

1 IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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3 JOE COMES; RILEY PAINT,)
an Iowa Corporation;)
4 SKEFFINGTON'S FORMAL)
WEAR OF IOWA, INC., an) NO. CL82311
5 Iowa Corporation;)
PATRICIA ANNE LARSEN;)
6 and MIDWEST COMPUTER)
REGISTER CORP., an)
7 Iowa Corporation,)

) TRANSCRIPT OF
8 Plaintiffs,) PROCEEDINGS
)

9 vs.)
)

10 MICROSOFT CORPORATION,)
)

11 Defendant.)

12 -----

13 The above-entitled matter came on for
14 hearing before the Honorable Scott D. Rosenberg,
15 commencing at 9 a.m., October 13, 2006, in
16 Room 404 of the Polk County Courthouse, Des Moines,
17 Iowa.

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APPEARANCES

FOR THE PLAINTIFFS: ROXANNE BARTON CONLIN

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1 PROCEEDINGS

2 (The following record commenced at 9 a.m.

3 on October 13, 2006.)

4 THE COURT: Are we ready to proceed?

5 First motion, Microsoft's motion in limine

6 regarding foreign antitrust proceedings.

7 MR. GREEN: Your Honor, the first two on

8 your list were going to be done by Mr. Holley.

9 THE COURT: Oh, sorry.

10 MR. GREEN: So we will start -- no, sorry.

11 It's my fault. I didn't tell you which one he was

12 doing. So we will start with No. 3.

13 THE COURT: Wealth and stockholdings

14 motion.

15 MR. GREEN: Thank you, Your Honor. That's

16 Microsoft's motion.

17 The court has already had before it a

18 discovery motion on this issue that you might recall,

19 and it concerns certain witnesses who are either

20 former or present employees of Microsoft who will be

21 called as witnesses in this case.

22 The plaintiffs have designated prior

23 testimony of at least eight of current or former

24 Microsoft employees, and in their designation they

25 have included questions which were propounded and

1 answered with regard to either the amount of stock,
2 Microsoft stock owned by those employees or X
3 employees, the amount of options, including the stock
4 price that those potential witnesses have in
5 Microsoft and in some cases the amount of their
6 compensation, including bonuses.

7 Further, there are several witnesses who
8 are on the witness list where there is not prior
9 testimony or deposition testimony in this case. But
10 pursuant to a request by the plaintiffs and an order
11 entered by this court, Microsoft has provided to
12 plaintiffs' counsel this same information with regard
13 to stockholder compensation and that sort of thing.
14 So it's anticipated -- we know for sure that the
15 plaintiffs intend to -- well, if they follow their
16 prior testimony designations -- present this evidence
17 with regard to eight former or current Microsoft
18 employees. And they very well might be eliciting
19 that information or going into that information which
20 they possess with regard to other similarly situated
21 witness who are witnesses who are on the witness
22 list.

23 It's Microsoft's position, Your Honor, that
24 evidence of a witness's wealth is entirely irrelevant
25 to the defendant Microsoft's liability in this case.

1 The plaintiffs, in fact, have conceded on
2 the relevancy issue in effect in their memorandum at
3 page 2 by stating that we misapprehend the nature of
4 their reason for wanting to get into this information
5 and that it all has to do with impeachment and bias
6 of the witness.

7 First of all, Your Honor, there are Iowa
8 cases which state that a witness may not be impeached
9 or discredited on immaterial facts. And I have a
10 cite here, Your Honor, which is not in the brief
11 because I just found it this morning.

12 MS. CONLIN: We will stipulated that a
13 witness cannot be impeached on immaterial facts.

14 MR. GREEN: Okay. Well, it's good that you
15 did because that's the law.

16 MS. CONLIN: I understand.

17 MR. GREEN: So, you know, assuming that it
18 is irrelevant, which it seems to me that the
19 plaintiffs have conceded, but I'm sure they won't
20 agree, even if it's going to be used for impeachment
21 purposes, it's not admissible.

22 Next, Your Honor, Microsoft contends that
23 even if it is relevant, it is prejudicial, and it
24 should be excluded under Iowa Rule of Evidence 5.403,
25 which, of course, Your Honor, is the evidence that --

1 the rule that says that the judge or the court should
2 exclude the evidence if the probative value outweighs
3 the prejudice.

4 The prejudice in this case is pretty clear.
5 The evidence could bias the jurors against Microsoft
6 and its executives in the rendering of the liability
7 decision.

8 I think everybody here knows that the
9 relative wealth of the parties is not admissible
10 evidence unless, of course, it is admitted for the
11 purposes of exemplary damages. And I think the rules
12 and the cases are pretty clear on that.

13 And addressing this bias argument. The
14 plaintiffs' argument is, "Well, their shareholding
15 may affect the credibility of their testimony because
16 a finding might affect the value of their Microsoft
17 stock," which, of course, wouldn't even apply to
18 salary, although I suppose they are arguing that it
19 might affect their salary.

20 Number one, we believe that the jury can
21 assess liability without -- and credibility of the
22 witnesses -- without this sort of knowledge to make a
23 determination of liability. Plus, the total wealth
24 of Microsoft is such -- and this is in our reply
25 brief, Your Honor -- that even an award of the size

1 that the plaintiffs claim for the 443 million or
2 whatever it is would not affect -- have a material
3 affect on the -- well, the price of the Microsoft
4 stock and, therefore, that is not a legitimate claim
5 of bias with regard to witness testimony for former
6 or present employees of Microsoft.

7 Lastly, Your Honor, this very issue came up
8 in Minnesota in front of Judge Peterson. And he
9 determined, one, that their holdings were irrelevant.
10 But he did say that it could go to bias but
11 determined that the -- in order for the jury to
12 assess that -- but there was a certain prejudicial
13 nature to it that could be occasioned. And in order
14 to sort of weigh that against the bias issue, he
15 determined that the plaintiffs could only ask the
16 question: "Are your shareholdings worth a million
17 dollars?" And they could answer yes or no, and that
18 was it.

19 And I made copies of that order, and I will
20 hand them up, Your Honor. I underlined the relevant
21 parts just for your convenience, but I can tell by
22 the nodding of your head that you've already --

23 THE COURT: I've read it.

24 MR. GREEN: -- read it.

25 THE COURT: Thank you.

1 MR. GREEN: And I think, you know, our
2 position is that the Iowa rules are different, and
3 it's not relevant at all. And if it is, its
4 prejudicial value outweighs any probative value. But
5 if the court is inclined to go ahead and let it go
6 forward, we think that the reasoning by
7 Judge Peterson should be reviewed carefully and that
8 this court weigh the prejudice against the possible
9 usefulness of the evidence to determine witness
10 credibility and do something the same or similar to
11 what Judge Peterson did in Minnesota.

12 That is all I have, Your Honor.

13 THE COURT: Very well.

14 Plaintiffs.

15 MS. CONLIN: Thank you, Your Honor.

16 We do agree that the issue of wealth,
17 generally, is irrelevant to any issue. But the issue
18 of wealth derived from Microsoft is relevant always
19 to the issue of bias, and bias of a witness is always
20 an issue. Jurors are told that in our standard
21 instruction. They are told that they should assess
22 credibility and determine specifically if the witness
23 stands to gain anything as a result of his or her
24 testimony.

25 How can they do their jobs effectively if

1 we don't tell them the truth?

2 What Microsoft says is evidence of
3 testimony relating to the wealth or net worth of
4 current or former Microsoft employees is irrelevant
5 to any issue in this case. Whether a Microsoft
6 employee has a particular amount of wealth does not
7 make it more or less probable that the employee
8 engaged in anticompetitive behavior. And it has
9 nothing to do with whether any such alleged behavior
10 caused harm to class members. That is certainly a
11 red herring. We don't say it does. We say only that
12 such evidence is not only material but absolutely
13 required in connection with whether or not the
14 witness has any bias in favor of Microsoft.

15 The issue is: Do Microsoft employees have
16 any reason to lie to the jury or to shade or
17 exaggerate their testimony? Wealth derived from
18 Microsoft. That's all we're talking here. Not the
19 general net worth of these individuals. Not income
20 derived from other sources.

21 We're talking only about wealth derived
22 from Microsoft. And that should be admitted for the
23 jury to use in their sound judgment to assess whether
24 the witness has a financial stake in the outcome of
25 this lawsuit for former employees worth hundreds of

1 millions of dollars, even billions of dollars, from
2 Microsoft. The jury is allowed to consider whether
3 such a witness may feel gratitude to Microsoft from
4 whom such wealth was acquired as well as concern that
5 they may have -- that their continued wealth almost
6 always based on holding Microsoft stock may be
7 affected adversely by the outcome in this lawsuit.

8 To fail to give the jury this essential
9 information about the witness's financial ties to a
10 party deprives them of one of the most important
11 factors, one of the enumerated factors noted in not
12 only the instruction but many cases.

13 Microsoft concedes two significant points.
14 Number one, evidence of compensation and ongoing
15 financial interest is relevant to the bias of the
16 witness and may be introduced for that purpose. And,
17 two, evidence of stockholdings of up to \$100 million
18 is admissible for impeachment purposes. Those are
19 the two facts they conclude.

20 Cases cited by the defendant include cases
21 where the plaintiff made the point that plaintiff was
22 poor and defendant was rich and, therefore, the
23 defendant should compensate the plaintiff. That is
24 not, of course, what we will do here and not the
25 purpose for which we would offer such evidence.

1 The other cases, Your Honor, are criminal
2 cases where evidence of the criminal defendant's
3 poverty was offered as evidence of why he would
4 commit a crime involving money; in other words, the
5 defendant's motive. Again, not the purpose here.

6 The defendants cite one case where evidence
7 of financial interest in a party was admitted in the
8 Whiteley case. The court admitted evidence of the
9 wealth of a defendant in a civil personal injury case
10 even though in that case, Your Honor, punitive
11 damages were not available. The court admitted the
12 evidence to rebut what the defendant had said, which
13 was basically "poor me," you know, "I don't have
14 enough money to answer in damages." And so the court
15 admitted evidence that the defendant was not a poor
16 man in order to rebut that kind of testimony. Of
17 course, evidence that is admissible for one purpose
18 may be perfectly admissible for another.

19 What Microsoft argues is that the
20 witness -- that a witness's wealth may prejudice the
21 jury, and they cite Judge Peterson's decision which
22 says, "Such amounts could distract jurors from the
23 merits of the case against Microsoft by suggesting
24 that the damages sought by plaintiffs are so trivial
25 for Microsoft that they need not be carefully

1 evaluated."

