

1 IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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3 JOE COMES, RILEY PAINT,)
an Iowa Corporation,)

4 SKEFFINGTON'S FORMAL)
WEAR OF IOWA, INC., an) NO. CL82311
5 Iowa Corporation,)

PATRICIA ANNE LARSEN,)

6 and MIDWEST COMPUTER)
REGISTER CORP., an)

7 Iowa Corporation,)

) TRANSCRIPT OF

8 Plaintiffs,) PROCEEDINGS

)

9 vs.)

)

10 MICROSOFT CORPORATION,)

)

11 Defendant.)

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13 The above-entitled matter came on for
14 hearing before the Honorable Scott D. Rosenberg,
15 commencing at 9:05 a.m., April 7, 2006, in
16 Room 404 of the Polk County Courthouse, Des Moines,
17 Iowa.

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1 PROCEEDINGS

2 (The following record commenced at
3 9:05 a.m. on April 7, 2006.)

4 THE COURT: We're here on the matter of Joe
5 Comes, et al., vs. Microsoft Corporation, CL 82311.
6 Several motions are before the Court at this time.

7 The parties are present by their respective
8 counsel. Among the motions I have is Plaintiffs'
9 Motion to Compel Discovery, Plaintiffs' Motion for
10 Leave to Serve Interrogatories in Excess of 30,
11 Plaintiffs' Motion for Protective Order to Prevent
12 Second Deposition of Joe Comes and Riley Paint, Inc.;
13 Plaintiff's Appeal from the Special Master's Rule --
14 is that for today too?

15 MS. CONLIN: It is, Your Honor.

16 THE COURT: Plaintiffs' Appeal from Special
17 Master's Scheduling Order and for Entry of Pretrial
18 Scheduling Order No. 3, Defendants' Motion for Leave
19 to Contact Absent Class Members; Defendants' Motion
20 for Protective Order.

21 MS. CONLIN: Your Honor --

22 THE COURT: I'm probably missing --

23 MS. CONLIN: No, Your Honor, actually not.

24 And in addition to that, the parties have reached
25 agreement on several of the outstanding motions,

1 working yesterday and into the evening in good faith
2 to try to find some resolutions. So if I may speak
3 to the Court about what has been resolved and what is
4 still at issue we did achieve, Your Honor,
5 significant success.

6 THE COURT: Good.

7 MS. CONLIN: I'm sure the Court will not be
8 disappointed.

9 THE COURT: I won't be.

10 MS. CONLIN: First, Your Honor, the parties
11 agreed, of course, with the Court's approval, to
12 extend the expert deadlines by five weeks across the
13 board. This will not affect the trial date. The
14 plaintiffs are withdrawing their motion to supplement
15 all discovery, and we will meet and confer about any
16 specific issues of supplementation that arise, but
17 only with respect to the discovery propounded in
18 Comes.

19 We will also meet and confer with respect
20 to some of the issues remaining in Interrogatories 22
21 through 26 and withdraw our other interrogatories
22 that were at issue except, Your Honor, for
23 Interrogatory No. 21, which deals with the
24 stockholdings.

25 We agree, also, Your Honor, that the

1 Supplement to our Motion to Propound More than 30
2 Interrogatories is not right for review. And with
3 respect to our Motion to Propound More than 30
4 Interrogatories with respect to our Fourth Set of
5 Interrogatories, that, too, is withdrawn, again,
6 except insofar as it may affect Interrogatory No. 21.

7 So, Your Honor, what remains for the
8 Court's review are only three matters: The first of
9 which -- and, Your Honor, in our discussion yesterday
10 we also discussed what we thought might be the
11 appropriate order for the Court to take up these
12 matters leaving nothing to chance.

13 THE COURT: Okay.

14 MS. CONLIN: So, Your Honor, Rick reminds
15 me -- I must have overlooked this in my remarks, we
16 will also meet and confer -- okay. Microsoft --
17 first, Your Honor, we would like to take up
18 Microsoft's Motion to Contact Absent Class Members.

19 THE COURT: Okay.

20 MS. CONLIN: Second, Your Honor, we would
21 like to take up the Plaintiffs' Motion to Compel with
22 respect to some remaining requests. We have resolved
23 many but there are some remaining. I will provide to
24 the Court a list of those that are still outstanding,
25 and with respect to Interrogatory No. 21; and, third,

1 Your Honor, with respect to our appeal, there is only
2 one issue remaining for the Court to review and that
3 is with respect to redirect examination.

4 There is an issue of dates for Phase VII,
5 which we will try to resolve. We think it's just a
6 mistake, and also plaintiffs are not waiving the
7 right to go back to the Special Master about the
8 lines and the document for the last phase, which is
9 something that the Special Master granted in his very
10 last order.

11 Third -- or, no, not third. We did third.
12 We will commit our agreement to more formal writing
13 than the e-mails that went back and forth furiously
14 yesterday and get the Court a proposed order
15 concerning expert deadlines, assuming, Your Honor,
16 you can approve our agreement as soon as possible,
17 which will also be -- the stipulation into which the
18 parties are going to enter will also include an
19 agreed limitation on future discovery -- on future
20 discovery with language to be worked out.

21 THE COURT: Great. Wonderful.

22 MR. NEUHAUS: A couple of points on that.

23 One is on the nonwaiver of the number of the question
24 of the number of lines to be designated in Phase VII,
25 we don't conceive one way or the other whether they

1 have or have not waived that. They withdrew their
2 appeal on that before the agreement yesterday. The
3 record is what the record is, but the record is what
4 the record is.

5 The second thing is all of this is
6 dependent and contingent on us reaching an agreement
7 on that critical point about the language limiting
8 future discovery, which we will be working out in the
9 next few days.

10 THE COURT: You have no problem with the
11 deadlines being extended the five weeks; is that
12 right?

13 MR. NEUHAUS: As long as we can reach
14 agreement. Our agreement yesterday, as recorded in
15 e-mails, proposed general concepts as to limitations
16 on future discovery.

17 THE COURT: Oh, okay.

18 MR. NEUHAUS: And we assume that we will be
19 able to reach agreement on the final language and the
20 deadlines will then be extended as part of this
21 stipulation.

22 THE COURT: Does that comport with what
23 you --

24 MS. CONLIN: Yes, Your Honor.

25 THE COURT: Okay. Great. I thank the

1 parties very much for their cooperation with and
2 working with each other.

3 Is there anything else before we start on
4 the motions?

5 MS. CONLIN: Not from us, Your Honor.

6 MR. GREEN: Nothing here, Your Honor.

7 THE COURT: So the first one is Motion to
8 Leave to Contact Absent Class Members. Is that okay
9 to start with that one?

10 MR. GREEN: Yes, Your Honor.

11 THE COURT: Okay.

12 MR. GREEN: I'm going to present oral
13 argument on that matter, Your Honor, for Microsoft.

14 First of all, I just want to stress to the
15 Court -- not that you don't consider all motions
16 important, but Microsoft considers this one of the
17 most important matters that has come to Your Honor's
18 attention because it goes to Microsoft's ability to
19 defend this lawsuit. It goes basically to
20 fundamental fairness to almost constitutional levels.
21 And we're very, very serious and adamant that we need
22 some sort of ability to contact absent class members.

23 We believe that you have the authority to
24 do that, contrary to some arguments made by
25 plaintiffs' counsel and their agents, and we believe

1 that we have presented to you the reasons why. And
2 this is a matter which we take very, very seriously,
3 and I ask the Court to consider it in the same way,
4 which I know the Court will.

5 By way of background, Your Honor -- and I
6 think some of this stuff is elementary and I'm
7 telling you stuff you know; but if for nothing else,
8 it just makes my ability to argue it better.

9 THE COURT: That's fine. Go ahead.

10 MR. GREEN: As you know, Your Honor, this
11 is probably the broadest class action ever filed in
12 the state of Iowa. By that I mean the members of the
13 class. You know, it's from 1994 to present all
14 Iowans who used any software products are basically
15 in this class. That literally probably includes most
16 adults in the state of Iowa. It includes you. It
17 includes Janis. It includes me. It includes
18 everybody. It includes my wife. Now, maybe that's a
19 good excuse for me not to talk to my wife, but
20 literally that is -- this is just the most
21 encompassing, broadest class you can have.

22 THE COURT: Are you seeking some order from
23 the Court to have your wife not talk to you during
24 the pendency of this case?

25 MR. GREEN: I think she can not talk to me

1 on her own on several occasions.

2 THE COURT: All right.

3 MR. GREEN: Anyway, the carve-outs, there

4 are very few carve-outs in the definition of the

5 class action. I think there are carve-outs for

6 employees of Microsoft, and I guess there's a

7 carve-out for you. It says governmental officials.

8 There's not a carve out for me. I don't know, maybe

9 I'm doing something wrong by representing Microsoft,

10 but it doesn't say anything about that. And this is

11 what these plaintiffs wanted. They wanted this broad

12 class action. They kept amending their petition.

13 They kept expanding their claims, and, frankly,

14 they've got -- they've got what they've asked for.

15 Now it's time for them to pay their dues.

16 What the defendants seek to contact by this

17 motion, Your Honor, is a limited number of absent

18 class members to determine whether they possess

19 knowledge about the overcharge claims and the

20 Microsoft -- their use of Microsoft products; in

21 other words, we would like the ability to defend

22 ourself. We would like to go out and see if there

23 are people out there that say, "We're satisfied with

24 the Microsoft products. We don't think we got

25 overcharged for it. We don't think they've stymied

1 innovation. We don't think these things." I mean,
2 that's what we want to do.

3 Now, there may not be anybody out there,
4 but we would like the ability on a controlled,
5 limited basis, which this Court can do and which is
6 done in several other cases by other courts in class
7 actions; in spite of what the plaintiffs' counsel and
8 their agents say several times. And by the way, Your
9 Honor, as a footnote, we haven't given you an outline
10 of what we would do.

11 I thought what I would do is see if the
12 Court was inclined to grant the motion; and if you
13 were, you can tell us to prepare something which we
14 would define how we would make the contact and we
15 would limit it and then we could go from there. If
16 you thought what we were doing was too broad, you
17 could amend it or something like that. But I thought
18 we would get over the first hurdle first as to
19 whether you're going to permit the contact at all or
20 not because they are saying no contact under any
21 circumstances with anybody who is a member or
22 possibly a member of the class.

23 We sought permission to contact members of
24 the class from plaintiffs' counsel. We were flat,
25 unequivocally turned down. No negotiations, no talk

1 about, "Well, how are you going to do it?" They
2 didn't even care. They just said, "No, you cannot
3 contact them under any circumstances. They are our
4 client." That's why we filed this motion. There is,
5 under the no-contact rule which is cited in all the
6 briefs, it's 32.42, an exception to the no-contact
7 rule which says that you can contact a party
8 represented by another attorney if the Court orders.
9 And then there's all sorts of comments. And what the
10 burden is to show that there are, quote, "exceptional
11 circumstances," quote, for which that should be
12 allowed. We think and our expert thinks that this is
13 a case where there are those exceptional
14 circumstances, and there's authority for it and it's
15 been done before in class actions.

16 Why do we need to make the contact? It's
17 because the absent class members have information
18 which is essential to Microsoft's defense in this
19 case. Because the claims are, one, these hundreds
20 and thousands of lowans, who wouldn't know these
21 plaintiffs' counsel if they ran into them paid
22 excessive price for Microsoft products, (A); (B),
23 have been denied free choice among competing
24 software; (C), have been denied the benefit of
25 software innovation.

1 We need to develop that information to see
2 if there are people out there, real people, not
3 experts, real Joe six-pack kind of people or business
4 people, whatever classes we're talking about, who
5 come in and say, "I don't think I was overcharged,
6 and I don't think that you thwarted innovation, and I
7 think I had a choice. And, by the way, I like the
8 way your product works." We think we're entitled to
9 present that evidence. If you don't allow this
10 motion, it would be impossible for us to present that
11 evidence except through experts. And in this very
12 case, when the plaintiffs sought certification of the
13 class, we took an argument that said, "Well,
14 there's" -- you know, "there's lack of commonality
15 and that sort of stuff," to which the plaintiffs
16 replied, "Well, we got to have real evidence," and
17 the Supreme Court agreed and said that. That is in
18 Comes 2. Just like the plaintiffs wanted, we want to
19 have "real world" evidence to be able to defend
20 ourselves.

21 As an aside, Your Honor, we have deposed
22 all the named plaintiffs now. There's a controversy
23 about whether we will be able to depose the original
24 ones because they were only deposed during the
25 certification process, but we deposed the remaining

1 two, I think it was on Wednesday of this week. They
2 don't know anything about this case. All they are
3 are friends. One is a person who was represented by
4 Roxanne before in another lawsuit. The other one is
5 Frank Harty's wife who thought it was a good idea
6 that she get involved at Skeffington's. But they
7 don't know what they paid for the product. All they
8 have is a general sense that Microsoft has got this
9 monopoly and they don't know for sure what they paid,
10 so they must have been overcharged. So for them to
11 say, well, you got the ability to depose the named
12 plaintiffs, really doesn't give us any ability to see
13 if we've got witnesses out there who will help us in
14 our defense of this case.

15 Another important point, Your Honor, this
16 is a nonopt-out class action the way it was
17 certified. In other words, sometimes you have --
18 when they send out a notice to a class, you've got
19 people who will say, "I opt out." But there's an
20 Iowa rule that the plaintiffs urged again; again,
21 they got what they wanted. Now they have to live
22 with it. This is a common class, no opt-out; and the
23 plaintiffs obviously aren't going to do any opting
24 out until trial time. So we would have no ability to
25 contact any members of the class prior to trial. If

1 it is an opt-out class, then after people opt out,
2 would have opted out and there was still time before
3 trial, then, of course, we would be able to go talk
4 to those people because they would be saying, "I
5 don't remember the class, and I don't want these
6 lawyers to represent me." But we don't have that
7 opportunity here. So we have to talk to the members
8 of the class, absent members of class, as it's now
9 constituted.

10 Now, we're talking about hundreds and
11 thousands of people who never asked to be represented
12 by these attorneys. The comment to the rules say one
13 of the policy reasons behind the no-contact rule,
14 that a person who chooses to be represented by an
15 attorney should feel free to be able to not be
16 bothered by someone else who wants to talk to them
17 about the subject matter of that representation.

18 The key phrase in there is "choose to."
19 There's no choice here by these people. I mean, I
20 would be willing to venture that there are some
21 businessmen out there who would be very upset if they
22 knew Roxanne Conlin was their lawyer, and that is the
23 key point. We're dealing with fiction. To say that
24 these lawyers represent these absent class members is
25 a legal fiction. It's kind of like when they said in

1 law school, well, you impose a constructive trust.
2 The only thing that tells you is there wasn't a
3 trust. The same thing here. This whole idea that
4 these members, these absent members of the class, are
5 represented by these lawyers is just a total legal
6 fiction.

7 And in this case, I mean, I will admit that
8 the cases say that they are attorneys for absent
9 class members. I mean, we can't dispute that.
10 That's what the authority is, but there's also a lot
11 of cases we've cited that say regardless, counsel can
12 make contact with those absent class members.
13 There's also an exception in the rule which we're
14 urging that you could order the ability to contact,
15 limited, though may be a reasonable -- or whatever
16 word you want to use, for -- pursuant to the Court
17 order exception to the no-contact order -- which, by
18 the way, we feel was put in there exactly for a
19 purpose like that, and I will talk about that later.

20 To say that -- and at some point, Your
21 Honor, unfortunately, maybe that doesn't happen
22 enough in our business, common sense has to come into
23 play. I mean, to say that we cannot contact and talk
24 about this case with anybody who's a member of this
25 class has absurd ramifications. We can't do a jury

1 survey. In a case like this, attorneys do jury
2 surveys. I'm sure the plaintiffs will. They can.
3 We can't. We want to hire somebody to do
4 demonstrative evidence workups for us for trial.
5 We're going to have to tell them about the case, but
6 I will betcha they use Microsoft software. They can
7 and we can't.

8 I mean, I could go on and on about the --
9 if their position, which is no way, no contact under
10 no circumstances, limited, reasonable or not, then if
11 you allow their position to stand, it just results in
12 manifest unfairness; but not only that, it results in
13 absurdities.

14 Now, just for legal authority, the Gulf Oil
15 case, which was cited on page 5 of our opening brief,
16 concerns contact by plaintiffs' counsel with putative
17 members of the class, but it stands for much more
18 than that because of the prodigy that come from that,
19 all of which are cited in our brief. What it says is
20 that in a class-action setting, the Court has broad
21 discretion to control the class and do what you think
22 is right and should do that.

23 I remember when I was a baby lawyer and we
24 were before Judge Hanson, Tom Hanson's dad, he would
25 always say, "Are you sure you want this class

1 certified?" to us, to the plaintiff's class action,
2 because he says, "Because if you do, you've got a
3 tiger by the tail: Because of responsibilities and
4 stuff." That's what they bought into. And they just
5 kept -- they weren't satisfied. They kept expanding,
6 expanding, expanding, expanding, expanding, expanding
7 their class so they're representing everybody in the
8 state that has got anything to do with Microsoft,
9 basically, and that's why this is an exceptional
10 circumstance.

11 But anyway, what Gulf Oil says is if
12 there's no legitimate possibility of abuse by making
13 the contact, then the Court should allow it. And I
14 will get into a little more of that later, but we
15 have asked for -- we asked in our original letter, we
16 asked in our opening papers, we asked for a limited
17 contact and said exactly what was going to go about.
18 And rather than saying anything about, "Well, we can
19 talk about that," we were flat turned down.

20 Now, one of their arguments is, "Well, why
21 don't you just take formal discovery?" There's a
22 procedure in class actions for us to apply to the
23 Court and allow us to take formal discovery of absent
24 class members. Ironically, we brought that up in our
25 first brief, in spite of what plaintiffs' counsel and

1 their agents say, as a basis for showing that we
2 should be able to contact class members, although we
3 want to do it informally and here is why.

4 First of all, it's a lot less intrusive on
5 us class members than formal discovery. I mean, to
6 issue subpoenas and drag people in for depositions
7 who we don't even know that they are a member of the
8 class subjects them to the rigors of formal discovery
9 which we're trying to avoid. We all know that
10 laypeople get intimidated by the formal discovery
11 process, and that's what we're trying to avoid. So
12 we proposed the informal contact.

13 Also, how do we know who to subpoena? How
14 do we know who to propound interrogatories to? How
15 do we know who to ask for request for production to?
16 Do we pick 5 percent of the population in Dubuque?
17 Twenty percent of the population in Des Moines? A
18 couple of people up in Spencer randomly? No. That
19 just is unworkable. We want to make initial contact
20 with people, and if they agree to talk with us, only
21 if they agree, and if they have a real lawyer who
22 represents them, for instance, in a corporate
23 setting, it would be perfectly okay to have their
24 real lawyer there. Then do the interview.

25 If it's determined we want to use them as a

1 witness, we would obviously notify. We would have to
2 list them as a witness; plaintiff's counsel, they
3 would have the right to depose them, him or her,
4 prior to trial. It would be much less intrusive than
5 us going out and applying to the Court and the Court
6 saying, "Okay. You can serve interrogatories. You
7 can serve and come up with some sort of slice of
8 population." This is the best way for contact with
9 absent class members to be made by Microsoft, the
10 informal, reasonable, limited contact approved by
11 this Court.

12 Plaintiffs have the ability -- they can go
13 talk to any of these people, and they can list them
14 as witnesses and they can have them all woodshedded
15 before we ever depose them. They don't have any
16 restrictions, and we're talking about witnesses who
17 are basically the adult population of the state of
18 Iowa.

19 So out of fundamental fairness, this is
20 what the plaintiff's counsel can do and that we will
21 do, but we will do it pursuant to whatever
22 limitations that the Court thinks is appropriate, and
23 this would avoid an intrusive fishing expedition by
24 formal discovery.

25 At page 8 of our brief, Your Honor, opening

1 brief, we cite the Fulco and Montgomery cases.
2 They've tried to distinguish them, like they are
3 prone to do. They distinguish them because the facts
4 are a little different, but they can't distinguish
5 them because of the reasons we recited them, the
6 policy reasons that we recited them; and that is that
7 what the cases said, and these were class cases, if
8 interviewees consent and consent is requested from
9 class counsel -- which we've already done and been
10 turned down -- that, yes, limited, reasonable contact
11 can be made with absent class members.

12 And the courts have recognized, Your Honor,
13 and the Iowa Rules have recognized that there is a
14 difference in class action and the ethics of the
15 lawyers when it comes to class actions. I will give
16 you a "for instance." There is a part of the rule
17 that says -- of the no-contact rule that says it
18 doesn't apply that a party, such as Roxanne, such as
19 Mr. Hagstrom -- they could represent a party who is
20 adverse to an absent member of their class. I will
21 give you a great example.

22 I've got a legal malpractice case that just
23 settled yesterday. I'm defending a lawyer. Now, I
24 know that lawyer probably used Microsoft products.
25 God forbid I should ask him, but I know he did.

1 Roxanne was designated by the plaintiffs as
2 an expert witness to testify that that lawyer
3 violated a standard of care, and she gave a
4 deposition, which I took, and she's a very good
5 witness. But --

6 MS. CONLIN: It's a good thing, now that
7 I'm not a real lawyer.

8 MR. GREEN: The absurdity of that is, that
9 she can go out there and testify against somebody she
10 claims she represents with total impunity and yet
11 she'll sit there and complain that we would go out
12 and make contact with class members under court
13 supervision. It's just absurd, but it shows you --
14 the main point of that is it shows you that this
15 class action business is treated differently for
16 ethical reasons, and it's just really a fiction that
17 they represent these people.

18 I already talked about it, but the policy
19 reasons behind the no-contact rule are not in play
20 here. They talk about, in one of their papers, that
21 is to protect a person who has been chosen to be
22 represented by a lawyer. Well, there's no choosing
23 here, as I've discussed before, and that's all
24 discussed at page 10 of our brief.

25 Now, the next thing I want to talk about is

1 the reasonableness of Microsoft's approach.
2 Microsoft has said that they will only talk to people
3 after initial contact and they give their consent.
4 We will follow whatever guidelines the Court feels
5 are necessary regarding that or any other matters; in
6 other words, if the Court feels that they need signed
7 consent or informed consent and something in there
8 that says they have the ability to contact class
9 counsel or contact independent counsel.

10 I didn't mean you were not a real lawyer,
11 Roxanne. I just meant for these purposes, these
12 people don't even know she represents them and many
13 of them would have their own counsel which they've
14 had for years.

15 We will limit the questions to the views on
16 Microsoft products only. We will not urge any
17 opt-out. Not that it's even possible. It's just not
18 in play here, or a settlement. We're willing to
19 stipulate -- although I think, again, it might not be
20 necessary, but we're willing to do that -- that any
21 information we obtain will not be used as an
22 admission against interest under the hearsay rule
23 against plaintiffs.

24 And, obviously, we will identify them.
25 Counsel can depose them and can vigorously

1 cross-examine them at trial, and all of that is much
2 less burdensome for the absent class members than
3 formal discovery. It allows the class members,
4 absent class members -- and this is one of the things
5 that they talk about in the cases -- to remain
6 passive in the lawsuit -- formal discovery does not
7 allow the absent class members.

8 I want to talk a little bit about the
9 opposition memo, and I'm talking about the one they
10 filed in a timely fashion to our opening memorandum.
11 Frankly, it was not a very strong "attempt," I guess
12 is the word I will use, to avoid your granting this
13 motion. They try to distinguish the cases we cited
14 in our opening brief, but they've never distinguished
15 them for the purpose for which Microsoft cited cases;
16 i.e., class actions are different and the Court has
17 discretion to allow reasonable contact with absent
18 class members. Because the attorney-client
19 relationship with class counsel is really fiction.

20 And then what they said -- and this is
21 really an incredible position in view of what they
22 did on their class certification -- they said,
23 "Microsoft, you can defend yourself by solely using
24 experts. That's how you defend yourself. You just
25 use experts." In other words, none of this "real

1 world" evidence that they want. Your Honor, that's
2 not equitable.

3 Now, I want to talk for a minute about our
4 reply brief, which went into the same light. They
5 are distinguishing the cases, and these other things
6 I talked about were not valid arguments in their
7 opposition brief; but in view of their absurd
8 position that no contact, unequivocal, no way,
9 da-da-da, we decided to find out -- and it was very
10 proper, Your Honor, in spite of what they said in
11 later papers -- we decided to find out what is the
12 reason about the no contact in Iowa and does it apply
13 in this situation.

14 So in our reply brief we attached an
15 affidavit from Gregory Sisk, who I assume the Court
16 is familiar with, taught out at Drake for about 11
17 years and was a professor for ethics. But more
18 important than that, he was the one that motivated
19 the adoption of the Code of Professional
20 Responsibility, Model Code in the State of Iowa. He
21 originally wrote the Drake Law Review Article and
22 said it's time for Iowa to do this. The Supreme
23 Court appointed a committee to make a recommendation
24 about its adoption. He was on the committee and the
25 reporter of the committee, and the way these

1 committees work, the reporter really is the big deal
2 on the committee. That went on for a couple of
3 years, and, then, as you know, Your Honor, I think it
4 was effective July 1, 2005, the Code of Professional
5 Responsibility, which was modeled after the Model
6 Rules -- they didn't adopt them in their entirety --
7 were adopted, and Professor Sisk is still on the
8 Supreme Court monitoring committee, Iowa Supreme
9 Court monitoring committee, for any changes in those
10 rules.

