

1 MR. JOHNSON: Your Honor, if I could start. I owe  
2 you a sincere apology. You know, when you brought us up to  
3 the bench, I didn't even know what you were talking about.

4 THE COURT: Mr. Johnson, I said what I said. I  
5 will not make any decision. Everybody, I know --

6 MR. JOHNSON: I just want you to know, obviously I  
7 was up very late last night taking over for Mr. Taskier, and  
8 I'm not as sharp as I would like to be, obviously. It was  
9 completely inadvertent, and I apologize to the Court.

10 THE COURT: I understand. I hope this is all -- I  
11 want it to fade in the mix.

12 MR. JOHNSON: My sincere apologies.

13 THE COURT: I understand. This is a hard case, and  
14 it's got --

15 MR. JOHNSON: After all these weeks --

16 THE COURT: It's got its ups and its downs, but  
17 it's been a pleasure.

18 MR. TULCHIN: Your Honor, I just want to make one  
19 comment. And the Court said what it said at the bench, which  
20 I thought was completely appropriate and we agreed with what  
21 you said. I don't know whether it was advertent or  
22 inadvertent, and my next comment doesn't depend on that.

23 THE COURT: Let's just not discuss it. If we ever  
24 have to discuss it, we'll discuss it.

25 MR. TULCHIN: If I could just say one sentence for

1 the record, Your Honor.

2 THE COURT: Sure.

3 MR. TULCHIN: Once sentence. The remark twice  
4 about the government case does communicate to the jury exactly  
5 what should never have been communicated.

6 THE COURT: I know that. And I know that, and  
7 that's the problem. We'll just -- I just hope -- I  
8 understand. Mr. Johnson, thank you. That's all.

9 Okay. Let me, we've got a couple things to decide,  
10 and then everybody can hopefully have a nice longer weekend.  
11 I put on your desk which I think you have proposed revisions.  
12 And let me -- I think it's self-evident why they are, why I've  
13 done what I've done. It was based on yesterday's discussion.

14 MR. HOLLEY: Your Honor --

15 THE COURT: On 4 and 5, I tried to address the  
16 concerns raised by Mr. Holley, but at the same time preserve  
17 the fact that I don't have to highlight the issues for the  
18 jury. What I intend to do in addition, that is, the origin of  
19 the new things about 4 and 5, of course, I would delete what  
20 was problematic, which is to prove damages. That becomes  
21 redundant. And also I understand Mr. Holley's concern. But  
22 what I'm trying to do is to recognize the point but also not  
23 to have to decide the issue.

24 Yes?

25 MR. HOLLEY: Your Honor, can I be blunt? I really

1 do believe that if the jury is instructed as this paragraph  
2 now says, that no matter who wins this trial the likelihood of  
3 a reversal in the 10th Circuit is scarily high. The problem  
4 is that I think we have to tell the jury what Novell must  
5 prove. And it isn't acceptable to say on the one hand it may  
6 be that they have to prove X, and it may be that they have to  
7 prove Y.

8 I frankly, Your Honor, would rather have the jury  
9 instructed in a way that I like less but have it clear than  
10 have one party or the other have an argument that the jury  
11 didn't get instructed about the elements of the claim. I  
12 don't think that's in either party's interest.

13 Your Honor, I understand completely the Court's  
14 desire to hedge your bet on this, but with respect I'm afraid  
15 that we're creating a record that is going to allow a Court of  
16 Appeals to force us to do this all again. And I know --

17 THE COURT: Mr. Schmidtlein, do you agree? Or  
18 Mr. Johnson?

19 MR. SCHMIDTLEIN: Well, I'm obviously not happy  
20 with this because you're giving the opportunity for Mister --  
21 either way you're incorporating the issue that he wanted  
22 yesterday.

23 THE COURT: Well, that was there, anyway. But in  
24 any event --

25 MR. SCHMIDTLEIN: Right. But you're incorporating.

1 THE COURT: Do you take his point, I've just got to  
2 bite the bullet on this one? If so, I'll do it.

3 MR. SCHMIDTLEIN: I don't agree with that. I think  
4 you can do it in an either/or.

5 THE COURT: Why can't I? I instruct them what the  
6 elements are. I just say that one element is unclear.

7 MR. HOLLEY: Well, Your Honor, I just -- I know of  
8 no case where a jury has been instructed that the legal  
9 requirements of the cause of action may be X or they may be Y.  
10 To me it communicates a confusion to the jurors about what it  
11 is that they're being asked to decide. And if I put myself in  
12 the shoes of appellate courts, which I obviously am never  
13 going to be, but I mean, if I put myself in that position, I'm  
14 afraid that it gives them great leeway to say that the jury  
15 wasn't told what the elements of the claim were. And it's not  
16 in my client's interest --

