

1           IN THE MFEM DISTRICT COURT FOR POLK COUNTY  
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3       JOE COMES; RILEY PAINT, )  
          an MFEM Corporation; )  
4       SKEFFINGTON'S FORMAL )  
          WEAR OF MFEM, INC., an ) NO. CL82311  
5       MFEM Corporation; )  
          PATRICIA ANNE LARSEN; )  
6       and MIDWEST COMPUTER )  
          REGISTER CORP., an )  
7       MFEM Corporation, )  
                                  ) TRANSCRIPT OF  
8       Plaintiffs, ) PROCEEDINGS  
                                  )  
9       vs. )  
                                  )  
10      MICROSOFT CORPORATION, )  
                                  )  
11      Defendant. )

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13           The above-entitled matter came on for  
14       hearing before the Honorable Scott D. Rosenberg,  
15       commencing at 9 M.m., October 18, 2006, in  
16       Room 404 of the Polk County Courthouse, Des Moines,  
17       MFEM.

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24                               MFEMF M. MFEMFEMF  
                              Certified Shorthand Reporter  
                              Room 405B-Polk County Courthouse  
25                               Des Moines, MFEM 50309

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1 PROCEEDINGS

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

3 on October 18, 2006.)

4 THE COURT: All right. Sir, we rudely

5 interrupted you yesterday.

6 MR. PIERSON: Not so rudely. Good morning,

7 Your Honor. Kit Pierson for Microsoft.

8 Recalling where we were yesterday, the

9 plaintiffs have inserted into their expert report M

10 \$131 million payment for the time value of money on

11 past damages. Their ability to do this, as we

12 discussed yesterday, is clearly governed by M very

13 comprehensive MFEM statutory scheme.

14 The MFEM Supreme Court, really, could

15 hardly have been any clearer on this in the Wilson

16 case at 589 N.W. 2d at 730 when it says, "Any award

17 of interest depends entirely on statute because at

18 common law there was no right to interest on any type

19 of damages." That's worth repeating, "Any award of

20 interest depends entirely on statute." That's the

21 instruction of the United States Supreme Court. So

22 they have to have M statutory basis to adjust their

23 past damages for the time value of money as they are

24 trying to do here.

25 THE COURT: That was from Wilson you read?

1 MR. PIERSON: That's from Wilson.

2 THE COURT: Is that the U.S. Supreme Court?

3 MR. PIERSON: No, this is the MFEM

4 Supreme --

5 THE COURT: I thought you said U.S. Supreme

6 Court.

7 MR. PIERSON: Sorry if I misspoke.

8 THE COURT: That's all right.

9 MR. PIERSON: I'll describe the MFEM

10 statutory scheme briefly because I'm sure you're very

11 familiar with it. The MFEM Competition Law -- I

12 don't think there's any dispute about this --

13 contains no provision authorizing prejudgment

14 interest. They don't argue that it does.

15 Section 535.2 of the MFEM Code allows

16 prejudgment interest only in very specific

17 circumstances that are set forth in the statute, and

18 none of those are applicable here. And even when

19 it's allowed under 535.2, you only get five percent.

20 You don't get to treble it. You don't get to

21 compound it.

22 Then there's 535.3, which is the statutory

23 provision in MFEM, which used to allow prejudgment

24 interest from the day M lawsuit was commenced up

25 until the time of judgment.

1           The MFEM legislature has specifically  
2 narrowed that statute so that it no longer  
3 authorizes. They removed the authorization for  
4 prejudgment interest from the period of commencement  
5 of an action through the date of judgment. And  
6 that's been recognized in the cases that we've cited  
7 in our brief, M couple of cases in 2006 by the MFEM  
8 Court of Appeals, from Frontier and Parisi.

9           What 535.3 continues to allow is  
10 post-judgment interest. So in the event they got M  
11 favorable verdict and judgment was entered, they  
12 could then come back to the court and make an  
13 argument about what kind of interest they are allowed  
14 on the judgment itself, any kind of post-judgment  
15 because that's what 535.3 allowed. But the  
16 legislature has made it very clear: It's narrowed  
17 the statute. It doesn't allow what they're seeking  
18 here. The only other, I think, relevant provision of  
19 MFEM statutory scheme, or one that is at least worth  
20 mentioning is 668.13, but that's M for tort actions.  
21 And, again, they not arguing it has any application  
22 here.

23           Now, faced with that statutory scheme, the  
24 plaintiffs have tried to end run the statute simply  
25 by relabeling what they are trying to do, M

1 correction or an adjustment. And I discussed that  
2 yesterday. I won't repeat what I said yesterday, but  
3 the key point is that they are violating the terms of  
4 the comprehensive statutory scheme in at least four  
5 ways.

6 First, the statute doesn't authorize any  
7 interest prejudgment in circumstances of this case.  
8 So they can't get anything of what they are seeking.

9 Secondly, where it's authorized, they only  
10 get five percent.

11 Third, where you do get the five percent,  
12 it's simple interest paid on an amount each year.  
13 It's not compounded, which is what their expert has  
14 done. And that, again, is from the MFEM Supreme  
15 Court in the Landals case, 454 N.W.2d 891 at 896 to  
16 897, where the court makes clear that the rule in  
17 MFEM is that absent express statutory authorization,  
18 you only get simple interest, even when you're  
19 entitled to it, not compound interest.

20 And, finally, and perhaps most  
21 significantly from M monetary point of view, they  
22 have built interest into their damages number so that  
23 it will not only be included in single damages, but  
24 would also -- it also gets built into any exemplary  
25 damages that might be issued at the end of the case,

1 if the jury and the court determine that was  
2 appropriate.

3 Now, they allege in their brief at page 13  
4 at note 5 that prejudgment interest on exemplary  
5 damages is permitted under MFEM law.

6 MFEM law, in fact, could not be clearer to  
7 the contrary. The citations to the contrary are in  
8 our brief at page 11. It's the Midwest Management  
9 case, the Hagan case, the Nassen case and then M  
10 federal case called IBP. All of these cases hold  
11 that you can't get interest on the exemplary damage  
12 portion of any award.

13 So what they are trying to do here is  
14 directly contrary to MFEM law in numerous respects.

15 In fact, here you have M situation where  
16 the legislature has narrowed their ability to recover  
17 this. Plaintiffs are not only disregarding this, the  
18 legislature has basically moved this way. They are  
19 moving substantially in the opposite direction and  
20 trying to get M level of interest that has never been  
21 permitted or even remotely permitted under MFEM law.

22 Now, they basically make two arguments.  
23 They make six arguments, but I think I can condense  
24 it down to two. They try to avoid the statute simply  
25 by relabeling this as an adjustment or M correction.

1 As we discussed yesterday, that's M different label  
2 for the same thing. The United States Supreme Court  
3 has been clear on that. The leading authorities on  
4 antitrust law are clear on that. You can't avoid the  
5 impact of the rule just by stamping another label on  
6 it.

7 They cite cases which they suggest or  
8 argue -- they claim the that cases in their brief  
9 support the proposition that present-value  
10 adjustments are fine on past damages. In fact, the  
11 cases don't support that proposition at all. All of  
12 the cases they cite, all of the MFEM cases they cite  
13 are cases in which the plaintiff was seeking M large  
14 recovery of future damages. And in that situation --  
15 For example, in the Gleason case there was M statute  
16 in MFEM that specifically provided that in M personal  
17 injury action for M future damages claim, you've got  
18 to reduce it to present value. And the other cases  
19 are simply MFEM courts dealing with that issue on  
20 future damages in the absence of an express statutory  
21 scheme.

22 Here, MFEM has M comprehensive statutory  
23 scheme. And it's one that the legislature has  
24 repeated addressed on how you deal with the time  
25 value of money in the prejudgment-interest situation,

1 M situation where the plaintiff is not seeking future  
2 damages. And that statute clearly does not authorize  
3 what they are trying to do.

4 In fact, and this is the point I want to  
5 emphasize, it's the point I made yesterday. If they  
6 were right, if they were right that all you have to  
7 do is stamp M new label on this and call it an  
8 adjustment or M correction, they in effect wipe out  
9 the statutory scheme on prejudgment interest because  
10 there's no -- there's no case involving past damages  
11 where you couldn't simply stamp the correction on.

12 In the MFEM statutory scheme the five percent, the no  
13 compounding, the no treble damages, that all gets  
14 wiped off the books in effect, and no MFEM court has  
15 remotely suggested that that's something that would  
16 be appropriate to do.

17 The plaintiff -- the last argument that is  
18 made in the plaintiffs' brief is an assertion that  
19 they actually can get prejudgment interest in this  
20 case. That is not correct under MFEM law. And I  
21 think the fact that its the sixth argument they make  
22 out of six in their brief may suggest the  
23 significance that they give to the argument.

24 They concede in their brief at page 11 that  
25 the general rule in MFEM is that prejudgment interest

1 is typically no longer available under MFEM law. So  
2 there's no dispute about the general rule.

3 The only question is, what do they fall  
4 within the exception that they assert at the end of  
5 their brief, which is on M case called  
6 Schimmelpfennig, if I got the pronunciation correct.

7 Schimmelpfennig is M case -- it's an  
8 indemnification case involving an insurer in which  
9 there was no dispute about what money the plaintiff  
10 had paid out. The plaintiff's expert knew exactly  
11 what it was -- plaintiff had paid for some deposition  
12 costs. He had done reimbursement for medical  
13 expenses. Very straightforward case. Plaintiff's  
14 expert knew exactly what damages had been paid, and  
15 there were no disputes about it.

16 And in that case what the MFEM court did  
17 was basically apply 535.2 of the statute, which  
18 allows for recovery for prejudgment interest at five  
19 percent where there's -- essentially where there's an  
20 amount due and payable. And the MFEM courts said in  
21 that situation where there's really no dispute and  
22 the damages were complete, they could get it.

23 That exception does not fully apply to this  
24 situation for M number of reason.

25 THE COURT: In that case the damages were

1 complete at the time of the filing, right? They were  
2 easily ascertainable?

3 MR. PIERSON: The damages that they were  
4 covered were easily ascertained. He paid for  
5 deposition costs. He paid -- it was an  
6 indemnification case. He paid the plaintiff for  
7 medical costs. There was no issue at all about what  
8 he was entitled to.

9 In fact, it's similar to the other case  
10 they talk about, the Woods case where the Woods case  
11 discusses damages that are clear-cut. I think the  
12 term they use in the Woods case is clear-cut and  
13 easily ascertainable.

14 Number one, there's no -- I don't think  
15 there's serious argument that that kind of situation  
16 is present here. As we noted in their brief, even  
17 their own expert when their own expert tries to  
18 estimate what the past overcharges are -- and we use  
19 the year 2002 as an example on one product, but we  
20 could have used any year on any product -- in the  
21 example we give, their own expert says the price  
22 overcharge may be 30 percent. It may be 70 percent.  
23 So even their own expert isn't saying this is  
24 clear-cut or easily ascertained.

25 Secondly, this is M case where their

1 argument is there is M continuing stream of damages,  
2 literally over thousands of examples. So, for  
3 example, if I buy software on M given day, they are  
4 arguing -- and you heard this yesterday -- they are  
5 arguing -- and this is M name I'm not even going to  
6 try to pronounce -- but in Dr. G's report, he argues  
7 that there's M security flaw in the software the day  
8 you buy it. And every time you have M patch, you get  
9 injured again, it takes up three minutes of your time  
10 or whatever. So they are arguing M continuing stream  
11 of injuries.

12 And the same way with overcharges. They  
13 are arguing that people are buying software in M  
14 market in which the price is inflated. So you buy  
15 software. Then when you upgrade it, you pay an  
16 overcharge. Every time you upgrade it, you pay an  
17 overcharge. They are really arguing M continuing  
18 stream of violations and injuries here over an  
19 extended period.

20 The third difference with these cases is in  
21 the Woods case, one of the basis for the exception  
22 they talk about. The Woods case says this isn't M  
23 case where you're going to have to piecemeal interest  
24 calculations. Again, you've got sort of M clear-cut  
25 injury, it's at M definite moment of time, and you

1 don't need to figure it out over and over.

2           This case could hardly be farther in the  
3 other extreme from that. This is M case where you've  
4 got thousands, if not tens of thousands of  
5 transactions over time. And if you want to calculate  
6 interest on the injury on each one of those, on each  
7 one of those events, you're literally talking about  
8 tens of thousands of interest adjustments. So their  
9 expert tries to simplify that in M way by lumping  
10 them together all in one year.

11           The other thing is there is nothing in MFEM  
12 law that says you can do that. This is, I would  
13 submit, the quintessential example of M case that  
14 would require -- that would require piecemeal  
15 adjustments.

16           So the fundamental point, Your Honor, is  
17 that there is no case in MFEM that has awarded  
18 prejudgment interest or said it's available under the  
19 statute in anything that remotely resembles these  
20 circumstances.

21           Beyond that, even assuming, just for the  
22 sake of argument, that the exception of  
23 Schimmelfennig applies, and it doesn't apply, but  
24 even assuming it does apply, all Schimmelfennig said  
25 and all Schimmelfennig did was say when it applies,

1 you can get interest under 535.2. So all that did is  
2 bring you into the statutory scheme and let you get  
3 the five percent simple interest.

4 But as we discussed yesterday, that's not  
5 what their expert does. Their expert seeks interest  
6 as high as 9 percent. Their expert compounds it.  
7 Their expert sets it up in M way that it will be  
8 trebled.

9 I would note -- I think this is  
10 important -- that what their expert has done, he even  
11 contradicts what it said in their own brief, and let  
12 me cite you to page 12, footnote 4, in which they  
13 write, "The Schimmelfennig case also established the  
14 statutory basis for the prejudgment interest in cases  
15 of complete damages." And then quote -- they say,  
16 "The rate at which this prejudgment interest accrues  
17 is five percent per annum, as provided in MFEM Code  
18 Section 535.2." So even their acknowledgment in the  
19 brief as to what this exception applies is completely  
20 different than what their expert is trying to do in  
21 this case.

22 Bottom line, Your Honor, is that there's M  
23 clear statutory scheme in place here, and the  
24 legislature -- it's one that the legislature has  
25 addressed repeatedly. The MFEM Supreme Court has

1 made clear that any interest recovery on past damages  
2 has to be based on that statute. And what is going  
3 on here is it's really M blatant effort to end run  
4 the statute, and it's \$131 million end run, which  
5 they would then try to treble. So it's M very, very  
6 serious problem, and M very clear error of law that  
7 is built into the damages model. And if it were  
8 right, if it were right, it would essentially wipe  
9 the books clean of both the statute and an awful lot  
10 of case law interpreting this statute.

11 Your Honor, I would submit that is clear  
12 error within their model and therefore request that  
13 our motion in limine be granted.

14 Thank you.

15 THE COURT: Thank you.

16 Response.

17 MR. REECE: Thank you, Your Honor. Jim  
18 Reece responding.

19 Your Honor, what Microsoft has done is  
20 they've constructed another straw argument, and then  
21 they attack the straw argument with considerable  
22 zeal. The straw argument is that in MFEM prejudgment  
23 interest is the same thing as present value, and  
24 we've heard that repeated multiple times today,  
25 multiple times yesterday throughout their brief. It

1 is not -- and I'll give the court citations to two  
2 cases that explicitly allow present value from the  
3 MFEM Supreme Court on past damages. And these are  
4 very important cases because they answer this point.

5 The first case is -- both of these cases  
6 are cited in our brief. The first case is LaFontaine  
7 v. Design & Builders, 156 N.W.2d 651.

8 The second one is Landals v. Rolfes,  
9 454 N.W.2d 891, so it's the LaFontaine and the  
10 Landals case.

11 Now, LaFontaine involved M lawsuit by  
12 plaintiffs for an alleged breach of contract for  
13 employment in purchase of stock.