11 But more importantly, Professor Sisk was
12 there and heard the debates and participated in the
13 debates about what is the purpose of this
14 court-ordered exception to the no-contact rule, which
15 we are urging you to follow today. This is a fairly
16 new exception. The one in Iowa has only been in
17 effect for, what, nine months now. It's only been in
18 effect in the Model Rules for four years. So there's
19 not a lot of law out there, Your Honor, which is what
20 they keep harping on. There's no precedent for this.
21 Sure, there's no precedent for it. There's no exact
22 purple cow out there which says you can do this, and
23 there's bound not to be. There's plenty of precedent
24 that say class contact will be made as long as its
25 reasonable and court supervised, but there's nothing

1 out there that says under the no-contact rule,
2 court-ordered exception, this is what you can do, and
3 there's not going to be. There is a lot of it,
4 according to the analogy we've cited.

5 I want to go through a little bit of his
6 affidavit for you, Your Honor, and it's not going to
7 be long. One thing that I've discovered in this
8 process is that these law professors that do
9 affidavits, the substance of their affidavits is
10 about three pages. It's the listing of their
11 articles and qualifications, which are long. I'm
12 going to refer to pages 8 through 15 of Professor
13 Sisk's affidavit, and I'm not going to refer to the
14 many other credentials and publications that are in
15 there.

16 First of all, he states on page 8: "Under
17 Iowa practice and ethical expectations, informal
18 fact-gathering in preparation of a litigated case is
19 permissible and expected, and the no-contact
20 Rule 4.2 contains an exception authorizing the Court
21 to issue an order permitting contact with represented
22 parties in the exceptional case where fairness
23 demands and there's no risk of abuse."

24 Then he says about this case -- he says:
25 "Defendant Microsoft seeks informal contact with

1 consumers of computer products in Iowa as part of
2 ordinary fact-gathering and so as to prepare the
3 factual element of its case by exploring the
4 expectations and understandings held by consumers
5 with respect to Microsoft products. Without such
6 contact, Microsoft is stymied in any effort to
7 identify and prepare consumer witnesses for the
8 defense."

9 And then what does he say about the
10 plaintiffs? "Plaintiffs having secured certification
11 of an exceptionally broad-defined class that
12 encompasses nearly every adult consumer in the State
13 of Iowa, now object to any such contact asserting
14 that, quote, 'Iowa law prohibits ex parte discovery,'
15 quote, and that,' quote, "no exception to the
16 no-contact rule,' and that, quote, 'there is no
17 exception to the no-contact rule in Iowa.'"

18 It goes on to say, "Plaintiffs are mistaken
19 on both counts. The exception is stated expressly in
20 the rule and was designed for circumstances such as
21 this."

22 He then talks about the importance of
23 informal fact-gathering. We all know that, Your
24 Honor, when we practice law. I mean, if you had a
25 car accident that was witnessed by 20 people, you

1 didn't want to go out and notice them all, subpoena
2 them all for depositions. You want to go out and
3 talk to them. If you decide to use them as a
4 witness, yeah, you list them and the other side can
5 depose. So the other side can talk to them because
6 that's not a nonparty situation. But here we have
7 everybody in the world, practically, in the State of
8 Iowa anyway. It would be like -- you know, I
9 remember I had the Clark College fire case and I
10 think we ended up deposing everybody in Dubuque who
11 smelled smoke on the day of the fire, which resulted
12 in a terrible abuse of the formal discovery. I think
13 there was over 300 depositions. That is not what
14 needs to happen here, but there needs to be fairness.

15 He goes on to state there's an expectation.
16 In fact, under the -- it's not Rule 80 now, but it's
17 the same Rule 80, same as in federal court, counsel
18 has a duty to go out and formally gather facts. You
19 have an ethical duty to your client, you have an
20 ethical duty to the Court to do that, and that's what
21 we're trying to do here.

22 None of this can be achieved through resort
23 to formal discovery, but especially when we don't
24 even know who the fact witnesses are in advance to
25 arrange the formal discovery. He cites a case by --

1 this is on page 9 of his affidavit -- by Judge
2 Bennett. It talks about the policy considerations
3 underlying the no-contact rule, and in that case he
4 did allow ex parte communications.

5 What he says and what is important for
6 this, and I know that they are going to say, well,
7 this is very distinguishable because you're talking
8 about the plaintiffs talking about other members,
9 da-da-da. It's not distinguishable for what I've
10 cited for, and that is what he says -- he talks about
11 the benefit of informal discovery, and he says,
12 "Formal discovery, in turn, can create protracted and
13 quarrelsome discovery disputes which consume finite
14 judicial resources." If we had to do informal
15 discovery before -- or formal discovery before --
16 under the rule of procedure, as they suggest -- well,
17 to be honest with you, they suggest we can't even do
18 that in some of these later papers they filed. But
19 if we had to do that, Your Honor, we would be in
20 front of you at a much greater extent than we are
21 now, and I know you've already seen enough of us.

22 He then goes on and talks about the court-
23 order exception to the no-contact rule, and basically
24 he breaks it down. He says "Rule 4.2 of the Iowa
25 Rules of Professional Conduct states: "In

1 representing a client, a lawyer shall not communicate
2 about the subject of the representation with a person
3 the lawyer knows to be represented by another lawyer
4 in the matter unless, [1], the lawyer has the consent
5 of the other lawyer" -- tried, turned down flat
6 here -- "[2], is authorized to do so by law," that is
7 not applicable -- that's where there's a statute out
8 there -- "or authorized to do so by a Court order,"
9 which is what we're asking.

10 He goes on to state that, "The court order
11 exception was added to provide a safeguard against
12 unthinking and harsh application of the no-contact
13 rule in a manner contrary to other important
14 interests." We're talking now about the guy who
15 drafted the rule and heard the debate and got the
16 Supreme Court to adopt it. Contrary to what they
17 say, it didn't have anything to do with the
18 legislature. These are Supreme Court rules.

19 Then he goes on to say, "Here the
20 exceptional circumstance is that an inflexible
21 application of the no-contact rule would unfairly
22 interfere with a party's ability to prepare its case
23 despite the absence of any risk of abuse when counsel
24 contacts a fact witness that is represented by
25 another attorney." They've never really ever in any

1 of their papers said what they think this abuse is
2 going to be. They for sure didn't do it in the
3 papers that were legitimately filed within the time
4 line.

5 His next point is, "The exceptional nature
6 of this case as precluding case preparation by the
7 defendant without permission to contact fact
8 witnesses who are formally represented by class
9 counsel." In other words, he's saying this is --
10 there are exceptional circumstances here pursuant to
11 Comment 1 of the Rule.

12 He says, "What makes this case exceptional
13 is the ubiquitous nature of the class certification,
14 throwing a blanket of formal representation by
15 plaintiffs' counsel over nearly every consumer for
16 computer products in the state of Iowa, hundreds of
17 thousands of people by plaintiffs' estimation."

18 And then he goes on to say, "To inflexibly
19 apply the no-contact rule so as to bar Defendant
20 Microsoft's counsel from speaking with any consumer
21 of computer products on a crucial subject, the
22 expectations and experiences of Iowa consumers for
23 computer products effectively removes any access by
24 defendant to ordinary fact witnesses for purposes of
25 fact-gathering and witness preparation."

1 One side, Plaintiffs -- I'm paraphrasing
2 now -- would be permitted to prepare the case by
3 consumer expectation experience without limitation or
4 without constraint; while the other side, being
5 Microsoft, will be altogether barred from doing so.
6 Plaintiffs would thus be granted -- again I'm
7 paraphrasing -- the unlimited and exclusive power to
8 conceal every potential fact witness on a question of
9 consumer expectations from ordinary investigation and
10 case preparation. The injury to basic principles of
11 fairness and equal ability to prepare a case in the
12 adversary process is manifest. Like I said at the
13 beginning, Your Honor, it almost rises to the issue
14 of depriving Microsoft of its constitutional rights
15 and the ability to fairly defend themselves.

16 Then he goes on and talks about, "The
17 absence of any risk of abuse in permitting any
18 limited contact with absent class members," and he
19 goes on to say, "So what harm does Plaintiffs'
20 counsel believe would follow from these contacts with
21 potential witnesses? Plaintiffs' counsel
22 forthrightly complains that defendant Microsoft
23 actually might find evidence" -- there's a concept
24 for you -- "that would be harmful to or perhaps even
25 defeat the plaintiffs' case." That's in their

1 opposition papers at page 6.

2 In other words, Defendant Microsoft would
3 be afforded the full and equal benefit of case
4 preparation guaranteed by the adversarial process.

5 Plaintiffs' attempt to interfere with and
6 undermine the other party's preparations of a defense
7 surely is not a legitimate basis for imposing this
8 order."

9 Ordinarily I don't read from material like
10 that when I present oral argument, but this is so
11 powerful by someone who is so uniquely qualified to
12 give an opinion that I thought I had to do that.

13 Your Honor, just to reiterate, there's also
14 some policy considerations which are at stake here,
15 and there's all sorts of handcuffs that are as a
16 result of a fiction, a total fiction -- are put on
17 Microsoft if the no-contact rule is enforced like the
18 plaintiffs' counsel want.

19 Your Honor, this case is about class-action
20 counsel. It's not about the class members. We all
21 know that. We should have the ability to defend
22 ourself fairly from these claims. It goes to a
23 fundamental right, and we urge -- and again, as I
24 told you, we would be willing to prepare for Your
25 Honor, if you determine we should be allowed to

1 contact the class members, an outline of how we would
2 do that approach or order, if you will, to which you
3 could make comments or anybody also could make
4 comments.

5 I just want to talk about one more thing
6 because I know it's going to come up. Last Tuesday
7 after five o'clock we were served with a copy of a
8 pleading concerning this motion. It was called a
9 "Motion to Strike," or in the alternative, to "File a
10 Surreply." In reality, all it was was plaintiffs'
11 counsel attempt to get a couple of affidavits in
12 front of you that came from out-of-state law
13 professors, one of which is up in Minnesota where
14 Mr. Hagstrom lives, in a late futile attempt to rebut
15 Greg Sisk's affidavit.

16 We filed an opposition to that yesterday,
17 Your Honor, and I'm not going to argue about it now
18 because its their motion because our position is that
19 you should not even consider that, and we've said
20 that in our opposition papers. It was filed 30 days
21 after our reply. It was filed 30 days after you set
22 an order for a hearing on this very motion. It was
23 filed three working days before the hearing. It just
24 was not filed pursuant to the Iowa Rules of Civil
25 Procedure.

1 For them to say, "Well, you brought up new
2 evidence in your reply," nonsense. We brought up
3 evidence which was directly appropriate to their
4 opposition memorandum, which we can do, which has
5 been done all the time, and it does not give you the
6 ability to strike nor does it give you the ability to
7 file a surreply. So we would ask that you simply
8 ignore that. If you are going to consider it, then
9 we would like the opportunity after -- in our reply
10 part or whatever, to respond to any arguments that
11 you allow Plaintiffs' counsel to make on that.

12 With that, Your Honor, that's my opening
13 statement on this matter. As I said, I don't
14 ordinarily go this long, nor do I ordinarily read
15 from material this much, but I just wanted to press
16 upon the Court how important this is to Microsoft's
17 ability to fairly defend this case.

18 Thank you.

19 THE COURT: We will take a 10-minute
20 recess, then we will start your response or reply to
21 this motion.

22 (A short recess was taken.)

23 THE COURT: Very well. I will let
24 Plaintiff respond to this first motion then. Go
25 ahead.

1 MR. HAGSTROM: Good morning, Your Honor.
2 Richard Hagstrom for the plaintiffs.
3 As I read through the Sisk affidavit and
4 listened to Mr. Green this morning, it was really
5 quite incredible to me that nowhere was Rule 1.269
6 mentioned. Rule 1.269 is the controlling authority
7 with regard to this issue. Mr. Green made a lot of
8 policy arguments, but the Iowa Supreme Court has
9 considered those policy arguments and they appear --
10 the conclusion from those policy arguments results in
11 Rule 1.269.
12 That rule states: "Discovery may be used
13 only on order of the Court against a member of the
14 class who is not a representative party or who has
15 not appeared. In deciding whether discovery should
16 be allowed, the Court shall consider, among other
17 relevant factors, the timing of the request, the
18 subject matter to be covered, whether representatives
19 of the class are seeking discovery on the subject to
20 be covered, and whether the discovery will result in
21 annoyance, oppression, or undue burden or expense for
22 the member of the class." That rule talks about
23 discovery, and the consequence of this rule combined
24 with 1.501, which describes the types of discovery
25 available to a party, is that if Microsoft meets the

1 heavy burden of these factors under this rule -- and
2 that's a major "if" and I will go through those
3 factors because Microsoft doesn't even address a
4 single one of these factors; therefore, for sure the
5 motion must be denied.

6 But the form of discovery allowed under the
7 rules are what we all know about: Interrogatories,
8 document requests, depositions. This rule prohibits
9 ex parte discovery. So why is it that Microsoft
10 doesn't mention this? Because this is the answer
11 that says if you meet these criteria, only then may
12 the Court provide for discovery, not ex parte
13 contact. And despite what is said in the briefing of
14 Microsoft, there is not a single case cited by
15 Microsoft that allows for the ex parte discovery that
16 they are seeking here, not one.

17 When Microsoft suggests this case is
18 unique, there have been plenty of statewide class
19 actions in Iowa. There have been plenty of
20 nationwide class actions and this type of procedure
21 has not once been allowed. They are asking you to
22 interpret Rule 4.2 to override Rule 1.269 and go
23 against every cited case out there on this issue.

24 And let me just turn a moment to Rule 4.2:
25 "In representing a client, a lawyer shall not

1 communicate about the subject matter of the
2 representation with a person the lawyer knows to be
3 represented by another lawyer in the matter unless
4 the lawyer has the consent of the other lawyer or is
5 authorized to do so by law or a court order."

6 Well, as Mr. Green pointed out, there are
7 three so-called exceptions. One is, "Has the other
8 lawyer consented?" And Mr. Green is correct, he
9 requested us to grant permission to give purely
10 ex parte -- make purely ex parte contacts with class
11 members. We refused. It is contrary to Rule 4.2.
12 It would be contrary to Rule 1.269, and it's contrary
13 to the public policy behind class actions.

14 The next exception, "Is there a statute
15 authorizing it?" As a matter of fact, there is not;
16 but importantly, there is a statute prohibiting it
17 and that's 1.269.

18 Now, Microsoft and Professor Sisk then
19 figured, Well, our one way to squeeze this
20 extraordinary request into this rule is, well, let's
21 go to Judge Rosenberg and get a court order.
22 Unfortunately, that doesn't work either. Microsoft
23 has referred to Comments 5 and 6, and let's take a
24 look at Comments 5 and 6. If Your Honor has the rule
25 book in front of you, it's on page 567, and under

1 Comment 5: "Communications authorized by law may
2 include communications by a lawyer." I should
3 mention the Comment 5 deals with the "by law"
4 exception of Comment 6. Comment 6 deals with the "by
5 order." So under Comment 5: "Communications
6 authorized by law may include communications by a
7 lawyer on behalf of a client who is exercising a
8 constitutional or other legal right to communicate
9 with the government." Well, that doesn't apply here.

10 The next sentence: "Communications
11 authorized by law may also include investigative
12 activities of lawyers representing governmental
13 entities, directly or through investigative agents,
14 prior to the commencement of criminal or civil
15 enforcement proceedings." That doesn't apply here.
16 That applies when I worked at the Attorney General's
17 Office and we did investigation before filing a
18 complaint, whether it was criminal or civil.

19 The next sentence: "When communicating
20 with the accused in a criminal matter, a government
21 lawyer must comply with this rule in addition to
22 honoring the constitutional rights of the accused."
23 That sentence doesn't apply.

24 "The fact that a communication does not
25 violate a state or federal constitutional right is

1 insufficient to establish that the communication is
2 permissible under this rule." This is a very
3 powerful comment stating that you have to have
4 extraordinary circumstances. You have to have a
5 specific statute to be able to violate the no-contact
6 rules.

7 Now let's look at Comment 6: "A lawyer who
8 is uncertain whether a communication with a
9 represented person is permissible may seek a court
10 order." Well, that's the circumstance where if you
11 don't know if somebody is represented by counsel, you
12 can make an inquiry, and a situation like that might
13 be basically any case where you contact somebody and
14 the first question you ask to comply with the ethics
15 rules are: "Are you represented by counsel? I need
16 to know that before I can talk to you." That's what
17 this particular exception is for. That and that
18 alone.

19 The next sentence: "A lawyer may also seek
20 a court order in exceptional circumstances to
21 authorize a communication that would otherwise be
22 prohibited by this rule; for example, where
23 communication with a person represented by counsel is
24 necessary to avoid reasonably certain injury." And
25 that injury, Your Honor, is to the person contacted.

1 So here this exception applies. Microsoft would have
2 to come in here and say, "Hey, we want to protect the
3 interest of these class members. We have to protect
4 them from reasonably certain injury, and that's
5 either physical injury or financial injury," and
6 Microsoft has made no attempt to make that showing.
7 So Comment 6 that deals with the "by court order
8 exception" clearly is not applicable here. And that
9 is precisely what Professors Stempel and Paulsen
10 state in their affidavits.

11 MR. GREEN: Your Honor, I'm going to object
12 to the reference to those affidavits for the record
13 because, as I've stated, they are -- whatever that
14 was that they filed last Tuesday was not pursuant to
15 anything contemplated by the Iowa Rules of Civil
16 Procedure and should not be considered at all; and if
17 it is considered, it should be considered at such
18 time as we've had a reasonable opportunity to respond
19 to it. Since we got it three working days before the
20 hearing, we did not. But for purposes of the motion
21 today, I'm objecting to it and ask the Court not to
22 consider it.

23 THE COURT: The objection is noted. I will
24 rule on it in my ruling.

25 MR. HAGSTROM: Your Honor, my quick point

1 on that, Your Honor, is I believe your order also
2 suggested that the parties could provide additional
3 authority at least two days prior to the hearing.
4 This was filed on Monday, not Tuesday, and we believe
5 that the exceptional circumstances here submitting an
6 affidavit of a professor from St. Thomas College of
7 Law in Minneapolis with the reply brief taking
8 positions that we believe are just so contrary to
9 Rule 1.269, we felt compelled to locate our own
10 professors who made comment to not only Professor
11 Sisk's affidavit, but also on the relevant rules,
12 1.269 and Rule 4.2.

13 I would like, Your Honor, to point out a
14 couple of things in the brief of Microsoft. In its
15 February 13, 2006, memorandum at page 2 Microsoft
16 states, quote, "Situations may occur in which
17 discovery of absent class members is the only method
18 to ascertain certain class facts without unduly
19 compromising fairness to the party opposing the
20 class," and it cites Manual for Complex Litigation,
21 4th, Section 21.33 of 301, 2005, and then see also
22 Newberg on Class Actions, Section 16.4 at 143, 4th
23 Edition 2004.

24 In actuality, this clause is taken out of
25 context. First, just to let me mention about the

1 clause itself, it talks about discovery:
2 Interrogatories, document requests, depositions. It
3 doesn't say "ex parte contact." But in actuality,
4 what the full sentence reads, rather than this just
5 little clipped portion from the entire sentence:
6 "While situations may occur in which discovery of
7 absent class members is the only method to ascertain
8 certain class facts without unduly compromising
9 fairness to the party opposing the class, such
10 discovery should not be imposed when a less
11 restrictive alternative exists."

12 Let's look at the sentences before that --
13 and, by the way, this was -- although the citation
14 was to the manual and see also the Newberg, I was
15 surprised, I kept looking in the manual under the
16 appropriate section. I just couldn't find the
17 sentence at all and finally I looked at Newberg under
18 the "see also" cite and here was the clipped portion.
19 But under this Newberg provision it says:
20 "Restriction of interrogatories and document requests
21 to named parties will not prejudice the party
22 opposing the class. So restricting discovery to
23 named parties, i.e., to the exclusion of unnamed
24 class members will not prejudice the party opposing
25 the class." Microsoft didn't quote that sentence for

1 Your Honor.

2 The next sentence: "A Rule 23 class action
3 is intended to be prosecuted by a class
4 representative without the necessity of absent class
5 members taking an active role in the litigation. The
6 class action rule was designed to protect the class
7 member from this burden."

8 I mentioned public policy before, Your
9 Honor, and the public policy that the Iowa Supreme
10 Court obviously looked at in adopting Rule 1.269, the
11 public policy behind class actions is a class action
12 is brought when there are multitudes of people with
13 small claims that cannot pursue those claims
14 individually because of the cost of litigation.

15 So the class action device was created so
16 that those small claims could be joined together
17 because the public policy is that the defendant
18 should not reap the benefit of its illegal conduct
19 just because it's injured thousands or tens of
20 thousands or hundreds of thousands of people in small
21 amounts. That's the purpose of a class action. As a
22 part of that policy, the courts have adopted rules
23 which restrict contact to named class
24 representatives. The cases that we've cited and, in
25 fact, the cases that Microsoft has cited, do not

1 allow ex parte discovery. They don't allow ex parte
2 contact.

3 In the Manual for Complex Litigation, the
4 section cited by Microsoft says, quote, "Once a class
5 has been certified, the rules governing
6 communications apply as though each class member is a
7 client of the class." For purposes of Iowa law, once
8 the class is certified and these classes are
9 certified as affirmed by the Iowa Supreme Court, each
10 class member is represented by class counsel, and
11 Rule 4.2 applies to each and every one of those class
12 members.

13 The manual goes on to state: "Defendants'
14 attorneys and defendants acting in collaboration with
15 their attorneys may only communicate through class
16 counsel with class members on matters regarding the
17 litigation." It goes on to state: "Of course, if
18 there are other matters not relating to the
19 litigation, it doesn't preclude communications on
20 those; but with regard to communications regarding
21 the subject matter of the class, communication, ex
22 parte communication, is absolutely prohibited."

23 Now, when reading Microsoft's brief, I was
24 taken back because I didn't remember the Iowa Supreme
25 Court writing something in the class certification

1 decision that Microsoft said that about "real world"
2 evidence. I just couldn't figure that out, so I
3 pulled out the Comes decision and to my surprise it
4 didn't say what Microsoft said it said. At page 4
5 Microsoft writes, quote, "The Iowa Supreme Court
6 recognized the importance of this type of evidence in
7 this very case. In upholding class certification" --
8 I'm going just to interject -- "that this type of
9 evidence is" -- this supposed evidence that Microsoft
10 will gather through ex parte contact, so let me start
11 again.

12 The Iowa Supreme Court recognized the
13 importance of this type of evidence in this very
14 case. In upholding class certification, the Court
15 stated that, quote, "'Real world' evidence to
16 establish damages," close quote -- as opposed to
17 economic models -- "would be appropriate in
18 considering the merits of plaintiffs' claims," close
19 quote. I cite Comes vs. Microsoft, 696 N.W.2d, 318,
20 324 to 325. But the Iowa Supreme Court said no such
21 thing. Here is what they said in their reciting the
22 argument that Microsoft was making to oppose class
23 certification. So here is what the Court says:
24 "Microsoft also attacks Professor Mackie Mason's
25 analysis, theories and methodologies claiming that

1 his economic methodology will not produce an accurate
2 measure of harm and consequently that the plaintiffs
3 have failed to present 'real world' evidence to
4 establish damages."

5 "Microsoft argues that the plaintiffs'
6 proof is insufficient, claiming that Professor Mackie
7 Mason's theories are inaccurate as a matter of fact
8 and that the district court should have engaged in a
9 rigorous analysis of this evidence to uncover its
10 flaws," end of quote.

11 So what Microsoft claims is a holding of
12 the Iowa Supreme Court about this "real world"
13 evidence issue that they need as a justification for
14 contacting ex parte through ex parte communication
15 class members is simply reciting a paragraph from the
16 Iowa Supreme Court that recited Microsoft's argument
17 to them in opposition to class certification. It has
18 nothing to do with this issue.

19 Now Microsoft claims that -- on the one
20 hand, that contacting class members is so important
21 to get evidence from these class members, and it
22 says, "Well, we need to hear what they have to say
23 about evidence of overcharge and innovation and
24 things like that." And Microsoft has repeatedly
25 taken the position in this case through the class

1 certification process that the Operating System -- 85
2 percent of Operating System sales come preinstalled
3 on computers, so your Dell computer -- I don't know
4 what type of computer Your Honor might have -- but
5 the Operating System comes preinstalled, and so when
6 a consumer like Your Honor or one of us or whoever
7 goes to Best Buy or Circuit City or whatever the
8 store, they don't see the price of the Operating
9 System.

10 So Microsoft has argued, "Well, how can
11 there be evidence of overcharge or pass-through?
12 It's all melted into one." So they've argued that
13 for purposes of class certification, yet now they
14 come in here and tell Your Honor that we need to go
15 ask these consumers how much were they overcharged.
16 They've said by their prior arguments that these
17 consumers aren't going to know, and that's why we
18 have experts. That's why they have their experts and
19 we have our experts.

20 In fact, in one exhibit, Plaintiffs'
21 Exhibit 431, it's an October 22, 1990 memo, internal
22 memo of Microsoft, it talks about goals of pricing
23 Operating System Software to OEMs. After discussing
24 the goals, it says, quote, "We can achieve these
25 goals by making it harder for the end user customer

1 to calculate the effective price of the software
2 offered by the OEM," period, close quote. In other
3 words, it's just what I mentioned. By incorporating
4 the software that had been preinstalled into a
5 computer, it makes it very difficult for somebody to
6 know what portion of the Operating System, what
7 portion -- you know, what that cost was as a portion
8 of the whole cost for the computer.

9 So when Microsoft suggests that it's going
10 to ask these individuals about an overcharge, that is
11 ludicrous. When Microsoft suggests, even if they
12 were right about Comment 6 -- which I think Your
13 Honor sees as absolutely inapplicable -- even if they
14 were right, they can take some discovery, we have to
15 look at what the real issues here are in the lawsuit.
16 This isn't about whether or not some consumer relied
17 upon representations of Microsoft. This lawsuit is
18 about Microsoft's conduct and federal courts have
19 already determined that Microsoft violated the law,
20 violated the federal Sherman Act and violated various
21 state's antitrust laws, including lowans. That's
22 what this case is about. It's about Microsoft's
23 conduct. It's not about whether or not some consumer
24 relied upon something that Microsoft said.