2 Judge Peterson was in error, and I think
3 Judge Peterson may have that concern about Minnesota
4 jurors, but I don't think we have that concern about
5 Iowa juries not carefully evaluating the evidence.
6 Protecting jurors from the value of the compensation
7 received by Microsoft employees or the stock held by
8 Microsoft employees is just a nonstarter.

9 Microsoft is a household name, and every
10 prospective juror or nearly every prospective juror,
11 aside from those living in caves -- and they might
12 not make good jurors -- knows that Microsoft is a
13 very large multinational company, very wealthy that
14 can afford to pay its executives handsomely. The
15 public at large and the jurors already know Microsoft
16 is rich. The issue before the jury is whether the
17 wealth was amassed legally or illegally.
18 Furthermore, the connection between a financial
19 interest of a witness and Microsoft's wealth is
20 remote at best.

21 Stock options are essentially free to the
22 corporation to authorize. It's impossible for a
23 person to take an individual employee's salary and
24 extrapolate Microsoft's wealth as a corporation.

25 Microsoft does like the court's ruling in

1 Gordon. We don't. Judge Peterson, however, did not
2 say that it was -- that this kind of evidence was not
3 admissible. He just put a cap on it. And that is
4 just error.

5 We were not given the freedom in the
6 Minnesota case to lay before the jury the full extent
7 of the witness's bias, something that should be
8 permitted under Iowa Rule of Evidence 5.607, which
9 takes a liberal approach to witness impeachment. The
10 one -- the one million dollar cap, which I think was
11 suggested by Microsoft, is just clearly arbitrary and
12 prevents the jury from assessing the witness's
13 credibility.

14 Many of the witnesses, Your Honor, maybe to
15 a person, I'm not sure, though it appears to me from
16 a review of the information that I have, that there
17 will not be a witness from Microsoft who does not
18 have at least a million dollars in wealth derived
19 from the company. And to put a cap on this puts a
20 cap on the jurors' ability to assess whether or not
21 the wealth derived from Microsoft may influence the
22 jurors' testimony. After all, the greater the
23 interest in Microsoft, the financial interest in
24 Microsoft, potentially the greater the bias.

25 We think that Judge Peterson's ruling was

1 prejudicial to us. He said, "If the jury is informed
2 that Microsoft employees hold Microsoft stock in
3 excess of \$1 million, they will have the essential
4 evidence of bias in front of them."

5 To the contrary. I think that the reason
6 this is prejudicial, Your Honor, is because the jury
7 will likely realize that an amount of one million
8 dollars is a tiny amount relative to Microsoft as a
9 whole and may assume erroneously that the witness
10 will not be adversely affected by a plaintiff's
11 verdict. It just turns the whole examination of bias
12 on its head.

13 In connection with the depositions, Your
14 Honor, in many cases Microsoft -- as you know,
15 because you had to rule on this issue -- took the
16 position that the witnesses' holdings were entirely
17 irrelevant. And in many, many cases in many of the
18 depositions that I'm stuck with, Microsoft witnesses
19 just simply refused to answer the questions.
20 Silverberg, however, did for some reason answer the
21 questions, and at the time his deposition was taken
22 he had stockholdings in Microsoft of \$180 million.

23 Myhrvold didn't answer the question. Of
24 the ones I took, one of the witnesses just couldn't
25 remember at all. No matter how I asked the question,

1 she just didn't have a clue what the amount of her
2 wealth derived from Microsoft would be.

3 I'm going to hand the court, Your Honor,
4 some highly confidential documents that came to me
5 because in ruling on this, Your Honor, I do want you
6 to know what I've got. What they gave me and what I
7 don't have.

8 THE COURT: What who gave you?

9 MS. CONLIN: Microsoft, Your Honor, in
10 connection with the court's orders. These are the
11 materials that I received, and I've only given you
12 one page of each type of evidence that I have, Your
13 Honor, in terms of these stock options. The first
14 page shows the name of the executive, the award date.
15 And when you get over to the side, you get the number
16 of stocks. You see under the "Awarded" column, and
17 then some of them were canceled for some reason, but
18 the "Vested" and the "Exercisable" columns will tell
19 us something. But the one that I think that will be
20 useful is the next page.

21 And it gives us three columns towards the
22 end that when you add up the gross proceeds --
23 Mr. Bach, incidentally, goes on for several pages,
24 Your Honor. And I have not added any of them up, but
25 you will see that the amount of money that we're

1 dealing with here is, in fact, very great. And to
2 deprive the jury of that information, there's just no
3 legitimate reason to do that.

4 Microsoft -- the reason I give you this,
5 Your Honor, is because ordinarily we would ask two or
6 three questions about this that would get to the
7 issue. Because Microsoft gave me this kind of
8 document rather than some sort of summary document, I
9 will make the summaries.

10 I will also try to make sure that I've done
11 so accurately by telling the defendant what number I
12 have -- what I've gotten. And I think we can work
13 that out, but I didn't want the court to make a
14 decision in a vacuum without understanding that I
15 don't have what you would usually get, Your Honor,
16 which is some sort of a total number.

17 I will have to extrapolate a total number
18 from what I do have, and I have different types of
19 documents. But we do have an adding machine that
20 has, you know, 12 or 13 spaces on it, and I think we
21 can add this up and just present it in one number,
22 which I will, as I said, give to the defendant in
23 advance so that there's no argument about the
24 accuracy of the addition.

25 Microsoft also argues that the

1 stockholdings of Microsoft employees will not be
2 impacted by the litigation because the damages to
3 Iowa consumers are relatively small compared to the
4 size of the corporation as a whole. But the argument
5 misses entirely the relationship between litigation
6 and stock.

7 If a corporation loses a lawsuit, its stock
8 may go down, but not just in relationship to the
9 amount of the award but, rather, in general it may
10 affect the value of a stock. When the stock goes
11 down, the value of the stock and stock options
12 decline sometimes precipitously. I'm sure that
13 holders -- I would be surprised and, really,
14 seriously disappointed if the holders of Microsoft's
15 stock are not justifiably concerned about the outcome
16 of this litigation.

17 Defendants also seriously underestimate
18 their exposure in this case. I don't know where this
19 comes from, but I do want to be sure that the record
20 is clear. They tell the court that the total amount
21 of overcharges and other damages allegedly suffered
22 by plaintiffs' class is 453 million, which is .17
23 percent of the market capitalization of this company.

24 Let me correct that serious misunderstanding.

25 First of all, 453 million is the overcharge

1 only, which under Iowa law can be trebled. Security
2 damages are about 49 million, and innovation damages,
3 if the court permits the security and innovation
4 damages, are in the sound discretion of the jury.
5 So Microsoft needs to understand that their exposure
6 here is not 453 million at all.

7 Microsoft's other arguments are overcome by
8 the plaintiffs' right to impeach witnesses.
9 Microsoft resorts to a sort of "jurors hate rich
10 people" and "rich corporations" argument in its
11 surreply, arguing that a corporate defendant is
12 personified in the courtroom by its witnesses.

13 Your Honor, by this logic plaintiffs should
14 never be permitted to impeach any of Microsoft's
15 witnesses for bias because it might make the
16 corporation look wealthy, and the jury may punish it
17 for its wealth. Plaintiffs have a firmly established
18 right to impeach witnesses, and the notion that
19 impeaching a witness might make the defendant look
20 bad simply does not overcome this right.

21 The same is true for Microsoft's other
22 argument in its surreply that Microsoft's employees
23 have a privacy right to protect the amount of their
24 wealth. And if they are forced to reveal their stock
25 options and holdings, they might not testify.

1 This privacy right does not exist. I mean,
2 it just doesn't exist. They cite no cases. There
3 are no cases.

4 Your Honor, let's take -- Jeff Raikes is a
5 name that comes to mind, and I really don't know how
6 much -- how many, you know, stocks. I have no idea.
7 I'm just going to make this up.

8 Let's say Mr. Raikes comes and tells the
9 jury he has more than a million dollars. But if he
10 has a billions dollars in stock, the jury has a right
11 to know that. They have a right to know the truth,
12 not some -- not the truth as capped by an arbitrary
13 amount.

14 Judge Peterson's order was certainly on my
15 list of appeal points because I've just never seen
16 such an order. There isn't any justification for
17 such an order. If the amount of the wealth of the
18 witness is material, then there is no justification
19 for capping what the jury learns about the amount of
20 the wealth.

21 What we would suggest, Your Honor, if
22 Microsoft is concerned about this, and I know that
23 they are, the court can give the jury an instruction
24 on this issue. I think that would be perfectly
25 appropriate for the jury -- for the jury to be told

1 what they may consider such evidence for. That would
2 seem to answer any argument that the defendant might
3 make to withhold from the jury information essential
4 for them to make a determination as to whether or not
5 the witness has bias or may have bias in favor of
6 Microsoft.

7 Iowa jurors do not lack sophistication.
8 Iowa jurors, I think, generally follow instructions,
9 and the pretense that they will use the evidence for
10 some improper purpose prejudices the plaintiffs'
11 right under the rule. And there's just no reason to
12 do that.

13 Your Honor, if I may also call the court's
14 attention to the fact that we moved to strike the
15 defendant's reply briefs. Do you have that by
16 chance, Your Honor? We delivered it to you, but it
17 may have gotten --

18 THE COURT: Yes.

19 MS. CONLIN: I don't know how you're
20 sitting in your office at this point with all the
21 paper we have delivered. The reason for the motion
22 to strike is that in the pretrial order, which was
23 negotiated --

24 MR. GREEN: Excuse me, Your Honor, we're
25 going to file a resistance to that. In fact, it's

1 being circulated now, and I don't think it's
2 appropriate to argue it at this point. But if the
3 court wants to --

4 THE COURT: We will hold off it then.

5 THE COURT: Anything further, Ms. Conlin?

6 MS. CONLIN: No, Your Honor.

7 THE COURT: We have to take a short
8 five-minute recess. I have to attend to a matter
9 that just came to my attention. Sorry.

10 (A short recess was taken.)

11 THE COURT: Mr. Green, gets rebuttal now,
12 though.

13 MR. GREEN: Your Honor, by way of rebuttal,
14 first of all, I can't tell whether Ms. Conlin is
15 critical of Iowa juries or worried about their
16 ability. But it seems to me that they can assess the
17 credibility of the witnesses and have always done so
18 in the cases I've been involved in without this
19 knowledge.

20 She says she's never seen such an order as
21 Judge Peterson has entered. Well, frankly, it's
22 probably because plaintiffs ordinarily don't have the
23 temerity to try to get this kind of evidence in. So
24 it's not an issue because it does violate the basic
25 rules whether it's parties, witnesses or what, about

1 trying to paint somebody as a good guy and somebody
2 as a bad guy based upon their wealth.