14 There, the MFEM Supreme Court -- the MFEM  
15 Supreme Court in looking at the trial court verdict  
16 said, "Plaintiffs, of course, had the duty to show by  
17 proper measure of damage their loss due to the  
18 breach." The trial court correctly held that  
19 LaFontaine was entitled to the present value of the  
20 difference between the minimum salary -- this is an  
21 employment case -- minimum salary he received under  
22 his employment agreement and basically what he was  
23 able to make. And then they provide the period of  
24 time over which they affirm the damages, which  
25 included both past loss and future loss.

1 Now, if there were any question about it,  
2 Microsoft cited the Landals case for purposes of  
3 saying, Gee, under the prejudgment interest statute,  
4 prejudgment interest is five percent, and it's simple  
5 interest. But what they didn't notice in the case is  
6 this: Again, the MFEM Supreme Court -- this is M  
7 case where it involved an employment discrimination  
8 claim under an MFEM statute that provided for actual  
9 damages, just like the MFEM Competition statute  
10 provides for actual damages. This is 601A.

11 And what the Supreme Court in reciting what  
12 happened in the trial court, it said Landals  
13 introduced evidence of his salary and benefits at  
14 this company. Of the unemployment compensation he  
15 received between his layoff and his acceptance of M  
16 job at another business and of his salary and  
17 benefits at his new job, with factors such as the  
18 time value of money and tax consequences applied to  
19 the lost wages and benefits, he submitted he has  
20 sustained certain damages. The jury found past  
21 damages. The jury found no future damages. So they  
22 had included the time value of money for the past  
23 damages.

24 Now, to drive home the point that this is  
25 not the same as prejudgment interest, in this

1 particular case the trial court also awarded Landals  
2 prejudgment interest because there was M statute that  
3 said at the time you get prejudgment interest from  
4 the date the action is commenced. And the court  
5 talked about this. It said, "By statute interest is  
6 allowed on all money due on judgments and decrees."  
7 This is the prejudgment interest statute. It doesn't  
8 have anything to do with present value.

9 Under the statute, interest accrues from  
10 the date of the commencement of the action. And here  
11 is the key language.

12 Although the amount already awarded by the  
13 jury included the lost value of money up to the time  
14 of trial, the trial court nonetheless allowed  
15 interest on the award, which included the lost time  
16 value --

17 MR. PIERSON: Jim, I can't see it. What  
18 page?

19 MR. REECE: I apologize. It's page 6. Why  
20 don't you go ahead and get your place before I talk.  
21 I'm sorry.

22 MR. PIERSON: I'm not seeing any language  
23 in the copy I have. Do you have M copy of the case  
24 because you didn't cite this in the brief for this  
25 proposition?

1 MR. REECE: This is M case I think you guys  
2 cited.

3 MR. PIERSON: Do you have M case?

4 THE COURT: Is this Landals or LaFontaine?

5 MR. REECE: This is Landals, Your Honor.

6 THE COURT: All right.

7 MR. REECE: I've got my notes on it, but go  
8 ahead.

9 MR. PIERSON: Thanks. Sorry to interrupt.

10 MR. REECE: That's okay.

11 And, Your Honor, I'm sorry. Are you there?

12 MR. PIERSON: Yes.

13 MR. REECE: So what the analysis the court  
14 was doing is they say, "Well, wait M minute. The  
15 jury award for past damages already included M time  
16 value, present value type of adjustment."

17 The trial court also allowed prejudgment  
18 interest because that's statutory. And, basically,  
19 the Supreme Court upheld this award, even though it  
20 acknowledged -- and, again, we're just asking for  
21 present value here, that's what the issue is.

22 Prejudgment interest, as I'll explain, is not an  
23 issue for today. Just to make it really clear that  
24 present value and prejudgment interest are not the  
25 same, that's just words for each other, the court

1 noted, "Well, we're going to support and affirm this  
2 jury verdict that includes time value and prejudgment  
3 even though we note that it kind of includes double  
4 damages."

5 So there the court, the MFEM Supreme Court  
6 made it really clear, "No, time value is different.  
7 It is not prejudgment interest, and you don't look to  
8 the statutory framework for prejudgment interest for  
9 time value."

10 Now, against that backdrop, I'll respond to  
11 Microsoft's motion in limine, which is to prevent  
12 Dr. Netz and Dr. Gowrisankaran from testifying about  
13 the present value of plaintiffs' damages. Again,  
14 they are not the same. And present value isn't  
15 governed by the prejudgment interest in MFEM.

16 Nevertheless, Microsoft argues the two are  
17 the same, and plaintiffs aren't entitled to  
18 prejudgment interest. And it even argues that if  
19 plaintiffs receive M verdict in their favor, any  
20 portion of which contains M present-value adjustment  
21 or prejudgment interest, that that can't be included  
22 in additional doubling of that verdict.

23 Because we've heard arguments on several  
24 different issues, I want to just go over what it is  
25 this motion is about. Drs. Netz and Gowrisankaran

1 are not going to be testifying about prejudgment  
2 interest. Plaintiffs aren't going to mention the  
3 subject of prejudgment interest to the jury unless  
4 for some reason they think they need to at some  
5 point. And if they felt they needed to, they would  
6 come to the court and ask for permission, at which  
7 time Microsoft could object.

8 Dr. Netz and Dr. Gowrisankaran are not  
9 testifying about what amounts should be doubled if  
10 plaintiffs prevail in this case. The potential  
11 additional doubling of the plaintiffs' damages and  
12 what that doubling applies to is clearly premature  
13 and is not part of the motion in limine. That would  
14 require a separate, dispositive type motion after the  
15 verdict, when any of the issue arises.

16 Turning back to the subject of this motion,  
17 the issue isn't a straw argument that is the topic  
18 sentence of their brief. Topic sentence of their  
19 brief is, when is prejudgment interest recoverable  
20 under MFEM law? And then as we've seen, once setting  
21 that up as the issue, then they attack on all fronts.  
22 The question is whether MFEM law allows experts to  
23 provide evidence as to present value of past damages.

24 Clearly, everyone understands, and  
25 Microsoft would acknowledge, that the present use of

1 money is itself M thing of value. And if an injured  
2 party, at least, we would assert, if an injured party  
3 gets no compensation for this loss, then her remedy  
4 does not altogether right the wrong.

5 Now, of course, we know that MFEM provides  
6 by statute for reducing future damages to present  
7 value. And the case that really lays out how you  
8 deal with the mechanics of present value is the  
9 Gleason case. And this, explicitly, under the facts  
10 of that case talks about future damages, but it talks  
11 about the procedure applying present value. And the  
12 Gleason case is 641 N.W.2d 553. So LaFontaine and  
13 Landals deal explicitly with present value of past  
14 damages. The Gleason case under the facts is dealing  
15 with discounting to present value, future damages.  
16 But it's instructive because it talks both about the  
17 rationale and also the procedure that the MFEM  
18 Supreme Court has adopted for present-value analysis.

19 The rationale, of course, for discounting  
20 the future damages is that you want to compensate the  
21 plaintiffs for their actual damages, no more, no  
22 less. So to make sure the plaintiffs receive  
23 compensation just for their actual damages, if you  
24 have M future loss, you need to take into account the  
25 effects of inflation, the fact that the plaintiff can

1 earn money on its award.

2 Now, in the Gleason case, the court very  
3 explicitly talks about, "Okay. If we're going to  
4 do" -- and I think they call it M present value  
5 analysis because it is M present value, it just is  
6 taking future to present as opposed to past to  
7 present.

8 So the Gleason court, of course, says  
9 because it involves future damages, MFEM law requires  
10 an award for future damages in M personal-injury  
11 action to be reduced to present value.

12 They identify, of course, the definition of  
13 present value, which is M method used to determine  
14 the value today of other losses, their future losses.  
15 They say it accounts for the reality that money has  
16 the power to earn money. And it's essentially that  
17 the person who has the money, who holds the money,  
18 can be earning money on it.

19 So when you reduce future losses to present  
20 value, it's because the plaintiff holds the money and  
21 because of the award they can earn money on that.  
22 When you look at past damages, the defendant is  
23 holding the money, and they can earn money on that.

24 The Gleason court talks about, "Well, how  
25 do you do present value?" And it provides different

1 approaches. It says, "Here's three different  
2 approaches to deal with it." Our highest court  
3 hasn't explicitly mandated M particular method,  
4 although what the Supreme Court has done, according  
5 to Gleason, is it's rejected use of the legal rate of  
6 interest in reducing future damages to their present  
7 value. Instead, they adopt M standard where experts  
8 testify about what they believe the correct present  
9 value is, and the jury decides which makes sense.

10 So the standard is not -- doesn't have  
11 anything to do with the legal rate of interest again.  
12 It's what is found by the jury from the evidence to  
13 be fairly expected from reasonably safe investments,  
14 which M person of ordinary prudence but without  
15 particular financial experience or skill could make  
16 in the locality. It's M jury issue. M jury issue  
17 based upon evidence presented by both parties.

18 It says, "Finally, the court has reaffirmed  
19 its faith in the jury to make the present value  
20 reduction based on all the relevant facts and  
21 circumstances shown by the evidence."

22 Now, I mention that because I realize  
23 Gleason involves future loss in discounting to the  
24 present, but it identifies the rationale and the  
25 procedure for doing this. And I'll get into why we

1 haven't had M lot of cases on present value of past  
2 damages. And in M nutshell it's because, as we see  
3 in the cases, there was M statute that said, "From  
4 commencement of the action you get 10 percent  
5 automatic, no questions asked on everything that you  
6 get." That was the statute.

7 So in order to -- as M plaintiff looking at  
8 that, I'm not surprised that M lot of people weren't  
9 hiring experts taking the costs, the risk of  
10 presenting present value, which they may or may not  
11 have received when they have an automatic on the --  
12 under the statute during M lot of the time of these  
13 cases, an automatic ten percent, later switched to  
14 five percent.

15 So when we look at the Gleason case, all  
16 the points about the rationale and the procedure  
17 apply equally to allowing present value for past  
18 damages. MFEM jurisprudence demands full  
19 compensation for injured plaintiffs.

20 It is undeniable that if we don't allow  
21 past damages to be stated in current dollars,  
22 plaintiffs are not receiving their actual damages and  
23 defendants are receiving M windfall. And Landals, of  
24 course, was under that MFEM 601 statute that had the  
25 actual damage language just like the MFEM Competition

1 Law has actual damage language.

2 Now, it's particularly significant in  
3 antitrust cases that plaintiffs receive their actual  
4 damages and defendants not receive M windfall because  
5 damages are supposed to have M deterrent effect.  
6 Antitrust cases can be --

7 THE COURT: Well, the anticompetition law  
8 does have an exemplary damage thing.

9 MR. REECE: Yes.

10 THE COURT: So the deterrent effect is  
11 recognized by the statute not to be in actual  
12 damages, but if the court decides there's evidence to  
13 show based upon the jury's finding of evidence that  
14 there was willfulness, the court -- that's the court  
15 prerogatory to do exemplary?

16 MR. REECE: Absolutely.

17 THE COURT: So any inclusion of punitive  
18 damages within actual damages, wouldn't that be  
19 error?

20 Wouldn't the jury be beyond the scope of  
21 its duties under its oath?

22 MR. REECE: Your Honor, I think present  
23 value is entirely separate. In other words --

24 THE COURT: You just argued about M  
25 punitive effect.

1 MR. REECE: I'm just saying under the MFEM  
2 Competition Law, basically what Microsoft would have  
3 here, if they don't have to pay the literal actual  
4 damages, which I would submit under Landals, under  
5 LaFontaine, is the present value of past damages. If  
6 they don't have to pay that amount, what they've  
7 acknowledged is that they get \$131 million windfall  
8 if MFEM law provides that they should have paid that  
9 amount.

10 So, in other words, the windfall -- and  
11 maybe I used my words inartfully, but what I was  
12 trying to suggest is that if plaintiffs are entitled  
13 to actual damages and Landals says actual damages and  
14 LaFontaine say it's present value of past lost, what  
15 Microsoft has acknowledged here is that if they  
16 succeed in their argument and if the MFEM law is as  
17 set forth in the two MFEM Supreme Court cases to deal  
18 with this, then the plaintiffs will have -- will be  
19 short on their actual damages, some amount.  
20 Plaintiffs' experts say 131 million. Microsoft may  
21 say 5 million. Some amount. It's up for the jury to  
22 decide.

23 Microsoft, again, if they are successful in  
24 keeping this issue from the jury and if the law is  
25 you get your actual damages, which is present value,

1 then they receive M windfall. Again, the windfall is  
2 in whatever amount M jury would have awarded for  
3 present value. In other words, they talk about our  
4 experts. I presume their experts would say, "No.  
5 Present value is M lot less than what our experts  
6 say."

7 So that's all I'm saying, is that the  
8 statute requires actual damages. Actual damages  
9 require present value of past damages. And if they  
10 aren't required to pay that, then they are getting M  
11 windfall at the expense of the consumers in MFEM.

12 Now, Microsoft has told this court there is  
13 no case that addresses present value of past damages  
14 in Minnesota -- or in MFEM. They, instead, have said  
15 the prejudgment-interest statute governs everything  
16 here.

17 The cases then that they cite -- and once  
18 they set up the issue, which is, "Gee, is prejudgment  
19 interest recoverable?" which generally isn't even  
20 addressed until the end of the case after there's M  
21 record and an application to the court. I mean,  
22 that's typically how prejudgment interest is handled.  
23 So what they've done is they've said that's the  
24 issue, and then all they cite are arguments for and  
25 essentially against prejudgment interest in this

1 case.

2 And I read every single case that they  
3 cited, and they all just involve different  
4 permutations of prejudgment interest. It's like in M  
5 dissolution action, do you award prejudgment interest  
6 from commencement or because the judge is trying to  
7 make some equitable division of property? Do you  
8 wait until the judge issues his degree? Under M  
9 particular statute is it -- and the facts of the  
10 case, when does prejudgment interest start?

11 Prejudgment interest, simple or compound. Can you  
12 get prejudgment on various things?

13 So all the cases -- if the issue were  
14 prejudgment interest, the cases may or may not apply.  
15 And I say that because it's usually handled at the  
16 end of the case when you actually know the facts that  
17 you're dealing with.

18 But the cases don't apply here because the  
19 issue is present value, and they've omitted to cite  
20 the two cases where the MFEM Supreme Court has  
21 explicitly allowed present value of past damages.

22 Now, Microsoft didn't make M lot of mention  
23 in their argument about federal cases. There's M  
24 number in their brief. And I'll just briefly say, as  
25 to the federal cases, they cite these for various

1 propositions, again, generally dealing with the issue  
2 of prejudgment interest, but other issues.

3 We've responded without doing M  
4 comprehensive analysis of federal law just to show  
5 that they've been somewhat selective in their cases,  
6 and we think inaccurate in some respects.

7 The Eighth Circuit, for example, has  
8 recognized M plaintiff's right to recover present  
9 value if they have past damages. That's in the H. J.  
10 Inc. case. But the point about the federal cases is  
11 they involve federal statutes and case law not at  
12 issue here. They often refer to various states' laws  
13 other than MFEM.

14 Here we're dealing with MFEM law. The  
15 federal cases they cite aren't applicable, and they  
16 obviously -- although throughout their brief they  
17 haven't emphasized those in oral argument. So the  
18 federal cases and the case law while pro and con are  
19 not really relevant to this issue either.

20 MFEM law, obviously, strongly endorses full  
21 compensation for injured parties. That means 100  
22 percent of damages, not some sliding scale dependent  
23 upon how long M defendant has kept their money.

24 From M procedural standpoint, the MFEM  
25 courts have held this is an issue where experts for

1 the different parties present testimony. The jury  
2 decides the issue.

3 In other words, we present testimony on  
4 present value. They present testimony on present  
5 value. The jury decides. They may agree with us.  
6 They may agree with Microsoft. They may pick  
7 something else.

