

1 THE COURT: Please be seated.

2 THE CLERK: Are we ready?

3 THE COURT: I think so. Unlike you all I didn't
4 time my instructions. How long do you think they're going to
5 be? An hour and 15 minutes?

6 MR. SCHMIDTLEIN: About that.

7 MR. JOHNSON: Probably do it in an hour.

8 THE COURT: Probably.

9 MR. TASKIER: It says partly sunny tomorrow, Judge,
10 35 degrees.

11 THE COURT: Thanks.

12 (Whereupon, the jury returned to the court
13 proceedings.)

14 THE COURT: Okay. We should be finished just about
15 2 o'clock.

16 Mr. Tulchin, about an hour and five minutes.

17 MR. TULCHIN: Thank you, Your Honor.

18 Ladies and gentlemen, I'm going to change subjects
19 now, and I want to go back to really where Mr. Johnson
20 started, the Hood Canal. And you remember that was an
21 executive retreat. It was a place where Microsoft executives
22 would spend I think it was a three-day weekend and bat around
23 ideas. And the premise to the theory that Novell has put
24 forward is that there was a plan that Microsoft agreed to and
25 Bill Gates ordered that came out of the Hood Canal retreat.

1 Of course, Mr. Johnson showed you the documents
2 that you've seen before about the Hood Canal, some of the
3 notes and some of the PowerPoint presentations. But he
4 referred not at all to any of the testimony about what
5 actually happened at the Hood Canal retreat in 1993.

6 Bill Gates was here on November 21st and 22nd and
7 covered this subject several times on direct and on cross. He
8 said on direct:

9 We did not ever decide to create a shell, an office
10 shell separate from the operating system.

11 He said on cross:

12 There was no plan that I ever agreed to to make the
13 Chicago shell non-extensible.

14 Mr. Gates was asked again:

15 No, we didn't even do any work related to that, not
16 to mention not shipping any such thing.

17 Mr. Gates was asked another time:

18 Did Microsoft ever formulate a plan in which it
19 held an extensible shell of Windows 95 for Office?

20 Answer. No, we did not. We never shipped a shell
21 with Office. We shipped an extensible shell including OLE
22 capabilities with Windows 95.

23 He was asked again:

24 Did Microsoft ever formulate a plan to take all of
25 the extensibility out of the Chicago shell and tell ISVs that

1 the reason that was done was that it couldn't get the work
2 done in time?

3 Answer. No.

4 Bob Muglia was here. This was just after
5 Thanksgiving, I think November 29. He asked:

6 Was a plan formulated to remove extensibility from
7 Windows 95 and put it in the Office shell?

8 Answer. No. No. Never was. It was thought of.
9 It was discussed in this brainstorming session. It never went
10 anywhere.

11 Joe Belfiore was here December 6th:

12 Did the Microsoft Office team ever create a
13 replacement?

14 Thanks for the picture. I didn't know that was
15 coming. They're usually a couple steps ahead of me.

16 Did the Microsoft Office team ever create a
17 replacement for Windows Explorer, of Windows any version of
18 Windows?

19 Answer. No.

20 Paul Maritz testified by deposition. Novell played
21 this for you on October 27. He said:

22 From what I can recall, it never got beyond talk.
23 There was never any real reality behind it.

24 And Brad Silverberg also by deposition. You heard
25 this on October 26 said:

1 That never occurred.

2 He was asked about whether the shell was to be
3 removed from Windows. He said that never occurred.

4 So it's nice to premise your argument and to draw
5 up this, if I could put it this way, sort of conspiracy theory
6 based on this retreat at Hood Canal. But every witness who
7 was asked about that retreat said there was never a plan.
8 And, of course, it never happened. Shell extensibility
9 remained in Windows. Everyone agreed with that.

10 And then let's look at Slide 451. This is about
11 Mr. Belfiore's presentation in December '93. Neither
12 Mr. Gibb -- sorry -- Mr. Harral or Mr. Richardson, they were
13 the two who mentioned it. They said they received this paper,
14 but neither of them remembered being at the presentation. But
15 Mr. Belfiore's slide when he talks about the NameSpace
16 extensions says:

17 Not for most applications. Users should not, in
18 all capital letters, edit documents with an Explorer
19 extension. This is a case about WordPerfect and the
20 WordPerfect word processor in PerfectOffice. Microsoft, yes,
21 evangelized shell extensibility. We'll come to what the means
22 when you send out a beta. But Mr. Belfiore warned everybody
23 at the beginning, don't use this for the word processor.

24 He explained in his testimony on December 5th that
25 developers of word processing and spreadsheet applications

1 would not have use for the NameSpace extension APIs.

2 And later in this document, you'll remember there's
3 the 10 keys. There are five of them each of two pages. And
4 we asked him on direct examination for these -- to tell us
5 whether the NameSpace extensions are being referred to when he
6 set forth the 10 keys for making a great Windows that is
7 Chicago application, and none of the 10 referred to the
8 NameSpace extensions. They were a specialized APIs set for
9 only for people who wanted to display a pseudo folder,
10 something like an e-mail client or a document management
11 system, not for word processors.

12 And then, of course, the second question you'll get
13 to is the third question on the verdict form. But the second
14 issue is whether the decision to withdraw support in October
15 was a legitimate business decision, whether there were
16 business reasons that made sense. And there's more about that
17 coming.

18 But the only witness who challenged this was
19 Ronald Alepin. Even Dr. Noll testified as follows. Let's
20 look at Slide 452. And here's Dr. Noll, Novell's antitrust
21 expert, conceding that the very circumstances present here
22 would make it perfectly valid to withdraw APIs. The first
23 question is a long one. You can read it. It's right there on
24 the screen. His answer to me is:

25 Quote, there are circumstances under which the harm

1 created by -- the potential harm created by a particular set
2 of APIs exceeds the potential benefits, and in those cases it
3 is perfectly valid not to document the APIs.

4 A minute later, I asked:

5 So if Mr. Alepin is wrong on this subject, then
6 your opinion would be that it is okay not to document the
7 NameSpace extension APIs?

8 Answer. I agree with that. If, in fact, they were
9 sufficiently unstable and the harms exceeded the benefits of
10 documenting, then it would be perfectly valid to withdraw
11 them.

12 Now, we talked about causation. But before we get
13 to the decision itself and the reasons, I wanted you to recall
14 Novell's own expert saying it's perfectly valid if they were
15 sufficiently unstable. And, of course, Dr. Noll also
16 testified that when you make software judgments, this is
17 November 15 at Page 1871, there's always a decision about
18 whether to release something or to continue to work on it to
19 make it better. And he says: Right.

20 And the question then was: The company making the
21 operating system has to make judgments, has to make those
22 tradeoffs.

23 His answer was: Yes. Companies have to make the
24 decision.

25 And, of course, the point here is, and I know you

1 appreciate this, the decision on what to do with the NameSpace
2 extensions was not a decision that you would put to the
3 legislature of the state of Utah or to Microsoft competitors
4 or to some subset of ISVs. It's Microsoft's operating system,
5 Microsoft has spent years developing it. Mr. Gates testified
6 about this eloquently. It was an enormous effort. It was a
7 complicated, difficult piece of software to write, and it was,
8 of course, hugely important for Microsoft to come out with the
9 product that people liked and would be successful.