3 Contrary to what Ms. Conlin says, we do not
4 concede that it's relevant, and by proffering to you
5 the order from Judge Peterson, we are saying that is
6 an alternative argument. Our first line is, as I've
7 said before, that irrelevant evidence, which we
8 believe this is, is not admissible even for
9 impeachment purposes.

10 She talked about, you know, how it's gotten
11 into evidence where somebody claimed -- defendants
12 have claimed they were poor. Microsoft has never
13 made a claim in any case that they're poor, and those
14 cases have no bearing on the consideration of this
15 issue.

16 She says that they are all over a million.
17 Frankly, I don't believe that that's true, and I just
18 am asking the court not to take that statement at
19 face value.

20 The fact is, Your Honor, as I'm just
21 glancing at this stuff, some of this stock was
22 acquired through splits, through dividends, stock
23 dividends. That would be the same as the general
24 public -- there's a lot of people in the general
25 public that made a lot of money off of Microsoft that

1 were not employees. And I would say there's a lot of
2 them that made over a million dollars. So you've got
3 accumulation of stock, which has nothing to do with
4 the fact that they were employees of Microsoft, but
5 it's just something that happened out there in the
6 general marketplace.

7 Her method of giving us this beforehand and
8 then having us determine whether her summary
9 calculations are correct, it seems to me is much more
10 unworkable and time-consuming than what was done by
11 Judge Peterson in the Microsoft case in Minnesota
12 where he wouldn't be bogged down with those sorts of
13 issues because you know that that's going to lead to
14 disagreement between counsel as we go through trial,
15 which already has built up those issues without
16 creating more.

17 She says, "Well, the stock could go down."
18 Regardless of how she calculates her damages, which,
19 of course, there's motions for summary judgment out
20 there on two of those claims. And there's a motion
21 -- there's motions out there, which if the court
22 granted, such as a motion for decertification, if the
23 court granted it in part, which would seriously
24 reduce the overcharge claim. So, you know, that's
25 not something that I think you should consider.

1 But the fact is that for counsel to say
2 that the stock will go down if there's an adverse
3 decision in this case against Microsoft is sheer
4 speculation. And if I had that kind of speculation,
5 was able to predict what the market would do, I
6 wouldn't be sitting here wasting your time. I would
7 be over at the Mediterranean somewhere on a yacht.

8 So, you know, a lot of their arguments, a
9 lot of the assertions that plaintiffs are making are
10 based on speculation, unworkable solutions. And,
11 frankly, it doesn't take into account at all -- I
12 know she says there's no right of privacy. Well,
13 there is a right of privacy. I think we all know
14 that. And regardless of that, the court has the
15 ability to be sensitive to those issues and for these
16 individuals who, frankly, a lot of them are already
17 reluctant because they no longer work for us.

18 But to have to come into Iowa and give out
19 this sort of information in open court for them to be
20 fair game -- I assume, Judge, you're not going to
21 seal the courtroom -- and could be picked up by the
22 press, I think is something that Your Honor should
23 consider. And that's why I think if you even feel
24 it's relevant, that the solution that Judge Peterson
25 worked out was very good. And a million dollars

1 certainly is a large amount of money and that is
2 enough for the jury to determine this bias issue that
3 they claim that it's necessary for.

4 I think that's all, Your Honor, I have on
5 that subject. Thank you for your attention.

6 THE COURT: Very well.

7 We will proceed to motion No. 4 on your
8 list here, Microsoft's motion in limine regarding
9 profane language; is that correct?

10 MR. GREEN: Yes, Your Honor. That's me,
11 again.

12 Your Honor, this has mainly to do with
13 internal e-mails between Microsoft employees, which
14 were never intended by those employees, of course, to
15 become public record and was a method of
16 communicating sometimes about issues which had
17 nothing to do with anything that could possibly be of
18 any relevance in this case, such as using profane
19 language by one employee against another employee at
20 the company, as opposed to any reference to any
21 competitors or anybody in the distribution chain or
22 anything like that.

23 So we have filed a motion, basically asking
24 the court to, at a minimum, if it determines that
25 some of these e-mails that we specifically attached

1 to the motion, as Your Honor knows, if you even feel
2 that these e-mails are admissible and, of course,
3 that's going to be a determination that has to be
4 made at the time of trial unless Special Master
5 McCormick has already made some determinations which
6 still, I think, everybody agrees that relevancy is
7 for Your Honor to decide.

8 And we don't think that the profane
9 language is relevant within those e-mails, and it
10 clearly -- the prejudicial effect is very clear. The
11 jury could just on the basis of the fact that some
12 Microsoft employees use profane language in these
13 e-mails determine that Microsoft are "bad people"
14 and, therefore, would influence their decision on
15 liability.

16 So it really is a weighing under the Rule
17 of Evidence 5.403, prejudicial value versus probative
18 value. And in many of the e-mails, as you'll see,
19 the striking of the profane language would not affect
20 the meaning of the e-mail. And so the probative
21 effect of the e-mail, if it is admissible, would
22 still be there without the obvious prejudice that it
23 might engender in the jury consideration of
24 Microsoft's liability.

25 And many of them, as I say, do not have

1 anything to do with outsiders, but it's just somebody
2 called somebody something within the company, sort of
3 like with maybe one your football teammates on
4 occasion, something like that.

5 And the solution that we have offered, Your
6 Honor, and I think this would be a determination that
7 can be made now, at least on the ones that we
8 attached, or the court could decide after he's
9 determined -- after the court has decided whether the
10 particular e-mail is relevant at all. And if it
11 determines it is relevant and admissible, then there
12 could be a simple procedure of looking at it and
13 saying, "Okay. If we struck the profane language,
14 would that change the meaning of the probative value
15 or what the claimed probative value is of the
16 e-mail"?

17 And if the court determined, for instance,
18 "No. If I struck that word or that reference, then
19 that is going to totally change the meaning of the
20 e-mail or the effect of the e-mail or the
21 comprehension of the e-mail."

22 Then, of course, the court in its judgment
23 could say, "Well, on that particular e-mail I'm just
24 going to leave it the way it is." But I do think
25 that we're in an area where that kind of discretion

1 should be exercised by the court, in other words,
2 allow us to redact it on a case-by-case or
3 e-mail-by-e-mail basis.

4 The plaintiffs in their opposition said,
5 "Well, there's just too many out there for the court
6 to exercise." Well, that's the plaintiffs' fault
7 because they have designated I don't know how many
8 exhibits, but it's just -- you know, I will guarantee
9 you they have way overdesignated. And I would be
10 surprised if they wouldn't admit that, and I don't
11 blame them.

12 You want to designate on the side of
13 overdesignated so you're not restricted from putting
14 into evidence what you want to. But when push comes
15 to shove, we all know trials are a lot different than
16 discovery or even pretrial filings. And they might
17 very well -- well, I'm going to speculate, such as
18 Roxanne does on occasion, that there will be a lot
19 less of a problem to deal with than they would lead
20 you to believe simply by their designation.

21 Right now, Your Honor, what we're really
22 asking for is simply a standard from the court to
23 maybe enunciate through this motion about the
24 redacting of profane language if it doesn't change
25 the meaning of the e-mail, assuming that the court

1 finds it is admissible for other reasons.

2 The plaintiffs seem to argue that, "Don't
3 worry about that because jurors are used to
4 profanities." Well, I don't know about plaintiffs,
5 but I've seen a growing existence in this country and
6 in Iowa of something called the "Christian Right,"
7 and profane language to those people, I think, would
8 have a very prejudicial effect.

9 And I don't think that we can rely on
10 plaintiffs' conclusion that jurors are familiar with
11 profanities to decide that there would not be, in
12 fact, some jurors that just the very existence of a
13 profane language issue by an employee of Microsoft
14 would prejudice them unfairly and unreasonably
15 against Microsoft by making determinations, even
16 though there is no probative value whatsoever to the
17 profane language.

18 And we've cited cases which say that, Your
19 Honor. I know that they say in their brief most of
20 our cases have to do with other matters such as
21 racial slurs and not. But we have cited cases that
22 have to do with profane language where the courts
23 have held that redacting the language was the thing
24 to do because the prejudice would outweigh the
25 probative value.

1 Thank you, Your Honor. That's all I have.

2 THE COURT: Thank you, Mr. Green.

3 Response.

4 MS. CONLIN: Yes, Your Honor.

5 What Microsoft is asking the court to do is

6 give it permission to tamper with the evidence.

7 Plainly and simply to tamper with the evidence.

8 Microsoft fears that the jury may conclude

9 that it violated the competition law because its

10 employees are bad people who used profane language.

11 Come on. Microsoft seriously underestimates the

12 sophistication and seriously overestimates the

13 gullibility of Iowa jurors. I just have not had

14 quite that experience.

15 Microsoft's arguments that the jury will

16 conclude that its employees are bad people and,

17 therefore, find that Microsoft violated the

18 Competition Law has been deemed to be frivolous by

19 the courts. It demonstrates an idealistic view of

20 jurors and today's society.

21 We cited, Your Honor, the case of

22 United States v. DiMuro. Defendant contended it was

23 improper for the trial court not to order obscene

24 language from recordings in transcripts redacted.

25 And the court says, "Specifically, the defendant

1 alleged that such language was irrelevant to any
2 matter before the court and could function only to
3 create the impression that the speakers were men of
4 bad character," exactly what Microsoft contends here.

5 Here is what the Court says: "To say in
6 the light of present day mores that appellants were
7 unduly prejudiced by a failure to clean up their
8 language is frivolous."

9 There are numerous other cases with similar
10 holdings, and even in its reply that we ask the court
11 to strike, they can't answer those cases. They
12 exist, and Microsoft doesn't even try to answer them.
13 Because the law is so one-sided, and believe me, Your
14 Honor, it is very one-sided, Microsoft misrepresents
15 to the court case law to the point of fabricating the
16 holdings. I'm going to provide to the court, if I
17 may, the cases that Microsoft cites because these are
18 serious matters of miscitation.

19 THE COURT: Thank you, ma'am.

20 MS. CONLIN: Thank you.

21 The first case that Microsoft cites in
22 support of its motion to tamper with the evidence is
23 the Schweih's case, and I have no idea how that is
24 pronounced, but we're going to call it "Schweih's."
25 That's a criminal case.

1 The defendant was convicted of Hobbs Act
2 violations, extortion, as I recall. And electronic
3 wiretaps were introduced, and those electronic
4 wiretaps included profanity and reference to people
5 with ethnic and racial slurs. The lower court
6 refused to redact the coarse language because it was
7 relevant not only to defendant's character, but the
8 court held that it was used to instill fear in his
9 victims and that to redact the profanity would have
10 destroyed the probative value of the evidence.