25 So they have not identified any

1 particularized need, even if that alone was
2 sufficient to allow discovery, not ex parte
3 communications because nothing allows that.

4 So let's take a look at Rule 1.269. In
5 deciding whether discovery should be allowed, the
6 Court shall consider, among other relevant factors,
7 the timing of the request, the subject matter to be
8 covered, whether representatives of the class are
9 seeking discovery on the subject to be covered, and
10 whether the discovery will result in annoyance,
11 oppression, or undue burden or expense for the member
12 of the class." As I mentioned before, Microsoft has
13 not even addressed these factors. It's not met its
14 substantial burden with regard to these factors. As
15 I mentioned before, citing Newberg and the manual,
16 the policy is, the law is, that unnamed class members
17 are left alone.

18 The "subject matter to be covered," as I
19 mentioned, they have not identified a subject matter
20 that is directly relevant to the issues here. Are
21 class representatives seeking discovery on the same
22 subject matter? We haven't. We aren't going out to
23 class members and seeking whatever it is that
24 Microsoft is seeking. So absent that, they don't
25 have a right to do it.

1 And "whether the discovery will result in a
2 annoyance, oppression or undue burden or expense for
3 the member of the class," Microsoft has not
4 demonstrated that there will be no annoyance or lack
5 of annoyance or lack of oppression or lack of undue
6 burden or expense.

7 Microsoft mentioned the Montgomery case.
8 It was Montgomery vs. Aetna Plywood. It's a Northern
9 District of Illinois decision. That case clearly
10 states: "Once a class action has been certified,
11 counsel for the plaintiff class is considered to be
12 the representative of all class members and the
13 ethical prohibitions against counsel for one party
14 directly communicating with the other party are in
15 force." And in the Fulco case, the Fulco's said the
16 same thing, although there was sort of a unique
17 circumstance in that case. It is a securities case
18 and it involved, you know, class members generally,
19 but it also involved some of Shearson's -- you know,
20 the brokerage firm, you know -- their internal
21 brokers. The Court allowed communications between
22 Shearson and its own people, but only after the scope
23 of the communication was approved by class counsel
24 and the Court and class counsel could be present.
25 That's the closest they've come to something other

1 than discovery, but they've not identified any single
2 case allowing the ex parte communications that they
3 seek in this case.

4 Let me turn for a few minutes to the
5 affidavit of Professor Sisk. As I mentioned, it was
6 incredible to me that Professor Sisk did not mention
7 Rule 1.269. I'm not sure if he was directed by
8 Microsoft's counsel to ignore Rule 1.269 or not, and
9 Professor Stempel and Paulsen found that incredible
10 as well.

11 But Professor Sisk does what I would call a
12 pretty interesting job of dancing around the issue.
13 As I mentioned, he avoids Rule 1.269 at all. His
14 first section of his affidavit is entitled, quote,
15 "The importance of informal fact-gathering and
16 witness identification and preparation prior to
17 formal discovery," and it seems that Professor Sisk
18 is suggesting that -- well, this informal
19 investigation is important so, a, for sure, Microsoft
20 should be able to do it. But, of course, in the
21 context that he describes it, he's describing it in
22 the context of a lawyer's obligation as plaintiff's
23 counsel to make an appropriate fact-finding
24 investigation prior to filing a lawsuit to comply
25 with, you know, Rule 11 requirements. I'm sorry,

1 Your Honor, I don't know the rule number for the Iowa
2 Rules, but Federal Rule 11.

3 MS. CONLIN: It used to be Rule 80. No one
4 knows what it is anymore. They changed all the
5 numbers.

6 MR. GREEN: It's 1 point something.

7 MS. CONLIN: Yes, we know that.

8 MR. HAGSTROM: So that whole entire first
9 section of his affidavit, we just set aside. It's
10 totally irrelevant. This isn't -- Microsoft is not
11 the plaintiff here and this isn't prior to the
12 lawsuit.

13 Now, then he uses the example of Judge
14 Bennett's decision in Cram vs. Lamson & Sessions
15 Company, 148 F.R.D. 259, Southern District of Iowa
16 1993. So Professor Sisk quotes a discussion by Judge
17 Bennett concerning an opposing party's ability to
18 informally, "informally," contact a defendant's
19 nonmanagement employees. That's the "why" in every
20 state that I know of. If you have, like, a former
21 employee of a corporation that is not in a management
22 position, cannot bind the corporation, the other side
23 can talk to that former employee. That's not this
24 case. So his discussion of Cram is absolutely
25 irrelevant.

1 In these first couple of sections of his
2 affidavit where he focuses on these kind of
3 irrelevant issues, you have to ask yourself, "Why is
4 he doing that? Why doesn't he address 1.269? Why
5 does he try to lead the Court off on these other
6 paths that are totally irrelevant?" I submit the
7 answer is that he knows that this motion is improper.

8 So let's look at the next section of the
9 Sisk affidavit. That section is entitled "The Court
10 Order Exception to the No-Contact Order
11 Rule 4.2." So as I started off my remarks, Your
12 Honor, in this section, and Mr. Green pointed to it,
13 Professor Sisk identifies those three exceptions.
14 And he talks about Comment 5 and 6 and concludes
15 that, "Gee, Microsoft really needs this discovery.
16 It just would be unfair; therefore, this Court should
17 order a clear violation of Rule 4.2 and allow it."
18 But thank heavens we've already shown Your Honor by
19 looking at the rule itself and the very comments,
20 Comment 5 and 6, this situation does not fall within
21 those comments.

22 Mr. Green suggested that Professor Fisk
23 wrote these rules. Well, if he wrote the rule and
24 wanted to say that ex parte communications are
25 allowed when there's class action with a few hundred

1 thousands members, he certainly could have done so.
2 Maybe he tried and the Iowa Supreme Court said, "Wow,
3 wait a minute. We're not going to do that." In
4 actuality, though, Professor Sisk didn't write this
5 rule. This is the ABA Model Rule that was adopted by
6 the Iowa Supreme Court Commission and by the Iowa
7 Supreme Court. So Mr. Green suggests that Professor
8 Sisk wrote this rule. I respectfully disagree.

9 The next heading by Professor Fisk --
10 excuse me, I keep saying "Fisk," I don't know why,
11 Sisk -- is, quote, "The Exceptional Nature of this
12 Case as Precluding Case Preparation by the Defendant
13 Without Permission to Contact Fact-witnesses who are
14 Formally Represented by Class Counsel."

15 Professor Sisk admits that in all cases
16 there should be no ex parte contact with a
17 represented party including unnamed class members.
18 He admits that in his affidavit. However, he says
19 this case is different. He says it's different
20 because so many people use Microsoft products. He
21 says Microsoft would not use this opportunity to gain
22 opt-out, to gain settlements or gain admission
23 against interest. What does he say Microsoft wants?
24 He says the crucial subject is, quote, the
25 expectations and experiences of Iowa consumers for

1 computer products.

2 I don't know where that has any relevance
3 to this lawsuit, Your Honor. There's no pleading
4 that talks about that issue. But even if there were,
5 ex parte communications are prohibited. This is an
6 antitrust case. It's not a consumer fraud case.
7 There's no issues of reliance. If there were issues
8 of reliance, Microsoft might be able to make a case
9 under Rule 1.269 for formal discovery if it meets
10 those criteria.

11 As Professor Stempel states in his
12 affidavit at paragraph 19: "There's nothing unfair
13 or impractical about requiring Microsoft to follow
14 the ordinary ground rules of litigation as set forth
15 in Rule 1.269 and Rule 1.501."

16 So let's look at Professor Sisk's final
17 heading, which is, "The Absence of Any Risk of Abuse
18 in Permitting Limited Contact with Absent Class
19 Members," close quote. First, Professor Sisk cites
20 the Comment 1 to Rule 4.2 and seems to indicate, as
21 Mr. Green indicates, that the rule only applies to
22 persons who have chosen to be represented by a
23 particular lawyer. Well, that comment doesn't
24 address class-action situations, and I've already
25 cited for Your Honor treatises and cases that

1 uniformly state, uniformly state, that once a class
2 is certified, class counsel represents all class
3 members for purposes of the no-contact rule.

4 What is incredible is that he cites this
5 comment when in the previous section he acknowledged
6 that very rule of law. I mean, his affidavit is
7 internally inconsistent.

8 Professor Sisk also suggests that there
9 won't be any harm to class members, but he also
10 purportedly justifies the contact by claiming that
11 this will allow contact with crucial fact witnesses;
12 but, of course, as Professor Stempel writes, quote,
13 "Any party witness possessing important factual
14 information deserves the full array of procedural
15 protections afforded to parties in litigation,
16 including the protections of Rule 1.269 and Rule 4.2.
17 To the extent that unnamed class members are not
18 important fact witnesses, Microsoft's case for
19 informal contact becomes even less tenable." If they
20 have no facts, why contact them? So as Professor
21 Stempel writes: "Practicality, economy and fairness
22 suggest that investigation and discovery efforts be
23 directed at germane witnesses rather than more
24 peripheral unnamed members of the plaintiff class."

25 Stempel also writes, quote, "Microsoft and

1 Professor Sisk are making a 'heads-I-win-tails-you-
2 lose' argument. In one breath they advocate ex parte
3 discovery because of the supposedly crucial
4 information possessed by unnamed class members. In
5 an immediately following breath, they advocate use of
6 ex parte contact on the ground that the unnamed class
7 members are not worth the time and expense of formal
8 discovery. This inconsistency highlights the lack of
9 justification for Microsoft's request. In addition,
10 Microsoft further diminishes its request by
11 inconsistently suggesting that on one hand the
12 unnamed class members hold important information; but
13 on the metaphorical other hand its unsupervised, ex
14 parte activities are so trivial that class counsel
15 need not be informed or permitted to participate in
16 whatever free-form grilling it may have in mind for
17 unnamed class members. Both of the Microsoft
18 propositions cannot be true." That's at paragraph 22
19 of Professor Stempel's affidavit.

20 And Microsoft essentially admits -- despite
21 the current disavowance -- but they essentially admit
22 in their reply memorandum that it seeks unfettered
23 contact with class members precisely because it
24 wishes to create a wedge between Comes' counsel and
25 its class, and they seek admissions.

1 At page 4 Microsoft says, quote, "Microsoft
2 will benefit class members by giving them a voice,"
3 and they argue that class members may well value the
4 chance to testify on Microsoft's behalf more than
5 they would value any potential recovery in this case.

6 So, in other words, Microsoft on the one
7 hand is just going, "Oh, this is just" -- "we're
8 going to go out and just chitchat with these folks";
9 but on the other hand, they are seeking admissions
10 against interest. That's the purpose of all of this.
11 I mean, if it wasn't, why bother. Of course, that's
12 the purpose, and of course that's why Rule 1.269 says
13 if you meet the burden, the Court can allow use of
14 normal discovery devices, notice to everybody,
15 participation by everybody, not some secretive
16 communications to gain admissions.

17 You know, just as a named party may be
18 victimized by ex parte contact with opposing counsel,
19 an unnamed class member and his or her interest may
20 be similarly harmed through unilateral contact that
21 undermines the lawyer-client relationship. And as
22 Professor Stempel writes, "In addition, there is the
23 matter of simple equity. If an individual filing a
24 lawsuit has the protections of Rule 4.2, members of
25 the class should have the protections of Rule 4.2.

1 In addition, under Iowa law, unnamed class members
2 have the protection of Rule 1.269, which not only
3 bars informal ex parte contact but also presumptively
4 bars even formal discovery of unnamed class members"
5 absent the showing of the exceptional circumstances.

6 Professor Paulsen -- I'm not going to go
7 through his affidavit to any extent, Your Honor. I
8 mean, this motion has already taken a lot of time
9 this morning, but Professor Paulsen comes to the same
10 conclusions. In fact, Professor Paulsen writes in
11 his affidavit that he knows Greg Sisk, he's --
12 despite knowing him and being a friend of his and a
13 colleague of his, Professor Paulsen was a visiting
14 professor over at St. Thomas Law School, did one of
15 those leaves from the University of Minnesota Law
16 School for a semester or two and went over to
17 St. Thomas. So he knows Greg Sisk. He says he just
18 can't understand how Professor Sisk could take this
19 position in this affidavit, how Professor Sisk could
20 completely ignore Rule 1.269, how Professor Sisk
21 could ignore the clear intent of Rule 4.2, and
22 particularly the Comments 5 and 6 which do not
23 provide a device to allow this Court to permit ex
24 parte contact.

25 Roxanne just reminded me about a couple of

1 points that Mr. Green said as to why Microsoft wants
2 this unpermitted ex parte communication, and one was
3 the overcharges. As I mentioned, In Microsoft's own
4 internal documents they work to conceal the prices
5 from consumers.

6 The second point was he wants to know if
7 folks think Microsoft innovates. I mean, the basic
8 question is how would they know Microsoft has a
9 monopoly. It's crushed all the competition. How
10 would these folks know what would have been absent
11 Microsoft's illegal contact -- conduct. That's what
12 the lawsuit is about. That's what experts are for.

13 And the third point was, Do they like the
14 product? Well, again, I mean, you could be over in
15 some small African country and there's no automobiles
16 around except one and it's a 1975 Pinto, and the
17 folks there just love it. It's the best thing. You
18 know, we don't have to walk. We don't have to ride a
19 horse. It's wonderful. We love it. Well, they
20 don't know about all the other vehicles. So it's a
21 pointless inquiry.

22 We hear about this ubiquitous nature of
23 Microsoft, as if that somehow justifies in this
24 case -- as opposed to the thousands of other class
25 actions that have prohibited ex parte communications,

1 that somehow this case is different. But we mention
2 -- you know, I mentioned earlier, there have been
3 plenty of statewide class actions in Iowa. There's
4 plenty of nationwide class actions: Ampicillin,
5 tetracycline, copper tubing, chickens -- the list
6 goes on and on -- baby formula, other antibiotics,
7 vitamins.

8 There's been all of these class actions and
9 things like vitamins. I would be willing to bet
10 there were more consumers of vitamins in the state of
11 Iowa than there are consumers of Microsoft software,
12 yet ex parte discovery wasn't allowed there, and it
13 wasn't needed because the issues there in those types
14 of cases were competitors getting together and
15 talking and fixing the prices and charging consumers
16 more. You know, what possible relevance could it
17 have been to ask a consumer, "Well, were you happy
18 with the product? Did you think you paid too much."

19 MS. CONLIN: I'm so sorry, Your Honor.
20 It's a nice little song.

21 MR. HAGSTROM: "Do you think you've paid
22 too much?" Well, how would they know? How would
23 somebody know that these defendants got together and
24 fixed the prices of these products. You know, the
25 consumer had to pay what it paid. The whole purpose

1 of the antitrust laws is to encourage competition;
2 and if there had not been the conspiracy, the price
3 would have been lower. It's the same situation as
4 here. Absent the monopolization and unlawful conduct
5 of Microsoft, we assert and we hope to convince the
6 jury that the prices would have been lower. So that
7 doesn't mean any consumer can say, "Well, gee, yeah,
8 I think the price was fair."

9 In Minnesota one of our class reps was on
10 the stand and the Microsoft counsel went through this
11 scenario of:

12 "Well, would you agree that" -- or,
13 "Can you agree with me that the cost of
14 the operating system in the computer you
15 bought was about \$50."

16 And the witness said:

17 "Well, you know, for these purposes
18 I will agree with that.

19 "And how long did you use that
20 operating system?"

21 "Well, actually my computer broke
22 down here just recently so I've had it
23 about four years."

24 So Microsoft counsel asked:

25 "Well, you know, can we call that

1 50 months?

2 "Sure, sure. That's fine.

3 "Well, that would about a dollar

4 a month for use of that operating system;

5 is that right?

6 "Well, yeah, if your math is correct,

7 sure, that's about a dollar a month.

8 "Wouldn't you say that's a pretty

9 fair value?"

10 And the witness said:

11 "You know, I can't tell you. I

12 don't have anything to compare it to."

13 Microsoft has squashed the competition.

14 Maybe it should have been a nickel per month. So all

15 of this, you know, "Oh, we need this kind of

16 contact," it's absolutely irrelevant. It proves

17 nothing and it doesn't meet the requirements of

18 Rule 4.2 or 1.269.

19 Interestingly, Microsoft has, you know, in

20 various briefs -- and I apologize if I forget the

21 exact number -- but they've talked about as a result

22 of these government actions they've had a couple

23 hundred lawsuits filed against them in the country.

24 There's been literally dozens of these

25 indirect-purchaser class actions; but not once, not

1 once, has this type of request been made or granted.

2 You know, California settled a month before trial.

3 Didn't happen there. Minnesota, we settled after

4 seven weeks of trial. Didn't happen there.

5 So Microsoft -- if Your Honor noted in some

6 of the briefs and I'm -- if you're like me, and I'm

7 more involved in this every day, I can't quite

8 remember which brief it was in, but maybe in all of

9 them because it's one of these repetitious things

10 that Microsoft likes to write about: "Well,

11 Ms. Conlin and Mr. Hagstrom took this case to trial

12 without all of this discovery." Microsoft went to

13 trial in Minnesota without ex parte communications.

14 Microsoft was on the verge of trial in California

15 without ex parte communications. They just knew

16 better. They knew it wasn't allowed. Never asked

17 for it, and it wouldn't have been allowed.

18 And assuming Microsoft could meet the

19 stringent requirements of Rule 1.269, Mr. Green says,

20 "Well, we don't know" -- you know, "We don't know who

21 these people are." Well, let's just think about a

22 little practical experience. Unfortunately, I don't

23 know anything about your personal life, Your Honor,

24 but if you bought a computer, you know, you start it

25 up and you get a bunch of questions and -- or if you

1 buy some new software and install it, you'll be asked
2 to register. So you put in your information and send
3 it off to the manufacturer so that if there's some
4 updates to the software, need some new drivers for
5 the computer, you know, the manufacturer will contact
6 you and send you that new information over the
7 Internet. But the point is, registration. Well,
8 Microsoft knows who is registered with them. So it
9 isn't like assuming they met the stringent
10 requirements of Rule 1.269 that bear that heavy
11 burden that they don't know who is out there. Of
12 course they do. They've got a database. They've got
13 several databases, in fact, where this type of
14 information is located.

15 And another point Mr. Green made, that I'm
16 not quite sure I understand it, but he suggested that
17 this is almost of constitutional import. Well, I
18 didn't see anything in the briefs about there is some
19 constitutional right to engage in ex parte
20 communications with unnamed class members represented
21 by class counsel. I didn't see any case authority to
22 that effect either. So if there is some
23 constitutional issue here, I think it would be
24 helpful for us and the Court to know about it.

25 But what is interesting is that Microsoft

1 cites the Gulf Oil v. Bernard case. Unfortunately,
2 Gulf Oil -- unfortunately for Microsoft, Gulf Oil had
3 nothing to do with contact of class members by the
4 defendant. Actually, what happened in Gulf Oil was
5 at the defendant's behest, class counsel were
6 prohibited from talking with unnamed class members.
7 That case went up to the U.S. Supreme Court and said,
8 "Huh-uh, these unnamed class members, unnamed class
9 members along with the named representatives, are the
10 clients of class counsel." So that case has no
11 application here.

12 When Mr. Green talked about the Gulf Oil
13 prodigy, case after case after case after case says
14 the same thing: Once the class is certified, class
15 counsel is counsel for not only the named class
16 representatives, also the unnamed class members and
17 the no-contact rule applies.

18 Now, Mr. Green also suggested that, you
19 know, plaintiffs here have filed motion after motion
20 and expanded the class and expanded the class and
21 expanded the class, and I don't know about this
22 lawsuit, maybe some other lawsuits he's thinking of,
23 but definitely not in this lawsuit. We started out
24 this case with the Operating System class. Class
25 definition hasn't changed. We amended the petition,

1 added an Applications software class and the class
2 definition has not changed.

3 So there's no expansion of the class; but
4 even if there were, even if there were, it makes no
5 difference for purposes of these issues. I mean, the
6 rules are clear. There's been hundreds of class
7 actions. This has not been allowed.

8 Microsoft talked about how allegedly
9 important this is to Microsoft and how it's unfair.
10 So as Professor Stempel and Professor Paulsen point
11 out, is it unfair to follow the rules of the Iowa
12 Supreme Court and follow 1.269 and follow and require
13 Microsoft to meet those stringent criteria? And is
14 it unfair then, supposing those criteria are met, to
15 require Microsoft to engage in a normal bilateral
16 discovery required by the Iowa Rules? Of course it's
17 not unfair, but it would be substantially unfair to
18 these plaintiffs.

19 The unnamed class members would be subject
20 to manipulation by questions of class counsel or
21 their agents. And we, as class representatives, not
22 only have the right but the obligation to protect
23 those interests of those unnamed class members. We
24 intend to do that, and we believe that it would be
25 entirely improper to allow such ex parte

1 communications. As the professors talked about, the
2 whole point of this would be to drive a wedge between
3 certain members of the class and others, and that is
4 inappropriate to do, to even attempt to do, on an ex
5 parte communication basis.

6 Now, finally, Your Honor, I would hope that
7 this is not a motion after-the-fact. I hope there
8 has not been ex parte communications with unnamed
9 class members about this litigation.

10 Your Honor, I know I've gone a long time,
11 and I would like to just inquire as to whether Your
12 Honor has any questions of me?

13 THE COURT: No.

14 MR. HAGSTROM: Thank you.

15 THE COURT: Reply.

16 MR. GREEN: I will try to be short, Your
17 Honor, which a lot of people say I am anyway.

18 First of all, that last statement truly
19 shows -- I mean, Mr. Hagstrom is trying to throw out
20 a chilling effect to us right there which basically
21 says, You better not be talking to anybody even
22 though we've got people, friends all over, relatives
23 and whatever who bought this Microsoft product. You
24 know, that threat they just made shows the very need
25 for what we're talking about. Now, it's interesting

1 to me that he would talk about 1.269 as being not
2 addressed in Professor Sisk's papers.

3 First of all, they never addressed it,
4 never brought it up in their opposition papers.
5 Sisk's affidavit was in reply. Why would he address
6 it when they didn't think it was worthy of
7 consideration? And why didn't they bring it up?
8 Because it doesn't have anything to do with what
9 we're here about today. That is the procedure for
10 formal discovery, and there's nothing in there -- I'm
11 reading this rule, it's in front of me -- there's
12 nothing in here that talks about informal discovery
13 or preparing your cases like lawyers usually try to
14 do. That's without formal discovery. It talks about
15 discovery and that's why it's not addressed and
16 that's why it's so absurd for Stempel and whatever
17 that other guy's name is -- Paulsen -- to even talk
18 about that. It is not what they say it is. It is
19 not the only way and "the only way" you can have
20 contact with class members. It talks about how you
21 do it if you ask for formal discovery. We are not
22 asking for that. As a matter of fact, we think that
23 that would be a bigger burden on the class. We're
24 asking for limited contact pursuant to -- well, I've
25 discussed all that and I'm not going to do it again.

1 They talked about -- when they talk about
2 the no exception or the court order exception to the
3 no-contact rule and they talk about the "personal
4 injury" thing as brought up by one of their
5 professors, that's just an example. The key in there
6 is it says "under exceptional circumstances you allow
7 it" and they give "for example."

8 Now, to make the quantum leap that that's
9 the only basis upon which you can do this is absurd
10 and Sisk so says in his affidavit.

11 On the Supreme Court thing, and I -- again,
12 if you go out and read, you know, again, what follows
13 that is clearly what the Supreme Court says, real
14 evidence is in the Comes case, which he claims we
15 misquoted when, in fact, he didn't read the next
16 page, the first sentence of the next page. It says:
17 "Microsoft's argument fails because in effect it asks
18 for the Court to make a class certification ruling
19 based on the merits of the case."

20 So what they were saying is when it comes
21 to the merits of the case, which is where we are
22 today, "real world" evidence is important and is
23 necessary and that's why we cited it and it was a
24 correct cite.

25 They say that nobody is going to know what

1 they paid for it. That's not true. They know what
2 they pay for the upgrades. I don't know if he thinks
3 that the Iowa consumers are just all a bunch of
4 whatever; but the fact is there's going to be people
5 out there, particularly business people, who know
6 exactly what they paid for their software product.
7 If they want to say that they have haven't got
8 anybody in the world who is going to testify about
9 what they paid for the software, then we will hold
10 them to it.

11 Now, when they say there's absolutely no
12 other cases, that's wrong. In fact, they cited cases
13 that say there can be ex parte communication and
14 exceptions and the cases are replete with it in here,
15 but -- I will let Your Honor sort that out, but that
16 is just absurd.

17 They talk about admission against
18 interests. That's what we're trying to get. I don't
19 know -- admission against interest is a rule of
20 hearsay. These people, if they are going to testify,
21 are going to be out there. They are going to be
22 live. They are going to testify. They are going to
23 be subject to cross-examination. It's got nothing to
24 do with admission against interest.

25 They talk about the vitamin case. I was in

1 that case. There was never a consumer vitamin case
2 in the state of Iowa. There was a fee formulators
3 but not consumers.

4 They -- I mean, I appreciate a couple of
5 things Mr. Hagstrom said. One, he spent a lot of
6 time on this Sisk affidavit, which, of course, is in
7 support of our position; and number two, he argued
8 the merits of the case and all these things which, of
9 course, is not why we're here today. But it just
10 goes to show why we need to obtain this information
11 in the best manner -- which is the one we suggested,
12 as opposed to formal discovery -- in order to defend
13 ourself because obviously the merit statements that
14 he has made are not true.

15 The government case is a vastly different
16 case than this case is, vastly different. Now,
17 you're going to have to struggle with that issue on
18 April 17 with the collateral estoppel matter, but I
19 think you'll clearly say that although they would
20 love to ride the coattails and have the government do
21 their work for it, they have expanded their case to
22 the point where they are going to have to do their
23 own work and we should be able to do our work.