10 As you know, as it turned out, Windows 95 was
11 hugely successful. It was fabulously successful. People did
12 like it. But the judgment about what is supposed to be in the
13 operating system, what will make it work best and have the
14 least risk that it will crash and cause users to get very
15 unhappy, and I think as Judge Motz said, along the way maybe
16 say a bad word or two, that judgment is a judgment that
17 Microsoft has to make. No one else. And it's a judgment that
18 a business, of course, is entitled to make.

19 After the fact, Novell says, will that hurt us?
20 The judgment hurt us? But as you know already, and I'll show
21 you in a few moments, Novell certainly didn't say that to
22 Microsoft at the time.

23 Before we get to that, there's one very important
24 subject that Mr. Johnson I think moved past very quickly in
25 his summation. In the Judge's charge there's a reference to

1 possible deception. Was Novell deceived? And the theory that
2 Novell has advanced to you this morning is that it had a right
3 to rely on the NameSpace extensions once the beta went out in
4 June of '94, that Microsoft maybe could have decided not to
5 document them at all. But once they documented them,
6 Microsoft was frozen. The internal debate had to end. They
7 had to stay there. They could not be withdrawn in any way.

8 That theory, the premise for the whole argument
9 that this decision was anticompetitive rests on this notion
10 that Microsoft was not entitled to change the beta version of
11 Windows 95. And the only thing that Novell's lawyers showed
12 you in his summation on that subject was a little snippet from
13 Mr. Harral in which he said, in his experience, the only thing
14 that changes in a beta are things that have to be changed
15 because of testing, not features.

16 Well, the testimony to the contrary, and I'll go
17 through it with you now, is just overwhelming. And I want to
18 start with the CEO of Novell because what better place is
19 there to start if you want to know what Novell's understanding
20 was? Does Microsoft have the right to make a change to the
21 beta? Let's start with the boss. Slide 454.

22 Was it your understanding in 1994 when you were
23 CEO of Novell that when Novell got a beta version from
24 Microsoft of what eventually became Windows 95, that the beta
25 version might change?

1 Answer. Yes.

2 Mr. Gates, of course, said:

3 We were always very explicit. Hey, this is
4 software. We want your feedback, but we don't know when it is
5 going to be done or which of these features will be in the
6 final product. We would like to hear from you.

7 And amazingly, Novell's contracts with Microsoft
8 we're going to look at two, they're identical, Exhibits 19 and
9 18. Let's start with Slide 455. These are Microsoft
10 contracts that were given to ISVs so that they would get a
11 license to receive the beta version of Windows 95.

12 So Microsoft said in the contract -- and by the
13 way, this doesn't mean it's a defense to the case. This isn't
14 the end of your inquiry. You need to decide whether what
15 Microsoft did is legitimate business conduct. But, of course,
16 you're entitled to take into account Novell's agreement.
17 Dave Moon of WordPerfect signed this just before Novell bought
18 WordPerfect, and someone named Richard King of Novell had
19 signed it a few months earlier. But the contract form, the
20 words are the same. And the contract says:

21 The product may not operate correctly and may be
22 substantially modified prior to first commercial shipment.

23 It doesn't say it might modify just a teeny bit, it
24 says substantially.

25 Now, Exhibit 38 -- Plaintiff's Exhibit 388 is the

1 Chicago Reviewers Guide. Novell used that during the case.
2 That says, as well -- sorry, we don't have a slide. I'm going
3 to read you a portion of it.

4 The discussion of Chicago herein does not represent
5 a commitment on the part of Microsoft for providing or
6 shipping the features and functionality discussed in the final
7 retail product offerings of Chicago.

8 Mr. Alepin testified on November 10th that that
9 document, Exhibit 388, was sent to ISVs before the M6 beta was
10 sent out in June of '94.

11 And then we used this document with Mr. Larsen when
12 he was here. This is Exhibit 612A. And perhaps Mr. Harral
13 said what he said, and you certainly are entitled to consider
14 his testimony. But Exhibit 612A was an internal memo. You'll
15 see at the top, it's hard to read, Novell Corporate
16 Development Group, Steven W. Bentley. And I'm going to read
17 you another portion besides what's up here. It happens to be
18 dated October 18th, 1994.

19 I mean, let's just stop for a minute. It was
20 written 15 days after Mr. Gates made the decision to withdraw
21 support for the NameSpace extension APIs. Novell says you
22 can't do that to us. You can't strip that away from us.

23 Here's what the Novell Corporate Development Group
24 said, Mr. Bentley, on Page 4 of this very formal memorandum
25 written in October of '94:

1 As with the alpha phase, the beta process typically
2 uncovers significant numbers of situations in which features
3 do not meet the conceptual design or the design is faulty
4 requiring further testing -- sorry -- further design, coding
5 and testing or abandonment of the feature which also results
6 in a new round of testing. Despite the conceptual freeze, the
7 product and features may still change dramatically during this
8 phase as problems are discovered.

9 Now, you're entitled to see this document in your
10 deliberations. I think what this phase refers to is the beta
11 phase. You're entitled to look at it and draw your own
12 conclusions. The jury is master of the facts in this case,
13 and you will come to see this for whatever you see it as.

14 But I would submit to you that 15 days after
15 Mr. Gates made his decision that Novell Corporate Development
16 Group acknowledged that the product may still change
17 dramatically, indeed, features may still change dramatically
18 during the beta phase of the development of a product.

19 Later on the same page, Mr. Bentley writes:

20 Until a product is released, quote, significant
21 uncertainties exist in the entire process, unquote.

22 And there really can't be any doubt about any of
23 this. Let's look at Slide 457. This is the Novell software
24 developers kit copyrighted in 1994 and 1995, just in the sweet
25 spot of our time right when it matters. And what Novell told

1 ISVs that received Novell's products is that beta products are
2 pre-released quality and may contain errors and omissions.

3 Novell does not guarantee that beta products will
4 become generally available to the public or that associated
5 products will be released. The entire risk arising out of
6 your use of beta product remains with you.

7 Now, that's good enough for Novell apparently to
8 tell its ISVs, but today in December of 2011 Novell takes the
9 exact opposite position, that the entire risk of what Novell
10 was doing -- Microsoft didn't know what it was doing, we'll
11 come to that in a minute -- the entire risk of what Novell was
12 doing should lie with Microsoft. I ask you if that makes any
13 sense.

14 And let's look at what Mr. Frankenberg said about
15 that exact document, Exhibit 618. I asked him the questions,
16 I read him what I just read to you. Question, and then the
17 next two sentences say:

18 Novell does not guarantee that beta products will
19 become generally available to the public or that associated
20 products will be released. The entire risk arising out of
21 your use of beta product remains with you.

22 Question. Do you see that?

23 Answer. I do.

24 Question. And again, that was something that when
25 you were CEO Novell put in its agreement, Exhibit 618,

1 covering the software developers' kit; correct?

