sold,
19 when was it? I keep forgetting.

20 MR. TULCHIN: Yes, but --

21 THE COURT: March of '96?

22 MR. JOHNSON: Yes, Your Honor.

23 THE COURT: If you see the period ending March '96,
24 that's a laid down, black-and-white hand. If you look at it
25 further in saying, but in context you have to look at whether

1 or not eventually within a reasonable period of time, which I
2 would think would be up to 1999 with the evidence in this
3 case, that the sale of Windows 95 would have decreased, that
4 is an issue. And I take it it's the plaintiff's position that
5 you take everything into account including the fact that
6 Microsoft perceived a competitor threat from other products.

7 MR. TULCHIN: There just isn't any evidence of
8 that.

9 MR. JOHNSON: We call that the whole picture, Your
10 Honor.

11 MR. TULCHIN: There just isn't any evidence for it.
12 It's argument from counsel. It's the same argument.

13 THE COURT: There is some evidence on the motion to
14 reopen. There may be some evidence before that I missed, and
15 there is evidence in the -- arguably in the Microsoft
16 securities files. Frankly I'm not sure that that fact that
17 Microsoft saw a potential threat establishes that there was a
18 real threat. That's a whole different question, but I'm not
19 sure that -- that's -- I'm not sure that all the proffered
20 testimony solves the gap and proves that there actually had to
21 be -- that there really was a competitor, but I haven't
22 analyzed that evidence close enough.

23 MR. TULCHIN: Your Honor, I don't think that Novell
24 could prevail in the face of the testimony from its former
25 CEO. It's just crystal clear. And if Novell had anything to

1 add to this, here there was no redirect on this subject, Your
2 Honor, if I recall correctly. And here I think Novell could
3 have said, Mr. Frankenberg, might it have been, even if they
4 wanted speculation, might it have been that somehow
5 competition would have been ignited if Windows 95 market share
6 had gone from 95 percent to 98 when PerfectOffice came out?
7 Because again, his testimony was clear that Novell wanted to
8 marry Windows, he didn't use the word but it's clear that's
9 what they wanted, and that PerfectOffice would have made
10 Windows 95 even better and more desirable than it otherwise
11 would have been. There would have been something on redirect.

12 So we had a long discussion on Friday, and we also
13 submitted a brief to you on Thursday. But there's no
14 deception here. Deception is not an antitrust claim, to begin
15 with. Supreme Court I think is in accord with that. There
16 certainly is no reasonable argument as a matter of law that
17 once a beta version goes out to ISVs, it can never be changed,
18 can never be altered without fear of some billions and
19 billions of dollars in treble damages. There really is no
20 deception here in light of the facts of the contract and what
21 Frankenberg says about industry understanding.

22 And beyond that, Your Honor, the middleware theory
23 fails on all three points; ubiquity, cross-platform, I gave
24 you his testimony last week from Frankenberg, that they never
25 were going to put a cross-platform, there was a plan for some

1 unstated time that was never realized. And, of course, the
2 third part of this which now counsel wants to run from, but
3 his complaint is married to this, too, that the middleware in
4 question has to expose enough APIs so that these popular
5 applications, productivity applications could be written to
6 the middleware. It's the only way according to
7 Professor Noll competition could be ignited in the operating
8 system market.

9 And lastly, it couldn't be clearer that there are
10 no damages as a matter of law because Warren-Boulton made a
11 counter-factual assumption when Novell's lawyers must have
12 known the clear law here. They hinged everything on a
13 calculation of damages dependent on the assumption that
14 PerfectOffice would have been out in August, September or
15 October. And Frankenberg agrees, Exhibit 230 and Exhibit 227
16 say the same thing, Quattro Pro wasn't ready.

17 Thank you, Your Honor.

18 THE COURT: Thank you.

19 Mr. Johnson, would you put up on the screen, that
20 exhibit, have Mr. Goldberg put up the one about the coupon?

21 MR. JOHNSON: Sure. 226, Your Honor.

22 THE COURT: And is this actually in evidence or
23 simply designated?

24 MR. JOHNSON: No. It is in evidence, Your Honor.
25 And if you look at Bates stamp ending 535. And down at the

1 bottom there it says, risk management matrix. Do you see
2 that?

3 THE COURT: Yeah.

4 MR. JOHNSON: And if you look under Quattro Pro.
5 The contingency is coupon Quattro Pro or slip date. See that,
6 Your Honor? So it's not just Mr. Gibb saying something
7 facetiously. Basically what he said was, of course, that
8 Quattro Pro wasn't the problem at all.

9 THE COURT: But how can he say that? I mean,
10 really there comes a point where somebody comes in and they
11 say it's like saying the world is flat. There couldn't be
12 clearer -- there could not be clearer evidence that
13 Defendant's Exhibit 230 says that as of January 2006 Quattro
14 Pro is not ready yet. I mean, it couldn't be clearer. And
15 for somebody to come in and say the world is flat and make
16 people stay around here for another month, that to me is a
17 real problem just because that's what he said.

