

6:30 p.m.

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2
3 (WHEREUPON, the following was heard in open
4 court.)

5 THE COURT: Hello.

6 We have two questions, one of which is easy, I
7 think, and one of which is probably not. The first
8 question, at least the one I want to address first, is does
9 Windows 95, Win 95 considered an operating system or
10 middleware? The answer is operating system.

11 MR. JOHNSON: Yes.

12 THE COURT: God bless you.

13 The second question is does Novell have evidence
14 that the withdrawal of NSE, which I assume is name stake --
15 for once I was conscious of what I had done -- namespace
16 extension APIs cause the market share or monetary lose,
17 which I assume means loss, with opposing, with an extra s,
18 operating system? I am prepared to say you have to rely
19 upon your recollection of the evidence and the arguments of
20 counsel.

21 MR. JOHNSON: Of course, Your Honor.

22 MR. TULCHIN: Your Honor, there is testimony from
23 Professor Noll on cross-examination. I showed him
24 Frankenberg's testimony where Frankenberg said that he
25 thought, that, he, Frankenberg, thought Windows would be

1 more desirable if Novell could have used the namespace
2 extension APIs to build their advanced file open dialogue.
3 And Professor Noll said I have no reason to disagree with
4 that. I may have even shown him the portion of
5 Frankenberg's testimony that said that, he, Frankenberg,
6 believed that it would have made Windows' market share even
7 higher.

8 I point this out to the Court, because although
9 the question is not crystal clear, it seems to me that that
10 is what the question is about, and the Court could suggest
11 that there is testimony in the record on this subject from
12 Professor Noll. I can give you the pages if you want.

13 THE COURT: No, I don't want them. God bless you.
14 That is why the Yankees are in the first place and the
15 Oriels are in the fourth. I'm going to give what I said.

16 Let's bring the jury in.

17 I'm also going to tell them to go home.

18 MR. TULCHIN: Thank you, Your Honor.

19 THE COURT: I will answer them.

20 (WHEREUPON, the jury enters the proceedings.)

21 THE COURT: I guess I could have answered all of
22 this in writing, but it is late. One answer is easy. The
23 question is was Win 95 considered an operating system or
24 middelware? The answer is it was considered an operating
25 system. I hope that answers that.

1 The second question is not so easy. Does Novell
2 have evidence that the withdrawal of NSE, which I assume
3 means namespace -- apparently I have said stake a couple
4 times -- namespace extension APIs cause the market share or
5 monetary lose, which I assume mean loss, for the opposing
6 operating system? The answer is you have to rely on the
7 evidence and your recollection and the arguments of counsel
8 and the evidence. There is no way to re-create that for
9 you. The answer is rely on your recollection.

10 Is that going to help? We can't do anything more.
11 You have been here for eight weeks and you have been
12 terrific but, you know, you have heard the evidence and you
13 have heard the arguments, and the reason I brought you all
14 in here is it may be time to say goodnight. You have worked
15 hard all day. Go home or go to the hotel, and if you want
16 to stay, and that is entirely up to you, but there comes a
17 point where you can just think through issues and analyze
18 them so much, and sometimes you have so step back and say
19 what is the case all about?

20 So my answer to the first question is operating
21 system, and my answer to the second question makes you bang
22 your heads, and if you need something more tomorrow --
23 sleep, if you can, and everybody out here has worked really
24 hard, and I'm sure they have had lots of sleepless nights.
25 I have had one or two when the Ravens lost.

1 UNIDENTIFIED JUROR: When we are uttering
2 namespace extension in our sleep, what do we do?

3 THE COURT: That is a little nightmare for you.

4 The second question is, as I understand it, it is
5 does Novell have evidence of the withdrawal of NSE,
6 namespace extension APIs, cause market share or monetary
7 lose, which I assume means loss, of opposing OS, which I
8 think means operating system? That is a question which
9 really goes to everything that we have spent eight weeks
10 doing, and you have heard arguments on, and if you want to
11 ask the question tomorrow after a good night's sleep ask it
12 again and we'll try to figure out an answer, which will
13 probably be we can't answer the question.

14 Our answer tonight is you have to rely on
15 everything that you have heard for the last eight weeks and
16 the arguments of excellent counsel.

17 Yes.

18 UNIDENTIFIED JUROR: If we cannot come to a
19 conclusion as a group, the 12 of us, in a relatively short
20 length of time, like by the weekend or something, what
21 happens then? That is a question that I have been asked
22 several times.

23 THE COURT: I would like to consult with counsel
24 before answering that question and then I can tell you. How
25 long you deliberate is up to you. You have no artificial

1 constraints. This has been a long trial, difficult issues,
2 and everyone here hopes that you can come to an answer,
3 because nobody wants to subject 12 more people to what you
4 have all been through.

5 That said, this country is based on the jury
6 system, and if you can't reach an agreement, you can't. At
7 some point I might give you an instruction which says, look,
8 nobody is going to do better than you all have and God knows
9 that is true. You have all been here at 8:00 every morning
10 and you have tried to listen, and if you can't reach a
11 verdict, you can't reach a verdict. Individual consciences
12 count. I will probably tell you in very formalized language
13 to try to reach a verdict, but if you can't, you can't.
14 That is the way the system works.