2 Answer. Correct.

3 Question. Would you agree with me that that was
4 something, as well, that was commonly understood in the
5 industry at the time?

6 Answer. I think so. Yes.

7 So 618, Exhibit 618 is spot on, and Mr. Frankenberg
8 acknowledged it was understood in the industry. Mr. Harral
9 may have thought differently. But we're not done because the
10 unanimous view other than he is exactly along these lines.

11 Let's look at Slide 459. This is from Mr. Alepin,
12 the only witness who says that there was no technical
13 justification for Mr. Gates to do what he did in October.
14 Alepin was asked, Mr. Alepin:

15 You testified yesterday, sir, about beta testing.
16 Do you recall that?

17 Answer. Yes.

18 Now, a beta program is when a software development
19 company feels that software is reasonably stable and close
20 enough to let a larger community of users work with it, but
21 they use it at their own risk. Is that not right, sir?

22 Answer. Yes, they use it at their own risk. They
23 shouldn't run their business critical applications on this
24 software and expect what the results will be, correct.

25 Later on Alepin says a couple answers later:

1 The expectation is that the software is still being
2 worked on, that is correct.

3 So you take 618 and Frankenberg and Novell's own
4 expert Alepin, the conclusion is very clear. The risk was not
5 with Microsoft. The idea that it's Microsoft's fault that
6 Novell chose to try to build this advanced file open dialog or
7 that it's Microsoft's fault that Quattro Pro wasn't ready, the
8 idea that you can't change a beta version, it's just rejected
9 roundly by everyone involved.

10 Let's look at the next slide. We have both
11 Mr. Gates and Mr. Struss on here. So we can do this quickly.
12 Mr. Gates says the same thing.

13 We don't know when it is going to get done or which
14 of these features will be in the final product.

15 Brad Struss, I think you remember Mr. Struss.

16 There is a good solid understanding that a beta
17 release of a product may or may not be everything that is in
18 the final release.

19 Nolan Larsen, Slide 461, says:

20 That's the definition of beta, there can be and
21 almost certainly will be changes.

22 And he said later on, the bottom of Slide 461:

23 It's very common for changes to be made.

24 Now, on cross-examination you may remember a long
25 cross of Mr. Larsen on this subject including

1 cross-examination of whether this ever happened to him,
2 whether he had received a beta of an operating system and
3 later on a feature was withdrawn. And Mr. Larsen testified at
4 Pages 3656 to 3658:

5 I can remember some examples where Apple with the
6 operating system did that to us.

7 Question. Did they offer an explanation as to why
8 they were doing it?

9 Answer. No.

10 Question. Did you find out that there was some bug
11 or some other issue with it?

12 Answer. No.

13 Mr. Harral stands alone against the testimony and
14 the documents from Novell itself. And look at Mr. LeFevre,
15 Slide 462. Same question. And, of course, Mr. LeFevre's
16 answer is consistent with what Frankenberg and Alepin and
17 everyone else said.

18 Beta by definition is an early release subject to
19 change.

20 Later on in his answer:

21 There is no promise that what is in an early beta
22 or even a late beta will be in the final product.

23 That's Mr. LeFevre. And Mr. LeFevre said
24 WordPerfect itself did that with WordPerfect 5.1 for Windows.
25 He said:

1 I ran the beta program, December 2nd at Page 4033,
2 and my job was to receive customer feedback during the beta
3 process. Quote, we cut a number of features in
4 WordPerfect 5.1 as a result of that feedback, unquote.

5 Apparently even WordPerfect did the same thing.

6 And John Bennett yesterday, of course, told you
7 exactly the same thing, betas change. Features can be
8 removed. It's not unusual that they are. Joe Belfiore said
9 it, as well.

10 The idea that what lies behind this lawsuit that it
11 was unfair or more relevantly anticompetitive for Microsoft to
12 withdraw support in October, it just cuts against what all
13 these witnesses have said. If you're using the beta release
14 of a product, it's commonly understood in the industry.
15 Things can change. You use it at your own risk.

16 So let's talk about the reasons for Mr. Gates'
17 decision. But just before we do, one really important point.
18 Novell says that the real reason, the real reason was that
19 Microsoft was trying to hurt Novell. That can't make any
20 sense, not even an iota of sense, if at the time that the
21 decision was made Microsoft had no idea that Novell was
22 planning to use the NameSpace extensions. And that, of
23 course, is exactly what the evidence here shows.

24 Slide 463. This is in September of 1994. It's
25 Defendant's Exhibit 17. And Mr. Struss, who does not work for

1 Microsoft and came here voluntarily to testify, told you that
2 he had written this document in September, that he had talked
3 to Mr. Creighton of Novell WordPerfect, his main contact,
4 Mr. Creighton, who never came to this trial. And Mr. Struss
5 reported:

6 WordPerfect. They have not begun any work upon
7 iShellFolder, iShellView, et cetera.

8 He goes on later to say:

9 For common dialogs, current plan is to use the
10 Microsoft dialogs, but I don't believe they've investigated
11 this enough to know for sure.

12 So Microsoft did the responsible thing in September
13 when this issue was coming to a head. And you remember the
14 meeting that Mr. Nakajima described in the big conference
15 room, and he said he was nervous because Mr. Gates and a lot
16 of other top guys were going to be there? And Mr. Nakajima
17 was supposed to defend the position that these APIs should
18 still be documented, and he said he decided not to because he
19 recognized the robustness issue. We'll come to that in a
20 moment.

21 Microsoft did the responsible thing. Before
22 Mr. Gates made the decision, there was a survey taken of major
23 ISVs to see if they planned to use the NameSpace extensions.
24 And here's what -- Exhibit 17 is what Mr. Struss reports. And
25 then let's look at Mr. Struss' testimony from the

1 November 28th.

2 What did you tell others at Microsoft about whether
3 or not Novell WordPerfect planned to use the NameSpace
4 extension APIs?

5 Answer. I told them what I knew to be true or what
6 had been communicated to me from WordPerfect, which is that
7 they were not using it and they were not dependent on it.

8 465. Mr. Gates was asked:

9 What knowledge, if any, did you have on October 3rd
10 about what Novell was planning to do?

11 Answer. I don't think I had any awareness at all
12 about the specifics of whether they were using them or not.

13 466. This is nine days after Mr. Gates makes the
14 decision. October 12th. Mr. Struss does what he should be
15 doing. He goes out and tells major ISVs of Mr. Gates'
16 decision. So far Stac, Lotus, WP -- everyone agrees that
17 means WordPerfect -- Oracle, SCC appear to be okay with this.

18 That's October 21 -- sorry, October 12th, my error.
19 And then let's look at the next slide, 467. This is on
20 October 21. It's from Exhibit 2. And interestingly, still in
21 October of '94 Novell WordPerfect are not telling Mr. Struss,
22 hold on a minute, there will be hell to pay in the press,
23 which was in an earlier e-mail, if you do this. They're
24 saying, we appear to be okay on this.