8 Microsoft's position is wrong. They  
9 haven't cited the cases that actually identify the  
10 issue. But if their position is accepted and  
11 plaintiffs are not able to even put on evidence of  
12 present value and the Supreme Court later says in  
13 LaFontaine and Landals we said that the plaintiffs  
14 should be able to put on evidence of present value,  
15 then obviously we would need M new trial. And M  
16 problem I see is that Microsoft probably would  
17 complain, because of the money involved, that it  
18 would be prejudiced by not having the jury, who heard  
19 the liability and other damage issues, hear this  
20 isolated issue.

21 We believe this jury should hear and decide  
22 the present value issue. The issue may end up being  
23 moot if they don't award anything for present value.  
24 But if they do, then we have M record so we won't  
25 have to have M retrial. And, of course, if we look

1 at the current precedent, the only two cases from the  
2 MFEM Supreme Court to address this issue say, "Yes,  
3 we are entitled to present value." Entitled to put  
4 on evidence of present value.

5 Now, I'll just have M couple of comments  
6 about --

7 THE COURT: So Landals awarded present  
8 value and the interest?

9 MR. REECE: They did, they did. And they  
10 recognized, "Hey, you're getting kind of both present  
11 value and you're getting interest" because, they say,  
12 "Look at this Eighth Circuit case. We recognize this  
13 is kind of double recovery here."

14 Here, all we're asking for at this point is  
15 present value. Prejudgment interest, I don't know if  
16 that will ever become an issue. But prejudgment  
17 interest is always addressed towards the end of the  
18 case, once there's M record and someone makes an  
19 application for it.

20 I just want to just touch on M couple of  
21 their theme points because, again, while they address  
22 prejudgment interest and not present value, I think  
23 that it's important just to point out some of the  
24 things that, again, we think are maybe not exactly  
25 right according to MFEM law.

1 Throughout their brief they say the MFEM  
2 Supreme Court has made clear that any award of  
3 interest -- and, again, they are talking prejudgment  
4 interest -- depends entirely on statute. And they  
5 cite the Wilson case, M 1999 case. And it's true  
6 that they've taken M snippet out of that case, the  
7 case we're dealing with M prejudgment interest  
8 statute.

9 However, the impression they are leaving is  
10 that the only -- and, again, I'm talking about  
11 prejudgment interest. I'm only doing it because  
12 they've made such M big deal of it. This isn't M  
13 prejudgment issue, but the impression and their whole  
14 theme is everything is according to statute. And now  
15 the statute says you don't get prejudgment interest.  
16 MFEM law does not allow prejudgment interest. And  
17 that's just wrong, and I think they've kind of  
18 conceded M little bit with this Schimmelpfennig case,  
19 and then there's another case, Gosch, G-o-s-c-h.  
20 That's M 2005 case. That's 701 N.W.2d 90. It's  
21 Gosch, G-o-s-c-h.

22 MFEM law has always allowed prejudgment  
23 interest apart from statute on damages that under  
24 these cases are complete. In other words, some  
25 cases, separate cases have an ascertainable standard.

1 Some have -- are the damages complete at M point in  
2 time? And they refer to the Schimmelpfennig case  
3 because the damages there were easily ascertainable  
4 and complete.

5 I think in the Gosch case it involved M  
6 jury verdict on damage to M truck. So it wasn't  
7 exactly that the damages were easily ascertainable,  
8 if I've got that case right. It's that damages were  
9 complete as of M point in time.

10 Now, I only mention that because that is  
11 not an issue for today. It's M prejudgment interest  
12 issue. But I'm trying to show what they've done in  
13 their reply is taken little snippets from cases and  
14 said, have this theme that, "Gee, MFEM does not  
15 permit any interest apart from the prejudgment  
16 statute," and, "Gee, the statute has been changed and  
17 there's no prejudgment interest and we keep asking  
18 the court to violate the law." And it just isn't  
19 true. They haven't properly cited the law.

20 Now, there's four points they make, and  
21 then I think I'm done.

22 They say plaintiffs' position would  
23 circumvent the prejudgment interest statute. That's  
24 wrong because they didn't refer the court to  
25 LaFontaine or Landals. The two are entirely separate

1 and different.

2 They say that our position would permit  
3 greater recovery than prejudgment interest. That  
4 depends. The Supreme Court says plaintiffs can put  
5 on their evidence. Defendants can put on their  
6 evidence. We don't know if it could, could provide  
7 for greater recovery on present value. It might  
8 provide for no recovery or less recovery. It's just  
9 an entirely different procedure.

10 As I mentioned before, it's not surprising  
11 that many plaintiffs in the past when these statutes  
12 had this automatic prejudgment interest statute, as  
13 high as ten percent from commencement of an action,  
14 it's not surprising we don't have M lot of cases back  
15 in those times asking for present value as opposed to  
16 just saying, "Boy, this is great." I just --  
17 whatever I get at trial, I get ten percent from  
18 commencement, later changed to five percent.

19 Microsoft says plaintiffs could always  
20 recover prejudgment interest by making an  
21 interest-based adjustment. Again, they start -- that  
22 all comes from their argument that the two are the  
23 same, and they aren't. And it isn't true we could  
24 always. Under M prejudgment interest statute you  
25 always could when it was from commencement. Here

1 it's completely up to M jury. All we get to do is  
2 put on evidence. The jury might accept our evidence.  
3 They might reject our evidence.

4 They say that any use of compounding  
5 violates MFEM law. That's not right. That refers to  
6 prejudgment interest. And, again, they cite the MFEM  
7 case for prejudgment interest. What the MFEM Supreme  
8 Court says is -- in the Gleason case, there's no  
9 particular methodology that we endorse other than you  
10 don't use the legal interest rate under the statute.  
11 That's not the standard.

12 So the experts put on their evidence, and  
13 they explicitly say in the Gleason case, "We have  
14 faith in the jury to evaluate both sets of experts  
15 and decide what is the right thing to do."

16 Then they argue that present value could be  
17 trebled and that's some violation. Again, the motion  
18 in limine is to prevent the plaintiffs from putting  
19 on evidence of present value. Something to do with M  
20 doubling, trebling at the end of the day is not  
21 before the court on this motion.

22 I presume if the plaintiffs receive M  
23 verdict and seek to have an additional doubling, that  
24 that issue, if there is an issue and there may not be  
25 an issue, depending upon what the jury decides, that

1 would be addressed to the court at that point in  
2 time.

3 So, Your Honor, I would submit respectfully  
4 that what Microsoft has done is they've created an  
5 argument that they think they can win, which is,  
6 "Gee, present value statute, if that's what governs,  
7 look at the current version of the present value" --  
8 I'm sorry, "the prejudgment interest statute. If  
9 that's what governs, then, look, they changed the  
10 statute. You don't get prejudgment interest."

11 So that's how they constructed their  
12 argument, and they've repeatedly told this court  
13 that's the law in MFEM. There is absolutely no  
14 authority for permitting present value of past  
15 damages. And all we are asking is that we be  
16 permitted to put on evidence, not that we're entitled  
17 to anything of right, simply that the jury in  
18 accordance with the Supreme Court's direction make  
19 that judgment based on the evidence.

20 Thank you, Your Honor.

21 THE COURT: Rebuttal.

22 MR. PIERSON: Your Honor, Mr. Reece is M  
23 very, very able advocate. But what he's advocating  
24 is clearly contrary to MFEM law and, in fact, builds  
25 M \$131 million legal error into their model, and then

1 seeks to have it trebled.

2 Let me begin with one of the points that I  
3 emphasized, which is, the effect of his argument, if  
4 it were law, which it is not, to wipe out the MFEM  
5 statute because in every single case the plaintiff  
6 could adjust their past damages, using whatever  
7 interest rate they choose. And they could make an  
8 adjustment for the time value of money, and Mr. Reece  
9 doesn't dispute that, and that would in effect  
10 displace the comprehensive statutory scheme.

11 What he argues is, "Well, the jury may not  
12 award it." So what he's doing, Your Honor, is  
13 displacing M comprehensive and often-examined-  
14 statutory scheme that the legislature set up and  
15 replaced it with M situation in which the plaintiffs  
16 are legally entitled to recover this at whatever  
17 interest rate their experts seeks, and then seek to  
18 have it trebled in every case. And his only answer  
19 is, "Well, the jury may decide not to do it." That  
20 just isn't the way MFEM law works.

21 Mr. Reece argues that this adjustment or  
22 correction is something different than interest. He  
23 disregards many of the authorities we cite on that  
24 proposition. He disregards the discussion in  
25 Vazquez, the discussion in Wilson that describes what

1 interest is, which is, in essence, exactly what their  
2 expert is doing here. It's an adjustment for the  
3 time value of money, and that's the way the Supreme  
4 Court describes what the prejudgment interest statute  
5 is doing. Mr. Reece has no answer to that. There's  
6 no discussion of the Shaw case in which the United  
7 States Supreme Court made very clear that you  
8 can't -- that interest is interest is interest. And  
9 what they are doing is reflected on the exhibit I  
10 gave to Your Honor earlier, which is very clearly  
11 what they are doing. And what the United States  
12 Supreme Court said in Shaw is you can't do it just by  
13 relabeling it as M delay factor or relabeling however  
14 you want to. And that's exactly what is going on  
15 here.

16 He also has no answer to the leading  
17 authorities on antitrust law: Areeda, who says that  
18 these are equivalent. So what is going on here is  
19 essentially M slight of hand where the leading  
20 experts on antitrust law, the MFEM authorities and  
21 the United States Supreme Court are saying there is,  
22 in fact, no difference. Mr. Reece discusses three  
23 different cases, and let me respond to each of them.

24 The first case he discusses is LaFontaine.  
25 But LaFontaine is M case where the plaintiff was

1 seeking 15 or 20 years in future damages in that case  
2 as part of M total award. So the court had to make  
3 an adjustment for that. And then there's no dispute  
4 MFEM law allows you to do reduce damages in that  
5 situation. In fact, it requires it in personal-  
6 injury cases, but that's what that case is about.

7 The Landals case is ironically elevated to  
8 significance in his argument when, in fact, if you  
9 look at the brief they filed in this case, they don't  
10 even mention the Landals case, the case that supports  
11 the proposition they are now citing it for.

12 In the Landals case, there was no argument  
13 by -- the defendant in that case didn't argue that M  
14 present-value adjustment was inappropriate. So it  
15 simply wasn't an issue that the Supreme Court had to  
16 decide. The only issue that the court had to decide  
17 in that case was whether to allow prejudgment  
18 interest, which it did in that case. But in that  
19 case, it's M 1990 case, and you've got M statute,  
20 535.3 that specifically authorized it at that time.

21 Now, as I pointed out, the legislature  
22 changed the law in 1997, and the law is exactly the  
23 opposite.

24 The Gleason case, as he acknowledges, is  
25 simply M case about present-value adjustments for M

1 future damages case. And MFEM has M specific  
2 statute, which the court relied on in that case,  
3 which is MFEM Code Sections 624.1a.

4 There the MFEM legislature has specifically  
5 provided in personal-injury actions you can adjust --  
6 in fact, you must adjust M future damages award, and  
7 it's M downward revision. Now, if the MFEM  
8 legislature wanted to do that here in the past  
9 damages context, it could do that. It could  
10 authorize it if it wanted to. Instead, it set up  
11 this very comprehensive scheme for prejudgment  
12 interest. And that's how situations on the time  
13 value of the money are governed.

14 Now, Mr. Reece argues, somewhat  
15 apologetically -- he says there are only M few cases  
16 that have ever suggested that you can make this sort  
17 of present value adjustment. And the reason he  
18 suggests for that is he says, "Well, MFEM law used to  
19 have this provision in 535.3 that allowed interest  
20 back to the time of commencement. So why would M  
21 plaintiff have ever sought what they are now trying  
22 to call M correction or adjustment in these old  
23 cases?"

24 Well, even the old MFEM statute, 535.3,  
25 stopped at the time of the commencement of the

1 action. So plaintiffs still had the incentive in  
2 every case to argue for past damages and an  
3 adjustment prior to the date the action was  
4 commenced. That incentive always existed. And the  
5 notion that, "Gee, no plaintiff ever had reason to do  
6 that because 535.3 already allowed it." The notion  
7 that plaintiffs haven't been doing this because they  
8 were entitled to prejudgment interest under 535.3,  
9 it's just wrong because the statute never allowed --  
10 the statute never authorized what they are seeking in  
11 this case.

12 The main gist of Mr. Reece's argument is  
13 really M policy argument at the end of the day that  
14 you really do this to provide M fair compensation.  
15 There really are two things to say about that.

16 Number one, Your Honor, that is M  
17 legislative judgment. It's not M judgment for the  
18 plaintiffs. It's not M judgment for this court at  
19 the end of the day. It's M legislature judgment on  
20 how you compensate people for the time value of  
21 money, and that's set forth in the statute. And  
22 that's what Wilson makes clear: You get what the  
23 statute allows, and it's entirely dependent on  
24 statute. So he can make whatever policy arguments he  
25 wants to, but that is quintessentially M legislature

1 judgment.

2 Your Honor makes the point, and I think  
3 you're exactly right about this, that Your Honor says  
4 isn't that, in fact -- Your Honor says the court has  
5 the ability to award exemplary damages in the  
6 appropriate case. And that, of course, is true under  
7 MFEM law. But that is M judgment for the court to  
8 make at the end of the day. It's not M judgment for  
9 their expert to make and try to do an end run around  
10 MFEM law by inserting this into their damages. The  
11 Court can decide at the end of the day what is  
12 appropriate based on the jury verdict.

13 They discuss these cases in which they  
14 argue that the Schimmelpfennig exception may be  
15 applicable here. Gosch is M case -- again, M case  
16 where you're dealing essentially with M pretty  
17 discreet injury. It was M defective wall in M  
18 hospital, and the plaintiff's expert said what damage  
19 had been caused by that. As I pointed out, this is  
20 an entirely different case in three respects, most of  
21 which I don't think were really answered in  
22 Mr. Reece's argument.

23 Number one, their own expert doesn't agree  
24 on the amount of money that is involved here. It  
25 could be 30 percent. It could be 70 percent. So

1 this isn't the sort of situation they are describing  
2 where the plaintiff's expert comes in and at least  
3 the plaintiff's expert is able to clearly identify an  
4 amount of money.

5 Secondly, this is M case with continuing  
6 damages alleged, not complete damages.

7 And, third, this is M case where piecemeal,  
8 literally thousands of calculations of interest will  
9 be required. And that is not like any of the cases  
10 they cite.

11 Finally, as I noted, if they were relying  
12 on Schimmelpfennig, Schimmelpfennig and that case law  
13 simply brings them within 535.2. Their own brief  
14 says they would be limited to five percent interest.  
15 It's also clear under MFEM law they would be limited  
16 to single damages. So even if this exception did  
17 apply, which I don't think it clearly doesn't, they  
18 still got to come within the statutory requirements.  
19 And that's what Schimmelpfennig says, and that's what  
20 their own brief says in the footnote I cited earlier.

21 So at the end of the day, Your Honor, what  
22 you have here is M statutory scheme that has  
23 addressed this situation. I don't think that  
24 anything -- there's several propositions here, which  
25 I don't think are seriously disputed in Mr. Reece's

1 argument. It is not disputed that the statute only  
2 allows five percent interest. And their expert has  
3 done something very different.

4 It is not disputed that MFEM law does not  
5 permit compound interest absent an express statutory  
6 authorization. And their expert has compounded the  
7 interest.

8 And, finally, I don't think it's disputed  
9 that the way they have built this into their model  
10 means that it will be included in any exemplary  
11 damage award. So not only do they improperly build  
12 it into the model, they do it in M way that it would  
13 be tripled or doubled if exemplary damages were  
14 awarded. And that is clear contrary to MFEM law.