11 Microsoft, first of all, tells the court
12 that in *Schweih's* the Seventh Circuit, and I quote
13 from Microsoft's brief, "upheld the district court's
14 redaction of certain portions of a tape recording
15 that contained offensive language" ... "a steady
16 stream of 'four letter' words that was unrelated to
17 any element of the crime charged." That is not --
18 that's exactly the opposite, "opposite" of what the
19 court held.

20 First, Microsoft tells the court that the
21 Seventh Circuit was faced with an appeal of a
22 district court's decision to redact certain "four
23 letter" words. No, no. In reality, the Seventh
24 Circuit was never presented with a question of
25 whether it was proper to redact. It was defendant

1 who appealed the decision not to redact. And that
2 decision, the lower court's decision not to redact,
3 was, in fact, upheld.

4 Second, Microsoft states that the Seventh
5 Circuit was faced with offensive "four letter" words.
6 In reality, however, Defendant Schweih's argued that
7 his racially derogatory remarks should have been
8 redacted from the videotapes.

9 Therefore, contrary to Microsoft's false
10 description of the case, the real issue in the case
11 was whether the district court erred in refusing to
12 redact offensive epithets used by the defendant. And
13 the Seventh Circuit held it was not error to refuse
14 to redact.

15 Microsoft in its reply admits that it
16 misrepresented the holding in Schweih's. But when it
17 does that, it, again, misrepresents the holding. It
18 says that the court "directed the redaction of some
19 offensive language." That is not true. What the
20 court did was redact whole passages because the
21 passages that they redacted were not relevant, not
22 because there was offensive and profane language in
23 those.

24 In the second case Microsoft cites in
25 support of its original motion -- another

1 difficult-to-pronounce name -- Frasc. Microsoft did
2 know better.

3 In that case Frasc argues that the
4 district court abused its discretion in refusing to
5 redact three tape recordings of conversations in
6 which Frasc used the word "nigger." And that was
7 the sole and only reason that Frasc asked for
8 redaction. It was an offensive racial epithet, not
9 the "f" word, which is what Microsoft was concerned
10 about here.

11 And the Frasc case is interesting for a
12 number of reasons. This was a police officer who was
13 apparently doing things police officers should not
14 do. And when he drew his jury, he had nine
15 African-Americans, and so he didn't really want to
16 redact his offensive language, but the court refused
17 to do so. The court held that the district court did
18 not abuse its discretion in refusing to redact
19 portions of tape-recorded conversations that
20 contained racially derogatory language.

21 Specifically, and I'm not going to go into
22 all of the specifics, but lots of, you know, the "N"
23 word used again and again as a noun, as an adjective
24 and, apparently, as a verb. Despite all of this,
25 Your Honor, despite this, the Seventh Circuit still

1 held that it was not an abuse of discretion for the
2 district court to refuse to redact the offensive
3 language. And the court also -- and this is
4 important -- the court also specifically held "In
5 other situations, the inflammatory character of the
6 language used may itself have significant probative
7 value."

8 The fact that these cases involved not
9 profanity alone but racial epithets is absolutely
10 critical. As far as I know, though -- I have not
11 read all 25 million pages, Your Honor -- we're not
12 faced with that choice here. What we've here are
13 people using principally the "f" word and also other
14 perhaps less remarkable words. And that's what
15 defendant doesn't want the jury to see.

16 We've provided the court with a case called
17 Andreas in which the court rejected the defendant's
18 efforts to analogize the use of profanity to racial
19 slurs. The court explained, "Here, unlike the highly
20 inflammatory racial epithets presented in the cases
21 upon which Andreas relies, the court seriously doubts
22 that the jury will become so disturbed by the
23 language that they would convict regardless of other
24 evidence of Andreas's guilt or innocence." Not only
25 does Microsoft misrepresent the authorities it cites,

1 it also ignores case law directly on point rejecting
2 its argument.

3 There are two additional cases that
4 Microsoft has in its reply, and they don't help
5 matters. One is a Rhode Island case called State v.
6 Cook, which Microsoft says stands for the proposition
7 that profane language may be redacted.

8 No, it doesn't. The Rhode Island case
9 excludes not profane language, Your Honor, but this
10 was a domestic violence, sexual assault case. The
11 defendant left phone messages, two phone messages for
12 the complaining witness in which he used lots of
13 profane language. And the court did not admit the
14 two tapes because he didn't threaten her in those
15 tapes. It wasn't -- the court mentions in passing
16 that those tapes included profane language, but
17 excludes the tapes because they were not relevant.

18 In United States v. Wilson, Microsoft
19 claims that the court refused to order the redaction
20 of profanity in this case only because the defendant
21 did not ask for it. That is untrue. The issue in
22 this case was not profanity but vulgar and gratuitous
23 descriptions of prior crimes such as murder and bank
24 robberies. Therefore, the prejudice did not come
25 from the use of profanity. The prejudice came from

1 using profanity to describe the murders of other
2 people.

3 Microsoft's habit of cherry-picking
4 language, using the really remarkable use of
5 ellipsis, making those decisions say something they
6 do not say is sufficient basis of its own to deny the
7 motion.

8 Your Honor, the problems attendant to
9 redaction make the courts extremely reluctant to
10 redact anything because as I indicated, it's really
11 tampering with the evidence, even when it's like the
12 racial slurs in the Schweih's case.

13 We've cited a number of those cases. In
14 Bright the court noted that "redaction or
15 substitution of the actual language used breaks the
16 flow of the evidence and as a result decreases the
17 usefulness of the evidence. Additionally, selective
18 deletion permits the jury to speculate erroneously as
19 to what was said in the deleted portions. As a
20 result, courts are extremely reluctant to order
21 redaction of even racial slurs, much less mere
22 profanity."

23 If Microsoft is permitted to redact the
24 profanities used by the employees, the flow of the
25 evidence would be interrupted. It would also leave

1 the jury to speculate about what words we took out.
2 And even if Microsoft were permitted to substitute
3 language, the jury would still speculate regarding
4 what the document originally contained.

5 Microsoft did not make any attempt to
6 address these problems. The purpose that Microsoft
7 brings this motion is, in fact, to dilute the
8 probative value of evidence that is harmful to
9 Microsoft.

10 Let's look at the exhibits that the
11 defendants note.

12 I have copies, Your Honor, and I have
13 highlighted them for us so that we can look at them.

14 We're going to have this morning, I think,
15 an unusual record. I bet you Janis has heard these
16 words too.

17 I put them, Your Honor, in numerical order,
18 and I'm going to tell the court a little bit about
19 each of them, if I know about them. These are all
20 plaintiffs' exhibits. They are internal Microsoft
21 e-mails for the most part.

22 The first of which is Plaintiffs' Exhibit
23 890. Yoachim Kempin is the worldwide director of OEM
24 sales for Microsoft. He has a very high position.
25 And the subject matter of his e-mail of June 27,

1 1991 -- I'm sorry August 2, 1991, the "Subject: "Re:
2 Shit" with one, two, three, four exclamation points.
3 That is in reaction to what he has been told about an
4 OEM who is taking -- considering taking its business
5 to DR-DOS for the palmtop.

6 So I don't know, Your Honor, what you might
7 substitute there for Mr. Kempin's subject matter.
8 It's his reaction to what he's been told.

9 The next one is Plaintiffs' Exhibit 951,
10 and it is Nathan Myhrvold. And I very often spell
11 his name wrong: M-y-r-h-v-o-l-d I'm thinking. Is
12 that right? Do you think that's right.

13 MS. CONLIN: We think Mike knows how to
14 spell it, Your Honor. I'm going to have him write it
15 down and then I will read it again.

16 Nathan Myhrvold is the technical guru at
17 Microsoft and writes extremely lengthy, extremely
18 lengthy memorandum about a variety of subjects having
19 to do with Microsoft's technical strategy. And this
20 is one of those. In this one he's talking about the
21 possibility that IBM will join with DRI, which
22 makes -- which at that time made a competing
23 operating system called DR-DOS. And that's what the
24 subject of this memo is. I should also tell the
25 court that where there were pages that were not

1 material, I took them out just because I thought
2 perhaps the court had enough paper.

3 In commenting on this he says, "For IBM
4 this has got to be a pure fuck Microsoft move."
5 Again, it's hard to know exactly what one would
6 substitute for what Mr. Myhrvold actually said, but
7 this is what Mr. Myhrvold actually said to Brad
8 Silverberg in this memorandum long ago. Myhrvold is
9 spelled M-y-h-r-v-o-l-d.

10 Plaintiffs' Exhibit 6011 is an e-mail from
11 Ben Slivka. He's writing to Bill Gates,
12 John Ludwig and Charles Fitzgerald, all high-level
13 Microsoft employees, with carbon copies with other
14 high-level Microsoft --

15 THE COURT: Which exhibit?

16 MS. CONLIN: Well, I've got 6011. What do
17 you have? Oh, wait a minute. I've got them out of
18 order. What do you have?

19 THE COURT: I have 1324.

20 MS. CONLIN: I'm sorry. Let's look at that
21 one next.

22 THE COURT: Okay.

23 MS. CONLIN: 1324. The one from Brad
24 Silverberg. The court will come to know his name
25 very, very well, Your Honor, because he was in charge

1 of both MS-DOS and Windows in the early '90s and
2 stayed with the company until late '90s in a very,
3 very high-level executive position. And this has to
4 do with Microsoft's concern when Novell, a networking
5 company, merged with DRI.

6 Now, what Mr. Silverberg is reacting to is
7 he gets notice by way of Trade Press that a company
8 called Z-Nix has decided to bundle DR-DOS with its
9 mouse. And he attaches to his e-mail the Trade Press
10 he has seen and his reaction is, "Look what Z-Nix is
11 doing. Cut those fuckers off." Again, one wonders
12 what one would put in there.

13 But more important, Your Honor, as with
14 many of these, there are subsequent acts and, in
15 fact, Microsoft did cut them off. What happened
16 within a few weeks after this e-mail from
17 Mr. Silverberg, high-level Microsoft employee, is
18 that Microsoft conducted an audit of Z-Nix and filed
19 a lawsuit within four weeks of this. Four weeks
20 after Mr. Silverberg sees this Trade Press, Microsoft
21 has filed a lawsuit against Z-Nix and shortly
22 thereafter Microsoft drives Z-Nix into bankruptcy.
23 So, indeed, I think this language is exactly what
24 they did. And to change it or delete it or
25 substitute other words, no, that destroys the

1 probative value of this exhibit.