24 I don't think I have anything further, Your
25 Honor, except nobody ever -- their experts, they have

1 never, ever, ever, ever really said in any meaningful
2 way what harm can come for the kind of contact we're
3 asking this Court to allow us to make. It's because
4 they can't, because they know that it will be
5 limited, they know that you will know what it is and
6 it will be done in that matter because we promise
7 that we will do it in a matter that we suggest that
8 you prescribe, but it was fundamentally important,
9 and I didn't say it was a constitutional right. I
10 said it was tantamount to a constitutional right and
11 it is because we have to have the ability to defend
12 ourself, just like they have the ability to prepare
13 their case, and they can talk to any of these people
14 they want to at any time and we can't.

15 So we would like the relief we asked for,
16 Your Honor, at some point.

17 Thank you.

18 THE COURT: Thank you.

19 I believe the next motion was the motion to
20 compel? Plaintiffs' motion?

21 MS. CONLIN: Yes, Your Honor. That is the
22 plaintiffs' motion, and I have prepared and I've
23 already shown to the defendant a list of those issues
24 -- the numbers, Your Honor, I thought that might be
25 equitable, the numbers of the requests --

1 THE COURT: Thank you.

2 MS. CONLIN: -- that are still at issue.

3 As we've indicated to the Court, we have resolved
4 some of those yesterday and in connection with other
5 meet-and-confer.

6 I also want to give the Court and Counsel
7 some of the attachments. These are all attachments,
8 Your Honor, to my affidavit in support of the brief;
9 but it's not so easy to get to them, so I thought I
10 would just pull them out and hand them to the Court
11 and Counsel so that we could deal with them.

12 Your Honor, the defendant offers four sort
13 of summary reasons why they should not be compelled
14 to answer plaintiffs' discovery requests. These are
15 global reasons. One is no one else in all those
16 other cases ever wanted more discovery. Two is it's
17 too late in the litigation. Three is we gave you
18 millions of pages and that's plenty; and four is
19 plaintiffs cannot handle the discovery already
20 ordered, so for goodness' sake, don't give them any
21 more.

22 I want to deal with them first because
23 these are the global issues that underline the
24 question of whether or not the Court should even
25 consider giving us any more material that we have

1 requested.

2 First of all, no one else ever made us turn
3 over all the relevant documents in all other cases
4 that Microsoft claims are virtually identical. We're
5 not responsible for what other lawyers in other cases
6 did or did not do, and in some case such as Minnesota
7 we asked for things that we didn't get. In
8 connection with the materials that Microsoft produced
9 in the multidistrict litigation, it took us months to
10 actually get access to that material. Minnesota, as
11 the Court is certainly well aware by now, is the only
12 case that ever went to trial. I entered the case a
13 few weeks before that trial. For Microsoft to
14 suggest, as it does, that we were satisfied with the
15 discovery is just plain wrong. We went to trial with
16 what we had because we couldn't reach a fair
17 settlement. That's what you do. The judge in that
18 case even refused to let the plaintiffs take
19 depositions of witnesses who were named by Microsoft
20 and never deposed in any case at all. We felt at a
21 significant disadvantage as a result of some of those
22 rulings.

23 There's another reason, another two reasons
24 why there's more discovery necessary here than was
25 necessary in other cases.

1 One is our class period is nearly twice as
2 long. In Minnesota, for example, it was from May of
3 1994 until December of 2001, about seven years. And
4 here in Iowa, Your Honor, it goes on five more years.
5 Five more years. Five more years of products. Five
6 more years of anticompetitive acts. Most important,
7 we make specific factual allegations that are
8 different than the factual allegations made in every
9 other case. We also make specific claims for damages
10 that are different than those made in the other
11 cases. All other cases ask for only overcharge
12 damages.

13 The third global reason -- well, Microsoft
14 is probably right in one respect, and that is that
15 there's -- this is a one-of-a-kind case, but
16 Microsoft's conduct is also one of a kind. Our
17 review of the documents indicates to us that all the
18 while that the government was suing Microsoft for
19 anticompetitive conduct, that anticompetitive conduct
20 continued innovated. Once they destroyed Netscape,
21 the browser, they turned their attention to other
22 competitors. And, Your Honor, the published reports
23 about the operating system that they are now working
24 on, which is now called Vista, which is a substitute
25 for Windows, you know, an update or --

1 those reports -- used to be called Longhorn, now it's
2 Vista -- those reports indicate that Microsoft is,
3 once again, plotting along in the settlement
4 agreement they reached. We really do think that
5 Microsoft apparently believe that the laws simply
6 don't apply to them, in many respects is
7 unprecedented. It was the scope of Microsoft's
8 conduct that dictates the scope of discovery.
9 Microsoft says, "We gave you millions of pages and
10 that's just plenty," and the issue is not number of
11 pages, its contents of those pages and what questions
12 they answer.

13 As I recall, Your Honor, one of the reasons
14 that Microsoft gave for the slow production of the
15 competitor case documents that you ordered last July
16 was so that they can eliminate duplicates. As we
17 have discovered in our review, sometimes it does
18 duplicate so we just have an extraordinary number of
19 duplicate documents. The number of unique pages
20 produced by Microsoft is probably about half what
21 they say and that's still lots of pages. There's no
22 question about that, just lots of pages. But we're
23 dealing with this long period of time, we're dealing
24 with dozens of competitors and hundreds of illegal
25 acts.

1 Microsoft says it's too late to do
2 discovery. You had six years and that really is an
3 attempt to mislead the Court. We have set out the
4 time frame in the brief. We filed our first -- our
5 very first merits discovery was allowed for us to
6 file in October of 2003. Microsoft did not answer at
7 all until April of 2004, and when they answered they
8 said either objections, "We won't" -- "We won't tell
9 you that," or "Look at the MD stuff."

10 The very first merits discovery that the
11 plaintiffs received in this lawsuit from Microsoft
12 was as a result of your order, Your Honor, in July
13 of 2005. Before that time, we had received no merits
14 discovery from Microsoft at all, and it took until
15 February for that production to be completed. And
16 the manner of the production is just inexplicable and
17 confusing which has complicated the task of review by
18 many, many, many multiples.

19 Microsoft also tries to convince the Court
20 that we should be deprived of legitimate discovery by
21 claiming erroneously that we've been unable to handle
22 what we have. Microsoft has done its very best to
23 make it impossible, but we have persevered and
24 managed to OCR. We have computer-read all the
25 documents that we got, something that Microsoft said

1 we -- we at one point suggested, Your Honor, that we
2 should share that task and the costs of that task,
3 and in the discussion Microsoft thought it couldn't
4 be done. Well, we've done it. We've provided in the
5 brief, Your Honor -- and I don't know if you've had a
6 chance to review it -- we've provided a few examples
7 of the document production mistakes that Microsoft
8 has made.

9 Leaving out the indices from the competitor
10 cases by third parties and providing them separately
11 three months later, sending us an empty jewel case
12 and not correcting that for three months;
13 accidentally leaving out 60,000 pages from a disk
14 represented as complete, corrected five months later;
15 telling us that there were no feed files at all for a
16 particular production and then saying a few weeks
17 later without explanation, "Here are the feed files,"
18 without mentioning these are the very feed files that
19 Microsoft said did not exist.

20 One of the problems that we have had is
21 what Microsoft produces as production files. Some of
22 the production didn't even come with production
23 files, but one of the things -- I really wanted to
24 take just a moment to look at what Microsoft says are
25 production files.

1 First of all, it says all those production
2 files show the source of the documents. They don't.
3 And, in fact, they are virtually useless. Your
4 Honor, the first in your series of materials -- now,
5 these production logs go on for hundreds and hundreds
6 and hundreds of pages. I didn't think you would like
7 to see that, so I gave you the first page of several
8 different productions. The first one is a production
9 for documents that are labeled MS-CCPMD; and if you
10 look at the top, Your Honor, you'll see the
11 "custodian" is -- this under "custodian," but it
12 says -- it doesn't say who the custodian is at all.
13 It says, "Communications, Netscape Expert Documents,"
14 and there are 95 pages. And that's the only
15 information that we have for that, 95 pages of
16 communications "Netscape Expert Documents, MS-DOJ-L
17 Microsoft."

18 The next entry is for 3200 pages that are
19 labeled "Expert documents." What documents? What
20 experts? None of that information is provided in
21 this production log. That's Exhibit 11.

22 And then the next one, Your Honor, is even
23 less doubtful. It is from the disk MSM_IA_060. That
24 is Caldera. Now, you know, Your Honor, that is the
25 DRI competitor cases, and it's a list of numbers,

1 that's it.

2 The next one, Your Honor, is the one
3 produced on December 22, 2005, and this one tells us
4 the beginning Bates and the end Bates for the
5 document. And it does tell us the "custodian," and
6 it also tells us the "custodian of exact duplicates."
7 And, Your Honor, the first 6,674 pages say the
8 custodian is Microsoft. Just Microsoft.

9 And then, Your Honor, the next part of this
10 I think is important to note for several reasons.
11 The next five pages are from a custodian, Gayle
12 Brook. Then there's one page from Bruce Olson, and
13 then there are five more pages from Gayle Brook.
14 Then there's one page from Ms. Brock, two pages from
15 Ms. Brock; 19 pages from Ms. Hufford, H-u-f-f-o-r-d;
16 and then we're back to Brock, two pages from Brock;
17 and then two pages from Bloom; and then back to
18 Mr. Olson, who is clear up here at the top.

19 I happen to know from reading the
20 depositions how Microsoft says it goes about
21 gathering documents. They go to the person's office,
22 they download them, they take them and number them.
23 They don't come out of the machine numbered,
24 obviously. They come out of the machine as they were
25 entered into the machine. And why in the world they

1 would separate the documents for one custodian,
2 Ms. Brock, as an example, and she goes on for pages
3 and pages where -- you know, one page here and one
4 page there from Ms. Brock mixed in with Mr. Olson, I
5 mean, there's just no legitimate explanation based on
6 how they say they get the documents for them to
7 organize them or disorganize them in this particular
8 way. Those are the production logs, Your Honor.
9 That is what we get with these materials. We also
10 get load file which lists for us beginning and ending
11 pages of the documents.

12 Microsoft also tells the Court that we've
13 been indolent in searching for documents in the 23
14 million pages of documents that we have, and we have
15 had the temerity to ask them to assist us in
16 identifying things that we should have been able to
17 find for ourselves. It's just false. I'm only going
18 to use a couple of examples, Your Honor, but I want
19 the Court to understand what we have faced here. We
20 detail a few more in the brief, and there are dozens
21 more.

22 On November 7th one of the things I wrote
23 to the defendant about was the production of hundreds
24 of pages -- of hundreds of illegible pages within the
25 exhibits to the depositions. Couldn't read it. All

1 messed up. That was -- about half my requests were
2 saying -- I told them the Bates numbers of every page
3 that I couldn't read. That's about half the requests
4 that I made in that November 7th letter.

5 Microsoft blamed it on a third party. I
6 accepted that explanation. They provided the
7 documents.

8 The second category was sort of random,
9 missing exhibits. Just one example from the
10 deposition of Anthony Bay, who is a Microsoft
11 employee, a Microsoft executive, and that deposition
12 was taken in Burst.Com vs. Microsoft. Your Honor,
13 the initial production of Mr. Bay's deposition and
14 appended exhibits was on August 25th. That
15 production contained Exhibit 1 and Exhibit 4 and so
16 on. All the exhibits are, you know, behind the
17 deposition electronically. They go in numerical
18 order. There is just stuff missing. And six weeks
19 later, on October 13th, Exhibits 2 and 3 were, in
20 fact, produced, and it is before I wrote the letter,
21 along with several other exhibits from the deposition
22 on the August 25th disk. Neither the August 25th
23 disk nor the October 13th disk had any production log
24 at all. The October 13th disk didn't say, you know,
25 "Here are the exhibits missing." It just said, "Here

1 is some competitor depositions and exhibits," and the
2 transmittal letter didn't say that either. The only
3 way that we could have known what was on that disk
4 was to open it and look at every single page. And
5 there are hundreds of thousands of pages on these
6 disks.

7 Microsoft also claims that all of the
8 deposition exhibits bear the Bates number at the
9 bottom that starts with the prefix "DEPEX." They say
10 that to you, Your Honor, in the brief. They all --
11 you know, "How can you be so stupid, Roxanne, because
12 they all say 'DEPEX' at the bottom." That is untrue.
13 Your Honor, I've given you these exhibits, and it
14 will just take a second for you to look through them
15 and see what we were facing.

16 Exhibit 1, if you look at the bottom, Your
17 Honor, you will see that there is no "DEPEX" number
18 on this. There's an "MS-SPCAIA" number on this
19 exhibit. This one, Your Honor, No. 1 came with the
20 deposition. No. 2 did not. It wasn't there as I
21 read through them. It does bear the "DEPEX" exhibit
22 designation, Bates designation.

23 Exhibit 3 -- and then this came
24 October 13th along with Exhibit 3 which came October
25 13th and also bears the "DEPEX" Bates number.

1 Exhibit 4 -- and, Your Honor, these are all
2 from the same deposition taken on the same date of
3 the same deponent.

4 Exhibit 4 was in the August 25th
5 production. That does not have the "DEPEX" numbers
6 on it, and it's not related in any way to these
7 "DEPEX" numbers on 2 and 3. The numbers, Your
8 Honor -- the number on Exhibit 1 ends with a Bates
9 number of "400," and the one on Exhibit 4 begins with
10 a Bates number "401." So the Bates numbers go
11 consecutively. These two exhibits, however, 3 and
12 4 -- 2 and 3 were simply -- they just weren't with
13 the others. And that's true of about 25 exhibits in
14 that August 25th production.

15 It's just hard to understand how Microsoft
16 thinks we could have put that all together when the
17 Bates numbers aren't related, when they are not
18 "DEPEX" Bates numbers on the exhibits. It's just --
19 you know, the path is difficult enough without making
20 it complicated by leaving out random exhibits which
21 is, indeed, what happened.

22 I want to give the Court another example.
23 Mr. Schiefelbein is also -- I'm probably not
24 pronouncing his name correctly -- but he's also a
25 Microsoft executive. The exhibit, Your Honor, is

1 Exhibit 40.

2 And here's what happens, Your Honor. I
3 wrote on November 7th and I say to Mr. Neuhaus,
4 "Mr. Neuhaus, here are things I'm missing. I'm
5 missing Exhibit 40. I don't know where it is." And
6 they argue, Your Honor, that because I wrote and
7 couldn't find Exhibit 40, we should not get any more
8 documents. But it was, in fact, Microsoft's fault.
9 This exhibit was not with the original set of
10 exhibits. The exhibit is handwritten. It does not
11 have even an exhibit number on it, Your Honor. It
12 has no exhibit number any place on it. It's not
13 marked with a "DEPEX" Bates number. Why wasn't it in
14 the production? Microsoft says this, "We took it
15 out. We redacted it and we didn't, you know, without
16 telling us, of course, but we took it out, we
17 redacted it, then we put it back in somewhere in the
18 17 million pages we produced." And now plaintiffs
19 are attacked for not being able to find it without
20 their help.

21 The next one, Your Honor, has to do with
22 even after the exchange with defense counsel, I was
23 undeterred. I wrote another letter on January 27th.
24 When I got that reply, Your Honor, the defendant said
25 that we clearly could not manage our documents and

1 threatening to bill us for the time they spent
2 looking for these documents.
3 Here's one of the documents I asked for,
4 Your Honor. If you look at Exhibit 25, Your Honor,
5 you will see that on the second page of that down at
6 the very bottom there is something indicating that
7 there was an attachment and it says "File Jimall."
8 It's "J-i-m-a-l-l 2-4-99." Well, I'm looking at that
9 and I know what that means, Your Honor. That means
10 there's an attachment to this. There's a PowerPoint
11 that went with this document. The PowerPoint was not
12 with the document. So I wrote and I said, "Where is
13 that attachment?"
14 In response Mr. Neuhaus pointed me -- or I
15 couldn't find it. And, Your Honor, it is the next
16 one. It's the same initial exhibit. I have not
17 given you all the pages of the PowerPoint because the
18 thing is about 130 pages long. That's not the point
19 I'm trying to make. I'm trying to say to the Court
20 we made a legitimate request for a handful of
21 documents that we couldn't find and that's why --
22 that's why Microsoft says the Court should not let us
23 have any more. The Bates numbers on what Microsoft
24 pointed me to don't have any relationship whatsoever
25 to the Bates numbers of the original exhibit that we

1 asked about. It's separated by 250,000 Bates pages.
2 How could we have found the document among the
3 thousands that were referred to?
4 Mr. Ulchin is a very high-level executive.
5 Got thousands of documents that refer to him.
6 And, Your Honor, you'll also notice that
7 there's no real title on the attachment. We couldn't
8 search by title. The title is "Windows Media
9 Technologies," and there's no title given on the
10 attachment. So we thought that asking for that
11 document was justified.
12 The next one, Your Honor, is Phillips 15,
13 and in that one I've highlighted both for you and for
14 defense what I was concerned about. This is the one,
15 Your Honor, that I got with the original production,
16 this Exhibit 15. It says at the top, Your Honor,
17 "Karl Neumann, LCA." It's an e-mail from
18 Mr. Stockdale to a bunch of people, and I'm looking
19 at it and I'm reading through it and I see that there
20 is this sentence or this phrase, Your Honor, at the
21 first highlighted portion: "Announce this deal by
22 the 16th, and the --" Well, I thought, "Golly, that
23 doesn't seem like a complete sentence to me." Then I
24 see it says, "I see three choices: Rewrite the
25 release," and then three letters, "bas." Well,

1 that's only one choice.

2 So I wrote Mr. Neuhaus and I said, "Well,
3 you know, that doesn't seem complete to me. Where is
4 a complete one of these?" And he pointed me to a
5 couple of places. And one of them, Your Honor, is
6 right. It's the same -- it's not the same e-mail
7 actually, but it is the e-mail that he pointed me to.
8 But when I looked at it, I saw that there were still
9 differences. I saw that and this one that he pointed
10 me to. It says, "This deal by the 16th period." And
11 the words "and the" are not there. And in the three
12 choices, "I see three choices." The first one is not
13 "Rewrite the release bas." It is "Stay the course,"
14 and then, "rewrite release" is the second choice and
15 it doesn't have the "bas." Again, we're justified in
16 asking for assistance, and, you know, despite the
17 defendant's accusations of carelessness, Your Honor,
18 I would point out that I read the document close
19 enough to realize there was stuff left out, a
20 sentence in the middle of the e-mail was incomplete.

21 Let me -- I'm done with that, Your Honor.
22 As I said, there are more in the brief and many more
23 in connection with this production, but I hope that
24 this gives the Court some idea of what we were
25 facing.

1 I want to talk for a moment about the
2 deposition transcripts because we've gone --
3 Microsoft goes on for pages about this.
4 As the Court is aware, we have about 1400
5 transcripts through the Gordan case. We learned
6 immediately before the Gordon trial that there were
7 different versions of the depositions, lines and
8 pages were off. It was a disaster. You know, we had
9 designated from one transcript and they had
10 designated from a different one that we did not --
11 you know, Your Honor, when you print it out -- I'm
12 not sure why this happens -- but sometimes they get
13 corrupted in some fashion, so we also found in the
14 beginning of that trial that some of the videos were
15 corrupted and most of the exhibits in those
16 depositions were not provided with the deposition at
17 all.

18 As I mentioned earlier, we found
19 depositions or disks that were not marked. And as
20 for the exhibits, they were just everywhere.
21 Microsoft substantially overstates what we requested
22 and does not mention that, in fact, it produced
23 depositions and exhibits that we didn't have. In
24 some cases it didn't because it's lost the deposition
25 or the video or the exhibits or all three. Microsoft

1 did refuse to help us correct the corrupted
2 depositions. Now we've designated from them, as I
3 said I would have to do, and Microsoft has
4 complained. And even though I said I wouldn't
5 correct them, Your Honor, I have because it isn't the
6 opening day of trial. But Microsoft cannot use our
7 request to work with us on these deposition problems
8 to argue against our discovery motion and cannot
9 defeat our motion to compel by pointing out problems
10 that it has created and saying, "See, they can't
11 handle this volume." We can and we have despite what
12 Microsoft has said about it.

13 There's a general request that we have
14 made, Your Honor, that I will deal with next, unless
15 the Court -- I've got quite a bit more, Your Honor.

16 THE COURT: Why don't we take a break then.

17 MS. CONLIN: That's what I was wondering if
18 you would want to do.

19 THE COURT: 1:15.

20 MS. CONLIN: I'm fine, Your Honor.

21 THE COURT: 1:15.

22 MS. CONLIN: Oh, I thought you said fifteen
23 minutes, Your Honor. I have my meal with me, so --

24 THE COURT: 1:15.

25 (A noon recess was taken.)

1 THE COURT: Is everybody ready?

2 You may proceed.

3 MS. CONLIN: Thank you, Your Honor.

4 I was beginning to talk about our request
5 for the defendant to identify the Bates numbers of
6 the documents that answer specific requests for
7 documents.

8 I've shown the Court what Microsoft gives
9 us as production lost, and this is simply the
10 electronic equivalent of the infamous "dump truck" of
11 documents, though there are several dump trucks here.
12 It reminds me of the asbestos cases where the
13 defendant said to us, in effect, "Here is the key to
14 our 50,000-square-foot warehouse out in the middle of
15 nowhere where we have stacked the documents in bank
16 boxes from the floor to the ceiling. There isn't any
17 heat and we dare you to find the important
18 documents." That's what we're dealing with here.
19 And the asbestos approach, that approach by the
20 defendant, so incensed a Scott County Judge -- I bet
21 you know that -- he threatened to issue an arrest
22 warrant for the first official asbestos company that
23 crossed into the State of Iowa, and this is the
24 electronic equivalent of that situation.

25 Your Honor, we've made two requests to deal

1 with Microsoft's documents log. One is provide us
2 with the Bates numbers that match up with the
3 requests that we've made or provide us your lists and
4 indices and summaries. I will deal with that one
5 later when we deal with this Bates No. 1 now.

6 Microsoft says that they can rely on the
7 federal rule which says Microsoft can produce
8 documents in the ordinary course of business. First
9 of all, they haven't done that, unless the folks
10 listed on our Exhibit 13 -- which I showed Your Honor
11 with the sources listed and the documents every which
12 way -- it does not make sense for production to be
13 done the way this has been done. It cannot be in the
14 ordinary course of business.

15 Second, as I'm sure the Court is well
16 aware, production in the ordinary course of business
17 is, in fact, not part of the Iowa Rules; and, third,
18 even if it were the rule, federal courts have held
19 that where the producing party -- where the producing
20 party's filing system is so disorganized that the
21 party to whom the documents are produced cannot make
22 its own review, the producer has to fix it one way or
23 another. Your Honor, and if there ever was such a
24 situation, this is it. Producing documents in no
25 apparent order does not comply with the party's

1 obligation under the Iowa Rules of Civil Procedure.
2 As an example, the hundreds of pages of e-mails are
3 downloaded from some executive's desktop computer and
4 this is before the document destruction policy. They
5 are not in any order. Other e-mails are incorporated
6 with them and they cover every possible issue: DRI
7 OS/2 applications. They include personal
8 communication, like, "Should we go to the baseball
9 game? or, you know, "Do I need to stop on the way
10 home to get groceries?" Just a document dump from
11 that computer. Microsoft, however, knows what
12 responses go with what request. In order to find the
13 documents and produce the documents, it has to match
14 them up with a document request. So Microsoft knows
15 and says it has the absolute right to hide the ball
16 from the plaintiffs. That isn't the law of Iowa, and
17 what we ask you is that Microsoft tell us what it
18 already knows.

19 Let me move now, Your Honor, to the
20 document request at issue. Rick and I are dividing
21 our argument because we divided our responsibility
22 for different aspects of the case.

23 Let me begin with antitrust policies and
24 antitrust training materials, that's 83 and 84. It's
25 a very simple one, Your Honor. If, in fact,

1 Microsoft has no producible documents on these two
2 subjects either because they didn't have any kind of
3 policy at all until 2002, which is what we think is
4 the case, or because whatever they had, they plugged
5 the attorney-client privilege, they just need to say
6 that clearly and concisely. That's what we ask for.
7 That's what we're entitled to. As ridiculous as we
8 think it is to cloak an antitrust policy with the
9 attorney-client privilege, we will accept that.

10 The next set of requests on which we still
11 have issues are those for personnel documents for
12 four employees, the first of which is Brad Chase.
13 Brad Chase is a Microsoft executive. At relevant
14 time frames he had charge of products at issue. And,
15 Your Honor, here is the deal. We have two or
16 three -- I can't remember for sure, but I've given
17 them to you, Your Honor. We have some of his
18 personnel appraisals. They were produced in some
19 other case. We've been able to locate them. We have
20 them. They contain two kinds of things. Two kinds
21 of admissions.

22 They describe in a congratulatory way what
23 Mr. Chase did to destroy DRI. They also contain
24 another kind of admission with respect to the quality
25 of the product, DRI, and what we say is Microsoft

1 already had to produce these in another case. We
2 just want the rest of them, and we think we are
3 entitled to them.

4 The second -- let me see, Your Honor, I've
5 given away all of my lists. Mr. Chase is Request 87.
6 Request 119 is for the personnel documents of two
7 unidentified people who Bill Gates in his sworn
8 testimony says were disciplined for violating the
9 company's reported antitrust policy.