15 I'll be much more formalized, and I'll hear from
16 counsel, but I got to say that is the bottom line. Do the
17 very best that you can. You know it as well as we do that
18 you are all terrific jurors. You have worked hard and you
19 have to keep working. I am going to tell you to keep
20 working. There is no time constraint.

21 All of us would like to have it sooner than later,
22 and for lots of reasons, but keep working at it. If you
23 can't reach a verdict, you can't reach a verdict, but I'm
24 going to tell you to try to reach a verdict and if you
25 can't, you can't. If there is individual disagreement, that

1 is what we're all about. Do the very best that you can.

2 Does that answer your question?

3 UNIDENTIFIED JUROR: Yes.

4 THE COURT: It is sort of vague, but I am doing
5 the best I can.

6 Counsel, if you object to what I have just said,
7 tell me. We can look in form books and try to tell you
8 exactly what I ought to say, but that is the bottom line.
9 Keep working at it. I will tell you to keep working at it.
10 I know it is the Christmas season, and I know there are lots
11 of reasons, and I would like to be home, but the fact is
12 this is up to you all. You have to work as long as you can.
13 If you reach a point where you say we can't do it anymore,
14 so be it, but I want that based upon somebody really saying
15 I just can't agree to what the rest of you are saying. That
16 is what the jury system is all about.

17 I really do suggest, and you have all worked and
18 we have been here since 9:00 this morning --

19 MR. SCHMIDTLEIN: 8:00, Your Honor.

20 THE COURT: I am on east coast time.

21 I suggest that you go home or back to the hotel.
22 I will stay here and answer more questions, but I really
23 think it is time to rest and step back and think what your
24 fellow jurors have hold you and reexamine your own views, as
25 I have told you before, and do the very best you can and

1 come back tomorrow ready to work.

2 If you can reach a verdict tomorrow by a
3 reasonable time, terrific. If you can't, you can't. That
4 is the way it is. Okay.

5 Is 8:00 good?

6 UNIDENTIFIED JUROR: Yes.

7 (WHEREUPON, the jury leaves the proceedings.)

8 THE COURT: I did a lot of ad-libbing about the
9 Alan charge and stuff, but I hope it was okay.

10 MR. TULCHIN: Your Honor, a couple of things, if I
11 could.

12 First is I think it is much, much too soon to do
13 anything but insist that they keep trying. They only got
14 the case this morning. There clearly is some disagreement,
15 but we have been here for seven or eight weeks and I think
16 we ought to make them try.

17 The second thing, Your Honor, is that under Rule
18 48(b) of the Federal Rules of Civil Procedure the parties
19 may stipulate to a non-unanimous verdict. I think that is
20 something for the parties to consider. We don't have to
21 have a verdict of 12, if we are in agreement that some
22 lesser number will suffice.

23 THE COURT: Who do you want to exclude?

24 MR. TULCHIN: No. I don't know what --

25 THE COURT: Excuse me. Whom do you want to

1 exclude?

2 MR. TULCHIN: I don't know what the discussion has
3 been, of course, and I don't know what the number is, but it
4 seems to me that this is at least something that might be an
5 option to move things along.

6 THE COURT: You can consider that but I think the
7 answer will be no, but maybe it is yes. I hope you consider
8 a lot of other things, but you are where you are and you
9 know what the evidence is and you know what the arguments
10 are and you know where I am, unfortunately, perhaps, but in
11 terms of the ultimate issues you don't know where I am
12 because I don't know either. I won't say anything more.

13 If you all can somehow come back to square one,
14 terrific.

15 MR. TULCHIN: One other thing, Your Honor. I am
16 very reluctant to raise this, and I don't mean to complain,
17 but one of the jurors is talking and gesturing with someone
18 on the Novell team on a regular basis when that juror comes
19 into the courtroom. It has been very obvious to us and it
20 has been going on for several days. It certainly went on
21 just now. It is I think at a point where the people on the
22 Novell side should be instructed that this kind of -- this
23 sort of developing a relationship with a juror is not
24 appropriate.

25 THE COURT: I am not going to intervene. Whatever

1 has developed has developed. It is not appropriate to
2 intervene with a juror, if that has happened. Jurors are
3 jurors and the system is the system and we have to live with
4 where we are. You all have tried an excellent case and we
5 are all tired, and I think it is just time to call it off.
6 Okay.

7 MR. SCHMIDTLEIN: Thank you, Your Honor.

8 THE COURT: Can we go home?

9 You all heard where I was, and I don't know what
10 the answer is, but you have to have jurors that work, and if
11 they can't reach an agreement, they can't. That is what I
12 tried to say. If I misstated something, please let me know.

13 MR. JOHNSON: We have no problem with what you
14 said. That was perfectly appropriate.

15 (Proceedings adjourned.)
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