2 The next one, I hope, Your Honor, do you

3 have 2023?

4 THE COURT: Yes.

5 MS. CONLIN: Good. Jonathen Lazarus,

6 another high-level guy, to Bob Kruger. And what he's

7 talking about, "BOOP," Your Honor, is Bill and the

8 office of the president. Those are the seven or so

9 highest-level people at Microsoft.

10 So these are slides they are making for the

11 presentation to that, and the only thing that

12 Microsoft complains about there is the last one, Your

13 Honor. I included -- it's a big, long exhibit, but

14 right towards the end it has these words: "Office

15 Goals (placeholder)," which means this isn't a final

16 slide. I think that is what that means anyway.

17 "Don't give an inch. Continue to beat the shit out

18 of SmartSuite."

19 I don't know if Microsoft wants us to take

20 words out like "screw" and, you know -- I just think

21 that it is important for us to look at the context of

22 the e-mails.

23 You have 6082, Your Honor?

24 THE COURT: Yes.

25 MS. CONLIN: That one is Anthony Bay.

1 Mr. Bay more recently has headed up Microsoft's
2 Streaming Media division, and he writes to several
3 people -- Bob Mugila, I think, is now one of the top
4 few employees at Microsoft. "My views on PN issues,"
5 and what they complain about is "this bullshit on
6 their side must stop."

7 Well, that is what he said. That is what
8 he meant. That is what he told the people to whom he
9 wrote, and that is what the jury should see.

10 The next one is 6433. This is Gary Schare
11 now in charge of Internet Explorer, I think, as I
12 recall. I took his deposition, and he has had lots
13 of jobs. He's moving steadily up. And he's talking
14 about Eric Engstrom. The court may already remember
15 his name. He's the guy who did the deals with
16 RealNetworks and has had a lot of role to play in
17 Microsoft's anticompetitive activity.

18 Mr. Schare is angry at Eric Engstrom
19 because Mr. Engstrom is angry at Mr. Schare for using
20 a competitor's product to display what Mr. Schare is
21 then in charge of. And so he says that he's mad.
22 And he talks about Eric's role in the company. "Eric
23 has pissed off too many people around here and he's
24 gotta chill." I assume Microsoft can stand "chill."
25 "We all work too hard to take shit like that from

1 him. We are all adults here at Microsoft but he
2 feels like he can piss and moan like a fucking child
3 and get his way. Ain't gonna to happen." So we
4 believe that the way that people express themselves
5 is probative.

6 All right. How about 6011 now, Your Honor?

7 THE COURT: Yes.

8 MS. CONLIN: Ben Slivka, as we talked
9 about. This is right at the time that Microsoft is
10 polluting Java, and he talks about -- he says, "The
11 Java community is having a hard time digesting
12 JDK 1.1, and while it has important new features
13 (like Beams) it still has that crappy AWT stuff,
14 shitty printing, the list goes on and on. JDK 1.2
15 has JFC which we're going to be pissing on at every
16 opportunity." I don't know for sure which words
17 there Microsoft doesn't like, but with the exception
18 of "shitty," the other two words you can hear on
19 television every night.

20 THE COURT: Slivka is S-li-v-k-a, right,
21 just for my court reporter's purpose?

22 MS. CONLIN: Yes.

23 Your Honor, let's look at just a few more.

24 Here is one for the court, counsel.

25 These are the ones we mentioned in our

1 reply, and one of them, again, features the extremely
2 prolific Nathan Myrhvold. He never writes a two
3 paragraph e-mail. It's always 10 pages or 20 pages,
4 and it's always dense and highly technical.

5 Let's first take a look at the first page.

6 This is quite a famous memo by those of us on the
7 other side from Microsoft. Microsoft blames IBM for
8 the failure of OS/2 in this e-mail. Oh, you know
9 what, Your Honor? I overlooked the very, very first
10 part. I didn't get the "fuck yes." I don't know
11 what that pertains to. That's to a previous e-mail
12 apparently.

13 Microsoft blames IBM for the failure of
14 OS/2. Mr. Myrhvold, on the other hand, in this quite
15 lengthy memo says, well, pretty much our fault. What
16 he says is, "As it is, our system software strategy
17 is a rambling litany of failure. We have patched
18 together a bunch of shitty technology with the
19 incredible personal performances of a couple of
20 outstanding individuals -- chiefly SteveB and BillG.
21 I could list endless examples of this, but one will
22 suffice -- the near miss we had with Presentation
23 Manager. We lost the fucking business, and then got
24 it back, but as a guy who was there, let me tell you
25 that it was close. This scared the shit out of me.

1 Stop and think for a moment what it would have meant
2 to have lost that, what the fuck would that leave us?
3 We would we way up shit creek without PM."

4 Redactions of the profanities used by
5 Mr. Myhrvold in Exhibit 19 would detract from the
6 message that he was attempting to convey.
7 Mr. Myhrvold explained in his e-mail that he was
8 intentionally being provocative to "capture my
9 opinion of recent suggestions that the Psycho project
10 be merged with IBM."

11 Mr. Myhrvold then goes on to use profane
12 language to describe the depth of his feeling on the
13 subject. He describes Microsoft's business strategy
14 as "a rambling litany of failure," and uses all of
15 those other words. It would be impossible to edit
16 out Mr. Myhrvold's profanity without breaking up the
17 flow of the communication and altering, altering the
18 exhibit, the evidence. Much of the probative value
19 would be lost.

20 The next one, Your Honor, is Exhibit 195.
21 This is Cameron Myhrvold, Your Honor. These guys are
22 brothers, and they came when Microsoft bought another
23 company for its technology and became instrumental in
24 Microsoft's ultimate success. And Cameron doesn't
25 write nearly as long a memo as Mr. Nathan Myhrvold

1 usually does, but this one happens to be 30 pages
2 long. In fact, most of it -- it's just a long e-mail
3 string. In this one -- let me see what -- Oh, here
4 we go, Your Honor.

5 So here is what he says. Let me see if
6 this is Cameron Myhrvold. Yeah, it is, Cameron
7 Myhrvold. "So if we bring the number one Unix
8 vendor" -- that is a server operator system
9 competitor -- to its knees and steal a whopping 50
10 percent of their market in 1990 we will get 75,000
11 units worldwide. Whoop-de-fucking-do." Those are
12 dashes between each of those. "For comparison Aldus
13 projects selling 18K units of PM PageMaker just in
14 England" and so on.

15 What would we put in there that would
16 express the same meaning? This is not a term easily
17 converted to nonprofane language.
18 "Whoop-de-blanking-do" does not convey the same sense
19 of distain. And leaving such a blank space would
20 certainly probably not fool the jury, but that's what
21 Microsoft wants to do.

22 Later in the same e-mail, Mr. Myhrvold
23 warns that "People we fuck now will not support us in
24 the future, or they will think twice before they do."

25 How should the profanity be translated

1 here? Should it be "screw over" or "cheat" or
2 something else entirely? Having the parties argue
3 and brief each of the many examples of profanity in
4 the parties' trial exhibits would be a logistical
5 nightmare, which would inevitably result in the loss
6 of relevant evidence.

7 In Plaintiffs' Exhibit 1526, Microsoft
8 employee Silverberg and Allchin describe how to
9 exclude Novell from an upcoming systems design
10 review. This is the one, Your Honor, I think I got
11 confused earlier. This is one where it's right after
12 Novell and DRI have merged, and they've invited
13 Novell to this meeting and now they want to take it
14 back. And Mr. Allchin says, "Why the fuck is Novell
15 invited to the SDR?"

16 Again, to remove the profanity would be to
17 deny the jury the benefit of probative evidence of
18 Microsoft's intent to exclude Novell.

19 Despite the fact, Your Honor, we have
20 completed our review, Your Honor, of some of the
21 profane language in the exhibits. We said in our
22 response flat out that the defendant's decision to
23 use profanities -- the defendant's employees'
24 decision to use profanity was often relevant
25 evidence, and then provided examples.

1 Microsoft indirectly states that we do not
2 argue that profane language is relevant. Well, we
3 do. We argue that the profane language in the
4 exhibits should be left alone. To take it out
5 tampers with the evidence. In any case, Microsoft's
6 request is fatally broad, ill-defined and impractical
7 at this stage.

8 Microsoft argues that we can deal with
9 exhibits with relevant profanity on a case-by-case
10 basis. There is, therefore, no reason to grant this
11 motion. Profanity is often relevant. Redaction will
12 always be difficult due to the problems discussed
13 above and given the possibility -- given the fact
14 that there is, in fact, no possibility of undue
15 prejudice as established by the numerous authorities
16 we cite and the fact that Microsoft's motion has been
17 deemed by other courts to be just plainly frivolous,
18 Microsoft's request should be flatly denied.

19 THE COURT: We will take a recess. I don't
20 know how long this meeting is going to last. I would
21 say half hour, so eleven o'clock. Sorry about that.

22 (A recess was taken at 10:29 a.m. until
23 1:15 p.m.)

24 THE COURT: All right. I think it's your
25 turn, Mr. Green.

1 MR. GREEN: Thank you, Your Honor. Still
2 arguing about the profane language issue.

3 THE COURT: Right.

4 MR. GREEN: First of all, contrary to what
5 Ms. Conlin says, it is not tampering with the
6 evidence. And I think we all know and have been both
7 in the practice and in court cases where evidence has
8 been -- well, language in documents have been
9 redacted for a multitude of reasons. To say that it
10 is tampering, just isn't a fair way to characterize
11 it. It's just using a discretion of the court to
12 protect against prejudice and in some cases against
13 disclosure of privileged information or confidential
14 information. But it's done all the time.

15 As a matter of fact, in the case that
16 Ms. Conlin relies on, the Andreas case, which she
17 handed up to the judge, it's stated -- and I'm not
18 sure what page this is because I can never read these
19 Westlaw things right, but it's paragraph -- well,
20 it's under the large paragraph: "C. Defendant
21 Andreas' Motion to Prevent Edited Tapes." And the
22 court says, "The court, in its discretion, may edit
23 highly offensive language to mitigate substantial
24 prejudice to the defendants. The court may delete or
25 substitute the offensive language if such action does

1 not destroy the probative value of the tapes."

2 And that's exactly what we're asking here.

3 It's not like we're asking to do something the courts
4 haven't said you can do and have approved and have
5 approved in the situation of profane language, not
6 just racial slurs, because it's also clear from those
7 cases it does apply to both types of language.