17 THE COURT: Okay. Well, if you find something from  
18 the 10th Circuit which bears upon that, let me know by --  
19 frankly, if you have district judges in the Court of Appeals  
20 that wouldn't happen because they'd realize -- they'd realize  
21 that the district judge had an eight-week trial and did  
22 instruct on the elements and simply said one is not clear and  
23 tried to preserve the system, and it was practical.

24 But if there's something in the 10th Circuit which  
25 prevents me from doing that, I'll hear you. But subject to

1 that, which I understand, that's a fair point, do I have it  
2 right?

3 MR. HOLLEY: Your Honor, with the Court's  
4 indulgence, could we when we get back to the office --

5 THE COURT: Of course.

6 MR. HOLLEY: -- take a look at this?

7 THE COURT: Of course. I tried to do that.

8 MR. HOLLEY: I understand exactly what you're  
9 trying to do.

10 THE COURT: And the second one was because it's  
11 based upon I think the obvious premise that I was not  
12 instructed as to what middleware was. I would simply say  
13 middleware. But again, to avoid a retrial, it's probably  
14 because I was tired yesterday afternoon, I really didn't quite  
15 understand what Novell was saying its theory of middleware  
16 was, which made me think, and I'll understand it better when  
17 I'm more awake when I've heard the closing arguments and when  
18 I reviewed Dr. Noll's testimony, if necessary, but it made me  
19 think you've got a legitimate argument under Rule 50, so  
20 that -- and then I thought, what am I going to do now, because  
21 right now we don't know what basis they decide on.

22 So what I thought I would do would be to not  
23 instruct them on that because I really do have a -- it's  
24 obviously a contested issue, I don't want to weigh in on one  
25 side or the other, to stay out of the debate, but then clarify

1 the record so that if the jury were to say, look, we are --  
2 we're not buying the popular theory because it wasn't very  
3 popular, anyway, but the middleware theory we are buying, that  
4 would segregate the issue, and then you would have a Rule 50.  
5 I mean, that is why I've done what I've done.

6 MR. HOLLEY: Okay. Your Honor, again, if the  
7 Court -- I understand what you're doing now that you explain  
8 this in question 6. I would -- I think I'd rather not do it  
9 on my feet, but we will offer an amendment to question 6 to  
10 make it a little closer to what I understand the moat theory  
11 or the franchise --

12 MR. SCHMIDTLEIN: We'd like an opportunity to do  
13 likewise.

14 THE COURT: Fine. That's fine. But the theory is  
15 to try to segregate, it is not to give the -- not to weigh in  
16 on what middleware because that is a factual dispute; on the  
17 other hand, recognize that you may be right, that there simply  
18 is no viable middleware argument, in which case we can  
19 segregate that out. And if they answer in a way that the  
20 case -- that they decided against you on based on a  
21 Newberg (sic) theory, then you can have a Rule 50 argument.

22 MR. HOLLEY: I understand that, Your Honor, and I  
23 appreciate that clarification. So, Your Honor, what we will  
24 do is see if there is any 10th Circuit authority about  
25 alternate instructions on elements or claims. So one way or

1 the other we will offer a suggested alteration to question 6.

2 THE COURT: That's fine.

3 MR. HOLLEY: Not to --

4 THE COURT: No. No. No. I understand.

5 MR. HOLLEY: Thank you, Your Honor.

6 THE COURT: Now, the other things about the  
7 instructions -- and I won't decide whether to include that one  
8 sentence by the government case until I've had a chance to  
9 review whatever Novell's letter. And I've seen it, but I want  
10 to think about it.

11 MR. SCHMIDTLEIN: Thank you. Thank you.

12 THE COURT: I'll let you know Monday. Generally I  
13 accept Mr. Holley's proposed interlineations unless there's  
14 objection, except on Page 4, and I don't know what Page 4 was.