15 At the end of the day, Your Honor, I  
16 submit, this is not complicated. In Wilson the  
17 Supreme Court said any award of interest depends  
18 entirely on statute. There's no authorization for  
19 this in any statute. The legislature has restricted  
20 the statute. And what the plaintiffs are doing is  
21 disregarding that and violating the statutory scheme  
22 in at least four ways. And that is clearly  
23 impermissible.

24 Thank you, Your Honor.

25 THE COURT: Does 535.3 -- or is it 535.2 --

1 it's 5 percent by 535.2, right?

2 MR. PIERSON: That's correct, Your Honor.

3 THE COURT: Very well.

4 Thank you, sir.

5 MR. PIERSON: Thank you, Your Honor.

6 THE COURT: That concludes the motion in  
7 limine.

8 What was the other matters you wish to take  
9 up?

10 MR. GREEN: There's two matters.

11 MR. JACOBS: One is plaintiffs' motion for  
12 sanctions against Microsoft.

13 MR. GREEN: And the other one is M motion  
14 to strike our reply brief, which the court wanted to  
15 hear today.

16 THE COURT: Let's go ahead with the motions  
17 to strike reply briefs first.

18 Now, the two motions in limine, No. 1 and 2  
19 are going to be heard on the 24th; is that right?

20 MR. GREEN: That's right, Your Honor.

21 THE COURT: You want to go to the motion to  
22 strike reply briefs?

23 MR. JACOBS: Yeah. The motion to strike  
24 the reply briefs, I think, is just handled really  
25 quickly here.

1           The pretrial order that Your Honor signed  
2           did not provide -- it provided for motions. It  
3           provided for resistances to those motions in limine.  
4           It did not provide for any filing reply briefs.

5           In those cases where the pretrial order did  
6           deal with briefing such as dispositive motions, there  
7           was M schedule set out for the motion, resistances  
8           and reply. So plaintiffs did not file any replies.

9           It was our understanding that no replies  
10          would be filed. My understanding is Mr. Hagstrom had  
11          discussed this with Ms. Nellis when setting out the  
12          schedule and when the parties were negotiating the  
13          schedule, and it was decided not to submit any reply  
14          briefs. So plaintiffs did not submit any replies.  
15          Microsoft submitted replies on all their briefs, and  
16          for that reason we're just asking that they be  
17          stricken.

18          THE COURT: Did the pretrial order  
19          specifically say no reply briefs?

20          MR. JACOBS: No, it did not.

21          THE COURT: Okay. Very well. Who is going  
22          first? Mr. Green?

23          MR. GREEN: Yes, Your Honor. I'll be brief  
24          also.

25          Number one, there's contradicting

1 affidavits about the deliberations between Ms. Nellis  
2 and Mr. Hagstrom on the issue; number two, as the  
3 court has made it plain here, there is no prohibition  
4 of filing reply briefs. Two, the Rules of Civil  
5 Procedure clearly allow for the same and they apply  
6 here.

7       Lastly, there's been plenty of opportunity  
8 for the plaintiffs to file reply briefs on their  
9 motions since the time we filed our reply briefs in  
10 order to have those for your consideration today.  
11 And, obviously, they've had full opportunity to argue  
12 or present oral argument with regard to those reply  
13 briefs and have done so on at least two occasions  
14 that I recall in the last two days. So there's no  
15 prejudice, and the replies were simply for the court  
16 for your purposes for your consideration and we feel  
17 were proper.

18       That's all I have, Your Honor.

19       THE COURT: You have the last word.

20       MR. JACOBS: I don't have anything else,  
21 Your Honor.

22       THE COURT: Okay. Next issue  
23 is Plaintiffs' motion to sanction Microsoft for  
24 improperly contacting class members; correct?

25       MR. JACOBS: Correct, Your Honor.

1 Your Honor, we brought this motion for  
2 targeted sanctions because plaintiffs believe that  
3 Microsoft has violated this court's ruling  
4 prohibiting it from conducting informal ex parte  
5 discovery.

6 Now, Your Honor will recall last week  
7 during the decertification hearing, Mr. Casper for  
8 Microsoft referred to M number of affidavits that  
9 were signed by MFEM resellers of Microsoft software.

10 Well, plaintiffs are very troubled by the  
11 fact that Microsoft has been making extensive  
12 systematic ex parte contacts on the subject matter of  
13 this lawsuit with MFEM class members who happen to be  
14 resellers of Microsoft software. The affidavits that  
15 were submitted are from such class members.

16 Indeed, Microsoft concedes in its  
17 resistance to plaintiffs' motion that its lawyers and  
18 an litigation investigative outfit have been  
19 contacting MFEM resellers since at least March of  
20 2006. That is while Microsoft's motion to conduct  
21 informal ex parte discovery was still pending before  
22 this court. That motion -- their first motion on the  
23 subject, Your Honor will recall, there were M number  
24 of motions dealing with variations on the theme that  
25 was originally filed in February of 2006, and Your

1 Honor ruled on April 10th of 2006 denying Microsoft's  
2 motion to conduct ex parte discovery.

3 Not only that, but during at least one of  
4 these ex parte communications, Microsoft told the  
5 class member that this lawsuit was "hurting resellers  
6 or hurting consumers." This was the -- this was in  
7 the deposition of Orville Erickson and at 44, lines  
8 14 through 20, and this is submitted as Exhibit K to  
9 our motion here.

10 So Microsoft -- somebody -- Mr. Erickson  
11 says that an attorney or an investigator, somebody  
12 working for Microsoft, in any event, was asking  
13 questions for about 30 minutes on the subject of this  
14 lawsuit. And Mr. Erickson testifies that he was told  
15 that -- well, that the lawsuit was "hurting resellers  
16 or hurting consumers because resellers couldn't  
17 charge as much."

18 So here we have M situation where  
19 plaintiffs, unbeknownst to plaintiffs, Microsoft is  
20 contacting these class members who are resellers.  
21 And it turns out when we took the deposition of  
22 Mr. Erickson, he confirmed that he's M class member  
23 in this case.

24 THE COURT: Did the contact occur after the  
25 court ordered no contact?

1 MR. JACOBS: That contact occurred in  
2 June of 2006, yes. So the court's order was  
3 April 10th of this year, and, yes, Mr. Erickson says  
4 that it was sometime in June. I think he said either  
5 May or June, but it's around the June time frame,  
6 late May early June time frame he testifies.

7 So you've got this communication going on  
8 with these resellers, and then most troubling from  
9 our standpoint was that Microsoft in connection with  
10 the motion for decertification as Your Honor heard  
11 last week, Microsoft is trying to use statements from  
12 class members who are resellers in connection with  
13 obtaining decertification. In other words, Microsoft  
14 is seeking the functional dismissal of this case,  
15 which is what decertification would be, based in part  
16 on statements obtained during ex parte contacts with  
17 class members, apparently without telling any of  
18 these class members what the effect of their  
19 statements would be.

20 I think that's very troubling for M number  
21 of reasons here.

22 THE COURT: So you're alleging there was M  
23 direct violation of the court order?

24 MR. JACOBS: Well, we believe there was M  
25 violation, yes, Your Honor. Now, obviously, it's up

1 to the court to decide what Your Honor meant in your  
2 April 10th court order and whether or not these  
3 violations, whether or not these contacts are  
4 actually violations of the court order or not. But  
5 we believe that there is no way, really, for  
6 Microsoft to argue that these contacts did not  
7 violate the court's ruling here.

8 Now, Your Honor will recall during the  
9 arguments on this original motion that Microsoft  
10 filed in February of this year, plaintiffs resisted  
11 that. Microsoft asked for leave to contact class  
12 members on an informal ex parte basis. Okay. And  
13 plaintiffs resisted that. And we said there are two  
14 reasons why that is improper for them to do that.

15 First is the no-contact rule. You know,  
16 Rule 32:4.2 prohibits ex parte communications with  
17 opposing -- an opposing party, representing party.  
18 The rule provides: "A lawyer shall not communicate  
19 about the subject of the representation with M person  
20 the lawyer knows to be represented by another lawyer  
21 in the matter unless the lawyer has the consent of  
22 the other lawyer or is authorized to do so by law or  
23 court order."

24 And now comment 1, of course, the rationale  
25 for that is to prevent possible overreaching by other

1 lawyers who are participating in the matter. And  
2 that's exactly what we think was going on here.

3 Now, as we also mentioned to the court back  
4 in February, March time frame when this motion was  
5 being briefed, is that once M class is certified, the  
6 law is very clear that all members, whether named or  
7 absent, become M represented party for purposes of  
8 the anti-contact rule.

9 Now, one of the cases we had cited was  
10 Kleiner v. First National Bank of Atlanta, 751 F.2d  
11 1193. The jump cite to that is 1207 at footnote 28.  
12 The Manual for Complex Litigation, 21.33, is also  
13 very clear on this point: That once M class is  
14 certified, the rules governing communications apply  
15 as though each class member is M client of class  
16 counsel. After certification, every class member is  
17 considered M client of the lawyers for the class.

18 Similarly, M case Fulco v. Continental  
19 Cablevision, Inc., 789 F.Supp. 45, the jump cite 47,  
20 and this was M case cited by Microsoft in its first  
21 motion to conduct ex parte discovery. The court in  
22 that case, in the Fulco case, put it very succinctly  
23 when it said, "After the class has been certified,  
24 defendants' counsel must treat the unnamed class  
25 members as represented by the class counsel for

1 purposes of the anti-contact rule."

2 So we've got the anti-contact rule out  
3 there. Microsoft should not be contacting these  
4 class members.

5 Now, the second rule here -- we've got  
6 basically two rules, as we pointed out, that govern  
7 how Microsoft can conduct discovery if it can come up  
8 with M compelling reason of why it needs to conduct  
9 discovery of class members.

10 The second rule here is Rule 1.269 of the  
11 MFEM Rules of Civil Procedure. And that rule  
12 provides, "Discovery may be used only on order of the  
13 court against M member of the class who is not M  
14 representative party or who has not appeared."

15 Now, the rule sets out criteria for  
16 determining whether discovery may be used by M  
17 defendant against absent class members. But  
18 Rule 1.269 and the no-contact rule read together lead  
19 to the following conclusion: That if Microsoft  
20 believed there was discovery from absent class  
21 members that it needed in connection with this  
22 action, there is M procedure for Microsoft to follow.  
23 And it's not to contact class members who are  
24 represented parties on an ex parte basis. It's to  
25 come to this court and seek leave pursuant to

1 Rule 1.269, as Microsoft did on M number of  
2 occasions. They said, "We need to contact these  
3 class members."

4 Your Honor will recall that after Your  
5 Honor denied Microsoft's motion on April 10th,  
6 Microsoft appealed that -- sought leave to appeal  
7 that to the MFEM Supreme Court. The MFEM Supreme  
8 Court denied that petition.

9 So on June 12th of this year, Microsoft  
10 filed M motion to conduct depositions of absent class  
11 members, which this court ultimately denied on  
12 July 5th.

13 So even Microsoft recognized the procedure  
14 that should be followed here: That if they wanted to  
15 be contacting class members, they come to this court  
16 and they present M compelling reason why they need to  
17 conduct certain discovery or make certain contact  
18 with class members.

19 Now, one of the things Microsoft stated  
20 here -- let me step back here.

21 THE COURT: One of their arguments is they  
22 are not class members.

23 MR. JACOBS: One of the arguments is they  
24 are not class members, but that simply, we think, is  
25 not supportable here.

1           We will go to the class definition here.  
2           The class definition for the Microsoft operating  
3           systems class is similar for the applications class.  
4           It says, "The Microsoft operating system software  
5           class consists of any person who at the time of  
6           purchase was M citizen of MFEM who on or after  
7           May 18, 1994 was an indirect purchaser of Microsoft  
8           operating-system software and who did not purchase  
9           Microsoft operating-system software for the purpose  
10          of resell."

11          Now, what Microsoft is trying to say here  
12          is that last clause, "and who did not purchase for  
13          the purpose of resell." That means anyone who is M  
14          reseller cannot be M member of this class for any  
15          purpose; that the resale of M license negates your  
16          membership in the class, even for those licenses that  
17          you purchased for your own use.

18          So let's say if, for instance, I'm M  
19          reseller. I have M reseller company that is  
20          reselling software, okay? I have M store. For  
21          licenses that I'm reselling, I'm not M class member  
22          for those purchases, but I buy software for my own  
23          personal use. I may buy software for use by my  
24          company. Those purchases bring you within the class  
25          because you're not purchasing those licenses. You're

1 an indirect purchaser for purposes of the class.

2 Now, Microsoft says, "Well, you know, Best  
3 Buy" -- they use Best Buy as an example here. They  
4 say, "Well, obviously, Best Buy is M reseller. So  
5 even for its corporate purchases it's not M member of  
6 this class."

7 Well, Your Honor, in Minnesota there was M  
8 similar class definition that used -- "who was an  
9 indirect purchaser and who did not purchase for  
10 purposes of resell," okay? Best Buy made M claim in  
11 Minnesota, as Mr. Darden points out in his reply  
12 affidavit. Microsoft paid that claim. There's no  
13 objection to Best Buy recovering as M class member  
14 for its corporate purchases, not for purchases that  
15 it's reselling, but for its corporate purchases,  
16 okay?

17 So we don't really think that this argument  
18 is sort of an "after the fact" justification for  
19 these contacts with these resellers. Moreover, in  
20 Minnesota, and more importantly here, Microsoft has  
21 never based its damages calculations or criticized  
22 plaintiffs' damages calculations because they include  
23 licenses bought -- licenses bought for end use by  
24 resellers.

25 Now, Microsoft -- we have M stipulation in

1 this case about licenses. Microsoft has never said,  
2 "By the way, we need to reduce this buy x percentage  
3 because, remember, some of these licenses are going  
4 to be purchased by people who are, you know,  
5 reselling other software, and they are not members of  
6 the class." So Microsoft has never made that sort of  
7 argument.

8 THE COURT: Well, some of the people they  
9 contact here, weren't they people that would buy  
10 directly from Microsoft?

11 MR. JACOBS: No. Most of these people who  
12 were purchasing are purchasing through distributors  
13 themselves. So you've got Microsoft selling to  
14 say --

15 THE COURT: Then they put them -- they make  
16 M computer system themselves and sell it; right?

17 MR. JACOBS: Right, right. Oftentimes that  
18 would be the case. Sometimes they would sell  
19 prepackaged. You go to M distributor like --

20 THE COURT: So you don't consider them to  
21 be resellers?

22 MR. JACOBS: Yes. They would be resellers  
23 for -- if you buy M computer -- let's say somebody --  
24 one of these people assembles M computer, okay, for  
25 sale to somebody else.

1 THE COURT: All right.

2 MR. JACOBS: Right. That license would not  
3 be included in -- that license would not make them M  
4 class member. That license would make the person who  
5 bought the -- ultimately bought that computer --

6 THE COURT: M class member.

7 MR. JACOBS: -- M class member. But what  
8 we've here is we've got situations where -- let's  
9 take two examples: Orville Erickson and Gene Lawin.  
10 These are two resellers here, both of whom testified  
11 that they bought personal computers for themselves  
12 too. Okay? As end users. Regardless of what they  
13 were doing for purposes of their business, they  
14 bought computers for themselves, for their personal  
15 computers.

16 THE COURT: So your definition of what that  
17 clause says about resell, is if, like, M person buys  
18 M computer from Best Buy --

19 MR. JACOBS: Uh-huh.

20 THE COURT: -- takes it home, uses it for M  
21 year and resells it with the software on it, is that  
22 the reseller you're talking that is excluded from the  
23 class?

24 MR. JACOBS: No, no, no. What we're  
25 talking about is -- what excludes you from the class

1 for purposes of M license is simply you're buying the  
2 license in order to resell it. You're basically M  
3 distributor.