25 And when Mr. Struss talks to the first wave ISVs

1 again later in October, he reports back that everything seems
2 to be fine. There's no mention of any complaint from Novell
3 or WordPerfect, something along the lines of holy smokes,
4 we're going to have trouble developing our products without
5 those APIs. On the contrary, nothing.

6 And Mr. Struss says, I'm trying to get them to
7 focus more on their 32-bit release, the product of Windows 95.

8 And then let's look at Exhibit 82, Slide 468. This
9 is Mr. Maritz writing in November, about a month later. He
10 says, I met on Friday with DRG and Joe B, Joe Belfiore. And
11 this is what Microsoft understood at the time. There were
12 four groups using these interfaces, Capone, Marvel, Stac,
13 Symantic. Not WordPerfect, not Novell, because WordPerfect,
14 Mr. Creighton had apparently said, we're okay with this.

15 So the very idea that this decision was aimed at
16 Novell, it was made to hurt Novell, the idea that again is the
17 premise to this whole theory, you did something to hurt us
18 even though we understood that beta versions can change, and
19 the CEO Mr. Frankenberg says it was understood in the industry
20 that they can, and that the user of the beta uses it at his
21 own risk? The premise that this was done to hurt Novell,
22 again, there just isn't any evidence that that is so.

23 So let's get to the three reasons. We have to go
24 quickly. I'm sorry. I've taken so long. I will do exactly
25 as the Court tells me to and adhere to my time limit.

1 The charge that you will get tomorrow about whether
2 this conduct was anticompetitive includes references to
3 legitimate business conduct, whether the conduct provides
4 benefits to consumers and whether it makes business sense.
5 Those are the factors for you to consider. And with all
6 respect to my adversary, again, the evidence is overwhelming
7 that it does.

8 Joe Belfiore testified on December 5th, this is
9 Slide 470, and I won't go back into all this debate. The
10 debate before the beta went out doesn't matter. What matters
11 to Novell is that they got the beta and that the decision was
12 made in October. But Joe Belfiore again said:

13 The Cairo team was focussed on higher end PC and
14 found that shortcoming, shortcoming, we're talking about
15 robustness, the chance that the operating system would crash
16 to be highly objectionable. Belfiore said this several times.

17 Let's go to Slide 472 from Mr. Nakajima. And I
18 want to pause here for just a moment. Mr. Nakajima gave you
19 two analogies which he came up on his own about the NameSpace
20 extensions. One was, I can buy my on GPS system and hook it
21 into my Toyota, that's the top slide, as opposed to a GPS that
22 I can buy from Toyota with the car and it's integrated into
23 the screen. And he said, you'll remember, that the NameSpace
24 extensions were like the bottom picture. If ISVs use the
25 NameSpace extensions and a bad application caused it to crash,

1 everything would go down.

2 On cross-examination the question to him was, well,
3 you mean that if the NameSpace extension goes down, it's like
4 this picture, the Toyota will still run, the only thing that
5 won't work is your screen on the dashboard.

6 And Mr. Nakajima said, actually, no. In the
7 Windows 95 case, the entire system goes down. That was at
8 Page 3785 on December 1st.

9 He gave you another analogy.

10 Thank you for the slide. That's 473.

11 He gave you another analogy, which is you have a
12 restaurant and it's a steakhouse, and you haven't -- you don't
13 have any chef preparing desserts. You can go out to the baker
14 across the street and buy desserts and bring them to your
15 restaurant, or you can ask that baker to come across the
16 street and work in your kitchen.

17 And the analogy he gave was that if you have an
18 extra cook in your kitchen, in other words, an application
19 that is running on the NameSpace extensions, there's a lot of
20 risk. Injecting new cooks into the kitchen means maybe there
21 will be a fire. You haven't trained those cooks in your
22 restaurant, or maybe they'll bring in some virus that will
23 contaminate all of your steak.

24 And again, Mr. Nakajima when he went to the meeting
25 with Mr. Gates didn't defend the NameSpace extension ISVs on

1 the subject of robustness. He acknowledged the problem and
2 didn't enter into the debate.

3 And here's Mr. Gates, Slide 474, on November 21.
4 Again, the idea that this was done to hurt Novell is just --
5 there just isn't any evidence that anyone knew at the time
6 that Novell was planning to use them. But as Mr. Gates says
7 here:

8 The risk to Microsoft is that if the NameSpace
9 extension documentation was left alone that applications could
10 crash the entire operating system.

11 And there's no debate that that's so because let's
12 look at Slide 475. This is Mr. Richardson, one of Novell's
13 witnesses, I believe the second witness in the case. And he's
14 asked about the NameSpace extensions. He's asked:

15 You agree with that, don't you, sir, that if
16 someone who didn't know what they were doing wrote a NameSpace
17 extension that was badly behaved, they could have crashed the
18 entire Windows 95 shell because they were running in the same
19 process?

20 Mr. Richardson said yes. Mr. Alepin, the only
21 witness to challenge the decision, said the same thing.
22 Slide 476.

23 It had the potential to make the system
24 unresponsive. You'd have to reboot, and you might lose your
25 work. And he said, I agree with that.

1 And let's look at Slide 477 and then 78 quickly.
2 Professor Noll, same thing I showed you a piece of this
3 earlier. If an API is unstable, that's a valid reason not to
4 document it.

5 Now, compatibility, there's also no dispute about
6 this, that the NT and Cairo teams disliked the NameSpace
7 extension APIs and didn't want to support them in future
8 versions of the operating system. The problem got worse when
9 Mr. Gates decided in September that the Windows NT project
10 would use the Chicago shell because robustness concerns,
11 concerns about crashing became even more important.

12 And Mr. Struss' e-mail, PX3, to which Mr. Johnson
13 pointed in his summation is truthful. It gives in the Q and A
14 portion robustness and compatibility as two of the reasons.
15 That's exactly right.

16 Let's look at Slide 479, again from Mr. Alepin.

17 Mr. Alepin, there was some interfaces which you
18 keep internal because among the reasons which you might keep
19 them internal is that you do not wish customers to attach to
20 them, lest you be obligated to support them in the future.
21 Mr. Alepin agrees that's a good reason. That was the
22 compatibility reason.

23 And then let's look at PX21 and Slide 480, the day
24 after Mr. Gates' decision. Mr. Muglia says:

25 This is very good news. NT development does not

1 have to expend precious energy.

2 So if this was just a pretest, if this was done to
3 hurt Novell, first a piece of evidence that Microsoft knew
4 that Novell wanted to use them, but secondly, I guess nobody
5 on the Microsoft side got that memo, that the real reason is
6 to hurt Novell. It was about robustness. It was about
7 compatibility, and the third reason, my time is short, is that
8 Mr. Gates was disappointed that the NameSpace extension APIs
9 were not achieving the rich level of functionality that he had
10 envisioned six months or a year earlier.

11 All those e-mails that Mr. Johnson showed you about
12 how Mr. Gates thought this would be important were e-mails
13 from earlier. And Mr. Gates thought this didn't achieve what
14 he intended, what he wanted.