10 At the time of the deposition, Mr. Gates
11 refused to give the names of those folks at his
12 attorney's suggestion. Although he did give some
13 descriptive information: One from England, a low-
14 level employee; one from Germany, a higher level
15 employee. And he talked a little bit about the
16 situation that he says gave rise to discipline for
17 violating the antitrust policies, Microsoft says they
18 won't produce the personnel documents because we
19 can't identify those two people. Because we don't
20 have any way -- any way at all of knowing who they
21 are because Mr. Gates won't say. We think
22 Microsoft's refusal might well be based on something
23 else entirely that, in fact, nobody has ever been
24 disciplined for antitrust violations no matter how
25 egregious. If two people were, in fact, all they

1 need to do is ask their top guy. He knew at the time
2 of his deposition a few years ago, and then they can
3 find out names. I mean, it's ridiculous to say we
4 should be able to identify two people's whose only
5 identify was in Mr. Gates' deposition and he wouldn't
6 say.

7 Perhaps, Your Honor, I should address one
8 other issue and everyone is concerned about privacy
9 in terms of personnel documents. And we are under a
10 very strict confidentiality order which we have
11 vigorously adhered to. There will be no violation of
12 the right to privacy. I don't think that I provided
13 the Court with any authority in the brief. I don't
14 know for sure that this is at issue, but I know that
15 the Court has probably dealt with these personnel
16 issues before and in this case we have the
17 confidentiality order and also and in actual fact
18 there is no privacy in personnell file. There is in
19 your social security number and medical data and
20 things of that sort that we don't seek, Your Honor.
21 What we're looking for in these files are things like
22 personnel appraisals, things that would congratulate
23 the employee, you know, commendation, disciplinary
24 action, that kind of stuff; not medical records, not
25 social security numbers. And if the Court orders the

1 production of those, certainly we're happy to work
2 with the defendant to be sure that we do not ask for
3 or receive things that we really don't need. I don't
4 care anything about the medical records. They aren't
5 supposed to be in personnel files anymore anyway.
6 But we do want to be careful. We are sensitive to
7 that, Your Honor.

8 And the fourth person -- we've got
9 Mr. Chase and then two unidentified people. The
10 fourth person is a man named Michael Dryfoos,
11 D-r-y-f-o-o-s. Again, Your Honor, we've got some of
12 these. We've got some of his performance appraisals.
13 So it's just unsupportable for Microsoft to say we
14 can't have the rest.

15 Mr. Dryfoos is, or was -- I don't know if
16 he's still at Microsoft or not -- a senior technical
17 person at Microsoft in charge of MS-DOS 5.0 and
18 MS-DOS 6.0, two products that competed with DR-DOS,
19 and they are very much -- very important in
20 connection with our lawsuit.

21 Mr. Dryfoos was also selected by Microsoft
22 to provide testimony to the FTC in the early '90s in
23 connection with investigation of some of Microsoft's
24 practices; but apparently Mr. Dryfoos got off the
25 ranch at some point and offered two documents that

1 are very embarrassing to Microsoft, one of which
2 destroys a part of its defense in connection with DRI
3 and DR-DOS, which is the competing operating system.
4 When peer executive Brad Silverberg, who was, I
5 think, a couple of levels above Mr. Dryfoos, was
6 confronted with those two documents in the course of
7 his deposition, his only response was to say of
8 Mr. Dryfoos, "He's just a disgruntled employee."

9 And what does Microsoft respond when asked
10 to produce contemporaneous documents created by
11 Microsoft during this time frame that assessed the
12 performance of Mr. Dryfoos? They say
13 Mr. Silverberg's statement only goes to Mr. Dryfoos'
14 state of mind, not to his job performance. Common
15 sense tells us that the state of mind of an employee
16 towards the employer is usually reflected in job
17 performance. It's manifestly unfair for Microsoft to
18 be able to protect this guy on the one hand telling
19 the jury not to believe him because he's a
20 disgruntled employee; and on the other hand, refusing
21 to produce their own internal relevant documents that
22 assess his performance as an employee. Certainly it
23 just cannot be argued that those personnel documents
24 would not be relevant to the issue of whether or not
25 Mr. Dryfoos was disgruntled. If he was so

1 disgruntled that he would write two documents filled
2 with lies, according to Microsoft, it's likely that
3 his state of mind would otherwise affect how he did
4 his job and the personnel documents would reflect
5 that.

6 All on the personnel files. We've already
7 done five, Your Honor. The next one is the other
8 lawsuits. In our original request for production of
9 documents, we requested materials from ten lawsuits.
10 We've whittled that down to the four that we think
11 are the most important. I'm going talk briefly about
12 each of them. Before that we maintain our requests
13 for production from our Bristol -- the name of this
14 is very difficult, I think it's Pancerzewski -- I
15 will spell that -- the Aldridge case and a case
16 involving a company called Z-Nix.

17 I've set out the case -- I think what I am
18 going to do, Your Honor, I've set all of the facts in
19 my brief, and I'm just going to deal with the one
20 case and that's the Z-Nix case. It's a long time
21 ago, Your Honor, and I don't know why this was not
22 produced in other cases, but this is a case that
23 Microsoft brought. Microsoft was the plaintiff in
24 the case for breach of contract against Z-Nix.

25 Z-Nix was a manufacturer of the mouse

1 product, but Z-Nix had bundled its manufactured mouse
2 with DR-DOS, the competing operating system. I've
3 given you some documents about this, Your Honor, to
4 sort of explain it. It is my Exhibit 31. Looking
5 down at this, this is also Plaintiffs' Exhibit 1324.
6 On the first page it shows that Microsoft employees
7 receive an article about the subject of which is
8 "Novell Enhances DR-DOS 6.0 with Business Update."
9 The date of the article is May -- I need -- I think
10 it's May 15th. I think I looked at that through my
11 magnifying glass and it looks like 19 now, but I
12 think it's 15. It's not terribly important, but
13 turning to the second page of the article, it's about
14 Z-Nix.

15 It says, "Z-Nix, Inc., from Pomona,
16 California, has bundled DR-DOS 6.0 and Microsoft
17 Windows 3.1 with its Super Mouse II and Cordless
18 Super Mouse products. We've been testing the two
19 products from top to bottom for a month now, and
20 we've uncovered no incompatibilities, said
21 C.J. D'Angelo, vice president of sales. We are
22 confident our OEMs and end users will be equally
23 successful."

24 It goes on to say, "DR-DOS 6.0 is the most
25 advanced DOS in the industry" and so on. The point

1 of this is Z-Nix is bundling DR-DOS. That infuriates
2 Mr. Silverberg, the Microsoft executive, and he sends
3 two other Microsoft executives, Joachim Kempin and
4 Brad Chase, this one sentence e-mail, which I've
5 highlighted for the Court, and he says to them, "Look
6 what Z-Nix is doing," exclamation point. "Cut those
7 f'ers off." Now, that is on May 9th.

8 Microsoft filed the lawsuit against Z-Nix
9 about one month after Mr. Silverberg's demand to cut
10 them off. Z-Nix counterclaimed alleging antitrust
11 violations in the operating system market. I gave
12 you, Your Honor -- it's not in the pile of the stuff
13 I gave you this morning -- but in the material
14 attached to my affidavit, you'll see the
15 counterclaim, and it alleges antitrust violation in
16 the operating system market.

17 It's also important, Your Honor, to note
18 that Microsoft talks in its documents about using
19 litigation against its competitors as a competitive
20 tactic, and here's a clear example. It was a long
21 time ago, 1992, but we should be able to see whatever
22 remains from that litigation as well from the other
23 three.

24 Pancerzewski -- Mr. Pancerzewski brought an
25 action for wrongful discharge against Microsoft. He

1 believes that -- he alleged that he was wrongfully
2 discharged because he was a whistle-blower in terms
3 of Microsoft accounting practices. Bristol was a
4 plaintiff in an antitrust action against Microsoft
5 also alleging that it's -- that Microsoft engaged in
6 anticompetitive tactics in the operating system
7 market.

8 And the last one is Aldridge. I go in some
9 detail in that one, Your Honor. That was filed down
10 in Texas, dismissed on the motion of summary judgment
11 and had to do with something almost "that is so close
12 to what we contend happened with DR-DOS."

13 The Aldridge Company said that Microsoft
14 put into its system -- since technically when you
15 loaded the disk-caching system that Aldridge made on
16 top of the Microsoft product, Microsoft product would
17 tell the user in a series of ever more threatening
18 warnings that using the foreign disk-caching system
19 would cause segregation of performance. And we say
20 they did very similar things with respect to DR-DOS
21 and they started back in 1988 doing those kinds of
22 things with foreign applications. So we think we're
23 entitled to these additional documents.

24 Moving now, Your Honor, to Requests for
25 Production of Documents 1 and 2, and in that request

1 we ask for the lists, indices and databases that the
2 defendant has. There are several cases that support
3 the plaintiffs' request, and none of them are as huge
4 or as aggravated as this one. Microsoft says this is
5 work product. Some cases say it's not, but if it is,
6 what we need to show the Court in order to get these
7 materials from Microsoft, which they admit that they
8 have, is substantial need. What is our substantial
9 need for getting what may or may not be work product?
10 Here it is, Your Honor.

11 Number one, quantity. We have 23 million
12 pages of documents. I happen to have studied the
13 issue of how many pages you can get in a bank box.
14 It's about 74 or 7500 bank boxes full of materials.
15 I'm never going to print them out and put them in
16 bank boxes, but that's a measure that makes sense to
17 me.

18 The second thing that constitutes
19 substantial need is the manner of production. The
20 meaningless production logs, the totally unhelpful
21 transmittal letters which tell us nothing and the
22 disorganized production. The cases are mixed
23 together. The documents and the depositions and the
24 exhibits are mixed together in no order of any kind.
25 It is certainly not the way that we would have

1 anticipated the production of materials from already
2 litigated cases. Like the deck was shuffled. It was
3 like 100 decks were shuffled, thousands, many.
4 Things that go together, like the Bay exhibits -- one
5 example of many, many, many examples -- comes week or
6 months apart. These are Microsoft documents. They
7 have had them for years. They either originated with
8 Microsoft or were produced to Microsoft by its
9 opponents in connection with litigation with
10 Microsoft. We've had them for a few months.

11 Let me deal for a moment with the issue of
12 work product. Microsoft says that the indices, et
13 cetera, are work product and contain mental
14 impressions of the lawyers, but it doesn't give us
15 any affidavit about that. It doesn't tell us how
16 these indices, or whatever they have, are kept.

17 What would be a usual way of doing this
18 would be on an Excel database, you know, with
19 different fields. You've got your field for date and
20 author and, you know, it's an e-mail, sender and
21 receiver and the subject, you know, their topic and
22 some few words, perhaps, about the content of the
23 document. In most of these that I have seen, there
24 is a field for attorney comments, you know, that's a
25 separate field. Take that off.

1 In Hense, the Iowa Supreme Court case, what
2 the Court did there was affirm a lower court order to
3 produce a document. That was internal. I think it
4 was a Copper 7 or Delcon Shield case, I don't
5 remember which. And the company had denied the
6 existence of the index and somehow produced some part
7 of it or some document that indicated that it
8 existed, and it really annoyed the judge, as I'm sure
9 it would any judge, and he ordered as a sanction that
10 they produce them all. It was appealed and the
11 Supreme Court said, "Yes, that's fine." I cited that
12 carefully to the Court, noting that it was as a
13 sanction. But that's not the only case -- the only
14 Iowa case -- that has been reported, but there are
15 cases from other jurisdictions and let me just talk
16 about two of them, Your Honor.

17 One of them is Washington -- or let me
18 start with Bloss, B-I-o-s-s. In that case there were
19 76 bank boxes full of documents, not 7400 or 7500,
20 76; and the Court held in that case it is not work
21 product, that indices are not work product because
22 they do not require any particular legal skill to
23 prepare.

24 The Court also rejected their claim of
25 attorney-client privilege and ordered the indices

1 produced, not as a sanction, but because they were
2 appropriate to give in that case, the plaintiff, I
3 think.

4 Another case, Your Honor, is Washington
5 Bancorporation. These cases are cited in the brief,
6 Your Honor. And in that case there were 2400 boxes
7 of documents as opposed to the 7500 or so here. And
8 in this case the Court held the summaries should be
9 produced even though that Court held that they were
10 work product because of the the sheer volume, 2400,
11 and the necessity to replicate the indices and that
12 those were the factors that constituted substantial
13 need.

14 Here we have an additional factor, Your
15 Honor, the train is speeding down the track towards
16 trial and there is simply no time to replicate what
17 the defendant already has. So what we have is a
18 situation where the production is inexplicable.
19 There are millions of pages of documents. There's no
20 key for us to open those in a way that makes sense.
21 The deck has been shuffled, and we are in need,
22 substantial need, of the indices, summaries and lists
23 that the defendant has.

24 We ask the Court to exercise its discretion
25 to permit us access to whatever the defendant has to

1 describe and organize these documents.

2 THE COURT: Mister --

3 MS. CONLIN: I'm not done. I'm sorry, Your

4 Honor.

5 THE COURT: Okay.

6 MS. CONLIN: I'm taking a little rest. I

7 don't know why I'm losing my voice. This isn't a

8 good sign. I am on the down side, Your Honor. I do

9 want to encourage you. I am on the down side.

10 THE COURT: Okay.

11 MS. CONLIN: 114 is the document retention

12 notices.

13 THE COURT: Okay.

14 MS. CONLIN: We requested that document

15 retention notices sent by Microsoft to its employees

16 in connection with this case and the other case for

17 which we have documents. We believe that the Court

18 will ultimately decide that Microsoft has adopted

19 policies that are intended to lead to the destruction

20 of e-mail and that's the principal means of

21 communication at Microsoft. We have provided

22 materials to the Court under seal from the Burst case

23 which described those policies from 1990 on. We will

24 not discuss those on the record, but I do urge you,

25 Your Honor, to take a look at those materials. I'm

1 sure you will. To me, at least, they are truly
2 shocking. But even in the early 1990s and in
3 connection with the discussion of the Robinson Patman
4 Act, Bill Gates wrote -- and I have given this Court
5 a document. This document is also filed under seal,
6 Your Honor, although I think that it has been
7 referred to in some public publications.

8 On this document, Your Honor, it's admitted
9 to be in the handwriting of Mr. Gates and the Court
10 can look at it and see I have highlighted. First of
11 all, it says, "Time/Robinson-Patman." Then over here
12 it says "e-mail purge." And certainly the
13 description of the duties of Mr. Gate's technical
14 assistant, which I've already -- which I've provided
15 to the Court in the exhibits -- would indicate that
16 Mr. Gates meant what he said. The policy of
17 destruction is supposed to be suspended on the
18 reasonable anticipation of litigation or when
19 litigation is filed. And when Microsoft employees --
20 of which there are, of course, thousands -- are
21 supposed to get document retention letters, which I
22 believe come by e-mail, there is evidence to support
23 that doesn't always result in the retention of
24 documents. But one of the issues here is whether
25 Microsoft really notified all the people who should

1 be notified not to continue to destroy their
2 documents. Clearly, it is not always done so. In
3 Burst it was discovered that Microsoft did not send
4 retention notices to two of the people who were
5 deeply involved in one of the transactions at issue
6 between RealNetworks and Microsoft.

7 The Burst materials make clear that
8 attorneys for Burst either had the document retention
9 notices or a list of who they were sent to and when
10 they were sent and what subject matters they would
11 cover. And we would accept, in lieu of the actual
12 documents, retention notices such as a list to avoid
13 any legitimate claim of attorney-client privilege
14 with respect to those notices. Microsoft's foliation
15 of documents in any of the underlying cases, whether
16 it be the FTC, DOJ competitor cases or this case,
17 directly affects the plaintiffs here, those documents
18 that we rely on to prove our case. If we don't have
19 all of them, there's certainly reason to believe that
20 some of them were destroyed, then that matters. This
21 is very a serious issue. It goes to the integrity of
22 the process. Plaintiffs believe they are entitled to
23 learn the nature and extent of Microsoft's
24 notification to its employees to retain documents.
25 That's what we ask for, Your Honor.

1 I don't want to take a long hesitation.
2 Interrogatory 21, that is what I have left.
3 Mr. Hagstrom has a few more, but let me talk about
4 Interrogatory 21. That is the only remaining
5 interrogatory, Your Honor, from the fourth set that
6 we have at issue.

7 In that interrogatory we asked the
8 defendant to provide to us the stockholdings and the
9 option to purchase Microsoft stock. The question is:
10 Are plaintiffs entitled to know and prove the extent
11 of the stockholdings that witnesses who either come
12 here to testify in court or whose depositions are
13 offered in Court on behalf of Microsoft? It seems so
14 crystal clear to me that it's really hard for me to
15 understand the contrary argument. It was also clear
16 as it happens, Your Honor, to Microsoft's attorney.

17 When they asked those very questions to
18 every single witness whose deposition they took --
19 and I've given the Court five or six examples -- in
20 one of those examples, I think the lawyers get in a
21 little tussle about whether or not it's appropriate
22 and Microsoft attorney said, "It's my absolute
23 right," or something to that effect, and I rooted
24 that Microsoft attorney, it probably is. In that
25 case, in Caldera, they explored not only the holdings

1 of the witness in the plaintiff company, but also in
2 all related companies. And in one case, I believe it
3 was Mr. Williams, in every company that -- which he's
4 ever been associated with.

5 The cases allowing the full exploration of
6 the sources of possible bias are legion, really
7 legion. Whatever might affect the witness's tendency
8 to testify truthfully is always fair game. It is
9 right in the standard jury instructions that every
10 judge gives every jury I betcha; but if we can't
11 discover it, we can't prove it. Microsoft succeeded
12 in getting the judge in Minnesota to limit the
13 testimony to whether or not a particular witness had
14 more than a million dollars in stocks or stock
15 options.

16 Had we not settled, that would have be an
17 important point on appeal. Microsoft seeks the same
18 limitation here. I just don't know of any precedent
19 for such a limit. Here, Your Honor, we have
20 witnesses with literally hundreds of millions of
21 dollars riding on the outcome of this case. If there
22 is a verdict and the stock goes down even a few
23 dollars, some of these witnesses will lose hundreds
24 of millions of dollars because that's how much stock
25 they have. If it crashes -- and I think there's no

1 reason to suspect it will -- but if it does,
2 eventually there will be billions. For most human
3 beings, that would be motivation to color their
4 testimony in a way to design to avoid that result,
5 consciously or subconsciously. Microsoft offers an
6 excuse while you ought not to do this.

7 First of all, Your Honor, the reason I ask
8 the question now is to avoid any problem of time
9 crunch, but Microsoft says, "Oh, we can't do that
10 because these depositions were taken a long time ago.
11 Too hard to go back and figure that out."

12 In Gordon, Your Honor, that would have
13 involved, from the best I can determine, counting up
14 the depositions that would have been offered in
15 Gordon, that would have been 20, 25 people that would
16 be affected. I'm sure more witnesses here because,
17 as I said, there's more to this case.

18 Microsoft refused to permit the deponents
19 to answer these questions about Microsoft's
20 stockholdings at the time of the deposition when it
21 would have been easy, so it is now more difficult to
22 find out. But that's Microsoft's fault, not ours.
23 They created the extra burden, so they ought to carry
24 it.

25 We tell jurors in Iowa the truth about

1 nearly everything except insurance. We should not
2 and cannot hide from them relevant information about
3 the amount of the stockholdings and people whose
4 testimony they are being asked to judge, to assess to
5 determine whether or not it's credible. We just --
6 we just don't do that.

7 Your Honor, that completes my part of the
8 request of the Motion to Compel.

9 THE COURT: Mr. Hagstrom.

10 MR. HAGSTROM: Thank you, Your Honor. I
11 just wanted to add one comment about the fourth set
12 of interrogatories. Ms. Conlin addressed
13 Interrogatory 21, and I think it's 22 through 26. As
14 part of the agreement that we talked about first
15 thing this morning, we withdrew (a) through (f), and
16 we've agreed that as to (g) and (h), we're going to
17 meet and confer; and based upon representations of
18 Mr. Neuhaus, it sounds like we should be able to come
19 up with a solution for those.

20 I'm going to address Document Requests 106,
21 107, 109, 110 and 117, and I will start with 106 and
22 107. 106 requests all documents that discuss or
23 analyze Microsoft's end customer prices relative to
24 its competitors from 2001 to the present. And first
25 let me just start with the last clause of that

1 request from 2001 to present.

2 The reason for that limitation is because
3 we were -- in the prior cases, California and
4 Minnesota, same type of information was requested,
5 same type of information was provided. So all we
6 were looking for is really, then, an update for the
7 last few years.

8 Unlike with the prior productions, however,
9 where Microsoft had provided information for the
10 products at issue; in other words, Operating System
11 Software and the Applications Word-Processing -- now
12 I'm losing my voice too.

13 MS. CONLIN: It's that bad wind.

14 MR. HAGSTROM: -- Word-Processing Software,
15 Spreadsheet and Office, those are the products at
16 issue. So that information was provided us to those
17 pre-2001 and Microsoft has represented that it has
18 complied with that request here for post-2001. The
19 difference, however, relates to products not at
20 issue. Microsoft has a number of other both software
21 and what you might call "hardware" products that are
22 sold. And we've got information in the prior cases,
23 but in this particular case we have not received that
24 information for these products not at issue. And we
25 had a meet-and-confer in the first week of January,

1 and as part of that process -- I think it was
2 Mr. Neuhaus, it might have been somebody else from
3 Microsoft, said, "Well, we've got so many products.
4 Narrow your list to nine, ten, something like that."

5 So what we did on January 9th then, the
6 following week, I sent an e-mail to Mr. Neuhaus, and
7 I wrote as a follow-up to our call last week
8 concerning plaintiffs' fourth request for production,
9 particularly Request 106 and 107, you asked that I
10 give you a specific list of not-at-issue products to
11 put a limitation on the requests. We are willing to
12 limit the requests for not-at-issue products to the
13 following nine product categories: DeskTop
14 Publishing, which includes the Publisher and Picture
15 at Publishing; the second one was personal finance,
16 which includes Money, the Money software; relational
17 database, which is the Access product; languages,
18 which includes Visual Basic and Visual C++; network
19 operating systems, which includes Windows NT and
20 Windows Server; server relational database, which
21 includes the SQL server; presentation software, which
22 includes PowerPoint; project management, which
23 includes Project; and then drawing software, which is
24 Visio, V-i-s-i-o. And I ask, "Please let me know if
25 this is agreeable."

1 Ultimately, then, Microsoft chose not to
2 agree to this limitation, and so basically what we're
3 asking for here is simply an update of what had been
4 provided previously, narrowed down to these nine
5 product categories for the type of information that
6 we requested. And let me just clarify what type of
7 information is requested.

8 One example is that Microsoft puts together
9 an analysis of what the street prices of its products
10 will be. So, in other words, Microsoft sets a price
11 for its direct distributor/purchaser; and then, of
12 course, the product proceeds through the distribution
13 chain and then ultimately it's sold at retail, for
14 instance, and the street price then is basically a
15 projection of what the price of the product will be
16 once it reaches the street. So, in other words, if
17 Microsoft sells product, say, at \$50 to its direct
18 purchaser and then it does this study and shows a
19 street price of \$100, that's the type of document
20 we're looking for.

21 And we have received these types of
22 documents for the products at issue, and we know they
23 exist for products not at issue such as for these
24 categories here. And then let me just explain why
25 these types of documents are important, Your Honor.

1 Our damages experts in California and
2 Minnesota proceeded with three types of methodologies
3 to estimate overcharge damages. One was "profit
4 margin," one was "rate of return," and one was called
5 "price premium." And this type of information is
6 relevant to the price premium methodology. And
7 simply put, the price premium methodology compares
8 the price premium that Microsoft is able to get on
9 monopolized products compared to the price premium it
10 gets in nonmonopolized products and then also looking
11 at price premiums of competitors' products.

12 So what this shows, then, is that the price
13 premium that Microsoft gets for a monopolized product
14 is much higher than the price premium for
15 nonmonopolized products as one would expect. So this
16 type of information is important for that type of an
17 analysis and that is the analysis that the experts
18 have done previously with the documentation through
19 2000. So we're looking for, you know, the next set
20 of exhibits of the same type.

21 So let me turn to 107. This is all
22 documents and data that discuss or analyze
23 Microsoft's performance in different software
24 categories or markets using third-party data in 2001
25 through the present. So again, we have that same

1 clause at the end of the request for precisely the
2 same reason because this stuff -- responsive
3 documents were produced before and, again, it's the
4 same type of limitation. Microsoft, you know, said
5 it would produce only products at issue, not -- it
6 would not produce products not at issue. And so,
7 again, this e-mail that I read for Your Honor is the
8 same type of limitation for 107. Again, this
9 information, again, goes to the damages
10 methodologies.

11 So we believe that -- I think it's
12 self-evident Microsoft acknowledged through its
13 production in prior cases that these types of
14 documents were relevant or discoverable and so they
15 should be so treated here as well.

16 Let me turn to Request 109 and 110, and
17 I've had a discussion with Mr. Neuhaus this morning
18 and I think we have a disagreement about the scope of
19 these requests. Let me just basically tell you what
20 the issue is here.

21 These requests -- these requests focus on
22 MS sales data, and part of the calculation of
23 damages, as I mentioned, the three methodologies,
24 and basically you take, once you determine a percent
25 of overcharge by that and apply that to revenue,

1 apply that to, you know, revenue generated in the
2 state, you come up with an aggregate overall damages
3 for Iowa consumers, just very simply put.

4 So the revenue number from which the Iowa
5 revenue is drawn for these products at issue, the
6 first step in doing that is getting Microsoft's U.S.
7 revenue for these products at issue. And either
8 through some misunderstanding or something, we
9 haven't gotten the same production as we did in the
10 prior cases. And sort of another quirk here is that
11 after 2001 Microsoft changed the way it kept its
12 profit and loss statements. It used to have those
13 profit and loss statements by products. So, you
14 know, you could have it for Windows, Word, Excel,
15 Visio, Money, et cetera. And since 2001, they
16 segmented these products so now revenues and so forth
17 -- so these products are segmented together. So you
18 might have products not at issue mixed with products
19 at issue. You get aggregate numbers for that
20 segment.