18 I mean, I understand his theory was this did not
19 turn out to be material in terms of the ultimate issuance of
20 the product because by the time shared code caught up, which
21 that really became the critical path issue, then whatever
22 problems Quattro Pro had had were no longer material.

23 But frankly, in light of the evidence, and we've
24 got a memo saying that as of -- we're not going to bring a
25 manager on board until, I think it's January 2nd of 2000 --

1 excuse me -- 1996, to bring this home I don't see how -- I
2 mean, I don't see how Gibb can say that.

3 MR. JOHNSON: Your Honor, if I can address this,
4 because Gibb directly addressed this. And, in fact, Mr. Gates
5 actually addressed it. There's always a tradeoff between
6 features and release date, of course. And Quattro Pro is
7 sitting there done. Gibb said it was code complete. He said
8 it was done at that time period. That memo simply says, we
9 lost a bunch of developers. We're going to have to have some
10 guys here to take care of bugs and do some things with respect
11 to Quattro Pro. There would be no reason having no shared
12 code, which is critical path, having no ability to advance the
13 ball further to really get it, that they would continue to
14 work on Quattro Pro with respect to bugs and little things and
15 perhaps even adding features. But the point is that would
16 have never held up the product if it wasn't for shared code.
17 It would have either been in the box on the way out of door or
18 it would have been a coupon because that's -- you're just --
19 you're not going to miss this critical time to market for
20 something as minor as that.

21 WordPerfect is where it's at. WordPerfect is what
22 has to be there. What that memo says, which you want to place
23 total reliance on, is that we lost a bunch of developers.
24 We're going to have them work -- we're going to have some
25 other developers work at home on bugs. And here's where we

1 are. It does not say, if shared code had been done in August
2 of 1995 or shared code had been done in September of 1995 that
3 we wouldn't have put the thing out the door regardless of a
4 few bugs in Quattro Pro or frankly regardless of whether
5 Quattro Pro was even ready because we would have done the
6 coupon.

7 The whole point what Mr. Gibb was saying is this
8 was not the problem.

9 THE COURT: Don't you have to at least -- on the
10 coupon theory doesn't there at least have to be some testimony
11 from the marketing expert that would have made any difference?

12 MR. JOHNSON: I don't think so, Your Honor. I
13 think this is a factual issue. If the jury believes that
14 somehow we wouldn't have gotten it done until some date, then
15 I guess we will lose. But it is a jury question given
16 Mr. Gibb's testimony in this case who testified without
17 contradiction that shared code was the critical path. Shared
18 code was the problem. Quattro Pro was not the problem.

19 Now, it makes sense to me I think it will make
20 sense to the jury --

21 THE COURT: No. I understand. Your position is
22 that even though it wasn't done by 1996 it would have been
23 done by 1996.

24 MR. JOHNSON: Actually Mr. Gibb said it was code
25 complete. They were done. They were just working on bugs.

1 THE COURT: I understand.

2 MR. JOHNSON: There was nothing that would have
3 prevented this product going out that comes from Quattro Pro.
4 The problem was shared code.

5 THE COURT: I understand.

6 MR. JOHNSON: And they talk about localization
7 issues, like we would care if there was a French version or
8 not. We put it out the door.

9 Sorry, Mr. Tulchin. I know you're fond of that
10 language.

11 But, you know, you don't hold up your flagship for
12 bells and whistles for that. You get it out the door so
13 you're on the shelf when Windows 95 comes out.

14 THE COURT: I understand your position, and it may
15 say a lot about the respect of marriage, the qualities of the
16 two products.

17 But be that as it may, I'm going to deny the
18 motion, the Rule 50 motion. I think that the issue of -- the
19 issue -- I think there is not a duty to cooperate generally
20 under antitrust rules. Certainly I don't think -- I think
21 there's another question which even -- I don't think there's
22 duty to share -- I don't think that there is under the
23 antitrust law, I do not believe that there's general duty to
24 share your work product. I think that the whole question of
25 whether there's a real gap in the proof as to whether or not

1 there was anything alternative on the market even if
2 supplemented by the evidence supplemented by the motion to
3 reopen or by the testimony of Mr. Gates today, I will have to
4 decide that in due course as to whether to let that evidence
5 in.

6 The fact of the matter is there is at least one --
7 at least one argument as to why the plaintiff has not met
8 their burden of proof, and that is simply that there is no
9 duty to share work product under the antitrust laws. And if
10 there's a deceit claim, deceit in connection was not
11 producing -- would not as to when they're going to let
12 somebody else have access to your work product is at most an
13 action for deceit, and that's not a violation of the antitrust
14 law.