15 Now, very quickly, there's no dispute, as I said
16 earlier, Office didn't use the NameSpace extensions.
17 Mr. Bennett said it yesterday on cross. That wasn't
18 challenged. Mr. Nakajima said it, Mr. Gates said it,
19 Mr. Belfiore said it. The only Microsoft technology that
20 wound up using the NameSpace extensions in this period was
21 Marvel. Marvel wasn't an application that competed with
22 Novell's product. Marvel was an online browser system
23 utility. It was internal to Windows 95. It became part of
24 the Windows 95 operating system itself. It was not used by
25 Microsoft to compete with Novell.

1 Okay. My time is short. I told you that there was
2 never any complaints by Novell. I want to look quickly on
3 this subject. I want to look quickly to Slide 482. You
4 remember we looked at this briefly. This is an internal
5 Novell e-mail. It's on a different subject. It was about
6 bugs. It's dated October 16th, '95, Defendant's Exhibit 6,
7 and it's entitled, five big bugs. And there was apparently a
8 letter, August 21, '95, that went out from DRB, that could be
9 David Bradford, the lawyer at Novell. The memo says:

10 DRB and others believe that this bug deal is a big
11 deal, but the apps people do not. Dave, perhaps Dave Miller,
12 the name mentioned at the top, thinks it's mostly our fault.
13 Later there's a reference to, we fumbled development. Dave's
14 conclusion is that our problems came from inept engineers.

15 Now, let's be clear. This is not about the
16 NameSpace extensions, and I don't want you to think it is.
17 It's about a different issue about bugs where Novell
18 complained to Microsoft. And someone concluded that the
19 problems were not anything Microsoft did at all, but internal
20 to Novell.

21 There is no similar memo saying that the NameSpace
22 extensions were at fault. And you see the memo about the logo
23 program. I showed you that earlier, Exhibit 155. No similar
24 memo there, either. You know Mr. Struss reported on
25 October 12th in PX3, WordPerfect appears to be okay with this.

1 You know that Mr. Struss testified that he spoke to
2 Mr. Creighton, and Mr. Creighton was fine.

3 Let's look at Slide 484. This is Mr. Struss
4 testifying on the witness stand on November 28th, the Monday
5 after Thanksgiving:

6 Other than this lawsuit, did you ever hear from
7 Mr. Creighton or anyone else that the withdrawal of support of
8 the NameSpace extension APIs caused a delay in the release of
9 WordPerfect or Quattro Pro or PerfectOffice for Windows 95?

10 No.

11 And then Exhibit 86. This is Slide 485. Yes,
12 there was an e-mail from Brad Struss to Kelly Sonberegger at
13 Novell. Again, look at this in the juryroom, if you choose.
14 No complaint from Novell that somehow the decision to withdraw
15 support for these APIs hurt Novell.

16 THE COURT: Then let's look at Slide 636. In
17 January you remember I asked Mr. Frankenberg about the minutes
18 that Dave Miller had taken of the meeting between Novell
19 including Mr. Frankenberg and Microsoft including Mr. Gates on
20 January 10th. This document goes on for -- well, I forget, I
21 think eight pages. I hope I'm right. And Mr. Frankenberg
22 testified that in this long meeting between Novell and
23 Microsoft there is not a single mention in January, a single
24 mention of the NameSpace extension APIs.

25 This is Slide 487. I asked Mr. Frankenberg:

1 Do you recall any letter that you sent to Gates
2 which mentions these APIs?

3 No, not specifically.

4 Have you seen any such letter?

5 No.

6 How about an e-mail?

7 And then there's a question and answer.

8 Answer. I have not seen an e-mail from me. I saw
9 an e-mail from Mr. Gates to a number of his people, but not
10 from me.

11 And then lastly on this subject, Dave LeFevre, this
12 is 47A. I think I referred to this earlier.

13 Mr. LeFevre, when was it that you first heard that
14 Novell was blaming Microsoft's decision to withdraw support
15 for some APIs for the fact that Novell was not able to get
16 PerfectOffice for Windows 95 out to market in a more timely
17 way?

18 The first time I heard that was in my deposition
19 for this case -- my initial deposition in 2008.

20 Let's look at the next slide, because I just want
21 to remind you, I think you remember Mr. LeFevre, but I just
22 want to remind you what he was doing during this period. He
23 never heard that the NameSpace extensions were a problem for
24 Novell. And Mr. LeFevre testified that he met with Gary Gibb,
25 Steve Weitzel and Tom Creighton on a regular basis in '95.

1 The meetings became daily. They were a triage, we called it a
2 triage meeting where we looked at the bugs, et cetera, and
3 went through all the different product challenges.

4 Now, if it were true that the cause of Novell's
5 problems, the cause of the delay was the NameSpace extensions
6 or if it were true that the NameSpace extensions had hurt
7 Novell at all to begin with, can it be that Mr. LeFevre who
8 met with Gary Gibb and Steve Weitzel and Tom Creighton would
9 not have heard of that throughout 1995, not indeed until 2008?
10 And I don't think there was a single document in evidence that
11 says, internal Novell document, that says that the reason for
12 the delay was the NameSpace extension API problem.

13 Now, I only have I think 15 minutes. I hope my
14 calculation is correct. We have a couple of other subjects to
15 cover. And by necessity, I'm going to do them a little
16 quicker than I otherwise would have planned.

17 The third major issue, which again, there are two
18 questions on the verdict form that you will answer if you get
19 that far. Again, if you find no causation, that will end
20 things right off the bat. But the third issue, and I think
21 it's Questions 4 and 5 on the verdict form, is whether or
22 not -- and I'm summarizing, these aren't the exact words,
23 whether or not the decision to withdraw support for the
24 NameSpace extension APIs contributed significantly to
25 Microsoft's maintenance of its monopoly in the operating

1 system market or was reasonably capable of contributing
2 significantly?

3 And, yes, there is a debate between Professor Noll
4 and Professor Murphy. I know you remember Professor Murphy
5 just here a few days ago. I won't go through everything he
6 said because of time. I think he dealt with both of
7 Professor Novell's theories more than adequately.

8 But let me just say this. Let's look at Slide 488.
9 You'll remember that Professor Novell said that there wasn't
10 an effective competitor to Windows on the market in '95 and
11 '96. Microsoft, this is Windows 95 and other Microsoft
12 products, Microsoft's -- excuse me -- market share in this
13 PC operating system market, we're not talking about the market
14 in which WordPerfect and PerfectOffice and Word and Excel and
15 Office competed, now we're talking about operating systems.
16 Is there something that Microsoft did to WordPerfect that
17 helped it have a monopoly or maintain a monopoly in the
18 operating system business?

19 The answer is clearly no, both as a matter of
20 common sense and based on the evidence. You will remember
21 Professor Noll said that in 1995 before August, before
22 Windows 95 came out, PerfectOffice 3.0, the product that
23 Novell says is so good that came out at the end of '94, had an
24 8-percent market share in suites.

25 Thank you. This is Slide 489. This is Novell's

1 testimony exactly on it.