15 Oh, that goes to the very issue we were discussing.

16 MR. HOLLEY: Okay. All right, Your Honor.

17 THE COURT: But I will exclude that whole paragraph  
18 if -- well, I will look back at my prior opinion, and my  
19 inclination is still to include the language regarding deceit.  
20 In terms of -- I probably will keep prevent rather than  
21 hinder, but I haven't looked back there. I think I will say  
22 prevent on a timely basis because I think that really is the  
23 issue in this case, which is a little closer to hinder and  
24 focuses on what this is about. I think it addresses tere is a  
25 concern, a legitimate concern of Mr. Schmidtlein's -- my

1 handwriting is atrocious.

2 Oh, nominal damages. What base -- I haven't read  
3 it. Is there an authority for the nominal damages?

4 MR. HOLLEY: I believe so, Your Honor.

5 THE COURT: Mr. Tulchin said one case he got it.

6 MR. TULCHIN: We did have one, Your Honor, where  
7 the jury awarded one dollar. It was on an Unfair Trade  
8 Practices Act claim under the law of Connecticut. It was the  
9 antitrust claims we prevailed on. But I do believe there is  
10 authority. I don't have the cases at my fingertips --

11 THE COURT: I'll read the cases.

12 MR. TULCHIN: -- for nominal damages of a dollar.

13 MR. SCHMIDTLEIN: Certainly the ABA model  
14 instructions do not include those.

15 THE COURT: I probably will not give it. I will  
16 let you know if I do.

17 MR. HOLLEY: Your Honor, subject to being  
18 corrected, I think this comes from the USFL case in the  
19 Southern District of New York, the case about, against the  
20 National Football League. But when we get back to the office,  
21 we'll send that, the relevant authority to Your Honor.

22 THE COURT: Thank you. Essentially the Novell  
23 changes I'm not inclined to give, except there's one part  
24 where I think the suggestion is harm rather than destroy.  
25 That clearly is an appropriate change.

1           A couple general instructions, I mean, I'll just  
2 give you -- I'll send it to you. Basically I'll give you my  
3 model. The two which I'm not sure I understand why they're  
4 there, and I don't feel -- one has to do with the number of  
5 witnesses. It seems to me that the number of witnesses was  
6 about equal.

7           MR. TULCHIN: Well, it depends whether you count  
8 the videotape witnesses or live witnesses.

9           THE COURT: So if you say you want me to give the  
10 number of witnesses, I will. Otherwise I'm not going to.

11          MR. TULCHIN: It's of no consequence to us.

12          MR. SCHMIDTLEIN: It doesn't matter.

13          THE COURT: And the second one is corporations.  
14 You've got two corporations.

15          MR. HOLLEY: I agree, Your Honor. The less you  
16 have to read to them the better.

17          THE COURT: Okay. Any further? That's my -- based  
18 upon my review after our discussion yesterday, that's my  
19 proposal. And I'll go back and work on them. People have  
20 their exceptions. When it comes time to except -- in fact,  
21 we'll put it on the record now.

22                I assume there's an exception for my not giving,  
23 each side -- each side has an exception for not giving the  
24 instructions they originally proposed. They also each have an  
25 exception to my not giving the proposals they made in regard

1 to my beta instructions.

2 MR. SCHMIDTLEIN: Correct.

3 THE COURT: And I think that probably covers the  
4 woodwork.

5 MR. HOLLEY: I think it does, Your Honor. And I  
6 think Mr. Schmidtlein and I for once are in heated agreement.

7 THE COURT: We don't have to go one by one.  
8 Everybody thinks I should have given the instructions you  
9 proposed originally, and everybody thinks that I should have  
10 given your suggested changes to the ones I've suggested to  
11 you. And that remains -- whatever I decide to do about some  
12 of these, that remains true.

13 MR. HOLLEY: Yes, Your Honor.

14 THE COURT: Now we have Mr. Bennett. Is it  
15 Dr. Bennett?

16 MR. HOLLEY: Well, Dr. Bennett. He's a Ph.D in  
17 Computer Science from the University of Washington, Your  
18 Honor. And he'll be here first thing Monday morning.

19 THE COURT: My inclination, having read the papers  
20 including the Novell reply memorandum, if, in fact, he  
21 testified on deposition that he had checked the code -- and I  
22 realize he never supplemented the report to put it in. It  
23 seems to me Novell has been on fair notice of this, and,  
24 frankly, it seems to me it just sort of establishes family by  
25 somebody having looked at the code what is already I think

1 generally agreed that Marvel did use it, and I'm not sure  
2 about Capone, it doesn't really matter, but it was not used in  
3 the Office productivity suites. It seems to me that I ought  
4 to let it in. But I understand the authority cited by Novell.  
5 But the fact of the matter is my own view of these things is  
6 you shouldn't put form over substance. What I had not  
7 realized the first time around until I read Microsoft's  
8 memorandum is that he had done it in response to a criticism  
9 by Mr. Alepin, and he was deposed about it. So it's been in  
10 the case for two years.