8 And again, she misstates what we're trying
9 to do here. Obviously, this is discretionary with
10 the court. And we're not saying that there would be
11 any abuse of discretion if the court didn't delete
12 the language. But we're also saying that if you did,
13 you also would not be reversed because it's clearly
14 within your discretion, weighing the balance of the
15 prejudicial effect against the probative value.

16 And here, you know, Roxanne went through
17 that -- all those things and got in the record all
18 those profane words. I'm not sure why we did that
19 except maybe she just likes to talk dirty. But, in
20 any event, for her to make a statement that, "Well,
21 if you look at all of those," and I was following it
22 closely when she said it and, of course, I read it
23 before, I mean, all of it could be changed either by
24 deletion or alteration and have the same probative
25 value that they would have had they not been changed.

1 I mean, it's something that my grandmother
2 could have edited very well and got the same meaning
3 across.

4 So the argument -- it's clear, Your Honor,
5 that the only reason that they want that profane
6 language submitted to the jury doesn't have anything
7 to do with probative value. It has only to do with a
8 goal of trying to inflame the jury and cause
9 prejudice by introducing what is clearly irrelevant
10 wording on the subject of this lawsuit.

11 Again, we're just asking the court, when
12 these matters come up, to set a standard. And I
13 would think they could be dealt with like that one
14 e-mail where the subject matter was a four letter
15 word. I mean, there's no -- there would be
16 absolutely no change in the meaning of that e-mail if
17 you deleted that.

18 In summary, Your Honor, we provided eight
19 examples of e-mails containing profane language of no
20 relevance to this action. The plaintiffs did not
21 argue nor could they that profane language in these
22 e-mails is relevant to their claims. It's not
23 impractical to address each of these exhibits
24 separately if the court determines that, yes,
25 changing that profane language would be -- at trial

1 it would not allow the probative value that it
2 supposedly is admitted for to have its effect. Then
3 we can deal with that on a case-by-case basis.

4 And that's really what we're asking you to
5 do in this motion, Your Honor. And we think that the
6 motion in limine was appropriate so you can get a
7 standard set and ask you to grant same.

8 Thank you.

9 THE COURT: Thank you.

10 MS. CONLIN: Your Honor, I've been accused
11 of lot of things in this courtroom, but this is
12 really pretty much the first time salacious has come
13 up.

14 MR. GREEN: Salacious?

15 MS. CONLIN: Salacious, S-a-l-a-c-i-o-u-s.

16 I don't talk dirty. People at Microsoft talk dirty,
17 and we want this in the record because it's already
18 there. They are the ones who wrote those words.

19 MR. GREEN: I didn't mean it to be
20 salacious, but it just seemed appropriate based upon
21 the record you made.

22 THE COURT: Very well. Anything else on
23 No. 4?

24 MS. CONLIN: No, Your Honor.

25 THE COURT: Plaintiffs' motion on exemplary

1 damage and charitable giving.

2 MS. CONLIN: Yes, Your Honor.

3 I'm going to start with charitable giving,
4 if I may.

5 We have asked the court to preclude
6 Microsoft attorneys and witnesses from referring to
7 the charitable giving activities of Microsoft and its
8 employees on the grounds that such evidence is
9 inadmissible character evidence and, therefore,
10 irrelevant.

11 We do need, Your Honor, to have the right
12 to ask potential jurors about Mr. Gates' charitable
13 giving. In Gordon many of the jurors -- I think
14 almost 100 percent, if I recall correctly -- in
15 answering the questionnaire indicated that they were
16 aware of Mr. Gates' charitable giving. And I think
17 that is, no doubt, exasperated by recent events that
18 have been much in the news. My intention is only to
19 touch on it enough to assure that the jurors will not
20 be unduly influenced by that fact.

21 This motion, however, goes to a much
22 broader issue. Defendant seeks to have its witnesses
23 provide the jury with chapter and verse on -- and
24 amounts on their charitable activities in order to
25 show that they are nice people who would never break

1 the law and to show that they really don't care about
2 money so they couldn't have been influenced by greed
3 to break the law. Indeed, they seek to offer
4 evidence about a separate entity, the Gates
5 Foundation. We haven't sued the Gates Foundation. I
6 may put it on my list but not yet.

7 In order to support the admission of such
8 evidence, they can point to not a single case. Much
9 as with the profanity issue, there is not a single
10 case that supports the defendant's argument. There
11 is not a treatise. There's not a rule. Evidence of
12 charitable giving by Microsoft employees is unabashed
13 pandering to the jury. It has no relevance to any
14 issue, to any of the claims. It doesn't make it more
15 or less likely that Microsoft engaged in
16 anticompetitive conduct.

17 If I may point, Your Honor, to the Robber
18 Barons, who committed all kinds of antitrust
19 violations and then set up lovely foundations from
20 which we now still benefit, using the money that they
21 gained by breaking the law. Even if it were
22 relevant, charitable giving is character evidence.
23 Rule 5.404 precludes character evidence. Such
24 evidence would be prior acts being admitted to show
25 conduct in conformity therewith. Character evidence

1 in a civil case is only admissible if it is
2 independently relevant to some element of a claim or
3 defense and even then it is only admissible as
4 opinion or reputation, not as specific acts.

5 Other courts have looked at this issue
6 under the Sherman Act and found just quite directly
7 and specifically character evidence is not an
8 essential element of an antitrust claim.

9 Microsoft tries to argue that charitable
10 activities are admissible as background evidence to
11 aid the jury. But the full definition of background
12 evidence, which Microsoft conveniently omits in its
13 brief, is evidence that "can scarcely be said to
14 involve a disputed matter yet it is universally
15 offered and admitted to an aid of understanding."
16 That's the Blackwell case.

17 The significance of any charitable
18 contributions by Microsoft or its employees is
19 entirely in dispute and should not be treated as mere
20 background evidence. Indeed, Microsoft's broad
21 interpretation of background evidence is simply
22 anything related to credibility, and it would render
23 moot all the other rules of evidence.

24 In Blackwell -- that's a criminal case,
25 Your Honor, in which the court rules that the

1 defendant's lack of a prior criminal record along
2 with such things as education and employment should
3 be treated as background evidence because it relates
4 to credibility. That doesn't really compare with
5 evidence of charitable giving.

6 The other case, Government of Virgin
7 Islands v. Grant is another criminal case, and,
8 again, Your Honor, it's lack of a prior criminal
9 record that was admitted, not evidence of
10 contributions to charity.

11 And evidence of charitable giving is, in
12 fact, ambiguous at best. There are lots of reasons
13 for giving to charity that do not have to do with
14 having a generous heart. People give money to
15 charity for tax deductions. People give money to
16 charity for public relations.

17 There is no reason to assume that even if
18 evidence of a charitable giving were admissible, it
19 would, in fact, be evidence of good character by
20 Microsoft or by its employees. For the court to
21 permit testimony of Microsoft employees and former
22 employees concerning their charitable contributions,
23 it would certainly need to be balanced with what
24 their total earnings and net worth would be.

25 Let's say -- I will use Mr. Raikes again,

1 we know how to spell his name. That is one of the
2 reasons for using him. Let's say he comes to court,
3 Your Honor, and he testifies that he gave a million
4 dollars to charity. Wouldn't we want to know, then,
5 that his income was a billion dollars, or that his
6 net worth was ten billion dollars?

7 I mean, it opens the door, I think, and,
8 indeed, cries out for us to be able to say, "Yes, a
9 million dollars is a lot of money, but to Mr. Raikes
10 it's like you and I giving \$10." His total income,
11 his total net worth would be clearly relevant then on
12 whether or not he was, in fact, all that generous.

13 Microsoft also argues that the evidence of
14 charitable contributions by employees should be
15 permitted to rebut evidence of a witness's ongoing
16 financial stake in Microsoft. How did that relate in
17 any way to the employees' past charitable
18 contributions. It simply doesn't.

19 Microsoft says that it comes in because we
20 will say that Microsoft witnesses have been
21 influenced to commit anticompetitive activities by
22 the prospect of personal rewards. That's how they
23 think they can get in the charitable giving on the
24 issue -- of rebutting the evidence of the financial
25 stake.

1 It's hard to imagine a more tortured
2 argument, and it's also not true. Microsoft's
3 corporate culture, apparently, includes rewarding
4 people who win at any cost no-holds-barred. None of
5 these people need the money. None of them. It's all
6 about winning. The stockholdings have to do with the
7 effects of a verdict or a gratitude towards Microsoft
8 on the witnesses. Charitable giving has nothing to
9 do with either.

10 Finally, Microsoft argues that it should be
11 permitted to bring in evidence of charitable
12 contributions by witnesses if plaintiffs submit
13 evidence of the good works performed by class
14 representatives or other witnesses.

15 The evidence that they cite in connection
16 with this is a class representative in Minnesota, a
17 woman named Jill Pavlak. Your Honor, she worked for
18 five or six years for a nonprofit agency. That's
19 what she did. She had -- her family was made up of
20 foster children that she had adopted and took into
21 her home and cared for. If they've got somebody like
22 that, let them bring them on. But that was true,
23 background evidence had to do with her employment and
24 her family, not with charitable giving of the sort
25 that Microsoft wants to present to the jury.

1 Second, any evidence of specific good acts
2 offered by the plaintiffs would have to meet the same
3 standards contained in 404 as would any evidence
4 offered by Microsoft. And we're not advocating any
5 double standard. We advocate keeping a clear line
6 between real background evidence -- where you used to
7 work and who is in your family -- and character
8 evidence. That's a line that Microsoft seeks to
9 blur.

10 The other issues in this motion,
11 plaintiffs' motion in limine are attorney fees and
12 exemplary damages.

13 We have moved, Your Honor, to preclude
14 Microsoft from referring to provisions of the Iowa
15 Competition Law permitting exemplary damages and
16 attorney fees.

17 Microsoft responded that the jury should be
18 allowed to know about exemplary damages because the
19 jury will have to find specifically that Microsoft
20 acted in a willful and flagrant manner to permit
21 exemplary damages. So the jury should be informed as
22 to why they are making that finding.

23 Then Microsoft also advocated that the jury
24 should be informed about attorney fees because that
25 information was already included in the press release

1 and should be permitted to rebut any suggestion that
2 class representatives are acting selfishly because
3 the class representatives do not bear the cost of
4 litigation.

5 As the court is aware, I'm a great fan of
6 telling the jury the truth, really, about everything.
7 The trouble with Microsoft's argument concerning
8 exemplary damages is that until the evidence is
9 closed and until the jury reaches its verdict, we are
10 not going to know the truth about exemplary damages.