2 And both Professor Noll's theories -- I know the
3 testimony on this is technical and complicated from the
4 economist, but both of Novell's theories depended on the idea
5 that PerfectOffice would become so popular, so popular that it
6 itself could impact competition in the PC operating system
7 market. Both his theories, what we call the franchise
8 application theory is that PerfectOffice would become so
9 popular and become cross-platformed, it would be written for
10 other operating system, as well, that people would actually
11 choose their operating system because PerfectOffice was so
12 popular and available that it would make it convenient to
13 choose Linux or OS/2 or some other operating system, none of
14 which had ever gotten any real traction.

15 And in addition to that, and I'm cutting through
16 this a little bit, but the findings of fact actually make
17 Professor Noll's second theory absolutely untenable, we can
18 look quickly at finding 28, Slide 493, currently no middleware
19 product exposes enough APIs to allow ISVs to write
20 applications, full-featured applications to those APIs.
21 Remember that's of 1999. It still hadn't happened.

22 Slide 494. This is finding 32. It remains to be
23 seen whether middleware-based development will flourish at
24 all.

25 Let's look at the next one.

1 These middleware technologies have a long way to go
2 before they might imperil the applications barrier to entry.

3 This is a reference to Java and Netscape, but the
4 answer is no different for WordPerfect here. In fact,
5 Professor Noll was pretty clear. Can we get the slide from
6 Professor Noll? I've lost track of the number. Thank you.
7 Thank you. It's exactly the one. You're way ahead of me.

8 Professor Noll said the same thing. From '94 to
9 '99, there never was a middleware product that could eliminate
10 the applications barrier to entry. And in the interest of
11 time, I'll let you look at it. I won't read the whole thing
12 to you.

13 There's one other absolutely impossible problem for
14 Novell on this theory, and that is that Mr. Frankenberg and
15 Professor Noll both said that if Novell had had the benefit of
16 the NameSpace extension APIs, if they had chosen option one
17 and used them, Novell's product would have been better, they
18 would have had this advanced custom open file dialog.
19 Remember Novell was writing that product only to Windows. And
20 if Novell's product was better, that would have made Windows
21 more desirable and increased its market share.

22 Can we look at those slides very quickly? I'm
23 sorry to rush.

24 Here's Mr. Frankenberg on November 8th.

25 If PerfectOffice had been released in a timely way,

1 I'm short-handing this, that would have made Windows 95 even
2 more desirable.

3 And he said definitely. It would have made
4 Windows 95 more desirable in the marketplace.

5 Then the next one, again from this Mr. Frankenberg.
6 If they had been able to use the NameSpace extensions and been
7 able to get their product out on time, that would have made
8 Windows 95's market share even higher, higher than the
9 95 percent it had.

10 Is there one more, Dave? Professor Noll.
11 Professor Noll reiterated that and said there was no real
12 substitute for Windows 95 available. Linux didn't become a
13 full-fledged commercial product until '96.

14 So the theory here about the PC operating system
15 competition and whether something that Microsoft did in
16 October 1994 contributed or was reasonably capable of
17 contributing to Microsoft's maintenance of its very high
18 market share, its monopoly, that theory depends on the idea
19 that if Novell had gotten the NameSpace extensions the way
20 they wanted, somehow competition would have increased in the
21 operating system market and Windows would have been less
22 successful, when Frankenberg said exactly the opposite,
23 Windows market share would go up.

24 Now, I'm going to talk very briefly about damages.
25 I'm going to talk very briefly about it for two reasons. The

1 first is, I don't think it's going to be necessary for you to
2 reach that question. You have to answer the seven questions
3 above it yes before you get to the Question 8. But secondly,
4 my time is short.

5 Professor Hubbard answered all the claims and all
6 the theories that Professor Warren-Boulton --
7 Dr. Warren-Boulton, I should say, put forth. A true
8 calculation of damages in this case would get you to zero.
9 Professor Hubbard explained to you about the overpayment and
10 the market's reaction. He went through in great detail the
11 flaws in Dr. Warren-Boulton's calculations.

12 But I want to just point out one assumption that
13 lies behind what Dr. Warren-Boulton said. Dr. Warren-Boulton
14 testified that his calculations were dependent on -- thank you
15 for putting up the slide. I was looking for the number, and
16 I've lost track of all my numbers. Professor Warren-Boulton
17 testified that his calculations depend upon the assumption
18 that Novell would have had its product in the market within a
19 sufficiently short period -- excuse me -- time period so that
20 there would not have been a significant affect on its sales.

21 He then goes on to say:

22 It's my understanding from the testimony on which I
23 totally rely on the programmers that we were talking about
24 something in the order of the time frame August, September,
25 October.

1 Windows 95, by the way, came out on October 24th,
2 you may remember.

3 THE COURT: August.

4 MR. TULCHIN: I'm sorry. Did I say October?

5 THE COURT: I thought you said --

6 MR. TULCHIN: Thank you, Your Honor. I'm sure I've
7 made other mistakes in the last two and a half hours. If I
8 have, please forgive me. It's unlikely that was the first.
9 And I'm getting close to the end and probably tired.

10 August 24th, 1995. So to get to the end of October
11 as Warren-Boulton said would be just over 60 days. He then
12 goes on to say, quote:

13 It is my understanding also from that testimony
14 that the expectation was that that was their goal, was to get
15 it out within 30 or 60 days. And that is my but for world,
16 unquote.

17 So his calculations, Novell's experts depend on
18 this assumption that the product would have been out within
19 about 60 days. From August 24th to the end of October is
20 66 days or 67. That's what Warren-Boulton says.

21 And even if you reach the question of damages, you
22 don't really have to resolve the debate between Hubbard and
23 Warren-Boulton, although I think you should if you resolve
24 it resolve it in favor of Dr. Hubbard, but you don't have to
25 because all the evidence shows that the products were not

1 going to be out by the end of October 1995 because of
2 Quattro Pro.

3 We're back to Exhibit 230, and the other exhibits
4 that we looked at and Larsen's testimony, that he went to
5 California in January of '96, there was chaos there. They
6 couldn't find the source code. And from this witness stand
7 under oath, Mr. Larsen who has never worked for Microsoft told
8 you that by no stretch of the imagination was the product then
9 ready to go.

10 In conclusion, we've taken a lot of your time, not
11 just today, over a period of I think it's seven or eight
12 weeks. We started almost two months ago. I thank you again
13 for your patience and your conscientiousness. I've been
14 before a number of juries. It's astounding that every single
15 day that all 12 of you are punctual and attentive and
16 listening and doing your best to understand a complicated
17 case. Steve Aeschbacher, Jim Jardine and Steve Holley and
18 Sharon Nelles and all of us thank you for your time, your
19 attention. I trust you will take your time deliberating and
20 do the right thing. Thanks very much.

21 THE COURT: Thank you, Mr. Tulchin.

22 Mr. Johnson?

23 MR. JOHNSON: You're not going to give the poor
24 jurors a break?

25 THE COURT: No. I will at five to.

1 MR. JOHNSON: All right.

2 Hi, again. We're going to try to hit some of the
3 high points of what Mr. Tulchin was talking about. I
4 obviously don't have the time to talk to you about all of it.