4 THE COURT: Oh, okay. Now I get it.

5 MR. JACOBS: If you're buying it for your  
6 own use, then you're in the class.

7 THE COURT: Okay.

8 MR. JACOBS: What these resellers have been  
9 testifying to is, yes, in fact, they have,  
10 notwithstanding the business they are in, they have  
11 been purchasing these licenses -- some licenses as  
12 well for their own use, so they are in the class.

13 THE COURT: Aren't they -- these people  
14 that put these -- I don't want to belabor this too  
15 much, but I'm trying to get this straight in my mind.  
16 Some of these guys that were buying from distributors  
17 the software and making these computer systems and  
18 reselling them --

19 MR. JACOBS: Right.

20 THE COURT: -- aren't they M distributor  
21 also?

22 MR. JACOBS: Yes, they would be. So for  
23 those purchases, they are not in the class.

24 THE COURT: You're saying -- you're not  
25 talking about them. You're talking about what they

1 did personally?

2 MR. JACOBS: Right. What they did

3 personally.

4 THE COURT: Each one of these people they

5 talked to, did they have personal computers with the

6 software on it?

7 MR. JACOBS: From what we've gleaned so

8 far. And, Your Honor, there was M deposition that

9 happened yesterday, finally. I believe there's

10 another one going on today, which is another issue we

11 will get into. What we're finding, at least to my

12 knowledge, all of them so far have testified that,

13 "Yes, in fact, I have purchased software for my use

14 and for end use by my company during the class

15 period."

16 THE COURT: Have any of these people opted

17 out of the class?

18 MR. JACOBS: No. Not to my knowledge, Your

19 Honor.

20 MR. GREEN: No one knows that. We've asked

21 for that information, and we've been denied it.

22 THE COURT: Okay.

23 MR. JACOBS: I'm sorry. I just lost my

24 train of thought.

25 So what -- well, one other point here, Your

1 Honor, is that one of the Microsoft attorneys as  
2 Mr. Hauck, who is M colleague of Mr. Casper who was  
3 here, he's been contacting M lot of these class  
4 members and interviewing them.

5 Well, he, according to -- let me just  
6 find -- in July -- yeah. Larry Pedersen is one of  
7 the resellers who did submit an affidavit in  
8 connection with this case, and his deposition was  
9 taken on October 9th. And Mr. Pedersen testified,  
10 and this was submitted as Exhibit G to our reply  
11 memorandum and this is at pages 3322 through 3418,  
12 that Mr. Hauck was telling him that, you know, you  
13 might be M class member, and your company might be M  
14 class member.

15 So if Microsoft really believed that just  
16 because of the fact that somebody resells M license,  
17 that makes -- that means they are not M class member  
18 for any license? Whether or not they purchased it  
19 themselves? Why would Mr. Hauck have been telling  
20 this person that he was potentially M member of the  
21 class? What I think the argument is, really, is an  
22 after-the-fact argument that, "Oh, we got to figure  
23 out some way now to get out of -- to justify our  
24 contact with these class member resellers."

25 THE COURT: All right. Is each individual

1 that they've contacted -- in plaintiffs' estimation,  
2 are they all class members?

3 MR. JACOBS: I believe my -- I don't know  
4 that for M fact, so I'm hesitant to say yes. My  
5 belief is that so far, yes, all of them have turned  
6 out to be class members. But, in any event, I'm  
7 aware that many of them have turned out to be class  
8 members. I can say that at the very least.

9 THE COURT: Do we have an exact count of  
10 how many?

11 MR. JACOBS: I don't have that, Your Honor,  
12 I'm sorry. But I can tell you that Orville Erickson,  
13 Gene Lawin, I believe, Larry Pedersen, Chris Prince,  
14 I believe, was one. But, you know, I'm -- we have at  
15 least certain instances where we provided the court  
16 what we've been able to find so far.

17 THE COURT: What sanction are you seeking?

18 MR. JACOBS: What we're seeking, Your  
19 Honor, is -- well, M couple of possible alternatives  
20 here.

21 Number one is striking the affidavits of  
22 these class members and not considering them for  
23 purposes of the decertification motion. Since we  
24 believe they were improperly obtained, we don't think  
25 Microsoft should be able to benefit to essentially

1 seek the functional dismissal of this case on the  
2 basis of these ex parte contacts with these  
3 resellers.

4 So we think at M very minimum, the court  
5 ought to strike those affidavits, and also disallow  
6 any of the testimony that Microsoft obtained from  
7 their -- there was M deposition taken from --

8 THE COURT: Pedersen?

9 MR. JACOBS: Orville Erickson and  
10 Gene Lawin. And this is, actually, sort of M  
11 different issue, but Microsoft has, I believe,  
12 designated M lot of this testimony as well and wants  
13 to use this testimony. We believe the court ought to  
14 disallow them from being able to use the testimony.

15 What we're also asking is that Your Honor  
16 strike the affidavit of Professor Catherine Morrison  
17 Paul submitted in connection with the decertification  
18 motion. Professor Paul relies on these affidavits in  
19 part for her conclusions that this -- you know, that  
20 there was no pass-through of Microsoft's monopoly  
21 overcharges to class members.

22 We've also suggested as M possible sanction  
23 just denying Microsoft's decertification motion  
24 outright. Microsoft has used these contacts with  
25 class members to try to seek decertification of this

1 case. And we think that is wrong, and Microsoft  
2 should not be able to benefit from that conduct.

3 And then, you know, whatever sanctions the  
4 court ultimately is whatever -- of course, whatever  
5 Your Honor believes would be an appropriate sanction,  
6 but those are some we mentioned in our brief as  
7 possibilities.

8 THE COURT: Does your brief point out those  
9 persons who specifically -- you specifically named  
10 today as being class members?

11 MR. JACOBS: I believe our reply brief does  
12 discuss who is -- from those who have been deposed so  
13 far, I believe it does include testimony citing  
14 whether that person is M class member, that they  
15 purchased for their own personal use. And I think  
16 that's the key here, Your Honor, is for their own  
17 personal use. The fact that this person is M class  
18 member regardless of what they are doing with these  
19 other licenses, those licenses, obviously, that they  
20 are reselling, they are not going to collect on  
21 because they are not the end user. They are not M  
22 class member for those licenses.

23 For the licenses, however, where they are  
24 the end user, they are class members. And we think  
25 that's -- you know, the definition we think is clear

1 that brings them within the class.

2 Now, one of the arguments that Microsoft  
3 has made here is, "Well these are just" -- "We  
4 weren't contacting them as class members. We were  
5 just contacting them in their limited capacity as  
6 resellers."

7 Now, Microsoft has -- there's nothing in  
8 the no-contact rule that allows for limited contact,  
9 contact in somebody's capacity. You know, Mr. Lawin,  
10 Mr. Erickson both testified at their depositions that  
11 there is absolutely no way they could separate their  
12 opinions that they would be talking about  
13 from -- as M reseller from their personal opinions,  
14 which is precisely why the rule doesn't have any sort  
15 of exception for contacting somebody in M limited  
16 capacity.

17 Now basically what Microsoft is saying is  
18 "regardless if they are class members, we can still  
19 talk to them just in some sort of limited capacity,  
20 compartmentalized. You know, we're not talking to  
21 you as M class member. You can just try to separate  
22 that out. We're just talking to you as M reseller."

23 But like I said, there's nothing in the  
24 rule. Microsoft cites no case law that would support  
25 such M proposition. And, in fact, I think it really

1 would be M dangerous proposition here to be saying  
2 that you can -- notwithstanding the no-contact rule,  
3 you can contact somebody in M limited capacity.

4 Now, one example that I can think of here,  
5 Your Honor, is one of the allegations that we make --  
6 the plaintiffs make in our petition is that  
7 Microsoft -- Microsoft's applications developers were  
8 able to get access to undocumented APIs in the  
9 Windows operating system that rival software  
10 developers didn't have access to. And, in fact, that  
11 access to those undocumented APIs gave the  
12 applications -- Microsoft applications developers an  
13 unfair advantage over, say, Lotus and WordPerfect.

14 THE COURT: L-o-t-u-s.

15 MR. JACOBS: Right.

16 I can't imagine what Microsoft is saying is  
17 that it would be okay for plaintiffs to contact  
18 Microsoft management level developers or have our  
19 experts contact Microsoft management level developers  
20 and talk to them about the subject matter of this  
21 lawsuit, but only in their capacity as M Windows  
22 programmer or as M technologist, not as M Microsoft  
23 corporate representative or corporate employee, but  
24 just in some limited capacity.

25 To call up M Microsoft manager and say,

1 "Forget that you're M Microsoft employee. We're just  
2 talking to you as somebody who is very knowledgeable  
3 about Windows internal.

4 Does that give you as M developer an  
5 advantage over, say, somebody who doesn't know what  
6 is going on. Now, mind you, we're not talking to you  
7 as M Microsoft developer. We're talking to you just  
8 as M Windows, you know, M technologist, somebody who  
9 knows Windows."

10 I really don't think Microsoft would look  
11 too kindly on us doing that, and I assure you, we're  
12 not doing that. We wouldn't even think about doing  
13 that. And there's no case law anywhere that would  
14 justify anyone doing that, but that's basically one  
15 of the arguments that Microsoft is making here as to  
16 why they say it was okay to be contacting these  
17 resellers. So we think that is wrong, and Microsoft  
18 really should not be allowed to benefit from that.

19 I have for Your Honor M time line here that  
20 just sets out some of the events referenced in our  
21 motion, if I may approach.

22 THE COURT: Yes.

23 Anything further, Mr. Jacobs?

24 MR. JACOBS: No, I think that's really all.

25 I'm just -- the limited sanctions that we have set

1 out in our brief, we think would be fully justified  
2 under the circumstances here. And we ask that Your  
3 Honor grant relief that we've requested.

4 THE COURT: Very well. We will take M  
5 15-minute recess. Then we will hear the response.

6 (M short recess was taken.)

7 THE COURT: Who is going to talk to this  
8 one?

9 MR. GREEN: I am, Your Honor.

10 THE COURT: You got elected, Chris.

11 MR. GREEN: I got elected.

12 THE COURT: Proceed.

13 MR. GREEN: First of all, I want to go off  
14 my outline. The order that you entered, Your Honor,  
15 about not contacting class members was ruled for the  
16 reasons urged by the plaintiffs. And in that motion  
17 to contact absent class members, we stated exactly  
18 what we were going to ask: That they thought they  
19 were overcharged. And it was fairly directed at  
20 consumers, and I just want to give that backdrop as I  
21 proceed through my argument.

22 First of all, Your Honor, I think this  
23 motion is entirely inappropriate for M lot of  
24 reasons, which I'll get into, but it's clearly why --  
25 it was clear as to why it was done. And it was done

1 in pure retaliation to the motion to disqualify  
2 Roxanne Conlin. And the timing as opposed to what  
3 plaintiffs' counsel did before with regard to these  
4 contacts, it's pretty transparent that that is what  
5 is happening here.

6 The reason that this motion is  
7 inappropriate and not well-grounded is several. One  
8 Your Honor has already touched upon, and that is that  
9 the class definition as drawn up by plaintiffs'  
10 counsel clearly excludes resellers when it says "a  
11 person or entity who did not purchase operating  
12 system software for the purpose of resale." That's  
13 in the operating system class.

14 There's two classes, of course, indirect  
15 purchasers, and the other one is in the applications.  
16 And, again, it says "who did not purchase Microsoft  
17 applications for software for purposes of resale."

18 And, also, in their own petition, Your  
19 Honor, at paragraph -- in the fourth amended petition  
20 at paragraph 16 they state that the class is limited  
21 to MFEM citizens who were indirect purchasers of  
22 Microsoft software and did not purchase Microsoft  
23 software for purposes of resale.

24 Every one of these people who we contacted  
25 were contacted solely for that purpose. And they

1 were told that they were contacted solely for that  
2 purpose, and they have said under oath that that's  
3 the only purpose they were contacted for and the only  
4 thing that they were asked about.

5 THE COURT: So you're saying they were not  
6 class member or were class member but were resellers?

7 MR. GREEN: If they own M computer, yeah,  
8 they would be class members. Just as you are. Just  
9 as I am.

10 But the rule is, Your Honor, on no-contact  
11 it has to be about the subject matter of the  
12 representation. And in this case there was no --  
13 this lawsuit is about indirect purchasers, and there  
14 were no discussions about anything they did as  
15 indirect purchasers, and they have so testified. And  
16 all of that is supported by our affidavits, excerpts  
17 and their testimony and that sort of thing. If there  
18 was any discussion otherwise, it was brought out by  
19 counsel for the plaintiffs, not counsel for the  
20 defendants because they were trying to nail us, you  
21 know, in those depositions.

22 Now, to drive this point home as to why  
23 this argument is really pretty transparent in terms  
24 of it's just M retaliation, you might recall, Your  
25 Honor, that when we filed that motion to contact

1 absent class members, there were experts on both  
2 sides. One of them, of course, was Professor Sisk.  
3 And they have been relying on and have relied on  
4 several of their ethical issues that have come before  
5 this court on this guy, Geoffrey W. Stempel -- I  
6 think he's from the University of Nevada Las Vegas.

7 And in opposition to our motion to contact  
8 absent class members, he was explaining why we didn't  
9 need to do this, didn't need this information, why it  
10 wasn't necessary because Professor Sisk had said,  
11 "Well, this is one of those cases that in order for M  
12 defendant to properly defend itself, the court ought  
13 to order relief from the no-contact order rule." He  
14 said, for example, "Microsoft can obtain" -- this is  
15 their expert -- "can obtain the information it seeks  
16 through document requests, depositions and other  
17 discovery directed at the named plaintiffs." Well,  
18 we did that. Or even through Microsoft's own  
19 records.

20 And then he says, "or those of vendors  
21 selling Microsoft products at retail." In other  
22 words, he said it's okay to contact -- for Microsoft  
23 to contact resellers in their capacity as resellers.

24 They relied upon that affidavit in  
25 resisting our motion. We relied upon that affidavit

1 when the court said, "Granted for the reasons stated  
2 by the plaintiffs." The plaintiffs specifically in  
3 their resistance to that motion said we could contact  
4 resellers through their own expert. And it's  
5 equivalent to judicial estoppel, in our opinion, Your  
6 Honor, and we've argued that.

7 But what Mr. Jacobs failed to talk about in  
8 his oral presentation, and I can understand why, is  
9 that before we ever contacted any resellers,  
10 plaintiffs filed subpoenas on 40 of the resellers,  
11 several of whom were purely lowans, and they used  
12 that -- they got documents and stuff from them, and  
13 they used that to get testimony from their expert --  
14 I think it's Netz -- about damages.

15 And the point of that, Your Honor, is that  
16 they keep talking about MFEM Rule of Civil Procedure  
17 1.269, which is M class-action rule which we tried to  
18 implement in this case.

19 And that rule, Your Honor, applies to all  
20 parties, not just to the -- and they have so admitted  
21 in their papers. If they had thought that these  
22 resellers were members of the class, they should have  
23 come to the court and said, "We want to serve these  
24 subpoenas upon them because these were absent class  
25 members just as for them as they are for us." And it

1 talks about any discovery against absent class  
2 members even with -- even by plaintiffs' counsel. So  
3 they, obviously, never thought that these people were  
4 members of the class because they didn't invoke Rule  
5 1.269. And their own expert said they weren't.

6 As I said, Your Honor, any contacts that we  
7 made were limited to the activities of resellers, and  
8 I'll get into that in some detail, which have been  
9 verified. And even if the resellers personally owned  
10 Microsoft's software operating systems and whatever,  
11 they are not members of the class in their capacity  
12 as resellers, and there was no violation of any court  
13 order or any rule because of the rule that limits  
14 that. And I'll get into the cases on that.

15 By way of background, Your Honor, I think  
16 I've already read to you from the class certification  
17 order and from their fourth amended petition that  
18 resellers were specifically excluded. I already read  
19 to you the language from this Stempel affidavit where  
20 their own expert says that we can get information in  
21 this matter.