21 So we talked with -- informally talked with
22 a person from Microsoft on Tuesday and about
23 addressing this U.S. sales revenue issue and, again,
24 I think Mr. Neuhaus suggests through talking with his
25 people -- and he will, of course, correct me if I'm

1 wrong -- but as I understand, there's a MARS database
2 that -- I think it's called Microsoft Accounting -- I
3 forget what the "R" and "S" is. But although in
4 response to these particular document requests, that
5 Microsoft said it was not going to give us the MARS
6 information, I understand that Mr. Neuhaus is now
7 going to work with us to get the MARS information and
8 he believes that that will be responsive.

9 So that's a very long explanation, but I
10 wanted Your Honor to understand in case something
11 doesn't work out here, that this is essential
12 information and we have Microsoft's representation,
13 as I understand it, that they are going to work with
14 us through this MARS database to now get us the
15 information for the U.S. sales.

16 One thing on the MS sales database issues
17 and the P&L statements too that I recall from
18 Microsoft's brief was that there was, you know, some
19 accusatory remarks about, "Well, why did plaintiffs
20 wait so long long to get this information?"

21 Well, the fact of the matter is we served
22 our request for these back last fall, but Microsoft,
23 as it has done in the prior cases said, you know, "We
24 will give you this stuff, but we're only going to
25 give it to you once because getting a pull out of MS

1 sales, for instance, interferes with our normal daily
2 operation."

3 So we said, "Fine, our class period is, you
4 know, continuing to run. We will try to hold off."
5 But we notified them at the end of last year and we
6 discussed it in the meet-and-confer that we had -- I
7 think it was January 2nd or 3rd, then it takes time
8 for them to pull and so forth. So what I'm saying is
9 the accusations that we sat on our hands or something
10 to get this data it just improper. We requested it
11 half a year ago, and at Microsoft's insistence, we
12 waited, and, you know, as it turned out, the changes
13 within the system and the changes within the pulls of
14 data, unfortunately, have lead to some problems. And
15 for that reason -- I mean, that was one of the
16 reasons we were seeking extension of time for the
17 expert deadlines, so hopefully we're on the right
18 track where we will get this problem fixed. The
19 experts will then have time to deal with it after we
20 get the updated data.

21 So let me turn to the Document Request 117,
22 and this asks for all documents relating to
23 negotiations directed to the settlement of, or
24 prevention of, litigation between Microsoft, and,
25 one, the DOJ and/or FTC in the 1994 investigation;

1 two, the DOJ and states in the 1998 lawsuit; three,
2 the Microsoft competitors including Be, Burst,
3 Netscape, Sun, Novell, IBM, Gateway and RealNetworks.

4 THE COURT: Just a minute.

5 Sorry. Go ahead.

6 MR. HAGSTROM: Certainly.

7 Microsoft contends that this request is
8 improper because it's seeking settlement materials
9 that, you know, are not admissible. But what we're
10 seeking here is documentation for purposes of
11 inquiring whether there's a possibility of bias by
12 witnesses; in other words, sometimes in settlements
13 of these type of cases, there are noncooperation
14 agreements either within settlement agreements or
15 side agreements or discussed as part of the
16 settlement and not really committed to writing and
17 that's what we're trying to get at.

18 And we've cited several cases in our briefs
19 that require some particularized showing. In other
20 words, Microsoft has argued in opposition that we
21 have to make some particularized showing, some
22 heightened burden to obtain these types of documents.
23 But we've cited In re Initial Public Offering
24 Securities Litigation, City of Wichita vs. Aero
25 Holdings; Bennett vs. La Pere, L-a P-e-r-e, and a

1 couple of other cases. So when Microsoft relies upon
2 the equivalent of Rule 408 and what Rule 1.503(1)
3 says, that "It's not grounds for objection that the
4 information sought will be inadmissible at the trial
5 if the information sought appears reasonably
6 calculated to lead to the discovery of admissible
7 evidence."

8 And Iowa Rule of Evidence 5.408 provides an
9 exception that evidence is not excluded when offered
10 to show bias or prejudice of the witness. So these
11 types of materials really serve the same purpose as
12 Ms. Conlin was describing with regard to discovery as
13 to stockholdings, witness's stockholdings and these
14 witnesses in Microsoft stock.

15 So it's our belief that Microsoft should be
16 ordered to respond to Requests 117 and that it's a
17 proper request. It's been shown to be such by a
18 number of courts, and we request Your Honor to grant
19 that.

20 And that's all, I believe, we have on the
21 motion to compel.

22 THE COURT: Mr. Neuhaus.

23 MR. NEUHAS: Thank you, Your Honor. Much
24 of the argument that you've just heard was made
25 particularly on the document dumped material for the

1 first time in Ms. Conlin's reply brief and her
2 supplemental affidavit, which attached far more paper
3 than they attached on their opening affidavit. And
4 I'm going to attempt to -- and that arrived a day
5 late. It arrived on Tuesday. It was due on Monday.
6 I'm going to attempt to respond to those points. I
7 have a set of documents that I would like to talk to
8 you about, and I've got a copy for Counsel.

9 THE COURT: Thank you.

10 MR. NEUHAUS: These are largely drawn from
11 the exhibits but not entirely. They are documents
12 that Ms. Conlin has. But this is the first time
13 we've had a chance to respond to much of these
14 allegations, many of which -- I mean, I've not heard
15 of any of this stuff -- many of these claims have not
16 been raised with us in this form at all. As you will
17 see, there is -- Ms. Conlin is completely wrong about
18 the nature of the production or the problems where
19 things have been produced out of order. It's, in
20 fact, because Ms. Conlin asked us to expedite
21 production of things or where documents are produced.
22 They were produced from prior production where that's
23 how they were produced in the earlier case.

24 Let me go back a step. There has been an
25 immense amount of document production in this case,

1 as Ms. Conlin says, 23 million pages of documents,
2 and that's an immense number. Her way of thinking
3 about it is 7500 banker's boxes. I thought if you
4 laid 23 million documents end to end, you would have
5 4,000 miles of paper, enough to get from Des Moines
6 to Anchorage, Alaska, which is about as far as you
7 could get and still be on land. So it's an
8 incredible amount of paper. That is -- most of that
9 was produced in the prior case, 17 million of that
10 was the result of Your Honor's order in July that we
11 produce documents that had been produced in earlier
12 cases to the competitors in other cases.

13 In addition, however, the plaintiffs have
14 served sweeping requests, huge requests, in this case
15 and we've responded to them. We've negotiated and
16 we've tailored their often extremely broad requests
17 down to things; and even so, it's been an immense
18 amount of production. It's a half million pages so
19 far just in the last four months of production and
20 that's continuing.

21 Microsoft has calculated the costs, and
22 I've submitted an affidavit on this, and in the last
23 four months -- this is not the 23 million pages.
24 This is just the 500,000 or since the last four
25 months, Microsoft has spent five and a half million

1 dollars in producing documents in this case. It's a
2 huge amount of material. This is a big case. But by
3 now the document requests with all of this material
4 up to now should be targeted. We shouldn't be in a
5 fishing stage. We shouldn't be looking for things
6 that maybe on the possibility there may be something
7 there, and that's what a lot of these requests are.

8 In many cases where you have discovery
9 obligations on both sides, there is kind of a natural
10 check to the kind of overreaching discovery requests
11 and that each side has requested of the other, and
12 that's not the case here. And so I think it's
13 unfortunate that we have to bring these matters to
14 you and these matters come to you, but the requests
15 here -- and I'll go through each one -- are not
16 justified and are not sound requests and they should
17 be denied.

18 I would like to first talk about
19 Ms. Conlin's request that we categorize the documents
20 for her. And before I do that, I think -- well, let
21 me -- well, there are five reasons why we shouldn't
22 have to categorize the documents for her, and then
23 I'm going to run through those in summary form. Then
24 I want to explain a little bit about how this
25 document production works in this case.

1 First, no rule requires us to categorize
2 it -- categorize documents for her. Second, and this
3 is most important, when Your Honor ordered the
4 production of the 17 million pages, Ms. Conlin
5 specifically undertook that she had the burden of
6 categorizing and analyzing the documents and you
7 relied on that in your ruling. Plaintiffs third
8 sought this same relief in a slightly different
9 context from Judge Reis and she denied it back in
10 2004.

11 Fourth, Microsoft does not have this
12 information. Microsoft does not record what a
13 document is responsive to and keep that record. When
14 it determines that a document is responsive, it says
15 yes, the reviewees -- and there's scads of these
16 reviewees -- yes, it's responsive and it goes. There
17 are times when we know that this is responsive to a
18 set of document requests and sometimes a single
19 document request because that's all that was being
20 reviewed in that time period, but we don't know
21 document-by-document what each document is responsive
22 to in this case, and we certainly don't know it as to
23 the prior cases where the documents were produced in
24 response to a completely different set of requests.
25 And so this would be an immense burden for Microsoft,

1 one that plaintiffs can bear just as well as we can
2 because what it means is going back and looking at it
3 document-by-document.

4 And finally, Microsoft has not produced the
5 documents out of order except that at plaintiffs'
6 specific request, which I will come to; and, in fact,
7 Microsoft has bent over backwards over and over again
8 to identify documents that plaintiffs say they cannot
9 find; notwithstanding the representation that she
10 would take care of it, that she would be the one
11 responsible for dealing with the burden of
12 categorizing documents.

13 Now, before I run through those points in a
14 little bit more detail, I want to talk about what
15 electronic document production is how it works, and
16 this is how it works in this case and how it works in
17 many other cases and certainly all the cases -- in
18 all the competitor cases, in virtually all of
19 Microsoft productions and in my other cases, in large
20 cases, and I don't think there's much difference of
21 view on this, but it makes -- but Ms. Conlin talks
22 about this as though it's an old-fashioned document
23 production with documents being thrown on your desk
24 in boxes and it's not that.

25 The documents are produced as images on a

1 disk. Okay? They are scanned in at Microsoft.
2 Typically, by the way, the vast majority of these
3 documents are e-mails, so they are just pulled off
4 the server.

5 Now, in the server the documents aren't
6 organized in any particular way. They are just
7 wherever on the disk the computer decides to put the
8 documents and that is an image -- or the e-mail. And
9 then programs, you can organize and you can organize
10 and sort that in any way you want. That's the
11 e-mail. Your Outlook program does that, but you can
12 do it with all kinds of other ways of organizing and
13 sorting documents from a server. Anyway, the
14 documents are pulled as images on a disk, they are
15 reviewed, determined to be responsive, someone checks
16 "Yes," and they are burned on to a new disk to be
17 provided on to plaintiffs.

18 We provide -- Microsoft provides two files
19 of that where available. The first is -- and I will
20 come back to "where available" -- the first is what
21 Microsoft calls a "feed file." I've heard it called
22 other things too, but it's just a file that says here
23 where the document begins and ends, begins and ends,
24 begins and ends. We have all these images. It just
25 tells you where the staple would go, but, you know,

1 that's the basic idea. So when you load it up, you
2 have the integrity of the document and you have a
3 separate file that will say, "All right. This is the
4 document and here is where it begins and ends."

5 The second thing that Microsoft provides is
6 the custodian of the document. In the case of an
7 e-mail, it's just the mailbox, and that is how it's
8 kept in the ordinary course of business. You know
9 that the mailbox is there, and you have all the
10 documents and the servers and they are linked
11 together in the production log, which is what she
12 calls -- well, Microsoft calls, she called it
13 something else -- "production digest" or something.
14 That's to provide the custodian, and I said "where
15 available." Many of these cases -- the documents in
16 this case, because we were producing from prior
17 production, were third-party documents, documents
18 produced by Caldera, the one that she got listed,
19 Bates numbers that she said, "This is production log,
20 this is worthless to me." That's the way the third
21 party produced to Microsoft.

22 Microsoft -- and that's -- a lot of times
23 that happens, particularly with third-party
24 production, not so much party-to-party, but
25 third-party production. You often get -- you know,

1 they don't provide you with the custodian. They just
2 give you the "begins" and "ends" and it's up to you.
3 Sometimes you fight over it, sometimes you don't, but
4 you don't necessarily have a custodian log for
5 third-party production because this was -- your order
6 was to produce, you know, what was produced in the
7 prior cases. They get that and they get what we have
8 on that, which is the production log provided by the
9 third party, and that is, in fact, what that document
10 was she showed you the Bates numbers. She said it
11 was -- it was third-party production. So we do a
12 production log when it's a Microsoft document, but
13 not otherwise and there's no way to do it otherwise.

14 And maybe I will just pause right now and
15 say the other thing about the production log is when
16 it's court papers, a lot of these -- this is an
17 unusual production, 17 million pages, a lot of that
18 was e-mail too -- but a lot of these court papers,
19 depositions, transcripts, exhibits, hearing
20 transcripts, pleadings, those -- I mean, there's no
21 custodian as such. Microsoft doesn't internally
22 record them as being held at the legal department or
23 held at Preston, Gates & Ellis, the outside law firm
24 that handles this or whatever outside law firm. It
25 just records them as court documents, and that's why

1 when you saw those expert reports, that's Microsoft's
2 way of keeping track of those and we provided that as
3 well.

4 And to my mind that is a more useful thing
5 than just saying, "Okay. Those came from Preston,
6 Gates." Those tell you those are experts reports.
7 That's what those were, expert reports, the ones she
8 showed you from the DOJ liability case, DOJ-L
9 liability. And I don't think that was obscure, I
10 really don't. I will come back to some of the other
11 examples, but anyway, that's the production log.
12 Okay.

13 In a document production, the recipient
14 loads the documents onto the database. Then
15 something called "optical character recognition" --
16 Ms. Conlin referred to it -- now has gotten pretty
17 good and can get to a high degree of accuracy in
18 understanding what -- you know, you'll be able to
19 make the document searchable with e-mail and with
20 typed out -- but you cannot, cannot look at the
21 documents. You still have to typically -- not a
22 lawyer, but mechanical or ministerial process,
23 someone has to look at the documents and do what is
24 typically called "object coding." But because you
25 have handwritten documents, you have exhibit

1 stickers, you have handwriting on the documents, all
2 of which -- you know, OCR typically can't capture.
3 And, in fact, there's an example of that in there.
4 You can see there is an example in here in which you
5 can see the OCR did not capture that; otherwise,
6 you're not going to be able to find, you know,
7 some -- you know, the handwritten documents, you
8 won't be able to search for. You have to have a way
9 to deal with that. So -- you know, you just cannot
10 throw it up on database and ignore it. You need to
11 have some kind of look at what you're doing, of what
12 you're dealing with.

13 Once it's all in the database, you can sort
14 any which way you want. You can sort by custodian.
15 You can say, "I want all of the documents of
16 so-and-so custodian," and it will give it to you, all
17 in (indicating noise), or you can ask by date. You
18 can have that or -- and this is what Ms. Conlin --
19 what typically is done, you can have it by keyword.
20 You can search for any word in the document and find
21 it.

22 Now, that is how electronic document
23 production works these days, and that's how this
24 production has worked and this is how the production
25 has worked in all other cases at issue here. But

1 it's become apparent over the last six months that
2 notwithstanding Ms. Conlin's representations -- which
3 I'm going to show you in a minute -- plaintiffs have
4 not managed to do that or have not invested the funds
5 or the energy to do that in a way that they made it
6 usable, and so they were constantly coming to us with
7 requests for searches that if they had that set up
8 properly, they should have been able to do it
9 themselves easily. I will show you a few examples
10 and what we're talking about. In fact, our examples
11 are exactly that -- some of the things Ms. Conlin
12 pointed to were exactly of that kind, where she was
13 not searching for the deposition exhibit that was
14 marked as a deposition which was in some way flawed
15 in the deposition, was incomplete in the deposition,
16 she wanted to know, "Well, now do I have a complete
17 version of this?"

18 Well, if you had a working database, you
19 just search for it, but she didn't and so she asked
20 us for it. We bent over backwards over and over and
21 over again to respond to those, and now we're getting
22 this.

23 All right. I said to you a moment ago I
24 had five reasons why this request for categorization
25 shouldn't be required, and I told you, first of all,

1 that no rule requires it. The only rule that they
2 have pointed to in their papers is Rule 1.501, which
3 is that responses to discovery requests, however
4 made, shall fairly address and meet the substance of
5 the request. In this case -- in all of the cases of
6 the -- of the requests at issue here, plaintiffs in
7 their instructions -- she said that the federal rule
8 in Iowa is different. The plaintiffs in their
9 instruction specifically provided the option in each
10 document request, the documents were to be produced
11 either, A, as they are kept in the ordinary course of
12 business; or, B, organized according to the document
13 requests to which they are responsive. We produced,
14 as Microsoft has consistently done, over millions and
15 millions of pages in many, many cases as they are
16 kept in the ordinary course of business with e-mail.
17 That means identifying the custodian of the mailbox
18 so you can do that sorting at any time.

19 Secondly, plaintiffs said -- when we argued
20 the motion back in July to produce the 17 million
21 pages of documents, Ms. Conlin specifically told you
22 that this was her burden, and the first document in
23 this set of documents I've given you is the
24 transcript of that hearing. And on page 111, the
25 third, fourth page in there, we had said -- at that

1 time we understood the documents were about 12
2 million pages. Document production was continuing in
3 one of the competitor cases, and there was further
4 examination and it turned out, in fact, to be about
5 17 million. We were saying, you know, 12 million
6 pages, it just -- it's way too much in this case and
7 there's no way it can be even analyzed, and we needed
8 a more targeted approach. And she said, "Why do we
9 need these? Why do we need these 12 million
10 documents? because, you know, we can't get through
11 them. Here is why we need them:

12 "We feed them to the computer. The
13 computer sorts them all out, and then we ask the
14 computer specific questions. A computer, we say,
15 'Show me everything you've got about a particular
16 thing that happened with Netscape.' And
17 "whrrr-whrrr-whrrr" that's what it does, and that's
18 how we're going to use these 12 million documents and
19 even the 6 million that we hope some day to actually
20 accumulate our ownelves." That refers to the
21 production in the MDL case. "That's how we're going
22 to use them. We're going to search the word searches
23 just like you do with Westlaw or whatever, only these
24 will be different search terms that we will use.
25 This is the problem of reviewing them. Frankly, that

1 is our problem, Your Honor, and we're willing to
2 assume the responsibility."

3 And, Your Honor, when you granted that
4 motion -- I didn't attach it -- when you granted that
5 motion, which was in July, you specifically said on
6 page 14 -- and, I'm sorry, it's not in this set of
7 documents. It's in the materials that were attached
8 to the protective order motion; but in any case, it's
9 your order of July 25th. You said, "The plaintiffs
10 acknowledge that they are asking for a tremendous
11 amount of material. However, the plaintiffs accept
12 they will be burdened with the responsibility of
13 reviewing and assessing these documents."

14 One of the grounds for Your Honor's ruling
15 was that these were already previously produced
16 documents and this wasn't going to be a huge burden
17 for us to produce. How it turned out to be a very
18 significant burden to collect all these documents --
19 I think it was 2700 hours we calculated to -- it's in
20 our papers, how many hundreds of hours to do that,
21 and -- but, in any case, the point was that you
22 viewed it as a relatively straightforward path that
23 would not unduly burden Microsoft, and shifting the
24 burden over to us to categorize the documents for Ms.
25 Conlin is precisely what you said was not going to

1 happen when you directed us to do this.

2 As I said, plaintiffs have sought and been
3 denied this relief before, and that's the next
4 document in the pile. On page 7 in paragraph 15 in
5 response to documents requested in the first round of
6 document requests, Judge Reis -- we objected that we
7 shouldn't have to produce documents that had been
8 produced in prior cases. They would be duplicative
9 requests, and plaintiff said, "Well, categorize them
10 for us. Tell us out of all those prior productions
11 which one is responsive to this request."

12 Judge Reis ruled, "It is not Microsoft's
13 obligation to characterize the documents previously
14 produced in response to plaintiffs' current
15 requests." And yet that is what plaintiff is seeking
16 yet again here.

17 As I said to you already, the fourth reason
18 was Microsoft doesn't have this information. I think
19 I've explained that. We don't keep records that way.
20 In other cases in my career I don't keep those
21 records either. They are responsive. They go out
22 the door because in the end you code them yourself.
23 You make sense of them yourself. You do your keyword
24 searching and you pick out your hot doc yourself.
25 So the fact its responsive to a particular request is

1 of no particular moment after a determination has
2 been made.

3 Now, nothing about how Microsoft has
4 provided the documents to plaintiffs justifies this.
5 As I said, over time it will become apparent that
6 what plaintiffs have been seeking to do over the last
7 four to six months has been to shift to Microsoft the
8 burden that they said they would undertake of
9 organizing these documents.

10 They have repeatedly claimed that they did
11 not have documents, that they couldn't find them and
12 that they did not possess them and sent us a letter
13 saying, "Where are they? They are missing." And we
14 would go and look and we would find them and provide
15 them with a list of Bates numbers. I provided in
16 this stack one example -- there are more in my
17 papers -- the document that is labeled Exhibit E
18 right after the opinion that I just referred to.
19 It's a letter from Mr. Hagstrom to me -- or, no, to
20 my colleague Ms. Nelles dated October 27, 2005 in
21 which he said, "As we have previously discussed, you
22 have kindly agreed to provide us with copies of prior
23 testimony that we do not possess." Actually, what we
24 said, "If there's a few you need, we'll get them for
25 you."

1 He attached 25 lists that contained over
2 1,000 items of things he claimed he needed. If you
3 turn over to the next exhibit, you can see that we
4 provided -- we went through this immense amount of
5 effort on December 2nd, we provided them in the
6 spreadsheet back with Bates numbers. Everywhere you
7 see Bates numbers, that means we found it in the
8 production, and everywhere in the Bates numbers --
9 most of these Bates numbers -- I could describe them,
10 but most of them -- Bates numbers are things we
11 produced directly to them, not things that had to go
12 to the other plaintiffs for -- under the early orders
13 in this case which required them to get the early
14 production from the other plaintiffs, but things that
15 we had provided to them so that "MS-CCPMDL" -- that
16 happens to be a code that we provided to them, we
17 produced in the last few months. "DEPTR," those are
18 all codes that indicate that we provided them to
19 them.

20 Not every single one, but the vast majority
21 of these, are things that we provided to them and
22 they should have been able to -- if they had done
23 what they said they were going to do, which was
24 taking on the burden of dealing with this themselves.

25 Now, I want to talk a little bit about the

1 claim that we produced things out of order.

2 THE COURT: Can we take a break for my
3 court reporter? Ten minutes. I think she needs a
4 break.

5 (A short recess was taken.)

6 THE COURT: Go ahead.

7 MR. NEUHAUS: All right. Thank you. Now I
8 want to deal with some of the specific charges that
9 plaintiffs have leveled in their reply papers in the
10 supplemental affidavit, to the extent I can, given
11 the very short time we have together.

12 First is the claim that we produced
13 documents out of order, and this claim is completely
14 spurious for two reasons or maybe three. The
15 documents were produced out of order, some of the
16 ones she cited, because plaintiffs, in fact, asked
17 for us to expedite the production of certain
18 documents which required that; and the second was --
19 is because the documents weren't produced out of
20 order at all. They were produced in the same order
21 as they were produced in the prior case.

22 On the first point, back in August after
23 Your Honor's order of July 25th, Ms. Conlin asked
24 that we expedite the production of transcripts and
25 exhibits. We were willing to do that, but it would

1 mean that documents produced by third parties that
2 were protected by a protective order in the
3 underlying case would be produced later. With those
4 we were required under the applicable protective
5 order to give the third parties notice before we
6 produced the documents to an additional -- to an
7 additional party, and this was discussed. I
8 discussed it with Ms. Conlin on August 2, 2005. I
9 told her that the third parties' document would be --
10 we would produce the documents first. Beginning in
11 early August, we sent out Microsoft again sending out
12 -- it ended up being -- I think it's about 150, but a
13 whole lot of notices of third -- to third parties.
14 It was a -- that may be a high number.

15 There were lots, dozens and dozens, of
16 notices to third parties that documents that they had
17 produced in the earlier underlying case would be
18 produced to plaintiffs unless they objected within 15
19 days, all this pursuant to the protective order in
20 the underlying case. Some of the notices were
21 returned because the addresses were wrong or
22 undeliverable. Some third parties raised questions.
23 I put an example of one of these notices in this
24 packet. It's the next stop in the packets. It's one
25 after -- there's a list of 25 pages of charts, right

1 after that, that 25 pages of chart. It's a document
2 dated September 14th, 2005. This one happens to be a
3 company called Applied Systems Innovation. Do you
4 see that?

5 THE COURT: September 14th?

6 MR. NEUHAUS: September 14, 2005.

7 THE COURT: Where is it?

8 MR. NEUHAUS: Because it's a subset. It's
9 after this long spreadsheet chart that looks like
10 this. It's right after that.

11 THE COURT: Okay.

12 MR. NEUHAUS: Incidentally, my colleague
13 reminded me, I see "MS-CCPMDL," this is in the chart
14 I referred to, was produced directly to plaintiffs
15 and she said maybe it would be confusing because it
16 had "MDL" in it. It was produced directly to
17 plaintiffs. That is the number of production in MDL
18 which we then reproduced them with the same number.
19 "CC" means we copied production, but in any case,
20 returning to the September 14th letter.

21 MS. CONLIN: Before you do, I want to
22 interpose an objection. This is not a document that
23 was given to us prior to -- in advance for these
24 purposes. Ordinarily, Your Honor, I would not
25 object, but the Court may recall that whenever I do

1 this, Mr. Neuhaus has been very distressed. Whenever
2 I think of something that I need to use that I
3 haven't specifically identified in advance, he makes
4 the objection. He has been quite hostile about the
5 whole thing, so I object to their doing exactly what
6 they have been criticizing us for doing, but I
7 suggest -- I'm sure the Court will want to listen
8 anyway, but we want to make that objection.