5 But let's start with that damages point, that slide
6 they put up there. Dr. Warren-Boulton said very specifically
7 in that slide that he relied totally on the testimony of the
8 developers with respect to the time period they were trying to
9 get the product out. I showed you the slide earlier that all
10 of the developers' goal was to get it done within 90 days of
11 Windows 95 shipment. That was, in fact, the goal of the first
12 wave program, and their view was consistent with the first
13 wave program. So it's not correct to say that we had to have
14 it out by the end of October. It's actually the end of
15 November we're talking about. So in the but for world that
16 you look at, you should be considering the end of November,
17 not the end of October.

18 Let's go directly to this Quattro Pro thing.
19 Again, Microsoft continues to attack the honesty and integrity
20 of Mr. Gibb, even though, of course, all of the witnesses have
21 said that he was in the best position to know whether
22 Quattro Pro would have released appropriately with
23 PerfectOffice. Microsoft continues to harp on this thing in
24 December with the 15 Quattro Pro developers who did depart at
25 that time. You may remember that what had happened Novell had

1 announced that it was going to sell the applications, so I'm
2 sure they weren't happy. And they moved on.

3 Now, I don't say that Mr. Larsen lied. He just
4 didn't know what he was talking about. You can remember he
5 was a human factors guy. He was shipped off to California.
6 He'd never worked on Windows 4. He'd never worked on a
7 spreadsheet before. He just plain didn't know what he was
8 doing.

9 Little memory quiz for you. What was the code name
10 for Quattro Pro? I bet you don't remember. We had Storm. We
11 had Lightning. Quattro Pro was Typhoon.

12 Let's take a look at Defendant's Exhibit 231.
13 Now -- excuse me. Go back. Go back. Defendant's
14 Exhibit 194. See that Typhoon Quattro Pro? We didn't talk
15 much about the code names for Quattro Pro. But that was --

16 Now, Mr. Gibb had testified -- if we could bring up
17 Slide 104 from the closing. I'm sorry. Mr. Goldberg, can you
18 get that?

19 Mr. Gibb had testified that by the time these
20 events in December they were basically, Quattro Pro was
21 basically code complete and basically everything in there was
22 done. They were basically done, is what he said.

23 So now let's take a look at Defendant's
24 Exhibit 231. Can we bring that up, Mr. Goldberg?

25 Defendant's exhibit, this is their exhibit, 271, I

1 may have said something else, shows that Quattro Pro Typhoon
2 was code complete on August 23rd, 1995. All right? Mr. Gibb
3 was telling the absolute truth to you when he told you that
4 Quattro Pro was code complete long before the events of
5 December. As a matter of fact, by the time we get to the
6 events of December, they were just fixing bugs. And that's
7 all they did when they went out there. And Mr. Gibb so
8 testified in his testimony in this case.

9 Mr. Gibb was the one who had weekly meetings with
10 Quattro Pro developers. Mr. Gibb was the one who followed the
11 progress of Quattro Pro development team. Mr. Gibb told you
12 that Quattro Pro was very conservative in their estimates and
13 over delivered based on those estimates, something that he
14 thought was a pleasant surprise shown here in the testimony.

15 If we could turn to the transcript at Page 809,
16 Lines 16 through 23, Mr. Goldberg. That's not the one,
17 Mr. Goldberg. Could we actually bring up the transcript on
18 Page 809, Lines 16 through 23? Thank you.

19 Was Quattro Pro team dealing with bug fixes in
20 December of 1995?

21 Well, so I was involved with -- when we took it
22 over I was involved with taking it over. So all we did is bug
23 fixes. There were no additional features added, no additional
24 things added, just cleaning and polishing for release.

25 Again, Mr. Gibb was telling you the truth. Fixing

1 bugs. Obviously the shared code was behind. They didn't
2 have -- they were sitting around because they had been code
3 complete in August of 1994. They would have been ready to
4 ship Quattro Pro -- 95, excuse me -- in August of 1995.
5 Quattro Pro would have been ready to ship within the critical
6 time to market.

7 And frankly, Microsoft's continued aspersions of
8 what Mr. Gibb said is scandalous and is just not right for
9 them to rely on this event where 15 guys left long after
10 Quattro Pro was finished to try to say that Quattro Pro was
11 the problem.

12 Let me deal briefly about this late to Windows,
13 late to suites thing. I don't understand what this has to do
14 with this case. Yes, we were late to Windows. Yes, we were
15 late to suites. But again, the relevant period to be looking
16 at here is when Novell had the product and we were producing
17 great products and where we had a chance to be on Windows 95.
18 It's not all that ancient history about how Microsoft was
19 talking out of both sides of their mouth about OS/2 and
20 Windows back when Mr. Peterson was involved in the early
21 1990s. It's about what's happening during the relevant period
22 of this case. So this is simply an effort and misdirection by
23 Microsoft trying to throw you off the scent of what this case
24 is all about.

25 The other thing I noticed, and I don't know whether

1 you picked it up, but every time we look at WordPerfect or
2 PerfectOffice success in the market place, they always show
3 you a chart that shows shares. They never show you a chart
4 that shows dollars. Why do they do that? Because our market
5 share was small, but that little market share in this enormous
6 market was worth hundreds of millions of dollars.

7 So every time Microsoft wants to say that we were
8 tiny, we were on the way out, we didn't have anything going,
9 they show you share data, which, of course, when you compare
10 yourself to the Godzilla, Microsoft, means we'd have a very
11 small share. But what we should be looking at is dollars,
12 which is -- Mr. Goldberg, Slide 119 from the closing -- I'm
13 sorry -- here's the dollars, hundreds of millions of dollars
14 in revenue for Novell WordPerfect on Windows. The bars in the
15 blue. So when Mr. Tulchin says that we only had an 8-percent
16 market share for suites, thank you very much. I'll take those
17 kinds of dollars any day for a company like WordPerfect.

18 Let's talk just a moment about the sales force
19 thing. I don't understand what this is all about. You know,
20 we allegedly ruined the sales force of WordPerfect. It was a
21 merger. There was testimony that WordPerfect had grown fat.
22 Apparently they never fired anybody. They were a private
23 company, and God bless them, everybody stayed on. But when
24 you come to a public company and they have to make a profit
25 for their stockholders, you're going to have some contraction.

1 And I think about 20 percent of the sales force was let go.
2 And that's hardly unusual. I mean, that's just got to happen
3 when you have a company like Novell that is very focused on
4 the profitability and their head count. So that's certainly
5 not very startling.

6 But the point here is, and I think again it was
7 misdirection by Microsoft, even if we had the most effective,
8 best salespeople in the world, even if everybody was happy
9 eating ice cream, making lots of money, what good would that
10 have done in this case? We didn't have a product to sell. I
11 mean, you can have the greatest sales force in the world. If
12 you don't have a product to sell, it doesn't matter. So this
13 again is I think a little misdirection sent to you from
14 Microsoft to suggest that this had some meaning in terms of
15 what happened in this case.