15 So the motion, I am -- I would like to have a
16 consensus on it, but I probably won't get that. But I want to
17 make it perfectly clear, what I'm going to tell the jury, what
18 I intend to do, unless you all persuade me that I'm wrong is,
19 and I'll put this in black and white so you all see this, but
20 I've written half of it so far saying that we're not asking
21 them to return a verdict based upon complex and perhaps
22 ambivalent instructions as to what antitrust claims are, to
23 give them four, so far I've identified four, I still have
24 more, four governing principles. Number one, there's --
25 antitrust law do not generally impose a duty to cooperate;

1 secondly, the antitrust laws do not impose a duty to share
2 work product; third, that anticompetitive intent is not
3 enough. There actually has to be, the defendant has to engage
4 in anticompetitive conduct. Fifth one, this is undisputed
5 during the relevant time period, which as of right now I'm
6 inclined to think goes through 1999, I could be wrong, and I'm
7 open to hear Microsoft's contrary view, that Microsoft had a
8 monopoly in the operating system market. And, fifth, that it
9 is not unlawful to maintain a monopoly by introducing to the
10 market a superior product.

11 But then I intend to say with that said, the
12 antitrust laws do prohibit a monopolist from maintaining a
13 monopoly by engaging in deception or by not having -- and
14 cannot maintain its monopoly by not having legitimate business
15 justification for any action it takes.

16 It seems to me that against that background, it's
17 very simple for the jury to answer these questions. Number
18 one, was the maintenance of the monopoly caused by the
19 introduction of superior product? Or was it caused by
20 anticompetitive conduct? Which in this case means two things,
21 the deceitful conduct will not end or not having a substantial
22 justification for withdrawal of product. If they find that it
23 was caused by anticompetitive conduct, that they then have to
24 reach the question whether Microsoft's actions caused a delay.

25 I think that for the purposes of the analysis that

1 we've just engaged in about damages we need a subsidiary
2 question of whether, if Microsoft did cause a delay when would
3 the product have come to the market? If the answer is not
4 until December of '95, then you all may be facing a recovery
5 of \$1.

6 And then I'll give, if you find that there's any
7 anticompetitive conduct caused the maintenance of the monopoly
8 again and that Microsoft -- for just for -- the other question
9 would just be that on the record, did Microsoft cause the
10 delay? And what amount, if any, do you award as damages? And
11 then I'll give a damages instruction. So that's what I intend
12 to do, I'll show it to you in more detail promptly.

13 But the Rule 50 motion is denied. I don't want to
14 give all in case I -- I'm either denying it or it's without
15 prejudice of being renewed at the close of all the evidence.
16 I suppose on the Rule 50 is to reserve ruling upon the Rule 50
17 motion until all the evidence is in. That's what I'm doing,
18 because clearly what I'm doing is saying that I think there
19 are legitimate legal reasons why the plaintiff may not prove
20 the case, but they're close questions. And I understand that
21 there is inconvenience to witnesses and the jurors. But I
22 think in terms of the macro picture, in front of the fairness
23 to the plaintiff, which has been through a month -- well,
24 everybody is going to go through the next month. You've been
25 in a month of trial. You've been up and down to the appellate

1 court two times, and frankly, with regard to the Tenth Circuit
2 and the Supreme Court, why should they have to figure out all
3 these difficult issues if? In fact, the jury determines,
4 look, it wasn't deceptive conduct. In fact, the monopoly was
5 maintained because Windows 95 was a better product, or that
6 Microsoft didn't cause delay, or that in any event the damages
7 are minimal, it seems to me we ought to have a jury verdict on
8 that as a practical matter.

9 So I'm either denying the motion without prejudice
10 being renewed or I'm reserving the ruling on the motion until
11 all the evidence is in. My intent is to allow Microsoft to --
12 all of the arguments that's been made and any others that they
13 believe appropriate, if there has to be a motion at the end of
14 the case or a motion for judgment notwithstanding a verdict or
15 whatever the present motion is called, then that's where we
16 are.

17 And I'll see you guys tomorrow morning.

18 MR. JOHNSON: Thank you, Your Honor.

19 MR. TULCHIN: Thank you, Your Honor.

20 MR. HOLLEY: Thank you, Your Honor.

21 (Whereupon, the court proceedings were concluded.)

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1 STATE OF UTAH)

2) ss.

3 COUNTY OF SALT LAKE)

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

6 That as such reporter, I attended the hearing of
7 the foregoing matter on November 21, 2011, and thereat
8 reported in Stenotype all of the testimony and proceedings
9 had, and caused said notes to be transcribed into typewriting;
10 and the foregoing pages number from 2861 through 2932
11 constitute a full, true and correct report of the same.

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

14 And hereby set my hand and seal, this ____ day of
15 _____ 201.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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