11 Under Iowa law, the court and the court
12 alone decides whether and in what amount there will
13 be such damages. The jury answers a question about
14 willfulness, but its answer does not have a known or
15 predicted effect. You know, Your Honor, in punitive
16 damages cases -- and I know the court has had many of
17 those cases -- in punitive damages cases we tell the
18 jury about punitive damages because it's the jury
19 that makes the decision. In this case it is the
20 court that makes the decision.

21 If Microsoft wants to treat this as
22 punitive damages and let the jury decide, we could go
23 with that. But if they want to follow the statute
24 that permits the court to make that decision, then it
25 would be improper to tell the jury.

1 It's firmly established by federal courts
2 that in antitrust cases juries should not be informed
3 of the treble damages provision because it might
4 cause the jury to improperly lower its damage
5 estimates. There is simply no law to the contrary.
6 And in the federal system, Your Honor, it's
7 automatic, as the court is aware. Treble damages are
8 automatic.

9 In Iowa it's discretionary. The jury will
10 have to find just one predicate fact: Did Microsoft
11 act willfully and flagrantly? But it does not have
12 to be told that this fact is predicate to exemplary
13 damages nor should it.

14 Microsoft argues that the jury should be
15 informed of the effect of its answer, but Microsoft
16 cannot point to a single antitrust case to support
17 its argument. Moreover, none of the cases that
18 Microsoft cites turns on the distinction between
19 whether the judge has the discretion to award treble
20 damages.

21 They cite employment cases, Your Honor, and
22 in employment cases, again, it is the jury who makes
23 the determination. They also cite a consumer fraud
24 case, Wanetick v. Gateway Mitsubishi. That's a
25 consumer fraud case under the New Jersey Act, and the

1 court does hold that the jury should be informed of a
2 mandatory trebling of damages. It does not address
3 the concerns raised by the courts in federal
4 antitrust cases. And, moreover, whether or not the
5 damages by the court are discretionary or mandatory
6 is not relevant to that court's decision.

7 Switching now, Your Honor, to attorneys'
8 fees. Plaintiffs will agree that the court should
9 instruct the jury that it will determine the amount
10 of attorneys' fees in the event of an award.

11 We have language to be included in the
12 class action preliminary jury instruction, which I
13 will hand to the court and counsel -- suggested
14 language, of course. It says, "I" -- meaning you,
15 the court -- "also decide what the attorneys for the
16 class will receive for their work. The attorneys are
17 paid separately by the defendant and any amounts are
18 based upon the reasonable value of their work. The
19 attorneys' fees do not come out of the damages
20 awarded by the jury."

21 That should respond to defendant's concerns
22 and obviate the need for any further comment or a
23 necessity for any proof with respect to that.

24 What defendants want to do and what we will
25 take up further in our Monday hearings is to beat up

1 the plaintiffs because one of the plaintiffs,
2 Mr. Comes, who has been in this case since the year
3 2000 -- who was the person who originally filed it --
4 is a friend of my son's since high school.

5 All of my children's friends think I am
6 their lawyer for all purposes including occasionally
7 bailing them out of jail.

8 Microsoft also argues that a class
9 representative will be portrayed as public, spirited
10 individuals who were loyal only to the members of the
11 class in performing a public service, which they are.
12 Microsoft argues that it should be able to rebut that
13 by showing that the class representatives are not
14 bearing the cost of the litigation.

15 Your Honor, my clients never bear the cost
16 of the litigation. We advance those costs in every
17 case. Many of my clients are people who, if they had
18 to advance the cost of their litigation, would never
19 have their day in court. This is the only time it's
20 ever been suggested that because I advance costs on
21 behalf of my clients, that that becomes an issue that
22 should be brought up to the jury. Plaintiffs have no
23 intention of suggesting that the class
24 representatives do bear the cost of litigation so
25 there's nothing to rebut.

1 And in addition, Your Honor, nonlawyers do
2 not make a distinction between costs and fees. It's
3 sort of all -- you know, it's all the same to them.
4 So the instruction that we've agreed to will handle
5 any perceived problems.

6 It's also fair, I think, to remember, in
7 connection with this and other motions Microsoft has
8 made, that the class representatives have made quite
9 substantial sacrifices in terms of their time and
10 effort. For a class representative to state in the
11 Minnesota case that she participated to get what is
12 fair and just for my class, as Microsoft complains
13 about in its motion, only describes the class
14 representative's motivation and in no way suggests
15 that she was paying for the attorneys in the case.
16 And in any event, Your Honor, with the agreement that
17 we have offered, that concern is obviated.

18 That's all I have, Your Honor.

19 THE COURT: Counsel.

20 MR. GREEN: Thank you, Your Honor.

21 First of all, on the attorney fee issue, I
22 will not, obviously, argue on that except to say that
23 we have not seen this instruction before. And I
24 understand it's only being offered and counsel is not
25 saying we've agreed to it, but I think it does, as

1 she correctly states, take away the need for me to
2 address that issue here today.

3 I'm going to start on exemplary damages, if
4 it's okay with Your Honor.

5 THE COURT: Please.

6 MR. GREEN: Just because that's the way
7 I've got it outlined and organized.

8 In this motion, plaintiffs are saying the
9 opposite of what they've said in some other motions.
10 In fact, we've argued today that you cannot trust the
11 intelligence of an Iowa jury and that you should not
12 tell them the truth because the only reason that they
13 can advance for not telling the jury that there is
14 going to be exemplary damages is that will somehow
15 affect their award of the compensatory damage and
16 reduce it. I think that is contrary to prior
17 assertions they made that the Iowa juries understand
18 these things. They can be told these things and do
19 not let those kind of matters, which shouldn't affect
20 the decision, to affect their decision.

21 Turning to the Iowa Competition Law, Your
22 Honor, and I've got a copy here, but I don't know if
23 you've read that part, and I don't know if we've
24 gotten into any issues yet with regard to this. But
25 it does have a --

1 THE COURT: Thank you.

2 MR. GREEN: The legislature clearly
3 intended to depart from the antitrust scheme when
4 they passed this legislation. As a matter of fact, I
5 would submit it's much closer to what is done in a
6 comparative fault case under 668 in Iowa than it is
7 under Section 4 of the Clayton Act, which gives
8 private -- which gives the parties a private cause of
9 action under the federal scheme.

10 There will be an instruction to the jury
11 that goes to the trier of fact which determines that
12 the prohibited conduct is willful or flagrant. So
13 the jury is very much involved in the decision as to
14 whether the discretionary exemplary damages can be
15 awarded by virtue of the statute.

16 To not allow them to understand why that
17 question is being put to them, in our opinion, would
18 simply confuse them even more than if they were
19 instructed about -- as the case is called -- "total
20 outcome" instructions, which are allowed contrary to
21 what Ms. Conlin says in many statutes where the court
22 makes the only determination as to the exemplary
23 damages.

24 I want to talk about some cases that are
25 cited in our brief, which Ms. Conlin says are not

1 applicable, which is not correct.

2 One is the Wanetick case. I've underlined
3 some sections of that case, Your Honor.

4 That involved -- it was a case of first
5 impression in New Jersey. It involved their Consumer
6 Fraud Act. And as noted in the first part, I have
7 underlined on page 4 -- it's, actually, page 5 of the
8 top of page 4. Under "II" there it says, "The
9 Consumer Fraud Act provides that in any action the
10 court shall, in addition to any other appropriate
11 legal or equitable relief, award threefold the
12 damages sustained by any person in interest."

13 Then the Court goes on to discuss whether
14 the jury should be informed of this fact in the
15 instructions, and that's really what the case is
16 about, for the most part, in terms of its
17 precedential value. And it talks about the two
18 viewpoints about one says they should not be
19 instructed. And it says, "The second viewpoint" --
20 the part I'm reading -- "reasons analogy to the
21 ultimate outcome charge directed in" -- citing the
22 case. If the ultimate outcome is to be stated to a
23 jury in a personal injury action, why should juries
24 be treated differently in Consumer Fraud Act cases."

25 And then if you go over to page 6, which

1 I've underlined, they discuss, again, the very
2 argument that is being made here: Well, if you tell
3 them about that, it might affect their award of the
4 compensatory damage, the underlying damages, if you
5 will. And they say there at the bottom, "Instead, we
6 believe that such information will assist the jury in
7 its fact-finding role and will avoid confusion
8 especially among those jurors who already have some
9 notion concerning the mandates of the Act."

10 Well, of course, here we have, presumably,
11 some jurors are going to be aware of the mandates --
12 actually aware of the mandates of antitrust cases,
13 and the court reasons that they should know about it.

14 I've also underlined, Your Honor, on page 7
15 two parts, and I won't read them to you, but, again,
16 they say that the concerns, which are expressed here
17 by the plaintiffs, "is outweighed by our belief that
18 the jurors are persons of good faith, that they
19 strive to fulfill their role without passion or
20 prejudice toward either side, and that they work hard
21 to abide by all instructions to the best of their
22 ability."

23 And they conclude by saying, "Hence, rather
24 than increase the likelihood of unfairness to any
25 party, an ultimate-outcome charge enhances the

1 prospect that the jury will arrive at a correct
2 verdict for the right reason."

3 So that's all we're asking for, Your Honor.

4 We're asking for the jury to be instructed as to the
5 truth. We're asking that they be fully informed, and
6 in particular, fully informed in a case where they
7 play a very pivotal role in the determination of
8 whether there is going to be exemplary damages
9 awarded or not. And this is entirely contrary to the
10 cases that the plaintiff has cited that come from the
11 federal antitrust scheme because they play no role
12 whatsoever in the award of the treble damages. It's
13 not called exemplary damage. It's not really an
14 exemplary damage scheme. It's a statutory scheme for
15 that particular statute, Section 4. And even then,
16 Your Honor, and, again, I will hand you up another
17 case, here's the Real v. Continental Group case.
18 Even then it's not totally followed by the federal
19 antitrust courts.

20 THE COURT: Thank you.

21 MR. GREEN: This was an age discrimination
22 case, and there the plaintiffs claimed that the court
23 erred in instructing the jury that a finding of
24 willfulness would automatically result in liquidated
25 or double damages. The court disagreed and affirmed

1 the lower court. We support -- they say, "In support
2 of his claim that the court erred in informing the
3 jury -- this is on page 19, Your Honor -- that a
4 finding of willfulness would result in an automatic
5 doubling of damage, the plaintiff relies on a line of
6 antitrust cases holding that it was error for the
7 trial court to instruct the jury that the court would
8 treble the jury's damages." And they go on to say
9 how those cases have nothing to do with the case that
10 is in front of them. And the court even goes on to
11 say -- and I didn't underline that -- and this in
12 antitrust cases, "Treble damages instructions have
13 been approved, however, where necessary to avoid
14 confusing the jury."