16 And now about halfway through this presentation
17 Mr. Tulchin picked up on Hood Canal, and he tried to say that
18 because they didn't do it, I suppose he was trying to say it
19 never was the plan. Well, it was a plan, and Mr. Gates
20 endorsed the plan. The plan didn't go forward because of what
21 happened is the executives and systems group said, no, no, no,
22 we're not doing that. We're publishing these extensions.
23 That's not appropriate for you to have our applications using
24 these extensions and not to publish them to ISVs. So that's
25 what happened, and the Office plan set forth in the radical

1 extreme didn't go forward.

2 And I showed that to you not to suggest that that
3 plan went forward, but suggest that this is a window into
4 Mr. Gates' thinking, to suggest to you that all the way back
5 in June of 1993 Mr. Gates was thinking about ways to gain
6 these interfaces to advantage Microsoft applications and to
7 hurt people like WordPerfect and Lotus.

8 So I don't care that it didn't become an actual
9 product, what I care about is what does this tell you about
10 Mr. Gates' heart in the matters that we've talked about today?

11 There was some reference to Mr. Professor Noll's
12 testimony about it being okay to pull APIs if those APIs were
13 unstable. What actually Professor Noll was testifying there
14 was that it was okay not to document the APIs if they were
15 unstable, not that it was okay to pull APIs if they were
16 unstable.

17 Let's talk a little bit about this beta thing.
18 Again, the Court already instructed you that those contracts
19 don't protect Microsoft against any anticompetitive conduct
20 that it engaged in in this case. And we didn't argue, and I
21 think I made this pretty clear when I started talking to you,
22 we didn't argue to you that you can't change a beta. Of
23 course you can. But you've got to have a legitimate reason to
24 change the beta. You've got to have something that was a
25 problem to change a beta. You don't pull something because

1 you want to hurt a competitor and for no other legitimate
2 reason.

3 I'm sure betas change all the time when they find
4 out their problems, but as Mr. Nakajima told you, he got
5 nothing but praise for the NameSpace extensions. There were
6 no problems revealed in the beta process. And, in fact, the
7 proof is in the pudding, the NameSpace extensions never
8 changed. They were there from day one. Apparently they're
9 still there today. Mr. Nakajima's invention is still working
10 within Windows today.

11 So it is not correct to say that we are suggesting
12 in this case you can't change betas. What we're only saying
13 is you can't do it for illegitimate purposes. And, in fact,
14 the documents that they showed from Novell about changing
15 betas said, I don't know if you remember what it actually
16 said, it said as problems are discovered. That was the last
17 line of that discussion about betas and how they may change,
18 as problems are discovered. Absolutely true. Can't argue
19 with that.

20 The situation here is there were no problems to
21 discover. These NameSpace extensions were working just fine,
22 thank you very much, not only on Windows 95, but on NT, as
23 well. And Cairo, the mirage in the desert, was already gone.

24 Mr. Tulchin suggested that Gates didn't know that
25 WordPerfect was using the extensions.

1 Could we have PX220 brought up, please? Can we
2 bring up Mr. Silverberg's e-mail there showing a copy to
3 Mr. Gates? Can we highlight the second paragraph, please?

4 Mr. Brad Silverberg and Mr. Russell Siegelman,
5 copied Mr. Gates and Mr. Maritz. October 5th, 1994, two days
6 after Mr. Gates' decision. Mr. Silverberg states:

7 Other ISVs using extensions are WordPerfect, Lotus,
8 Symantic and Oracle.

9 In other words, Mr. Gates knew that his arrow had
10 hit the right target. WordPerfect and Lotus were using these
11 extensions, and he had specifically called them out by name as
12 the reason for de-documenting the NameSpace extensions, to
13 hurt them specifically in order to advantage the Office
14 product. So it's not appropriate for someone to argue that
15 Mr. Gates didn't know that WordPerfect is using the
16 extensions.

17 We also have, of course, in Mr. Henson's report,
18 which was PX17, which I don't even think you need to bring up,
19 I think you remember this, based on what Mr. Creighton had
20 told them, Microsoft understood that it was very likely that
21 WordPerfect was, in fact, using the extensions.

22 Now, we did have testimony, of course, that
23 WordPerfect is not going to be revealing their full hand to
24 Microsoft. Obviously they're competitors in the applications
25 field. So, no, they didn't reveal everything that was going

1 on. What they tried to do was deal with a decision that they
2 thought was based on legitimate technical reasons. But it
3 wasn't based on legitimate technical reasons, and here we are
4 many years later finally getting to discuss that with you.

5 I want to make it clear here that Novell is not
6 trying to punish Microsoft for any past successes it may have
7 had. We agree that they have built some good things. I think
8 Mr. Nakajima's work is great. I really admire that man.

9 This case, however, is about preserving the
10 competitive process on the ability to compete in the
11 marketplace. All WordPerfect wanted was the ability to
12 compete with Microsoft Word and Office on a reasonably level
13 playing field and a chance to provide an updated version of
14 its products to its loyal user base on Windows 95 operating
15 system.

16 Now, you know, if we had been able to compete, I
17 guess there's no guarantees, but I think we had a fair shot
18 given our strong product at the time and the market that was
19 available and our user base. But what they did to us was to
20 make sure we couldn't even get on the field. And that's not
21 right.

22 Microsoft has stated repeatedly that it doesn't
23 matter that we couldn't get on the field. They provide these
24 justifications for their view. They basically say that
25 Microsoft was so big and powerful that even -- there's no way

1 we could have won even if we got on the field. Next they will
2 say we're so weak that even if we got a chance to play the
3 game we wouldn't have been able to finish, that we were
4 already some sort of sinking ship.

5 But none of those excuses mean that we shouldn't
6 have been given a chance to be on the field, given a chance to
7 compete in this system.

8 And as you may recall what Mr. Frankenberg said
9 about the reasons we ultimately sold the product --

10 Mr. Goldberg, could you bring up Page 1033 of the
11 trial transcript Lines 18 through Page 1034, Line 3?

12 Question. Let's return to the sale of the Office
13 productivity applications. Can you explain to the jury why
14 Novell decided to sell its Office productivity applications in
15 late 1995?

16 Answer. It became clear that we were not competing
17 on a level playing field. Our key competitor, Microsoft,
18 could control our ability to put product out the door and did
19 so, and that meant that it was impossible for us to fulfill
20 our promises to customers, it was impossible for us to derive
21 significant value, and it made much more sense for us to sell
22 product and pursue other opportunities.

23 Ladies and gentlemen of the jury, we put our faith
24 and our trust in your hands. Thank you.

25 THE COURT: Thank you, Mr. Johnson.

1 Ladies and gentlemen, see you at 8 o'clock in the
2 morning. I've not done the excellent job that counsel has
3 done in timing my instructions and to go over the verdict form
4 with you. It probably will take about an hour and 15 minutes,
5 then the case will be in your hands.

6 Thank you. I'll see you all tomorrow.

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

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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 13, 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 5284 through 5330
11 constitute a full, true and correct report of the same.

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

14 And hereby set my hand and seal, this ____ day of
15 _____ 2011.

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KELLY BROWN HICKEN, CSR, RPR, RMR