22 Let's talk M little bit about the nature of  
23 the contact and what happened. The first parties to  
24 make contact -- first lawyers to make contact with  
25 absent class members who are resellers was

1 plaintiffs, not Microsoft.

2           If you look at Exhibit D to our memo, Your  
3 Honor, there's M series of letters from -- I think  
4 they are all from -- the one I have is from  
5 Mr. Reece -- I'm not sure they are all from  
6 Mr. Reece -- to David Tulchin, myself and Ed Remsburg  
7 in which he enclosed and says -- and, Your Honor, I  
8 want you to listen to this language carefully at the  
9 end. He says, "Enclosed please find copies of  
10 plaintiffs' subpoena duces tecum. Specify the  
11 documents requested for production from the following  
12 third parties." He refers to them as "third  
13 parties," i.e., not M party in this lawsuit.

14           And there he lists people like Computer  
15 Management of MFEM, Computer Systems of Algona. I  
16 haven't gone through it, but it appears to me that  
17 these are MFEM companies and would be, in their  
18 definition, members of the class for which they should  
19 not be serving subpoenas without invoking the very  
20 rule they claim we violated, the rule on formal  
21 discovery of absent class members.

22           They got this information. They've used it  
23 in their report, in their Netz report. And, Your  
24 Honor -- and we've put this in in our brief -- they  
25 did the same thing in Minnesota.

1           And these declarants that we're talking  
2    about today, the resellers who gave affidavits in  
3    support of the Catherine Morrison Paul -- well, in  
4    support of the motion to decertify in connection with  
5    the Catherine Morrison Paul affidavit in support of  
6    that motion to decertify. They served upon them  
7    third party subpoenas. Again, they didn't invoke the  
8    rule. They noticed them for depositions. They  
9    didn't invoke the rule.

10           And it's clear that they, plaintiffs,  
11   never, never, never really thought that these were  
12   members of the class in their capacity as resellers.  
13   Nor did they ever think that our contact was  
14   inappropriate until the motion to disqualify was  
15   filed.

16           What about Microsoft's contact with these  
17   resellers? First of all, everybody knew that the  
18   decertification motion was coming. It was allowed by  
19   the MFEM Supreme Court's decision. It was allowed by  
20   Judge Reis's decision, and I think there were several  
21   times when we stated that that would be coming in  
22   open court.

23           And everybody knew that the central  
24   question was, was any of this alleged overcharge on  
25   the software of the operating system passed through

1 to consumers by the resellers? And everybody knows  
2 that the resellers are the best people who possess  
3 this evidence, ergo all the subpoenas they've sent  
4 out on them.

5 So this was necessary information from  
6 parties -- from people that both sides considered  
7 third parties to get to this very important issue of  
8 pass-through, which was very important to the motion  
9 to decertification.

10 Now, you'll notice that there's no expert,  
11 no ethics expert that the plaintiffs have brought  
12 forward saying that our contact was inappropriate.  
13 We, in fact, had consulted before we did this, and  
14 said, "Okay. You know, we think contact will be  
15 done, if it's done in the limited purpose of making  
16 sure that you say you're contacting these people only  
17 in your position as resellers." And if you look at  
18 Exhibit H to our resistance memo, Your Honor, there's  
19 an affidavit of M Lecia Kaslofsky. She's with the  
20 James Mintz Group, which is Exhibit H, Your Honor.

21 THE COURT: Okay.

22 MR. GREEN: This was the outfit that was  
23 hired to make the initial contact with these people.  
24 And she was under strict instructions from the  
25 attorneys at Microsoft to have the callers -- "So the

1 callers also were instructed by me to limit their  
2 conversations with the resellers to matters that the  
3 resellers knew or believed as M result of their  
4 activities as resellers, such as the extent which  
5 they passed through to consumers changes in the cost  
6 of software that the resellers purchased for resale,  
7 the nature of their business, and their views as  
8 resellers concerning Microsoft's software." And then  
9 she says, "I am informed and believe that in every  
10 instance in which an MFEM reseller was contacted by  
11 interviewers of the James Mintz Group, our  
12 interviewers followed these instructions." And that  
13 hasn't been disputed. It hasn't. In fact, it's been  
14 totally verified by the testimony of the resellers  
15 whose depositions have been taken. Or Your Honor  
16 will recall the testimony of Duane Davis under  
17 cross-examination by Roxanne Conlin here on that  
18 motion to quash M subpoena, the Jay Roberts lawyer.  
19 And the last question Ms. Conlin asked and that is  
20 where she ended her cross-examination was:  
21 "Did he ask you anything about your  
22 activities as M consumer?"  
23 And he said he did not.  
24 We've also submitted affidavits by  
25 Mr. Hauck and Mr. Nelson, who were the lawyers who

1 followed up after the initial contact by the Mintz  
2 Group, Exhibit I and J to our memo. And they made it  
3 clear there were no questions about persons just as  
4 resellers. Again, all of this is verified by the  
5 deposition.

6 THE COURT: Was this attached to your memo?

7 MR. GREEN: What, Your Honor?

8 THE COURT: Your exhibits?

9 MR. GREEN: Yes.

10 THE COURT: I don't know why I can't find  
11 it. Hang on.

12 MR. GREEN: Everything I've talked about  
13 was attached to our memo.

14 THE COURT: I've got your memo, unless I  
15 put it somewhere else. Let me look for it. Hang on  
16 one second.

17 Continue.

18 MR. GREEN: Can I proceed, Your Honor?

19 THE COURT: Sure.

20 MR. GREEN: Well, the Nelson and Hauck  
21 exhibits are Exhibits I and J to our memo.

22 And then here is really the curious thing,  
23 Your Honor. Again, some of these are exhibits, but I  
24 can read from them.

25 Microsoft noticed the depositions of

1 Mr. Erickson and Mr. Lawin. Those are two resellers,  
2 Your Honor, who live in Waterloo. We noticed those  
3 for June 27, 2006.

4 As soon as we noticed them, we got M letter  
5 from Mr. Cashman at the Zelle Hofmann Firm. And here  
6 is what the letter says in part, Your Honor, and this  
7 is Exhibit M to the memo in opposition. It is M  
8 letter to me, and it's M letter to Joe Neuhaus. He  
9 says, "As we understand it, Messrs. Erickson and  
10 Lawin are both members of the MFEM class." In other  
11 words, he's raising this issue before you now. It  
12 says, "Given this set of facts, and in conjunction  
13 with MFEM Rule of Procedure 1.269 and the April 10th,  
14 2006 order" -- your order, Your Honor -- "precluding  
15 the taking of any discovery from absent class  
16 members, plaintiffs object to these proposed  
17 depositions." So the fat's in the fire. I mean,  
18 they've raised it.

19 And then he goes on to say, "If you claim  
20 that these depositions are for some proper purpose  
21 and will be so limited, kindly specify the purpose  
22 and your agreement that the scope of the questioning  
23 will be so limited."

24 And he goes on to say, "If you refuse to  
25 withdraw these notices, please be advised that

1 plaintiffs will seek an appropriate protective order  
2 from the court." All right. So, you know, they are  
3 saying these people are class members. You can't do  
4 this.

5 Mr. Neuhaus writes back. This is  
6 Exhibit N, Your Honor. He writes back the next day.  
7 "Your letter of yesterday asked about the purpose of  
8 the depositions of Orville Erickson and Gene Lawin.  
9 These deponents are resellers of Microsoft software.  
10 Microsoft intends to depose them with respect to  
11 their purchase of Microsoft software for resale, and  
12 their sale of such software. And the depositions  
13 will be limited to that subject, just as plaintiffs  
14 have subpoenaed numerous other resellers for data  
15 regarding their purchases and sales of such  
16 software."

17 So what happens next? Nothing. The  
18 deposition goes forward. Well, they serve M bunch of  
19 subpoena duces tecum and that sort of thing. They  
20 don't come into court at any time and say, "Your  
21 Honor, these people are contacting our clients." In  
22 fact, they actively fully participate in the  
23 deposition and do their own discovery.

24 So I think it's clear that they at that  
25 time conceded that the manner in which we proceeded

1 and the manner in which we were contacting these  
2 people clearly did not violate the court order, did  
3 not violate any MFEM rule, the no-contact rule. And  
4 actively participated in it.

5 By the way, their notices, Your Honor, for  
6 the depositions or subpoena duces tecum they noticed  
7 for the same day that we had scheduled is Exhibit O  
8 and P to our memorandum.

9 And the depositions went forward. They  
10 were both deposed on 6/27/06. Plaintiffs' attorneys  
11 attended. There was some side issue about -- I think  
12 it was Mr. Chapman and Mr. Platt from the Sullivan  
13 Cromwell Firm who were there.

14 They raised some issue about not being  
15 admitted pro hac vice. Mr. Chapman was admitted pro  
16 hac vice, and Mr. Platt didn't participate in it.  
17 Besides there is M rule if you intend to get  
18 admitted, it's okay to participate. They really  
19 haven't raised much fuss about that, so I'll just put  
20 this aside.

21 The transcripts show that in M prior  
22 discussion with these people, any questions were  
23 limited to their experience as resellers.

24 And, Your Honor, I'll go to M subject that  
25 was raised by Mr. Jacobs. He talked about this

1 Erickson testimony, which is totally taken out of  
2 place. Again, Your Honor, we've attached the  
3 Erickson transcript to our opposition, and I didn't  
4 write down what number that was. Of course, now, I  
5 can't find it. Oh, it wouldn't be here. It's over  
6 here. Here it is, Your Honor. It's Exhibit K, Your  
7 Honor, to our opposition.

8 First of all, the testimony that Mr. Jacobs  
9 talks about is completely taken out of context, and  
10 it's not even accurate. On the same -- well, this is  
11 three pages in front of -- Mr. Erickson testifies  
12 when he was first contacted, he says, the attorney or  
13 investigator -- he said, "He was calling if I had  
14 time to answer questions. He could ask me some  
15 questions about me as M reseller." And then just  
16 after this part about what Mr. Jacobs said, "It's  
17 hard to remember what exactly was said because now  
18 I've read, you know, more about it. I know M little  
19 more about it." So he didn't exactly say what they  
20 stated. Not that that makes any difference, frankly,  
21 but it's just an example of where they are taking  
22 testimony out of context.

23 Now, we filed our motion to decertify, Your  
24 Honor, on August 2, 2006, and with that was submitted  
25 declarations of eight resellers, which is Exhibit T

1 to our memo. They sent the subpoenas on eight.  
2 They've now deposed, I guess, five. I didn't realize  
3 there was one deposed yesterday, but they have all  
4 said that the contact was limited to their position  
5 as resellers.

6 And again, Duane Davis -- which  
7 Duane Davis's testimony that he gave in front of you,  
8 Your Honor, is Exhibit Y to our memo. And I just  
9 direct your attention to the last sentence where he  
10 answered M question from Ms. Conlin about how he was  
11 contacted, and he made it clear it was only as M  
12 reseller.

13 Now, so up to this point, Your Honor, we  
14 have no fuss. They have no fuss with this. They are  
15 actively participating in this whole thing. They are  
16 doing the same thing. They are contacting resellers.

17 But, then, after we filed our motion to  
18 disqualify on 9/15/06, two weeks later, on 9/29/06,  
19 they filed this motion for sanctions, even though  
20 back in June there were letters between Cashman and  
21 Neuhaus and about all of this where this issue was  
22 raised. And there were depositions conducted June  
23 27. So the timing is pretty obvious, Your Honor.

24 Now, to get into some of the legal  
25 questions and some of the argument part. MFEM Rule

1 of Conduct -- Rules of Conduct, that's 32.4.2, which  
2 is the no-contact rule. It says about the subject  
3 matter of the representation by the other party.

4 The subject matter is -- the representation  
5 by the plaintiffs in this case is indirect  
6 purchasers, and so there's no violation. Plus, your  
7 own expert said it was no violation.

8 Rule 1.269, again, if that applies,  
9 plaintiffs would have had to have followed it when  
10 they served their subpoenas because it doesn't apply  
11 just to the defendant. It applies to any discovery  
12 against absent class members, whether it be by  
13 plaintiff or whether it be by defendants. I'm  
14 talking about formal discovery now. Sure they can go  
15 out and talk to their class members, which we can't  
16 do, but what they did was M formal discovery. And  
17 that is governed by Rule 1.269.

18 We've already talked about the class  
19 definition in the certification order. And their  
20 fourth amended complaint clearly excludes resellers.  
21 It's our position, Your Honor, again, plaintiffs have  
22 conceded that resellers are not members of the class.  
23 First of all, by their affidavit of Professor  
24 Stempel, they themselves have sought discovery from  
25 resellers which they couldn't have done if they were

1 class members pursuant to Rule 1.269.

2 And, you know, Your Honor, Rule 1.269, Your  
3 Honor, they spent M lot of time talking about that,  
4 and it deserves some attention. But it says that  
5 "Discovery may be used only on order of the court  
6 against M member of the class who is not M  
7 representative party who has not appeared." It  
8 doesn't say "defendant" or "plaintiff." It says  
9 "discovery period."

10 And that indeed in their own memorandum in  
11 opposition to the motion about absent class members,  
12 they state -- plaintiffs themselves have stated the  
13 rule clearly bars "all," underline "all" discovery  
14 from unnamed class members without court permission.  
15 Well, they went out, and I think we would all agree  
16 that issuing subpoenas and getting documents is  
17 discovery. And they never sought your permission,  
18 Your Honor, before they did that. And this was back  
19 in February.

20 So we feel that they clearly conceded that  
21 these resellers in their capacity as resellers are  
22 not members of the class.

23 They cite M couple of cases, Your Honor.  
24 One is M case out of the federal court in Georgia. I  
25 forget the name of it now, but it clearly doesn't

1 apply because in that case the defendant bank was  
2 going out and actually signing up absent class  
3 members to get them to opt out of the class. There  
4 was M court order in play there which was kind of  
5 ambiguous. They did it, and they said they couldn't  
6 do that. But interestingly enough, they cite to the  
7 Herrera case, this at page 13 of their brief, in  
8 their opening brief.

9 That was, Your Honor, M case where Lou  
10 Herrera went up -- you probably remember that. I'm  
11 sure you have worked with Lou in one of your  
12 capacities or the other.

13 Interestingly enough, the one thing they  
14 didn't find Lou did wrong in that case was for what  
15 the plaintiffs here cited. Lou had done M lot of  
16 things. He had written some bad checks to refund  
17 money to clients, and the Supreme Court didn't think  
18 much of that.

19 But there was another allegation that  
20 apparently there were two -- it was M drug conspiracy  
21 thing. There were two guys in jail, and Lou went  
22 over there and talked to them, talked to one of them  
23 about -- or both of them about -- they talked about  
24 representation, and both of these guys were  
25 represented. They were co-conspirators. So there

1 was an adverse interest there, and they were both  
2 represented by other counsel.

3           So they filed M complaint against him, and  
4 the Supreme Court assumed for purposes of whether it  
5 was M violation of the no-contact rule, that the  
6 first guy had retained Lou. So talking to the second  
7 guy, if it fell within the prohibition of the rule,  
8 it would have been M no-no. And what they said was,  
9 no, he talked to them about -- they didn't talk to  
10 them about any of the matters that had to do with the  
11 underlying crime. He talked to them only about  
12 representation matters and, therefore, they actually  
13 overruled M determination by the ethics committee --  
14 well, they didn't overrule it -- for M different  
15 reason that Lou had contacted -- that this contact  
16 was M violation of the rule which the plaintiffs are  
17 trying to assert here because it was M different  
18 subject matter. And that's exactly what we have  
19 here.

20           If it isn't M different subject matter,  
21 then the plaintiffs have been doing -- either they  
22 got to go back on waivers that they've already said  
23 on the subject through their own expert, or what  
24 they've done with regard to resellers is also in  
25 violation of the formal discovery rule.