15 So here it's more kind of to those dissent
16 cases, which are cited there, under the federal
17 antitrust law, because here we have the jury playing
18 a pivotal role in the determination of these
19 exemplary damages. And not to instruct them as to
20 the ultimate outcome instruction would simply confuse
21 them as to that role and should be done for all the
22 policy reasons that are stated in these cases for
23 giving a jury. And I think that it would be unfair
24 to think that the jury would not be intelligent
25 enough to be apprised of the ultimate outcome. They

1 already are going to know about the attorney fees, it
2 appears.

3 So I think, frankly, for all the reasons
4 that the plaintiffs have argued on several motions
5 for truth, for credibility to the jury, particularly
6 where they are playing a role, that there should be
7 allowed to be an instruction and evidence, which
8 would probably just be by the way of telling the jury
9 that the reason that they have to make the
10 determination as to whether there was -- the conduct
11 of the defendant was willful or flagrant is because
12 then the court in its discretion can award up to
13 twice the damages.

14 That's all I have on the exemplary damage
15 issue, Your Honor.

16 THE COURT: Thank you.

17 MR. GREEN: Moving to the charitable work.
18 Again, this is another motion where the plaintiffs
19 would like to have it both ways. We've been reminded
20 several times about what is good for the goose is
21 good for the gander. They would like to have for
22 purposes of credibility and bias this court to allow
23 them to introduce evidence as to the wealth,
24 stockholding, salary, bonuses, whatever, of the
25 witnesses of Microsoft who are the persona of

1 Microsoft for purposes of this trial. But they do
2 not want you to allow them -- allow us to introduce
3 evidence as to their good works.

4 And the reason they say that you should
5 allow the evidence of their stockholdings is to show,
6 you know, frankly, their greed in how it affected
7 their credibility in terms of whether there was an
8 adverse result and how it would affect the price of
9 their stock or their wealth. And yet they don't want
10 us to show that there is lack of same. And it does
11 go to background, and I think it is fair background
12 material, contrary to what Ms. Conlin says.

13 And, Your Honor, in the Minnesota case --
14 I'm not going to hand this up. It's an exhibit to
15 our resistance. The whole document is an exhibit to
16 our motion on shareholders.

17 THE COURT: What is it labeled? Exhibit
18 what?

19 MR. GREEN: It's Exhibit J, Your Honor.
20 I'm sorry.

21 THE COURT: J. Thank you.

22 MR. GREEN: On paragraph 13 of the rulings
23 on the motions in limine by Judge Peterson up there
24 where a similar motion was made, the plaintiffs
25 motion was denied. The court said that Microsoft

1 indicated at this time it has no intention of
2 introducing evidence of charitable giving; however,
3 Microsoft reserved the right to seek to introduce
4 such evidence in response to an inference from
5 plaintiffs that Microsoft's witnesses are biased
6 because of their financial interest in the company.

7 Well, here we know that they want to do
8 that. They've come right out and said it. They've
9 said it in the motion -- in resistance to our motion
10 today on the stockholders. It says the court can
11 imagine an unlikely scenario in which a witness's
12 charitable giving would rebut any inference of bias
13 by suggesting a witness does not really care about
14 money. And they denied the motion. They said that
15 Microsoft should inform the court before it's going
16 to give such evidence.

17 And so, Your Honor, I don't think it would
18 be appropriate to grant plaintiffs' motion in limine
19 at this time to deny Microsoft any ability to
20 mention, introduce evidence of, the charitable giving
21 of Microsoft employees because there could be, as
22 Judge Peterson recognized, a legitimate reason for
23 doing that. And I think it's clear that there will
24 be a legitimate reason to do that based upon the
25 position that the plaintiffs took with regard to the

1 wealth, the stockholdings and those sorts of things
2 that Microsoft believes.

3 That is all I have, Your Honor.

4 THE COURT: Thank you.

5 MR. GREEN: Hold on. Hold on. Let me look
6 at my notes.

7 Your Honor, just, again, it kind of goes --
8 the profane language motion goes -- they are trying
9 to show that these Microsoft people are bad people.
10 I mean, they are doing everything they can to do
11 that. That they are wealthy, bad people, that they
12 use profane language, that they have too much money,
13 and all sorts of other things, all of which we feel
14 is irrelevant to the issue of whether they engaged in
15 anticompetitive conduct which resulted in any actual
16 injury to these plaintiffs.

17 But, assuming that they are allowed to do
18 that, for reasons other than probative value, such as
19 bias, credibility or whatever, we should have the
20 right to show that they are not bad people, and the
21 evidence of their charitable giving would be such a
22 way to do that. And we ask the court, at a minimum,
23 to deny the motion for summary judgment and allow us
24 to do that if it is deemed appropriate during the
25 trial.

1 THE COURT: Thank you, Mr. Green.

2 You have the last word, Ms. Conlin.

3 MS. CONLIN: Thank you, Your Honor.

4 With respect to exemplary damages, we
5 cannot tell the jury about exemplary damages because
6 we don't know if there will be any. And if there
7 will be any, in what amount.

8 Comparative fault is determined by the
9 jury. Punitive damages, the amount is determined by
10 the jury, and the discretion to award or not to award
11 is in the jury's hands, not in the court's hands. I
12 make my offer again. Age discrimination cases under
13 federal law, Wanetick is one of those, but let me
14 tell you the general rule first and that is this: In
15 all of those cases, Your Honor, the jury is asked:
16 "Was the conduct willful?" Federal age
17 discrimination cases. If the conduct is willful,
18 they check yes or say yes. Then the amount of
19 backpay is doubled.

20 I've tried to get other things in there
21 without success. Just the amount of backpay is
22 doubled. That's the automatic result under a federal
23 age discrimination case.

24 No jury is ever told the effect of their --
25 of their answering yes to the question of

1 willfulness. The Eighth Circuit -- there are cases
2 on this in the Eighth Circuit, and they are just not
3 told. Wanetick is, first of all, a 1986 federal
4 district court case which, to the best of my
5 knowledge, is unique in all the world, and it is --
6 the reason that the court there said the jury should
7 be instructed about the effect of their answer is
8 also unique. Under New Jersey state law, Your Honor,
9 the jury has the right to award punitive damages in
10 their discretion. And what the court here -- and as
11 I said, I think this is unique, but there's a very
12 good -- there's a reason why the court did what it
13 did in this case. The case goes to trial before a
14 jury under both state and federal law. Under federal
15 law the answer willful doubles the backpay. Under
16 state law the jury has a right to make an award in its
17 discretion of punitive damages, and the court felt
18 like the jury should know that if they made an
19 award -- if they said willful, then the backpay would
20 be doubled so that they would over award punitive
21 damages. That is what I understand to be the court's
22 rationale for this unique -- for this unique result.

23 In Wanetick the court said, "We've always
24 emphasized that juries must understand the import of
25 their acts." In this case we can't tell the jury the

1 import of its act because we don't know the import of
2 its acts. Believe me, Your Honor, we will certainly
3 be here asking the court to exercise its discretion
4 to give us all of the exemplary damages we're
5 entitled to. But at this moment and until that time
6 comes, we simply don't know what the import of the
7 jury's acts will be.

8 On the issue of charitable contributions,
9 we have made no motion nor have we resisted any
10 motion remotely comparable to this one.

11 On the issue of wealth, we've already
12 argued that once. But let me emphasize it is not
13 wealth generally that we seek. It is wealth derived
14 from Microsoft, and we don't say they are greedy,
15 though they may be. We say that normal human beings
16 may be influenced by the impact of their testimony on
17 themselves. That's the whole reason for the rule
18 with respect to bias. What about this witness will
19 be affected by his or her testimony?

20 That's what we're seeking in offering -- in
21 seeking to offer evidence of the stockholdings of
22 Microsoft witnesses.

23 If the court denies our motion here, we
24 will, as I indicated, ask the court to let us have
25 the information necessary to put the witnesses'

1 charitable giving in context. We've already
2 indicated I think that's net worth and income for
3 maybe the last five years or so.

4 Returning, as Mr. Green did, to the issue
5 of profane language. They wrote it. They put it in
6 the document. We had nothing to do with that. It is
7 probative. It conveys the intent of the
8 communication. No other words convey the intent of
9 the communications. Iowa juries are not
10 ultrasensitive and not likely to think these are bad
11 people because of the relatively occasional use of
12 the "f" word. It's as though we inserted those bad
13 words in there. We didn't. They are there already,
14 and we seek only to offer the exhibit untampered with
15 to the jury.

16 We are not using them to show that the
17 witnesses -- that these people are bad people. We
18 have plenty of evidence of that otherwise, Your
19 Honor. We don't need profane language to show the
20 conduct of Microsoft employees. What we wish to show
21 by that is simply that they wrote these words and
22 they meant them.

23 And that we're going to the issue of
24 charitable contributions, those contributions are
25 offered specifically to show character. Mr. Green

1 has admitted that. The law is clear. Character
2 evidence, specific acts of charitable contributions
3 are specific character evidence, not admissible,
4 simply not admissible, in any civil case under any
5 circumstances.

6 That's all I have, Your Honor.

7 THE COURT: Very well. These three
8 motions are submitted at this time. We will take up
9 the other motions on Monday.

10 The court understands there's a motion to
11 strike. There's been no response yet. When do you
12 expect to have a response?

13 MR. BAINBRIDGE: I actually put it on your
14 chair over the noon hour.

15 THE COURT: Shall we take it up on Tuesday
16 then?

17 MR. GREEN: Whatever the court wants.

18 MS. CONLIN: Fine with me, Your Honor.

19 THE COURT: Tuesday.

20 Thank you. Have a great weekend.

21 MR. GREEN: You too, judge.

22 MS. CONLIN: Thank you, Your Honor. Nine?

23 THE COURT: Yes, ma'am.

24 (Record closed on October 13, 2006, at
25 2:00 p.m.)

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CERTIFICATE TO TRANSCRIPT.

The undersigned, Janis A. Lavorato, one of the Official Court Reporters in and for the Fifth Judicial District of Iowa, which embraces the County of Polk, hereby certifies:

That she acted as such reporter in the above-entitled cause in the District Court of Iowa, for Polk County, before the Judge stated in the title page attached to this transcript, and took down in shorthand the proceedings had at said time and place.

That the foregoing pages of typed written matter is a full, true and complete transcript of said shorthand notes so taken by her in said cause, and that said transcript contains all of the proceedings had at the times therein shown.

Dated at Des Moines, Iowa, this 30th day of October, 2006.

JANIS A. LAVORATO
Certified Shorthand Reporter