11 MR. HOLLEY: Yes, Your Honor. And I don't want to  
12 belabor it. I think the fact of the matter is that he was  
13 asked about it at his deposition, and then Mr. Alepin had two  
14 years to do whatever he wanted to do about it. So there's no  
15 unfair surprise.

16 THE COURT: That's my sense of it. But if Novell  
17 wants to talk me out of it, I just don't -- if -- when I first  
18 read it I thought it wasn't disclosed until last week, and  
19 that's why I kept saying, what's the response? What's the  
20 response? And that was a problem. If, in fact, it's been in  
21 the case for two years, and frankly, I don't think -- I think  
22 really just in terms of this is the way to get to the truth.  
23 I don't think it's really disputed on the evidence, but I  
24 think if he did it, we ought to just let the jury know.

25 MR. SCHMIDTLEIN: I guess the only thing I really

1 would add, Your Honor, is we saw I think during the  
2 cross-examination of Mr. Alepin for the first time that some  
3 document that they claim came from Mr. Bennett -- or  
4 Dr. Bennett's analysis. If there are underlying documents  
5 that go to this, those have not been made available to us.  
6 And I think --

7 THE COURT: That's a different question.

8 MR. SCHMIDTLEIN: And I think we should get  
9 whatever paper analysis or anything they're going to use with  
10 them.

11 THE COURT: Let me -- give it now -- in fact, it  
12 seems to me the testimony is sufficient. But obviously if  
13 there is any paper, give it to Mr. Schmidtlein.

14 MR. SCHMIDTLEIN: If he's going to put something up  
15 or we're going to see something --

16 THE COURT: Absolutely.

17 MR. HOLLEY: Understood, Your Honor. And I think  
18 that's fair, and we'll do that.

19 THE COURT: Okay. And frankly, it seems to me that  
20 since that really seems to be pretty established, anyway, at  
21 least Mr. Belfiore missed it, but it's as clear as day. You  
22 just look in the box and then use it. But be that as it may,  
23 obviously give over everything.

24 MR. HOLLEY: Yes, Your Honor. We will do that.

25 MR. SCHMIDTLEIN: The other issue obviously that

1 was raised in our paper, and maybe we have to just deal with  
2 this as it comes up. I mean, and both sides --

3 THE COURT: I gather from the response that  
4 they're -- is this the opinion?

5 MR. SCHMIDTLEIN: Yeah. I mean, the way this works  
6 in these cases is the experts, you know, submit their reports.  
7 They cover the entire beach head. Frankly, in many cases the  
8 entire beach head includes things they probably shouldn't be  
9 testifying to. I certainly, knowing Your Honor's predilection  
10 with expert witnesses, I know they disagree, that they think  
11 Mr. Alepin stepped over the line. But we I think tried to  
12 keep Mr. Alepin's testimony focused on technical aspects about  
13 middleware and the technical justifications that were put  
14 forward. They have a lot of things about, you know,  
15 WordPerfect hadn't started developing code yet, and a lot of  
16 factual things that, there's a lot of back and forth in the  
17 record.

18 And in fairness to them, in fairness to them, when  
19 Mr. Alepin's initial report was put together it covered a  
20 beach front that was much larger and much wider. Again,  
21 you're in disclosure and you don't know what you're going to  
22 do, and you've got to preserve it.

23 THE COURT: I wouldn't be surprised if someone  
24 found it in summary judgment.

25 MR. SCHMIDTLEIN: Well, in any event, we did want

1 to alert the Court --

2 THE COURT: Fine. I hope that's not going to be a  
3 problem. Mr. Holley said --

4 MR. HOLLEY: Your Honor, I think Mr. Schmidtlein is  
5 being fair. Professor Bennett's report responded to  
6 Mr. Alepin's report. It contained things that frankly in  
7 light of the Court's views and my own views about expert  
8 testimony are not proper subjects of expert testimony. I  
9 won't make any comment about what Mr. Alepin said.