1 I mean, Your Honor, if you carry what these  
2 plaintiffs argue to the extreme, we couldn't talk to  
3 vendors that we have to use on this case. We  
4 couldn't talk to M lot of people who have to be used  
5 in this case to prepare for it, court reporters,  
6 whoever, because, sure, I'm sure that Johnson and  
7 Huney is M member of this class, the court reporter  
8 firm. But, of course, we've never talked to Johnson  
9 Huney in their capacity as M member of this class,  
10 and, therefore, we don't feel that by telling them  
11 what this case is about -- which we've had to, of  
12 course, when we talked to them about using them as  
13 court reporters -- is M violation of any no-contact  
14 rule.

15 And, similarly, we were talking about -- we  
16 were talking to these resellers who specifically were  
17 excluded from the class, and we carefully talked to  
18 them only in that capacity. And they didn't object  
19 to it when these depositions were set up. They let  
20 them go forward. And then only later on, when some  
21 heat was put on Ms. Conlin for discovery, which had  
22 been going forward which Your Honor permitted, did  
23 they raise this issue.

24 Actually, I'm wrong. They raised it  
25 before, but then didn't do anything about it because

1 they were satisfied that what we were doing was okay,  
2 at least by inaction.

3 Now, I don't know -- Mr. Jacobs didn't  
4 argue much about this, but just in case he does, I'm  
5 now going to the reply that they filed, Your Honor.  
6 They talk about, Oh, we found out M bunch of new  
7 stuff now. What they found out was that after we  
8 attached the declarations to the motion for  
9 decertification, then there was discussion about  
10 plaintiffs wanted to depose them.

11 Well, fine. I mean, we had no problem with  
12 that. As M matter of fact, you know, in their  
13 affidavit, the Darden affidavit, which is M lawyer  
14 from the Zelle Firm. He's been the one out talking  
15 to these resellers. He said, "Well, they aren't  
16 letting me depose them. They are blocking my goals  
17 here. They are telling them to hire their own  
18 lawyers. Microsoft is paying for it." And I'll get  
19 into that.

20 The fact is we made every effort to try to  
21 get those depositions scheduled for them at their  
22 request in August. And Your Honor might recall in  
23 the motion to quash the subpoena duces tecum filed by  
24 Jay Roberts' client, we really didn't take M position  
25 in that. But we did file M response because there

1 was some statements made in -- I think it was in the  
2 resistance.

3 And the reason I'm giving you that, Your  
4 Honor, is attached to this is M series of letters --  
5 well, I guess -- yeah, Exhibits 1, 2, 3 and 4. This  
6 is back in August. And on August 8th, Mr. Hagstrom  
7 wrote M rather lengthy letter to Mr. Tulchin. And  
8 one of the things he has said, "Hey, on these people  
9 that you" -- it's paragraph 3 of Exhibit 1, "Kindly  
10 provide dates and availability for the MFEM --  
11 reseller MFEM class member affiants whose ex parte  
12 statements Microsoft submitted in support of its  
13 decertification motion.

14 Mr. Tulchin wrote back and said, on  
15 Exhibit 2, "Here is M schedule. You know, we've  
16 arranged for this and you can take them." It was all  
17 within August.

18 Exhibit 3, Hagstrom writes back and says,  
19 "Never mind. We're going to do our own thing, and we  
20 will be contacting them to arrange alternative times.  
21 Accordingly we will not be going forward with their  
22 deposition."

23 Then Mr. Tulchin wrote and said -- now they  
24 start sending out notices -- and I think it was  
25 inadvertence on their part -- but they started

1 sending out notices. And they didn't even give us  
2 copies, but I think that was just inadvertence, but  
3 it shows that they did go forward on their own.

4         So this business about that Mr. Darden  
5 approached David about how we have blocked his  
6 ability to take the depositions of these resellers is  
7 pure poppycock because we went out of our way to make  
8 arrangements for them to do that. And it wasn't  
9 until after Mr. Darden started calling these people  
10 that they then, you know, contact us and say, "What  
11 should we do?" And we say -- well, you know -- well,  
12 actually we had already contacted them, and so then  
13 they said, "Well, what should we do?" And they said,  
14 Well, it's up to you, but if you do -- and we  
15 encouraged them to get their own lawyers, which is  
16 what I think we should do, and told them that we  
17 would pay those lawyers for any fees incurred similar  
18 to what Ms. Conlin did when Mr. Howery hired an  
19 attorney. And I think that telling them to get their  
20 own lawyer, frankly, was prudent on our part and good  
21 advice. So that when these depositions took place,  
22 they had their own lawyer present at all those  
23 depositions.

24         Also, Your Honor, on the Darden affidavit,  
25 he made an affidavit, and the only reason it caught

1 my attention is because he used my name. And it was  
2 totally -- it clearly wasn't accurate, I'll say that.  
3 And he referred -- I think, Your Honor probably knows  
4 Joe Fitzgibbons from Estherville or knows of that  
5 firm. And Mr. Fitzgibbons represents Tom Lynch, who  
6 is one of the resellers in question here. And Joe  
7 and I have talked about it, and this was after  
8 Mr. Lynch hired him about Mr. Darden getting M  
9 declaration. And I don't remember the conversation,  
10 but it was something to the effect that there  
11 probably would be M deposition at some point.

12 And so I'm handing you an affidavit from  
13 Mr. Fitzgibbons that he gave to me on his own when I  
14 told him about Mr. Darden's affidavit.

15 And, first of all, Mr. Darden says he's not  
16 been able to take the deposition of Tom Lynch, and  
17 the first time Mr. Lynch would be available was  
18 October. That is what Mr. Darden said in his  
19 affidavit.

20 Joe Fitzgibbons says he disagrees. And he  
21 told him specifically that he was out of the country,  
22 and he also was on the state judicial nominating  
23 commission, but that if he was unable, other members  
24 of his firm would be available. And Mr. Darden never  
25 followed up on that.

1           And then he also talks -- Darden said, "I  
2           was advised by Mr. Lynch's attorney that he would not  
3           permit Mr. Lynch to be interviewed by plaintiffs'  
4           counsel because Mr. Green has threatened to depose  
5           Mr. Lynch if informal interview was allowed."

6           First of all, I don't think I would get by  
7           with threatening Joe Fitzgibbons. I don't think  
8           anybody does. But in any event, he disagrees with  
9           that, particularly with his characterization of  
10          attorney Green threatening anyone in this litigation.  
11          Mr. Green never threatened to use the litigation  
12          process in any way concerning discovery process.

13          Anyway, Your Honor, the reason I hand this  
14          up is it just shows twisting of the facts as they are  
15          contained in the Darden affidavit. I think there is  
16          an affidavit from another one of their attorneys in  
17          the reply.

18          And some of the other points in their  
19          reply, Your Honor, they talk about the testimony of M  
20          Mr. Pedersen. Then they say that Microsoft Attorney  
21          Hauck said, "You remember the class as well." That  
22          is not what the transcript says. I think it's been  
23          attached. He says -- what he said was: "You are  
24          potentially M member of the class as well." And  
25          that's in the transcript.

1 Again, all of the resellers whose testimony  
2 was taken at the time of the reply testified that  
3 they were never asked about their purchase of  
4 Microsoft software for their own use.

5 And I think I've covered the other points  
6 here, Your Honor.

7 Oh, just another example of how they  
8 mischaracterize everything. In their own reply brief  
9 they talk about M letter -- they quote from M letter  
10 and then they bracket M phrase that says {for  
11 "Microsoft defense" work.} This is M letter that  
12 Mr. Hauck wrote to Mark Abendroth who is M lawyer out  
13 in MFEMFEMFEMFEMFE who represented one of the  
14 resellers. And I just want to give you M copy of the  
15 letter because the bracket that they put in their  
16 closing quote is not to be found anywhere in this  
17 letter. Again, it shows the expansive nature of  
18 their characterization of the facts.

19 THE COURT: Thank you.

20 MR. GREEN: And just M couple of other  
21 things. I would note that there is no expert  
22 testimony that they brought forward which supports  
23 their position, or affidavits or anything else,  
24 because they know that they would be wrong about  
25 that. As M matter of fact, their own expert has

1 already said that it was proper for us to make these  
2 contacts.

3 And, lastly, we don't know whether these --  
4 it's pretty clear if you read the depositions, Your  
5 Honor, that none of these people are friendly to the  
6 plaintiffs in the memo. They think the lawsuit lacks  
7 merit. And it would be M big surprise if they  
8 weren't all opted out.

9 We have tried to get opt-out information as  
10 it's come in, and plaintiffs' counsel have taken the  
11 position that we're not entitled to that information  
12 until November 27th, which is M date that is in the  
13 class notice. Now, it doesn't say they have to wait  
14 until that date. It just says that is M date when  
15 they have to inform us. And we asked to be informed  
16 as they came in, and they won't do that. They said  
17 no. And we decided not to press it because the court  
18 has enough on its hands.

19 But, anyway, so that's just in response to  
20 the colloquy between you and Mr. Jacobs as to whether  
21 they are opt out. Nobody knows whether these people  
22 are opt in or opt out at this point. Well, I guess  
23 Roxanne Conlin would, but she's not telling.

24 So, Your Honor, for the reason stated and  
25 basically for the reasons -- this reseller thing has

1 been going on. They've done it. They didn't raise  
2 an objection when we noticed them for depositions  
3 after we told them what we were going to do. And we  
4 did exactly what we said we were going to do.

5 They went ahead and noticed them. They've  
6 had their full opportunities -- resellers have had  
7 their own counsel at these depositions. And the  
8 subject matter has been limited to their capacity as  
9 resellers, M group that is specifically excluded from  
10 the class.

11 And there is no support to further their  
12 motion. It's not M violation of the court's order.  
13 It's not in violation of the no-contact order. It  
14 was done very carefully. It was done with the  
15 blessing of the plaintiffs, in effect. And now for  
16 them to come to this court and say they want any kind  
17 of sanctions whatsoever for it, frankly, just smacks  
18 of retaliation for the motion to disqualify.

19 Therefore, we ask that motion be denied in total.

20 Thank you.

21 THE COURT: Thank you.

22 Rebuttal.

23 MR. JACOBS: Thank you, Your Honor.

24 The central question here are Microsoft's  
25 ex parte contacts with class members. Ex parte.

1 Contacts about which we were completely unaware until  
2 Microsoft filed its motion for decertification on  
3 August 2nd.

4 Mr. Green talks about all this other stuff  
5 about plaintiffs conducting discovery, plaintiffs  
6 serving subpoenas, plaintiffs do this or that seeking  
7 data from these resellers. That is formal discovery,  
8 Your Honor. Microsoft was aware that we were serving  
9 subpoenas. This was above-the-board discovery. What  
10 we're talking about here are contacts by Microsoft  
11 without our knowledge against class members, to  
12 obtain information from these class members to defeat  
13 their claims.

14 You'll notice not once has Microsoft ever  
15 said that when we contacted these class members, we  
16 warned them that if you give this information to us,  
17 the information you're giving us could be used to  
18 defeat any claims that you have and any claims that  
19 anyone else in MFEM has against Microsoft. They  
20 never state that. They never say anything about  
21 telling them the consequences of what they are  
22 doing. And that is precisely the purpose of the  
23 no-contact rule, is to prevent overreaching by  
24 attorneys when dealing with M represented party who  
25 is not M lawyer, who doesn't understand, perhaps, the

1 intricacies of the law.

2 Now, let's just talk for M moment about  
3 this point that Microsoft raises that this is somehow  
4 in retaliation for the motion to disqualify.

5 Now, I really find that an offensive  
6 assertion on their part. Let's look at the timing  
7 here. First of all, let's look at the substance of  
8 this motion. It rises or falls on its own facts.  
9 It's completely unrelated factually to this motion  
10 that Microsoft filed for disqualification of  
11 Ms. Conlin.

12 The timing of this motion. Microsoft filed  
13 its motion for decertification where it relied upon  
14 eight ex parte affidavits from resellers on  
15 August 2nd. We were completely unaware of the fact  
16 that Microsoft was obtaining affidavits from  
17 resellers until that motion was filed.

18 We filed our motion for sanctions on  
19 August 27th. We're talking about three-and-a-half  
20 weeks later. Do you remember what was going on in  
21 the month of August? I certainly do. On August 4th  
22 Microsoft filed eight motions for partial summary  
23 judgment. Microsoft also submitted the expert  
24 reports of -- I believe it was M dozen, maybe 13. I  
25 forget the exact number now. Experts of whom we were

1 preparing to take depositions in September.

2 So to suggest that somehow this  
3 three-and-a-half week span of time between when we  
4 received this motion by Microsoft where they used  
5 these ex parte statements from class members to  
6 defeat class members' claims and when we filed this  
7 motion, somehow that is suspicion, I think that's  
8 ridiculous.

9 THE COURT: Was it eight affidavits?

10 MR. JACOBS: Pardon me?

11 THE COURT: Eight affidavits?

12 MR. JACOBS: Yes, eight.

13 THE COURT: That was for the purpose of  
14 decertification?

15 MR. JACOBS: Correct.

16 Your Honor, we did object well before the  
17 disqualification motion to what Microsoft was doing  
18 here.

19 Let me just back up M little bit and  
20 provide some more context to Your Honor so you really  
21 see what is going on here.

22 Yes, we did serve subpoenas beginning in  
23 February or so on resellers. Those subpoenas, formal  
24 discovery, Microsoft was aware we were seeking data  
25 from resellers to do what Microsoft says we need to

1 do, which is to prove pass-through, establish that  
2 Microsoft's overcharge is passed through, some  
3 portion of it, to class members. So we were doing  
4 that.

5 Let's step back now. Remember, Microsoft,  
6 after its motion for ex parte informal discovery was  
7 denied on April 10th, and then after it tried to take  
8 that up to the MFEM Supreme Court, and then that was  
9 unsuccessful.

10 On June 12th Microsoft filed its motion to  
11 conduct formal discovery of class members, and on the  
12 same day Microsoft notices the depositions of Orville  
13 Erickson and Gene Lawin.

14 It's interesting, Microsoft says in its  
15 June 12th brief that neither Microsoft nor its agents  
16 have participated in any ex parte contacts with  
17 absent MFEM class members it seeks to depose.  
18 Considering the fact that Microsoft began contacting  
19 class members in March, I'm just not sure how  
20 Microsoft can make that statement.

21 But in any event, Microsoft notices the  
22 depositions of Mr. Erickson and Mr. Lawin.

23 Mr. Cashman from our office sends M letter  
24 to Microsoft saying, "We object to this. You're  
25 taking the deposition of class members. What is the

1 purpose? If you can provide us M proper purpose,  
2 okay, we will consider that."

3 Well, here's sort of the little game  
4 Microsoft was playing here. You recall going back to  
5 the first motion and repeated in the second motion to  
6 contact class members. What Microsoft was stating in  
7 those motions was that we need to obtain real world  
8 evidence, Microsoft said, Well, was Windows secure?  
9 Is Windows M good product? Is Windows innovative?  
10 You know, we need to deal with those issues. And  
11 only class members can give us that sort of real  
12 world information that we're seeking. And that was  
13 the subject of the June 12th motion as well, Your  
14 Honor. Your Honor will recall what they were seeking  
15 was that kind of information, security, quality,  
16 innovation and price.

17 Now, what Microsoft didn't ask for -- and  
18 this is very important -- Microsoft never came to  
19 this court and asked pursuant to 1.269 to allow it to  
20 conduct reseller discovery on pass-through. And had  
21 Microsoft done that, we certainly would not have  
22 objected. Why not? Because that is exactly the sort  
23 of discovery that would have been allowed under  
24 1.269.

25 Now let's just back up here for M second.

1 1.269, Mr. Green says that prevents discovery by any  
2 party without court order. Well, that's wrong.