9 THE COURT: Objection is overruled. Go
10 ahead.

11 MR. NEUHAUS: Thank you, Your Honor. This
12 document was copied to Ms. Conlin and Mr. Hagstrom,
13 and that's the real reason I wanted it to show you.
14 This is one of the dozens of notices to third parties
15 and they were getting these all through the latter
16 part of the summer. They had to have been aware we
17 were holding back -- we were not producing
18 third-party documents while we were producing the
19 Microsoft documents and so that on August 25th, which
20 is the next document, when we sent out -- I think
21 it's the first shipment of deposition transcripts, we
22 made clear in the sentence that -- this is a letter
23 dated August 25th from a litigation clerk at Preston,
24 Gates & Ellis to Ms. Conlin that says: "Pursuant to
25 the ruling on Plaintiffs' Motion to Compel, enclosed

1 please find a disk labeled MSN_IA_007, and here it
2 says -- then the next sentence says: "The disk
3 contains the competitor case deposition transcripts
4 of Microsoft employees" -- those that we could
5 produce -- "and the accompanying deposition exhibits
6 where exhibits are Microsoft-produced documents."

7 This has been explained to her in August,
8 but maybe she forget or maybe this is all a tactic to
9 shift the burden on to us; but in any case, it should
10 have been absolutely clear that we were not producing
11 third-party-produced exhibits together with the
12 transcripts.

13 Much later in December I explained this
14 again, and that is the next letter of the document,
15 Exhibit J. I explained it myself. She was saying --
16 this is on the letter of December 27, 2005 from me to
17 her. Second page in response to a number of
18 charges -- and I encourage you to read this exchange,
19 I think you actually have all the pieces of it in the
20 papers attached to this motion -- and in the middle
21 of the second page: "You also say that our
22 production has been 'piecemeal and random.'
23 Microsoft has provided you, at your insistence, a
24 rolling production attempting to get things out the
25 door to you as soon as we can. You have also asked

1 for certain things, such as depositions, to be
2 expedited. We have shipped those to you when we can,
3 subject to third-party notice requirements imposed by
4 protective orders in other cases."

5 And then when we were free to produce the
6 third-party documents, we did so. And contrary to
7 what Ms. Conlin says, the cover letter, which is
8 October 13th -- that's the letter she's been
9 referring, October 13th production -- specifically
10 called attention to the fact, if you look at the
11 second paragraph, again, this is another document
12 clerk, not a lawyer, at Preston, Gates & Ellis
13 writing to Ms. Conlin.

14 THE COURT: Where are you now?

15 MR. NEUHAUS: I'm sorry. October 13, 2005.

16 It should be the next exhibit past the letter of
17 December --

18 THE COURT: -- 27?

19 MR. NEUHAUS: --27, yeah. It's a letter
20 dated October 13, 2005.

21 THE COURT: It looks like an e-mail.

22 MR. NEUHAUS: Those are attachments to the
23 letter.

24 THE COURT: Oh, okay.

25 MR. NEUHAUS: I'm sorry.

1 THE COURT: Okay. Got it.

2 MR. NEUHAUS: October 13, 2005 second
3 paragraph, disk name, "MSM_IA_048 contains
4 third-party deposition transcripts and exhibits taken
5 in the MDL competitor case." That's where the
6 other -- I think the 25 documents that she said she
7 couldn't find.

8 She wrote us on November 7th saying, "Where
9 are these documents?" We said, "We produced them to
10 you on October 13th." And that is why Bay Exhibits 2
11 and 3 were produced after Bay Exhibits 1 and 4. Once
12 they are loaded into a proper, you know, database,
13 you can sort them and you can find them easily,
14 assuming you're investing, as Ms. Conlin said she
15 would, in undertaking the burden of organizing these
16 documents.

17 In this case, Preston -- we put on a Bates
18 number that is designed to show that these were
19 deposition exhibits that were being produced. They
20 used the prefix "DEPEX" Bates numbers. That began
21 halfway through this process when we began producing
22 deposition transcripts and exhibits that had not been
23 produced in the underlying competitor case.

24 The Bates numbers are intended to identify
25 the source of production. By loading these onto the

1 database, it would be easy for Ms. Conlin to organize
2 them. Ms. Conlin also has said that she asked us for
3 some exhibits that she could not find and they were
4 produced 250,000 pages away from that -- when we gave
5 her the exhibit number, she said, "Look at this.
6 It's 250,000 pages away from the exhibit." This is
7 the Bay exhibits that she referred to. Maybe I
8 should get those for you. Those are the ones that
9 were -- yeah, this would be the Bay Exhibit 25,
10 where -- in her set now, I apologize, but in her set
11 she pointed to this Bay Exhibit 25 -- I don't think I
12 have it here -- that had attached to it or rather had
13 an indication of a "file Jimall." That's back in her
14 set if you find that.

15 THE COURT: I got it.

16 MR. NEUHAUS: And then she said, "Look, we
17 asked them to find 'Jimall,' the PowerPoint, for us,
18 and lo and behold it was produced 250,000 Bates
19 numbers away from the document exhibit. Isn't that
20 terrible?"

21 Let me show you what is going on. And she
22 said -- she told you that she discovered this when
23 she was reading the transcript, she was reading
24 diligently the transcript. If you look at the
25 transcript for the Bay exhibit, for the Bay

1 deposition, which is the next document in my bundle.

2 THE COURT: Okay.

3 MR. NEUHAUS: Bay Exhibit 25 is referred to

4 on page 119, and the first answer that I've

5 highlighted says, the slides, "Exhibit 25 is marked

6 for identification." Then there's an answer, a

7 reference to the "Jim Allchin slide."

8 Then if you turn over to page 120, "I would

9 make the request that the slides do not appear in the

10 production that are referenced here. And looks from

11 the last -- second page like there is 42 of them.

12 And I will send a letter to you, but I would ask you

13 to kind of check to see if you can find them."

14 So the slides were not attached to Bay

15 Exhibit 25, and that is not unusual because Bay

16 Exhibit 25, if you look back at her bundle, is an

17 e-mail, and in many e-mail programs when you reply to

18 an e-mail, the attachment doesn't go with it anymore.

19 The e-mail, the attachment, was a PowerPoint attached

20 to the first e-mail, then it would be replied to.

21 And so, you know, this was the e-mail and was marked

22 at the deposition way back in 2004 without the

23 attachment after at the deposition. It was plain on

24 the face of the deposition that the slides were not

25 attached to the exhibit.

1 She said, "Where are the slides? Do we
2 have those" in her November 7th letter.
3 Now, if she had a proper database, she
4 could have done the searching. I'm told that
5 somebody searched the words -- I think this is the
6 place where they searched the words "scrubbed" and
7 "silly" and "feedback," which are the words just
8 before the reference to PowerPoint. They got four
9 documents back and here they are, and there are the
10 slides.

11 Now we didn't have to do this. She said,
12 "Do we have those? We wanted to make sure there
13 weren't holes in the production." I don't know why.
14 We answered the question, "Yeah, you got them," and
15 we gave her the Bates numbers. This is what she's
16 talking about. And, of course, they are someplace
17 different from the deposition exhibit. They come
18 from a completely different place. They come from
19 the underlying files, not from the deposition
20 transcript.

21 The next example is Phillips Exhibit 15 and
22 16 -- I think that is the next one which she cited --
23 or Phillips Exhibit 15 where she said, "I've given
24 you our copy of Phillips Exhibit 15, which has,
25 incidentally, a little Bates stamp on it -- or the

1 exhibit sticker. It's not on her copy. I don't know
2 why, but in any case, it should be there. But she
3 recognized it. She understood it was Phillips
4 Exhibit 15, so there must be something that they have
5 to make it up.

6 But in any case, this is the document where
7 she says she was reading through the transcripts and
8 found this was a partial document. Isn't that odd,
9 it seems to be incomplete. Sure, that happens.
10 That's what life is like. You know, of course, there
11 are incomplete e-mails and incomplete documents all
12 over the place. And she wrote us and said, "Can you
13 find it for us? Do I have it? It seems to be
14 incomplete. It seems to be cut off. Please, do we
15 have the complete one?"

16 Once again, in retrospect, I'm not sure why
17 we do all this, but we did. We went and looked, and
18 she -- and we found a few things. One is we found
19 complete copies, you know, of the finished copy of
20 this, and we provided her with a Bates number. We
21 said, "See such and such Bates number" and -- you
22 know, because it existed somewhere else and that was
23 the Bates number we provided her. But in preparing
24 for today, we found one other thing, which is that
25 Phillips Exhibit 16, which is right after Phillips

1 Exhibit 15, is the complete e-mail. And if you look
2 at the sentence highlighted on Phillips Exhibit 16,
3 it says "Sorry." It says -- Russell Stockdale, who
4 wrote the partial one in the Phillips Exhibit 15, and
5 Russell Stockdale, 12 minutes later -- he sent the
6 incomplete one at 6:27 and at 6:39 he sent the
7 version that is complete saying, "Sorry, hit 'Send'
8 before completing the message. Here's the real one."

9 So not only does it appear that her
10 database was up and running, but she wasn't even sort
11 of making the connection. She said, "Just get it for
12 me," wrote us and said, "Do we have the document?"
13 Like I say, lo and behold, we did. I'm not sure why,
14 but we did. And Ms. Conlin says in her brief on this
15 exhibit, on page 14, "It would have been a monumental
16 task for plaintiffs to try to locate this document."
17 Well, frankly, I don't think it would have been
18 because it was right there with Phillips Exhibit 16;
19 but if you had a working database, which she
20 undertook to do back in July to access and review
21 these documents, she could have done the same thing
22 herself. She could have done the same kind of word
23 searches, and that is what's been frustrating.

24 We've gotten flurries of these over and
25 over again. "This is missing." "You didn't produce

1 that." "Where is that deposition?" "Where are these
2 exhibits?" "Do we have that yet?" And we -- over
3 and over again we do the searches for her and we find
4 it. That's what has been driving us nuts.

5 Now, related to this claim that we should
6 have produced all the documents of each custodian all
7 together as opposed to this six pages -- six pages
8 and so forth, again, this is an electronic
9 production. You can sort it any way you want. As
10 long as we tell you who the custodian is, you can do
11 that any way you want. The way these document
12 productions work is you have scads of reviewers. You
13 break up a custodian's documents and reviewers to get
14 them out the door as quickly as you can, and when
15 they are done and somebody said it's responsive and
16 they are checked and somebody makes sure it's not
17 privileged, out the door it goes. As long as you are
18 providing that log that links it all together, it's
19 not -- it's a perfectly appropriate production
20 because the recipient, also dealing with electric
21 production, can load them and "whrrr-whrrr-whrrr," as
22 she's told us back in July, produce them in any way
23 you want. You can produce them as custodians. You
24 can produce them as dates or whatever you want.

25 There is also -- she pointed you to

1 the -- there it is -- to that production log that had
2 7,000 pages with just Microsoft. If you recall, it's
3 the third page, her Exhibit 13, 7,674 pages just
4 Microsoft custodians. That production log was
5 produced in December of '05. That production log
6 was, frankly, just to sort of complete previously
7 used Bates numbers in this particular series and I
8 don't know when it was produced. She tells us it was
9 December, but it was produced in the fall. It was to
10 complete previously used Bates numbers. That
11 production to which that refers -- and you can find
12 this easily by reference to the Bates numbers --
13 occurred in May of '05. She has been telling an
14 untruth when she says the first merit discovery we
15 got was in the fall. It's not.

16 We sent her in May '05 what I'm about to
17 show you and in June of -- I can't remember what year
18 now -- we also sent a disk of resaler data that she
19 had asked for in -- I believe it was June of '04.
20 But in any case, May 10 of 2005. This is the next
21 document in the bundle after the Phillips exhibit
22 that "hit the wrong button" is my letter to
23 Ms. Conlin, May 10th of '05, that identifies the
24 Bates numbers of these documents that were identified
25 as "Microsoft only." And the reason they were

1 identified as "Microsoft only" as the custodian is
2 because the documents -- as I say in my third letter,
3 these documents consist of expert reports served in
4 the California and MDL consumer cases and transcripts
5 and exhibits of MDL depositions, which is what she
6 was asking for at that time. That was a little
7 document request at that particular time. So that's
8 why that comes out as a Microsoft custodian. There's
9 no doubt about what they are; and, of course, if you
10 look at them, if you open -- if you take a look at
11 the documents, as I say you have to do, at some point
12 you will find -- or even in this case, search for
13 them because I'm sure they would search easily.

14 Ms. Conlin has also said in her papers and
15 briefly today that a lot of deposition transcripts
16 were produced in a "jumbled mass," she called them,
17 on October 4, 2005. Keeping in mind that we were
18 required to produce documents from -- the request was
19 "Produce for us what you produced in the competitor
20 case." So she got the competitor case production.
21 In the competitor cases we faced the same problems of
22 third-party notice issues that we faced here, so
23 there were some Microsoft exhibits, Microsoft
24 transcripts and then third-party transcripts. No
25 prior party has complained about any of this. They

1 had invested in the systems to be able to handle this
2 just like anybody else does these days.

3 No one on our side ever dreamed that
4 until -- that she wasn't coding these documents, that
5 she was not doing something to put these documents in
6 order using the computer that she said she was going
7 to use, "whrrr-whrrr-whrrr," and no one thought that
8 she wasn't doing the job she was. Although over time
9 she asked over and over and over again for things
10 that she should have been able to find, we began to
11 get the picture.

12 I dealt with each -- I dealt with each of
13 the production log problems that we talked about that
14 she mentioned, the third-party production log where
15 you can only have Bates numbers because we don't have
16 a custodian. And we've told her on numerous
17 occasions that we don't have production logs. We
18 don't have custodians for third-party production.

19 Now, there have been errors in production.
20 She mentions as well errors in production, and when
21 they were caught -- and that's -- I mean, she
22 acknowledges everybody makes mistakes. And, you
23 know, when they are caught, you correct them as soon
24 as they are caught. But what is telling, frankly, is
25 plaintiffs didn't catch them themselves. There was

1 this disk that we sent her in a stack of six or eight
2 disks and apparently -- I'm amazed that someone
3 discovered this -- but they found three months later
4 precedent, Microsoft found, that we must not have
5 sent the disk to Ms. Conlin. I guess they found the
6 disk. So we wrote, "We may have left one of the
7 disks out." And she says, "Now, we were searching
8 for it, my gosh, we were looking for it." For three
9 months they were looking for it. They didn't call up
10 and say, "We're trying to load these things up. They
11 didn't call up the Tuesday after they got the
12 documents. "We're trying to load these up and we
13 can't get it loaded up. Three months later they are
14 still looking," and we sent it over the transit.
15 That tells you something they aren't doing with the
16 documents when they receive and what is generating
17 all these requests we're getting for, "Where's this?
18 Where is that? It's missing," and usually
19 accusations, "You haven't produced this," you know,
20 "You said you produced all the transcripts. Where
21 are they anyway?"

22 One claimed error that she says -- since
23 she says, "Look, Microsoft didn't itself even know
24 what they had," and she says this in the brief a
25 little bit today she referred to. It was a feed file

1 and this is the next two documents in my bundle,
2 which is Ms. Conlin's Exhibits 9 and 10. What she
3 says about this is October 31, 2005, and at the
4 bottom it's "Exhibit 9."

5 THE COURT: Your file?

6 MR. NEUHAUS: My bundle, yeah, my file.

7 THE COURT: October 31?

8 MR. NEUHAUS: October 31, 2005, right after
9 the May 10 letter we just looked at. It's
10 October 31, 2005, and at the bottom it says
11 "Exhibit 9."

12 THE COURT: Got it.

13 MR. NEUHAUS: Okay. What Ms. Conlin says
14 in her brief about this is that October 31, 2005; we
15 sent her a letter, again, Robert Switalski, document
16 clerk at Preston Gates: "Please note that all but
17 two of the folders contained in this volume do not
18 have document level feed files or Bates numbers in
19 the page-level feed files. These were not provided
20 by those third parties in the original production."
21 That means you don't have the beginning and ends of
22 documents. There's the feed files.

23 Two weeks later we sent her a letter
24 saying, "We told you" -- saying, "In the transmittal
25 letter dated October 31, 2005, which forwarded

1 MSM_IA_59, we pointed out that MSM_IA_059 did not
2 contain a complete set of feed files. MSM_IA_059A"
3 -- which was enclosed with this letter -- "contains a
4 complete set of document and page-level feed files
5 for the images contained on MSM_IA_059."

6 And in her brief she says, "Look at that.
7 Microsoft didn't even know it had it. They found
8 it." That's not the case at all. We didn't find
9 third-party feed files. We generated one for her.
10 Again, why? I'm not sure, but we did because without
11 the feed file it's kind of hard to load them up and
12 at some point Microsoft had generated a feed file to
13 load it up on its database and so we sent that to
14 her. That's my understanding of how that happened,
15 but it is not third-party feed file that we located.
16 It's one Microsoft generated for her.

17 What I blame her for is the accusation
18 based on this evidence. I mean, there's no reason
19 she knew one way or another. We didn't tell her we
20 generated it for her. But the accusation that we
21 didn't know what we were doing arising out of this
22 when we were providing her a service is aggravating.

23 So, Your Honor, the document production has
24 not been riddled with flaws or problems. We have
25 done this in an orderly fashion in a way that

1 electronic productions are done. The accusations
2 that we've shuffled documents are either because she
3 asked us for documents to be expedited, we told her
4 we would be -- have to deal with the third-party
5 documents separately and we sent her the third-party
6 documents separately. The rules don't require the
7 categorization. So there's no justification for the
8 categorization she seeks and the kind of a sanction
9 against us. The rules don't require it. Judge Reis
10 so ruled in December of 2004 there should be some
11 presumption of correctness on that point.

12 The plaintiffs persuaded you to grant this
13 immense 17-million-page production in reliance on
14 their undertaking -- they would take on the burden of
15 reviewing and analyzing the document. We've never
16 had to do in this any other Microsoft case and the
17 claims that we jumbled the production are just false.
18 All of this -- and as I said at the outset and we
19 don't have it -- it would be every bit as burdensome
20 for us to go back document-by-document to try to
21 review and assign the documents to individual
22 requests for us as it would be for them and it
23 shouldn't be required.

24 The same all goes for her subsidiary or
25 alternative request that we provide her with our

1 indices and databases -- with more, because this is
2 plainly work product. It's generated in connection
3 with litigation. That's the definition of "work
4 product." It's quoted in our brief. It would be the
5 height of injustice to require us to produce this
6 work product when plaintiffs obtained the production
7 in question by representing that they would do that
8 themselves, that they would organize the documents
9 themselves. It is plain the motivation -- Ms. Conlin
10 was very forthright today with what is going on.
11 She's said, "We're speeding towards trial. There's
12 no time to replicate what the defendant already had."
13 I will tell you, this is, A, with diligence and
14 without waiting for three months to load up documents
15 they couldn't do it. Now, she said earlier in the
16 hearing she's got them all OCR; but, B, this is what
17 we told her and the Court back in July. This is a
18 huge production. It's a lot of stuff and a more
19 targeted approach would have been appropriate.
20 That's not where we are. She got what she asked for.
21 The Iowa Supreme Court has held that it's
22 not enough to show hardship to override work product
23 production, that it would cost a party money to
24 reproduce the work product. In Squealer Feeds v.
25 Pickering, which we cited in our brief, the Court

1 makes clear there's not to be any free-riding. You
2 have to show the work product in question could not
3 be obtained through review of the documents already
4 produced or from any other sources.

5 The Hense case that Ms. Conlin has said was
6 a case involving sanctions for denial that the
7 indices existed. We do not deny that, but they are
8 our work product and they are -- just to be clear,
9 there are all kinds of approaches and databases. I
10 don't know what they all are that exist. Many of
11 them -- because somebody had the bright idea, "Let's
12 try to organize the documents this way. Let's take a
13 look at it this way." That is an attorney work
14 product. Somebody is thinking about a way of
15 approaching with this material and that is very much
16 what we do for a living.

17 All right. I want to now turn to the
18 individual requests that -- the individual, I would
19 say, underlying requests besides Document Request 112
20 that are at issue today.

21 The first is the request for antitrust
22 policies and training materials, Requests 83 and 84.
23 When plaintiffs propounded this request, they
24 insisted that the Word policies and training
25 materials would include day-to-day advising on any

1 antitrust lawyers by lawyers in the company -- any
2 antitrust matters by lawyers in the company. In
3 fact, the request cites as a parenthetical that --
4 cites a transcript, a Bill Gates transcript, in which
5 when you look to see what they meant by policies,
6 it's literally just him talking about, "I received
7 advice from Counsel on that." So they were
8 interpreting policies and training materials
9 extremely broadly, I mean, wildly overbroad. In no
10 way could there ever be any case in which it would be
11 relevant to list on a privilege log because it's
12 clearly all privileged, the day-to-day advising that
13 the company lawyers do on antitrust, if it even could
14 be done over the huge, the long period that they are
15 requesting.

16 We discussed this. They would not abandon
17 that view of things. They also -- Ms. Conlin also
18 claimed that the term -- that any training materials,
19 antitrust training materials, were not privileged. I
20 disputed that. We claimed privilege consistently
21 over any such document. And in order to enable Ms.
22 Conlin to test that theory if she wished, we agreed
23 to produce a privilege log of training material
24 relating to the products at issue in this case or to
25 general training that were developed by a group in

1 the law department called the "antitrust advice
2 group," a group of six or seven lawyers whose job it
3 is to provide antitrust advice. Since 2000 in order
4 to allow her to test that theory, that is Exhibit R
5 in our papers, we provided that privileged list.

6 Plaintiffs have now abandoned that approach
7 and now say what they want really is an admission
8 that there are no nonprivileged policies or training
9 materials. Now, I don't know what the relevance of
10 such an admission would be if it's privileged. You
11 can't make very much out of a fact before the jury or
12 shouldn't be allowed to say, "Oh, look, they don't
13 have a policy because they are claiming privilege."
14 But in any case, this is not a function of a document
15 request. You can't serve a wildly overbroad request
16 interpreting in an absurd way and then assert that
17 you are entitled to an admission that there are no
18 documents such as the ones you have described. This
19 is a request that was overbroad. It was an improper
20 request, and we -- it should be -- the motion to
21 compel further response should be denied.

22 Let me turn to the personnel documents.
23 The personnel documents, there's a history behind the
24 request for personnel files. Ms. Conlin and
25 Mr. Hagstrom have tried to get personnel files for

1 witnesses over and over again. The issue has been
2 litigated both here and in Minnesota.

3 In Minnesota they sought all personnel
4 files for all witnesses or some huge category. The
5 judge and the Special Master denied the request. In
6 order to lay the matter to rest in that case, the
7 parties, Microsoft and Mr. Hagstrom and Ms. Conlin,
8 agreed that the plaintiffs could have five personnel
9 files of their choosing, and they chose and those
10 files were provided. Then we gave you the cover
11 letter that shows the production, Exhibit X. Then in
12 Iowa the plaintiffs again asked for all personnel
13 files for all witnesses. Judge Reis denied that
14 request back in December of '04.

15 Then in the third set of requests for
16 productions, plaintiffs asked for Mr. Chase's
17 personnel file. Then in the fifth set of requests
18 for production, plaintiffs asked for three more
19 personnel files, two referred to without naming names
20 in the deposition of Mr. Gates more than four years
21 ago, and one other, Mr. Dryfoos.

22 In the Gates transcript the lawyers
23 agreed -- that's the next document in my bundle. I
24 should ask you to keep your finger in this, but --

25 THE COURT: Are these people witnesses in

1 this case, Chase and Dryfoos?

2 MR. NEUHAUS: I don't believe Dryfoos is
3 employed any longer and neither is Chase. I'm pretty
4 sure they are not employed at all.

5 THE COURT: Are they going to be witnesses
6 called?

7 MR. NEUHAUS: I don't know. I don't know.
8 As we said at the outset today, our witness lists are
9 not due until September. I don't think any
10 determination has been made on that one way or the
11 other.

12 MS. CONLIN: May I interpose an objection
13 again, Your Honor? I brought the Gates deposition to
14 share with the Court and decided not to do it
15 because of Mr. Neuhaus' hysterical reaction to any
16 attempt to give to the Court anything that hasn't
17 been done well in advance. And actually, Your Honor,
18 my copy is actually readable. The copy produced --
19 maybe it's only me and an age thing.

20 MR. NEUHAUS: I do apologize for this small
21 type. I do not accept the rest of what Ms. Conlin
22 just said.

23 THE COURT: Overruled. Go ahead.

24 MR. NEUHAUS: I offered this because
25 Ms. Conlin did provide one or two pages of this, and

1 I wanted to provide a couple of other pages just in
2 order to show that the lawyers in the deposition
3 agreed that Mr. Gates did not have to provide the
4 names of the witnesses at the time.

5 At the bottom of page 13:

6 "Are you aware of any Microsoft
7 personnel who has been terminated for
8 any violation of business ethics?

9 "Well, if I think hard, I'm sure I
10 can come up with some examples.

11 Mr. Tulchin, a lawyer from Microsoft:

12 "Can we do this, Mr. Markovits,
13 if you want to explore this -- and I'm
14 not quite sure how it's relevant, but is
15 there any reason whatsoever that you need
16 the names of these individuals?"

17 And the answer is: "No."

18 So it wasn't that we insisted. It was an
19 agreement, that was fine.

20 There's no reason at this point that we
21 should have to go back and try to plumb memories or
22 guess about what Mr. Gates was referring to.
23 Plaintiff -- it's too late in the day at this point
24 to be fishing around for documents in little
25 categories like "personnel files" or "case files."

1 At this point we should be getting particularized
2 subject matter, particularized targeted requests.

3 There was an agreement reached in Minnesota
4 that they would get five personnel files and that was
5 it. All of those files are usable here. We
6 shouldn't be required to go back and reopen these
7 questions at this stage of the game.

8 As to Mr. Dryfoos, the fact that a witness
9 says he's disgruntled does not justify fishing
10 through his personnel file.