10 THE COURT: If there's a little leakage because of  
11 Mr. Alepin, I hope there isn't, I hope it's just -- frankly, I  
12 think this jury -- and I was worried about the note, too. I'm  
13 not sure that the inference is that they decided against  
14 Microsoft. I think it could very well be that they decided,  
15 look, it's time to go home. We've heard -- we've heard the  
16 case -- and I have no idea what the inference is.

17 But I think it's time -- you guys are good. The  
18 evidence is in. You're going to be able to argue. How long  
19 do you all want? Two hours each? Two and a half hours? Tell  
20 me on Monday just so I can schedule it.

21 MR. TULCHIN: That's great.

22 THE COURT: I don't need an answer now.

23 MR. TULCHIN: We'll let you know on Monday.

24 MR. JOHNSON: We should talk.

25 MR. TULCHIN: Yes.

1 THE COURT: I think if we start at 8:00, I think if  
2 it's over two hours, we should be -- if it's over two and a  
3 half hours each we're in trouble.

4 MR. SCHMIDTLEIN: We'll talk. But obviously two  
5 hours, break, two hours, maybe an hour.

6 THE COURT: It would be -- I assume it would be an  
7 hour and a half, two and a half.

8 MR. SCHMIDTLEIN: Exactly. Exactly.

9 MR. JOHNSON: Let me and Mr. Tulchin chat a bit.

10 THE COURT: There's a lot to cover. But let me do  
11 this, a meandering thought, that it's time for the case to get  
12 to the jury. And I think the evidence is really pretty clear.  
13 But there are other things for you to address. It's going to  
14 take you some time to do it, but you --

15 MR. SCHMIDTLEIN: If you can't do it in two hours,  
16 Your Honor --

17 THE COURT: If you can't do it in two hours you're  
18 in trouble.

19 MR. HOLLEY: Your Honor, we will not belabor the  
20 testimony of Professor Bennett. I understand the Court's  
21 points.

22 THE COURT: Sure. I know that.

23 MR. SCHMIDTLEIN: One last issue, or at least that  
24 I've got, and this is a little delicate. It has come to our  
25 attention that through a blog that Mr. Nakajima apparently

1 has, and I will tell the Court it's in Japanese but we've had  
2 people who speak and translate Japanese, that there is  
3 apparently to us a reference on his blog to having received a  
4 script of questions and answers in connection with his  
5 testimony. I am not going to offer any commentary one way or  
6 the other on that. But I guess, you know, we're at the end  
7 here. We have one more witness. If they have provided a  
8 script of questions and suggested answers to Dr. Bennett, I  
9 would like that produced to us. I'm not -- I frankly don't  
10 think that's appropriate and proper to be doing, but if they  
11 are -- if that has happened or it is happening, it certainly  
12 is not a privileged document, and it is a discoverable  
13 document, and I would like that produced if they have done  
14 that with Dr. Bennett.

15 MR. HOLLEY: We have not, Your Honor, so there's  
16 nothing to produce.

17 THE COURT: That does remind me of a story which my  
18 wonderful father-in-law who has passed away was involved in, a  
19 very big antitrust case for its day in Chicago when he was a  
20 young lawyer, and it was having to do with the divestiture of  
21 I think Du Pont and it could have been GM. And I've probably  
22 told Mr. Schmidlein this story before. And John Marshall  
23 Harlan along with my father-in-law was representing -- I guess  
24 my father-in-law was Du Pont and his partner, and I think  
25 Justice Harlan was representing -- I don't know. It doesn't

1 matter. But anyway, then Mr. Harlan had Mr. Du Pont on the  
2 stand. It was a non-jury case, I think. And everything was  
3 going swimmingly. And all of a sudden Mr. Du Pont looks down  
4 at Mr. Harland and says, haven't you forgotten a question? So  
5 scripts are probably not that unusual.

6 Okay. The only other thing, and I'm not pressing  
7 it, I'm just worried about the time. If it's going to be a  
8 chunk of time, don't forget, I hope the exhibits thing can be  
9 worked out. That is something which potentially could be a  
10 hunk of time which we could take up outside of the presence of  
11 the jury. But it's going to be a time-consuming matter.  
12 That's something that we've got to bear in mind. I think  
13 everything else is taken care of.

14 I'm going to go exercise. Thank you.

15 (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 December 8, 2011, and thereat reported  
8 in Stenotype all of the testimony and proceedings had, and  
9 caused said notes to be transcribed into typewriting; and the  
10 foregoing pages number from 4937 through 4953 constitute a  
11 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 \_\_\_\_\_ 2007.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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