3 What the rule is intended to do is to  
4 prevent M defendant in M class action from serving  
5 oppressive discovery on absent class members.

6 THE COURT: The rule doesn't say that. The  
7 rule says discovery --

8 MR. JACOBS: The rule says discovery  
9 against absent class members.

10 THE COURT: Or by.

11 MR. JACOBS: We're not seeking discovery  
12 against absent class members.

13 THE COURT: Look at the title of it.

14 MR. JACOBS: The Rule also notes, though,  
15 1.269(1) notes that one of the factors, Your Honor,  
16 in determining whether to grant this request, M  
17 request for discovery against absent class members is  
18 whether -- "whether representatives of the class are  
19 seeking discovery on the subject to be covered." And  
20 when it does say "discovery by," it's talking about  
21 discovery by class members is governed by --  
22 discovery against named plaintiffs is handled just  
23 like you would normally handle discovery. It's  
24 discovery against absent class members where these  
25 rules kick in.

1           And the fact that it's talking about -- one  
2           of the factors is whether representatives of the  
3           class are seeking discovery on this subject to be  
4           covered. And it suggests that this rule is not  
5           targeted just as -- I'm sorry, that it is targeted at  
6           preventing M defendant from conducting discovery  
7           against absent class members unless they can come in  
8           and provide the court with M rationale for obtaining  
9           that discovery.

10           THE COURT: That's how the cases has been  
11           interpreted?

12           MR. JACOBS: I'm not aware of any cases  
13           that have interpreted the rule in any way.

14           THE COURT: Okay.

15           MR. JACOBS: But anyway, getting back,  
16           then, to the depositions of Mr. Erickson and  
17           Mr. Lawin, clearly the named representatives, the  
18           named plaintiffs in this case, we were seeking  
19           discovery from MFEM resellers on precisely this  
20           subject of pass-through.

21           So there's absolutely no way we would have  
22           objected to that kind of discovery. We realize we  
23           were taking that discovery, and Microsoft would be  
24           entitled to that discovery. Formal discovery. And  
25           that's the important point here. Formal discovery

1 under 1.269. So that the court -- it's aware of  
2 these contacts that are being made, and so that's to  
3 prevent any abuses. That's why that rule is there.

4 So when Mr. Green says we didn't object, we  
5 just let these depositions go forward, well, what  
6 Microsoft says in its letter is "Intends to depose  
7 Erickson and Lawin with respect to their purchase of  
8 Microsoft software for resell and their sale of such  
9 software and the depositions will be limited to that  
10 subject." We went in there under the assumption that  
11 Microsoft really meant what it said in this letter  
12 and their purchase and their sale of that software,  
13 in other word, pass-through.

14 What happened at that deposition,  
15 however -- and Mr. Reece was present at that  
16 deposition -- is that Microsoft really asked very few  
17 questions on pass-through, very few questions on the  
18 resale of software. Why? Well, you recall in the  
19 decertification motion, Mr. Casper never cited to the  
20 Erickson or Lawin testimony because when we were  
21 there and we were present at this deposition, their  
22 testimony didn't support Microsoft's position of no  
23 pass-through. They talked about pass-through. Yes,  
24 they passed through their costs.

25 What Microsoft then did, however, over our

1 repeated objections, was to begin to ask them about  
2 all of the same questions that Microsoft wanted to  
3 ask other class members: Quality of software, the  
4 innovation, security, all of -- the very same  
5 subjects that were the subject of M pending motion,  
6 the June 12th pending motion.

7 And we repeatedly objected to that, and  
8 Mr. Reece said I'm asking you to ask this person,  
9 Mr. Erickson, Mr. Lawin in both depositions, ask them  
10 whether he is M class member, and they refused to do  
11 that.

12 And what they just did instead was they  
13 went through and just asked the same questions they  
14 wanted to ask otherwise. They said, "Well, as M  
15 reseller what do you feel about security?" "As M  
16 reseller, what do you feel about innovation?" "As M  
17 reseller, how do you think the pricing is of  
18 Microsoft products?" So basically they were trying  
19 to do an end around this court's ruling and this  
20 court's subsequent ruling on July 5th denying their  
21 June 12th motion.

22 Okay. We objected to all of that, and, in  
23 fact, Mr. Reece then, when he examined the witnesses  
24 asked them, "Now, can you tell" -- "Do you have any  
25 way of being able to differentiate your views on

1 Microsoft software as M personal user versus as M  
2 reseller?" And they said "No. No, of course not."

3 So this notion that they somehow  
4 differentiate between somebody's capacity as M  
5 reseller versus as M personal user of Microsoft  
6 software, Mr. Erickson and Mr. Lawin in their  
7 depositions make clear just as M factual matter you  
8 cannot differentiate like that.

9 Now, whether or not these people were class  
10 members, we have never conceded that they are not  
11 class members. And, in fact, in the letter from  
12 Mr. Cashman, we say that Mr. Erickson and Mr. Lawin  
13 are class members. You can't just depose them on  
14 these subjects. We didn't concede that they were not  
15 class members.

16 THE COURT: What about this Stempel thing?

17 MR. JACOBS: The Stempel thing, Your Honor.

18 Professor Stempel does not say what Microsoft is  
19 claiming he's saying. What Professor Stempel is  
20 talking about is why Microsoft attempted to conduct  
21 ex parte discovery of class members was wrong. Why  
22 you can't do that. Why M no-contact rule does not  
23 allow them to do that. This was submitted in  
24 conjunction with the no-contact motion -- I'm sorry,  
25 with the informal-contact motion.

1 Now, what Professor Stempel says is, you  
2 know, there's absolutely no reason Microsoft needs to  
3 conduct informal discovery of class members because  
4 you know what? It can get other -- it can get this  
5 information that it says it needs through formal  
6 discovery, okay? And that's what Microsoft could  
7 have done, is formal discovery. It could have done  
8 formal discovery of these resellers where we would  
9 have been present at the time.

10 And let's also remember what Mr. Erickson  
11 and Mr. Lawin -- there wasn't just formal discovery  
12 being conducted of them. They were being contacted  
13 by Microsoft ex parte well before the deposition was  
14 taken.

15 Mr. Lawin, for example, testifies that he  
16 was contacted in May of 2006. That's on the time  
17 line here, and he was -- Microsoft counsel, he said,  
18 contacted him and asked him how he felt about  
19 Microsoft pricing, Microsoft quality, and inquired  
20 whether Mr. Lawin would be willing to testify in this  
21 case.

22 Mr. Erickson was first contacted ex parte  
23 again in June. He says either the end of May or  
24 early June of 2006.

25 Now, the day before the deposition,

1 Microsoft actually sits down and prepares these  
2 resellers for deposition. So this wasn't just for  
3 serving M formal subpoena, and we're going to show up  
4 and have depositions.

5 Now, Microsoft is meeting with them before  
6 hand, and Mr. Lawin testifies that when they met,  
7 that he was asked -- he was told -- they talked about  
8 what M deposition would be, the types of questions  
9 and how to respond.

10 So these are the sort of ex parte contacts  
11 even with this -- even had these depositions of  
12 Mr. Erickson and Lawin been proper under 1.269. And  
13 as we've stated in our brief, we would not have  
14 contested Microsoft's requests to take formal  
15 discovery like that under 1.269. Now, Microsoft is  
16 still meeting with these resellers to prepare them  
17 for depositions.

18 So these are precisely the sort of ex parte  
19 contacts -- you know, they are meeting with class  
20 members. So that's really the issue even with  
21 respect to these individuals.

22 But with these other eight declarants, we  
23 had no idea that these contacts were going on at the  
24 scope of the contact that was going on with these  
25 class members until after Microsoft files their

1 decertification motion. In fact, all these contacts  
2 were going on about the same time, from what we're  
3 learning now. This Mr. Hauck appears to have been  
4 traveling around MFEM talking to all these various  
5 people and interviewing them. Microsoft -- from  
6 testimony we've got -- has been going down  
7 essentially the Yellow Pages phone book and  
8 contacting these class members.

9           And what is disturbing is that we have the  
10 testimony from Mr. Erickson that contradicts what the  
11 Microsoft affidavits now say in their resistance  
12 about, "Oh, we were very careful in terms of what we  
13 were saying." Mr. Erickson says, "They were telling  
14 me this lawsuit was harming class members, harming  
15 resellers."

16           So here we have M situation where we don't  
17 know exactly the total scope of these contacts, but  
18 it appears to be rather large. And at least one of  
19 these resellers now has testified that they were told  
20 something essentially derogatory about this lawsuit.  
21 So that I think is quite troublesome.

22           Now, this notion that Microsoft was not  
23 talking about the subject matter of the  
24 representation, I don't know how they can say that.  
25 All the affidavits that Mr. Hauck drafted for these

1 resellers and that Microsoft then submitted in  
2 connection with this decertification motion say in  
3 some words in substance, "I understand one of the  
4 issues in this lawsuit is whether or not cost changes  
5 are passed through to consumers?"

6 And as Microsoft has said in its briefing,  
7 that is the central question. Now, we disagree with  
8 them, whether that's the central question, but  
9 Microsoft says that's the central question on  
10 decertification. So how can Microsoft be talking to  
11 these resellers, these class members, about what it's  
12 now saying is the central question in this lawsuit?  
13 And to say it's not the subject matter of the  
14 representations? It's to defeat the claims of these  
15 people that it's talking to on an ex parte basis.

16 On these other points that Mr. Green  
17 raised, he says that we refer to these resellers as  
18 third parties. Well, you know, they are not the  
19 named plaintiffs, and they are not Microsoft. So we  
20 weren't conceding they were not class members. We  
21 were saying that they are absent class members.  
22 There's nothing inconsistent there.

23 Mr. Green actually made an interesting  
24 point here earlier -- actually, he made M couple of  
25 interesting comments during his argument. One, was

1 he said that plaintiffs can go out and talk to their  
2 class members, which Microsoft can't do.

3 Well, that's what they were doing. They  
4 were talking to class members. And again, they  
5 provided absolutely no authority that somehow you can  
6 slice and dice M class member and suggest that we can  
7 talk to them about the subject matter of this  
8 representation, mind you, but only in some sort of  
9 limited capacity.

10 That's exactly like the example I gave  
11 about if we were going to start going and contacting  
12 Microsoft employees who would be otherwise -- we  
13 would otherwise be prohibited from contacting in some  
14 sort of limited capacity. You know, it's contacting  
15 them on the subject matter of this lawsuit but just  
16 in M limited capacity as M programmer. You know,  
17 there's absolutely no authority for that proposition,  
18 and it would create havoc to adopt such M position  
19 because it would allow the very kinds of abuse and  
20 overreaching that the no-contact rule is designed to  
21 prevent.

22 Another comment Mr. Green made was that if  
23 one of these resellers owned M computer, they would  
24 be M subject -- they would be M class member.

25 Well, that's exactly our point. These

1 resellers have testified that they purchased for  
2 personal use as well as M reseller. But that doesn't  
3 mean the mere fact that they have resold software  
4 means that they then are no longer class members for  
5 purposes of their personal purchases. And what  
6 Microsoft is doing here is contacting them to defeat  
7 their claims with respect to those personal  
8 purchases.

9           Finally, I guess one of the points that I  
10 would just like to make here is that, you know, the  
11 resellers are class members for their purchases. I  
12 just don't know how we can conclude anything other  
13 than that.

14           Microsoft, you will recall, in one instance  
15 when it did try to make an argument that non-MFEM  
16 corporations were not class members but were coming  
17 to this court anyway out of an abundance of caution  
18 so that we don't later get accused of conducting --  
19 of doing something improper. Well, they came -- they  
20 argued these non-MFEM corporations who did business  
21 in MFEM have M presence in MFEM weren't class members  
22 and, therefore, discovery should be allowed. That  
23 motion was denied.

24           But if Microsoft really thought that these  
25 resellers were not class members, well, (M), the

1 proper thing to do would have been to come into the  
2 court and seek M ruling under 1.269 for an order  
3 allowing them to conduct formal discovery of these  
4 class members. But alternatively, it could have come  
5 in and said, "Okay. Fine. We don't believe they are  
6 class members. We would like Your Honor to tell us  
7 whether or not you think they are class members, and  
8 if not, then we will have no problem here." They did  
9 it on one motion, but they didn't here.

10 And you recall Microsoft on M number of  
11 occasions came to this court with requests to conduct  
12 formal and informal discovery on class members.  
13 Microsoft said repeatedly, "This is the only way we  
14 can get what Microsoft was calling 'real life  
15 information' on innovation, quality, security and  
16 prices. The only way we could get this."

17 Microsoft even sought to appeal the court's  
18 first ruling on this to the MFEM Supreme Court,  
19 saying it was M violation of our due process rights  
20 for the trial court to not allow us to conduct this  
21 ex parte contact because it's the only way we can get  
22 this -- this type of "real life" information.

23 Now, however, Microsoft is arguing in its  
24 brief that resellers who Microsoft says were not  
25 members of the class can legitimately provide the

1 kind of testimony that Mr. Erickson and Mr. Lawin  
2 provided. They are saying now, "Hey, they are just  
3 providing that information as resellers. Plaintiffs  
4 really should have no problem with this other  
5 testimony that they were providing."

6 Well, I would submit that the position  
7 Microsoft is taking now and the position Microsoft  
8 took repeatedly before this court that the only way  
9 they could get the information they needed on  
10 quality, innovation, prices and security was to  
11 conduct discovery of class members. Those positions  
12 are mutually exclusive.

13 If Microsoft really believed that when it  
14 began contacting resellers that those resellers were  
15 not class members and, you know, the statements of  
16 Mr. Hauck and Mr. Pedersen showed that Microsoft did  
17 not really believe that, then Mr. Hauck was  
18 suggesting that they could be class members.

19 Well, then Microsoft claims that it could  
20 only obtain so-called "real world" testimony by  
21 deposing class members, really, was misleading at  
22 best.

23 And, finally, Your Honor asked about  
24 Professor Stempel. Like I mentioned, Professor  
25 Stempel did not give them just the green light to

1 say, "Hey, go ahead, conduct ex parte discovery of  
2 class members" -- I'm sorry "of resellers." What he  
3 was saying was you could come to this court and seek  
4 M ruling to conduct formal discovery. But in any  
5 event, you know, Microsoft -- did it really rely on  
6 Professor Stempel's affidavit?

7 Professor Stempel's affidavit, Your Honor,  
8 was submitted April 4th, I believe it was, early  
9 April in connection with our first motion. Microsoft  
10 by its own admission was contacting these resellers  
11 in March of 2006, M month before Professor Stempel  
12 ever submitted his affidavit.

13 So I find this notion that they somehow  
14 relied on Professor Stempel to give them the green  
15 light to conduct this discovery somehow is hard to  
16 believe.

17 So stepping back for M moment, Your Honor.  
18 We are asking for M very tailored, narrow relief  
19 here. We're not saying, you know, disqualify  
20 Microsoft counsel. We're not saying, you know,  
21 strike their answer. We're not saying anything of  
22 that sort. What we're saying is Microsoft should not  
23 be allowed to benefit from these ex parte contacts  
24 with resellers who were also class members. They  
25 should not be allowed to use this discovery in order

1 to defeat the claims of those people who they were  
2 contacting improperly.

3 And I have nothing more.

4 THE COURT: Thank you.

5 (Record concluded on October 18, 2006, at  
6 12:18 p.m.)

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CERTIFICATE TO TRANSCRIPT

The undersigned, MFEMF M. MFEMFEMF, one of the Official Court Reporters in and for the Fifth Judicial District of MFEM, which embraces the County of Polk, hereby certifies:

That she acted as such reporter in the above-entitled cause in the District Court of MFEM, 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 M 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, MFEM, this 3rd day of November, 2006.

\_\_\_\_\_  
MFEMF M. MFEMFEMF  
Certified Shorthand Reporter