11 As to Mr. Chase, the fact that he was a
12 manager of the product at issue doesn't justify
13 looking at his personnel files either. There's got
14 to be some reasonable, particularized, at this point
15 requests in order to justify fishing through
16 documents like personnel files.

17 THE COURT: Well, if they were named as
18 witnesses, do you think that would be enough
19 justification?

20 MR. NEUHAUS: I don't, Your Honor. I don't
21 think that anybody who's named as a witness has to
22 have his personnel file produced and that was the --
23 that was certainly the ruling in Minnesota and that
24 was Judge Reis's ruling back in December of '04, that
25 we wouldn't have to produce -- I think it was all

1 deposition witnesses.

2 THE COURT: What if Mr. Chase hated
3 Mr. Gates' guts and would do whatever he could to
4 testify at a trial to hurt him or hurt Microsoft and
5 it's in his personnel file. Wouldn't that be
6 important as to bias, prejudice?

7 MR. NEUHAUS: What was the point about --

8 THE COURT: What if Chase was called as a
9 witness and what if the personnel file revealed at
10 one time he was disciplined personally by Mr. Gates
11 and he comes in and testifies at trial against
12 Mr. Gates, Microsoft. Wouldn't it be relevant as to
13 his bias, interest and prejudice? You would
14 certainly bring it up, wouldn't you?

15 MR. NEUHAUS: There has to be some basis
16 for believing that's the case. That there's --

17 THE COURT: That is the whole point of
18 discovery, isn't it?

19 MR. NEUHAUS: Well, Judge, I mean, what
20 you're suggesting is some kind of wholesale
21 production of personnel files and that is not -- I
22 mean, the cases do indicate --

23 THE COURT: No, I'm saying if this person
24 is called as a witness.

25 MR. NEUHAUS: I mean, that would be, in my

1 mind, unprecedented that every witness who was
2 testifying would have to have his personnel file
3 exposed to the other side. I think that is -- yeah,
4 that is pretty extraordinary. That would be my
5 reaction. You're the judge.

6 THE COURT: So you don't think there's ever
7 been a case in the United States --

8 MR. NEUHAUS: I cannot say that.

9 THE COURT: -- where a personnel file had
10 been ordered discoverable because it contained bias
11 or prejudice for some reason, bias or prejudice by a
12 witness testifying?

13 MR. NEUHAUS: I'm not saying that, Your
14 Honor. I'm saying if there's some particularized
15 reason to believe that is the case, that there would
16 be something there that was -- you know, some
17 testimony, some indication that you would find
18 something, fine; but not on a wholesale basis, which
19 is what we're getting here.

20 THE COURT: Okay. Go ahead.

21 MR. NEUHAUS: On the four cases, that would
22 be my next one, Document Request No. 120.

23 THE COURT: 120?

24 MR. NEUHAUS: 120.

25 THE COURT: Oh, okay.

1 MR. NEUHAUS: These are very old cases, as
2 Ms. Conlin candidly admitted, filed between 1992 and
3 1998; eight, 14 years ago. That period had been the
4 subject of intense discovery seeking all relevant
5 documents by plaintiffs in this case and many others;
6 and, indeed, numerous documents from the Borland case
7 and the Z-Nix case have been produced in prior cases.
8 Again, at this stage there is no reason for this
9 blunderbuss approach, "Give me everything from that
10 particular litigation." It sounds mildly
11 interesting. This is unlike the 17 million pages
12 that you ordered produced last July. Those were all
13 filed or almost all filed in the period since 2001
14 and served an updating role as well. Here it is.
15 Just -- let's go back and see, maybe, if there is
16 something more there with no particular basis.

17 Let me take them one-by-one. Pancierzewski
18 was a retailer discharge claim --

19 THE COURT: Is that how you pronounce it?

20 MR. NEUHAUS: I have no idea, but
21 "Pancierzewski" is what I settled on -- filed in 1997,
22 plaintiffs say justify this claim. I don't really
23 understand it, this request, on the grounds that this
24 person -- that credibility is at issue, so other
25 wrongful acts may be admissible, or other similar

1 wrongful acts, on the theory that if we fired
2 Mr. Pancerzewski, if Microsoft had fired
3 Mr. Pancerzewski in retaliation for whistle-blowing,
4 that that would somehow be similar to bad acts here
5 and because credibility is at issue that would be
6 admissible. That is just wrong. Bad acts are not
7 admissible to try to prove that a witness is lying.
8 A credibility is a character trait of lying and you
9 cannot offer a prior lie, even if there were one, to
10 prove that the witness lied this time. There is no
11 particular basis for seeking this set of documents on
12 the grounds they've advanced.

13 Aldridge is similar. Aldridge is the case
14 involving warning messages when another program was
15 used with Windows. The warning messages are all in
16 the complaint that Ms. Conlin attached. They are
17 quite different. They are not -- there is a claim in
18 the case about warning messages and that the warning
19 messages in that case were designed to warn a
20 competitor; but these are quite different warning
21 messages and there all kinds of warning messages in
22 Windows dealing with other software that might affect
23 how the computer runs. Here in this case a
24 disk-caching product manufacturer filed an eight-page
25 complaint alleging product disparagement and

1 monopolization, not of any market at issue in this
2 case, but of the disk-caching market.

3 The warning messages. As I said, had
4 nothing to do with the warning message that
5 plaintiffs point to. The trial court dismissed all
6 of the antitrust claims in a summary judgment in a
7 published opinion that we cited in the brief.

8 There's really no connection to this case
9 except a vaguely similar-sounding claim and that
10 shouldn't be enough to require production of those
11 documents.

12 Both Bristol and Z-Nix, as I've said, have
13 had documents produced, that they have a fair amount
14 of documents. There are 78,000 documents of -- pages
15 of documents from the Bristol case that were produced
16 in earlier litigation. And plaintiffs have provided
17 no reason to think that was insufficient. The
18 evidence said, "Where is this?" "Where is that?"
19 There's no particular showing why it is that we
20 should go back and see whether there's any more
21 documents that still exist. These documents have not
22 all been preserved over time for any of these cases.
23 These are very old cases. There's no requirement
24 that Microsoft do so. There was no request that they
25 do so. Documents that had been relevant to other

1 cases have been produced and the volumes they've been
2 produced in other cases, of course, have been
3 preserved in the antitrust case that relate to this.

4 In any case, Your Honor, on this request we
5 don't think that any of these cases should be the
6 subject of wholesale production at this stage, but
7 this request includes a reference to indices,
8 summaries, glossaries, and other materials that they
9 want relating to these cases. For the same reasons
10 as we've described with respect to Request No. 112
11 and the overall categorization request, that should
12 not be ordered, that is work product; and it would
13 just require a huge -- well, I don't know what it
14 would require in terms of what indices and summaries
15 exist today, but they would just be listed on a
16 privilege list and they shouldn't be ordered and
17 identified at this stage for the same reasons as
18 described earlier.

19 There's one issue I have to clarify. The
20 source -- there's a reference to source-code products
21 at issue in the plaintiffs' request, and they say
22 this is a request for source code for all Microsoft
23 products -- for a huge array of Microsoft products
24 over a huge, long time, and in the briefs we deal
25 with the merits of that request. In their reply

1 brief, plaintiffs say that this request is satisfied
2 because Microsoft offered to provide source code for
3 ten or 15 other products and they were going to take
4 us up on that offer. We never offered that. I don't
5 know where they got that. We offered that with
6 respect to different requests involving working
7 samples of products. We didn't offer that with
8 respect to the ten to 15 products. I want the record
9 clear on that. The source code is the crown jewel of
10 the company.

11 They also say in the reply brief that we
12 recently produced to them 40 -- source codes for 40
13 products. I don't believe that is the case. I
14 believe that we produced source codes that had been
15 previously produced for products going back to the
16 early '90s. I think they actually had it, but I
17 can't be certain of that because their expert
18 witnesses cite to some of the source code, but in any
19 case -- or to some source code, I should say. We
20 produced that to them.

21 The source code is, as I say, the crown
22 jewel. There should be a heightened standard for
23 production of source code. It also would be
24 extremely burdensome to produce and there's not been
25 an offer to let them pick and choose. It may be we

1 can work this out, but I didn't want the record to
2 reflect acquiescence that they had said we made this
3 offer when we hadn't.

4 I should be clear. I am open to any
5 requests, any particularized request, they wish to
6 make on this point. Their request for production was
7 a blunderbuss request for source code for many years
8 over many, many products.

9 The document retention notice is the next
10 one I would like to deal with, No. 114 and 141.

11 141, the plaintiffs have accepted the
12 ruling of the -- in a prior case that one of these
13 document retention notices, the one that they had
14 sought, was privileged and they abandoned that
15 request. I mention it only because they accepted
16 that that ruling -- they accepted that ruling. And
17 the plaintiffs in their brief in reply said that it
18 is clear that the plaintiff in Burst had access to
19 either the retention notices or a list of those
20 notices to whom they were sent and their subject
21 matter. Plaintiffs here will accept the list in lieu
22 of the retention notices to avoid Microsoft's
23 insistence that such notices are protected by the
24 attorney-client privilege and work product
25 privileges.

1 We have produced that list that I believe
2 Ms. Conlin must be referring to, and I've attached it
3 now to the bundle as well with the Bates numbers at
4 the bottom indicating that the document had been
5 produced in the Burst case, so I believe that one is
6 satisfied.

7 I would next like to deal with Requests 106
8 and 107. These are the ones regarding end-customer
9 prices and Microsoft performance with respect to
10 not-at-issue products.

11 Mr. Hagstrom explained that the plaintiffs
12 do do in their damage analysis an analysis of the
13 "price premium," as they call it, between the
14 at-issue products and pricing for not-at-issue
15 products. That is the analysis they do, and they do
16 it using standardized data, which you have to do.
17 You have to have some way to have the data, the
18 apples and oranges be both apples, standardized data
19 reflecting the prices on the at-issue products and
20 the prices of not-at-issue products. That's how they
21 do that analysis. What they seek here is not that.

22 We have, incidentally, produced
23 standardized Microsoft data on -- accounting data on
24 these not-at-issue products. All of that has been
25 done, and they also have produced great quantities of

1 third-party data relating to those that -- to those
2 not-at-issue and at-issue products; and plaintiffs,
3 in their expert reports in the past, have actually
4 used a third source of standardized data.

5 What they are seeking now is not that.
6 What they are seeking now is that we go off and look
7 for documents relating to end-customer prices and
8 Microsoft's performance over with respect to those
9 not-at-issue products. That may be in the hands of
10 custodians. That will inevitably produce nonstandard
11 information, any particular custodian does whatever
12 analysis he's done on his own. The search is
13 extremely burdensome to do. We've said in our papers
14 to them that the search would require a search across
15 eight different product groups where these products
16 in Microsoft are made or are dealt with.

17 Microsoft estimates that each product group
18 will have one or two persons whose job
19 responsibilities are focused on this or include this
20 kind of an analysis. That is eight to 16 custodians,
21 and this will surprise you, perhaps, but each
22 custodian -- now this is just an average -- will cost
23 approximately -- the average is \$49,000 to pull their
24 e-mail and review it for responsiveness. That's in
25 the Holt affidavit.

1 So these requests alone are likely to cost
2 somewhere in the neighborhood of 400 to 800,000
3 dollars and it will take weeks to do. This is a
4 major, major production.

5 That is in our submission unjustified by
6 the relevance of the data. This is vaguely
7 corroborated data. They say that they would use it
8 to corroborate and that this vaguely corroborated
9 data doesn't justify that effort. At some point,
10 Your Honor is certainly empowered to weigh the
11 relevance of information against the burden of
12 obtaining it and in this case it's not justified.

13 I'm getting close. Actually, four more
14 requests. 109 and 110, Your Honor, are the requests
15 that Mr. Hagstrom raised about the MS sales data and
16 the data production from there. I had thought this
17 one was off the table when I came in here today, and
18 this is a fairly complicated issue.

19 The question -- the only question at this
20 stage is did 109 and 110 ask for the data that they
21 now say they need. The problem is -- there are two
22 problems: That in the period up to 2001, when
23 plaintiffs asked for certain data, the data was
24 generated in a way that they wanted Microsoft to
25 allocate it across Microsoft to permit products

1 specific calculations. Microsoft stopped doing that
2 in 2000, at the beginning of 2000 of 2001, and now as
3 a corporate matter no longer allocates cost to each
4 product. It doesn't do that anywhere in the
5 company -- well, no, doesn't do it with respect to
6 these products. So it now does it in a larger
7 segment.

8 Plaintiffs knew this was the case back in
9 2001. There's a deposition taken in which they
10 learned all of that. They then asked us at this
11 stage in November of 2005 to update the prior
12 production and we did that. They knew, of course,
13 that the updating would not allow them to get down to
14 a product specific level. It would be by segment.
15 So that was the request that we answered.

16 Then fundamentally, because I think they
17 were squeezed -- they were getting squeezed on their
18 experts deadline because they waited so long, we
19 produced the document material January 27th of this
20 year and they requested it November 23rd. They knew
21 that it wouldn't work. They knew there would be a
22 problem and so they propounded a seventh RFP, which
23 is not before you today. In fact, our response is
24 not due for another week and we're working diligently
25 to try to address this, with a proposal to fix the

1 problem by having us produce a ratio of at-issue
2 products. It's complicated, but a proposal to have
3 us fix the problem by giving them revenue information
4 that would allow them to develop a ratio to divide up
5 that segment.

6 Now the way they have suggested doing that
7 in that seventh RFP, which is not before you, I don't
8 think will work because of certain overlap problems.
9 And we now are engaging in discussions about a way to
10 make that ratio work. I think we have a way. But
11 the only question now -- and that's why I thought
12 this was withdrawn -- is did they in their fifth RFP
13 request data that we should have produced to them?
14 And the answer to that is no. I thought in their
15 reply papers they admitted that. In their reply
16 papers on this motion two to three days ago, they
17 said -- they mentioned the seventh request, and they
18 say, "Plaintiffs' counsel limited the original
19 request for MS sales data to updates of the data that
20 were used before, when Microsoft presented its P&L
21 data in a fairly disaggregated form," but that is the
22 main point. All they wanted was an update of what
23 they wanted before, and they knew that would come out
24 in a segment way; and, therefore, the supplemental
25 request, that's the seventh one, was necessitated by

1 Microsoft's change in the organization of its P&L
2 after 2000.

3 So on this motion, I believe that is an
4 admission that they had limited their requests to a
5 pure updating, not this segmenting ratio problem;
6 and, therefore, the motion should be denied.

7 There is a second problem that Mr. Hagstrom
8 has raised, nowhere raised in the papers on this
9 motion. First you hear about it. It was actually in
10 an earlier document late last week or early this week
11 and involving this U.S. revenue problem. That is a
12 completely different problem, brand-new problem not
13 addressed by this set of requests, not addressed by
14 the seventh set of requests, one that involves their
15 request for data.

16 Back in 2001 they requested data for the
17 United States and 14 foreign countries. That's how
18 plaintiffs got the data back in the first round. In
19 their request here, they requested data for U.S.
20 sales only, for MS sales. MS sales attributes
21 data -- all sales to the headquarters -- all sales
22 for certain products and for certain companies to the
23 headquarters of the company in question. So that if
24 there are foreign sales for Dell, they'll all be
25 allocated to Dell; if there are sales for Toshiba

1 anywhere in the world, they are all allocated to
2 Toshiba. There's no way in MS sales you can
3 determine anything else than where they are allocated
4 under the allocation rules.

5 So we produced what they asked for, which
6 was U.S. sales only, not as they asked for before,
7 U.S. sales and 14 foreign countries. Once again, we
8 produced what was asked for. This problem we haven't
9 begun to address because it was only raised a few
10 days ago or a week, but my understanding at this
11 stage is that in their damages calculations, they've
12 always just simply used the U.S.-allocated income for
13 MS sales. But again, the dispositive question on
14 this motion is have we provided what they requested,
15 and I think the answer is yes. And as to this U.S.
16 sales issue, it has not been raised in the papers
17 before you and shouldn't be permitted to be raised in
18 this kind of way on the fly. I wanted to get on the
19 record a response, but the motion should be denied.

20 Finally -- not finally, I'm afraid, but all
21 but finally, penultimately, the settlement
22 agreements. This is Document Request No. 117.
23 Settlement agreements are another category of
24 sensitive documents and many courts have said that
25 because the desire to promote settlement, they are

1 reluctant to permit discovery of settlement
2 negotiations or agreements because they are highly
3 sensitive and confidential and would discourage
4 settlement if they would become produced in other
5 cases without a particularized showing of need.
6 There are other cases that don't impose that kind of
7 a heightened standard. There are no cases in Iowa, I
8 don't believe. The cases that we cited in our brief
9 on page 35 are not, as Mr. Hagstrom said,
10 admissibility cases, they are discovery cases.

11 Plaintiffs' sole argument -- but in this
12 case, you don't really need a heightened standard
13 because their sole argument for this is so
14 attenuated, I mean, it doesn't rise to a level of
15 relevance, and it's plain -- what they really are
16 looking for is, you know, snooping around to see what
17 Microsoft was willing to do in the past or something
18 like that.

19 And in this case it's particularly
20 intrusive because plaintiffs are seeking not just the
21 settlement agreement but all documents related to
22 negotiation of the agreement. Plaintiffs' sole
23 argument for seeking these agreements and all the
24 documents related to them is that the agreement might
25 contain a cooperation clause that might indicate bias

1 of the testimony of a witness from the other party to
2 the settlement agreement who might testify here.

3 This hardly justifies -- this attenuated chain hardly
4 justifies this discovery.

5 Three of the cases involved are
6 investigations by the DOJ, FDIC and the states that
7 were involved in the DOJ case. It is, frankly,
8 ludicrous to suggest that there will be any testimony
9 from any witness, from any employee of the DOJ, the
10 FDIC or in the 21 states who would be subject to any
11 cooperation clause if there were such a thing in any
12 such settlement agreement. The other cases are with
13 competitors. The settlements are all within the last
14 three years. 2003 is the earliest through October or
15 November -- October 2005. They are competitors still
16 of Microsoft.

17 I think it is relatively unlikely that
18 Microsoft will offer the testimony of a witness from
19 any of these companies, but if it comes to that,
20 plaintiffs can ask the witness about any settlement
21 that may have been entered into, but they shouldn't
22 be permitted on a blunderbuss basis on the
23 possibility that someone may come as a witness. No
24 one has identified their witnesses at this stage, I
25 think it's fairly unlikely we're going to have a

1 Microsoft witness from any of these companies. They
2 are all pretty vigorous competitors of Microsoft. I
3 could be wrong on that, but they shouldn't be
4 permitted to just root around at this stage in the
5 settlement agreement on the chance that there will a
6 bias issue or a cooperation clause issue. I think
7 it's an extremely attenuated theory.

8 Now, finally, Your Honor, Interrogatory
9 No. 21. This is the interrogatory that would require
10 Microsoft to apparently, as a condition, I guess, of
11 offering deposition testimony or live testimony about
12 for many present or former -- from any witness, I
13 guess, that Microsoft would call finding out that we
14 first have to find out the number of shares and
15 options and the value of their Microsoft stock held
16 by that witness.

17 At the outset, I should say that this
18 interrogatory, like all of the interrogatories in
19 this set, exceed the 30-interrogatory limit that is
20 set forth in Iowa Rule of Civil Procedure 1.509(1),
21 although it's numbered 21, because of subparts in
22 earlier interrogatories. This is in excess of 30,
23 and that's, as our briefs point out, how you count
24 interrogatories. Plaintiffs must show good cause to
25 exceed the 30 limit and that everybody agrees means

1 more than relevance.

2 Plaintiffs argue that this is necessary
3 because in the coordinated discovery they say, and
4 I'm quoting, "No Microsoft employee or former
5 employee could be required to answer any questions
6 concerning his or her stockholdings in Microsoft."
7 That's just not true. That's a overstatement of what
8 was going on.

9 First of all, we have a huge range of cases
10 from where these depositions come from, and there
11 wasn't complete uniformity in this, but for most of
12 the witnesses they are talking about, the witnesses
13 were permitted to testify about the -- about whether
14 they had any stock and the proportion of stock that
15 they had or the proportion of their net worth that
16 consisted of Microsoft's stock, and the last exhibit
17 in the bundle is an example of that.

18 It's a deposition of Mr. Myhrvold, and this
19 is how many of these -- many witnesses were never
20 asked about their stockholdings; but in the
21 coordinated discovery, many witnesses, some witnesses
22 when they were asked:

23 "Do you still own Microsoft stock?"

24 They would put: "Yes."

25 "How much?"

1 "I don't know offhand.

2 "Can you estimate the value for me?"

3 There is an objection. The lawyer says:

4 "Taking your client's suggestion, is

5 the Microsoft -- or counsel's suggestion,

6 is the Microsoft stock that you own

7 a significant portion of your net worth?"

8 "Yes, it is."

9 Now, the reason for that approach and no --

10 none of the plaintiffs in the many cases in which

11 this was litigated ever moved to compel further

12 responses.

13 It's no secret that some Microsoft

14 executives -- not all, by any means -- are very

15 wealthy people. And there is and was -- well, a

16 great deal of concern that the unnecessary disclosure

17 of wealth could be dangerous to them or their

18 children and for the purposes of showing that a

19 witness was biased, the question is not the absolute

20 amount of the stockholdings, but whether it is a

21 significant portion of their net worth.

22 The question is how much difference will

23 this holding make to them. And this all is on the

24 presumption that a witness would make the calculation

25 that when they hold a tiny percentage -- of course,

1 we're not talking about Bill Gates. Bill Gates'
2 stockholdings are public, as are many senior -- the
3 big -- the most -- the major executives are public
4 and they live with that and they have bodyguards or
5 whatever they have; but we're talking about people
6 who are not, who are not in the realm of persons
7 whose stockholdings are disclosed by in filing.

8 For them, I mean, you have to imagine they
9 would make the calculation that because they own some
10 tiny percentage of Microsoft stock, that they should
11 lie in order to insure that they don't move the stock
12 in some way; but in any case -- which I think is a
13 relatively implausible calculation when you're
14 talking about the ownership in a public company --
15 but in any case, the relevant question is the
16 question that was asked and that was permitted to be
17 answered. And I should say again many witnesses
18 weren't asked this. In Minnesota these concerns were
19 raised by Microsoft in a motion in limine, and as
20 Ms. Conlin has told you, or Mr. Hagstrom, the Court
21 ordered that plaintiffs could ask a live witness
22 whether they own more than a million dollars in stock
23 and we had proposed that as another solution here to
24 this issue, but no additional discovery was
25 permitted.

1 The discovery the plaintiffs seek here
2 would be unfair and prejudicial to Microsoft if
3 permitted in this form. Many of these deposition
4 witnesses will be unavailable to Microsoft. By
5 definition, Microsoft is offering their deposition
6 testimony, and so this would be in reality a one-way
7 requirement that would, perhaps, apparently block our
8 use of testimony if we couldn't obtain that
9 information. It's also unclear and Rule 1.704 on the
10 use of deposition testimony imposes no such
11 requirement.

12 The testimony that exists on the record is
13 the testimony. It is usable under the rule. No
14 doubt we would all like to go back and ask another
15 question with respect to any particular transcript,
16 but it is what it is. And if the plaintiffs wish to
17 supplement that record and get additional testimony,
18 we're still in discovery, they can do that.

19 As to live witnesses, this would be an
20 impediment to getting the witnesses to come to trial,
21 again, only adverse to Microsoft. For reasons of
22 personal privacy and safety, many people will be
23 extremely reluctant to expose themselves to
24 questioning about their stockholding, and requiring
25 us to get that information from them in advance would

1 be a one-way burden.

2 The proposal we've made which was adopted
3 in Minnesota was a balanced approach that protects
4 the parties, the witness, and provides the parties
5 the -- plaintiffs and the jury with what is relevant
6 information.

7 In any case, Your Honor, that question can
8 be handled in an in limine motion as we approach
9 trial.

10 So, Your Honor -- and then we cited in our
11 briefs cases that hold that the testimony about the
12 wealth of a witness, and this is -- in the end for
13 many witnesses, testimony about their wealth is often
14 not admissible because of it's -- normally, I should
15 say, it's normally not admissible because of its
16 prejudicial effect.

17 So there is at this stage no justification
18 for requiring Microsoft as a condition of offering
19 testimony to obtain the information about the
20 plaintiffs about the witness's stockholdings in
21 discovery at this time. The matter should be dealt
22 with, we submit, as an in limine motion dealing with
23 live witnesses.

24 I think I've handled all of the requests at
25 issue today, and I'm sorry that it was a lengthy

1 presentation. I think that it bears repeating that
2 we have provided immense amounts of discovery in this
3 case, a huge amount beyond, I think everybody agrees,
4 any case that anybody knows of in Iowa. It is late
5 in the day. We believe these requests are
6 unjustified, and I should say in particular the
7 requests regarding categorization, but the others as
8 well, and that the motion to compel should be denied.

9 THE COURT: Thank you. Reply.

10 MS. CONLIN: I will try to be very brief,
11 but I might not succeed.

12 THE COURT: Well, we're going to stop at
13 4:30 no matter what.

14 MS. CONLIN: All right.

15 Your Honor, then that will compel me to
16 move forward more rapidly. I can talk about 325
17 words a minute, but I probably better not if I want
18 to make any kind of record at all.

19 Let me -- this is problematic, Your Honor,
20 for many reasons. Let me first say that among his
21 introductory remarks and his explanation of why we
22 get these documents the way we do, we were told by
23 Mr. Neuhaus that these e-mails come off of servers.
24 I refer the Court to the Burst material that I gave
25 you. Servers at Microsoft subject to backup will not

1 store PST files, which are e-mails; and that is --
2 there's sworn testimony to that effect, some of which
3 I think you also have, Your Honor, so they didn't
4 come off of searching.

5 One of the points I was making was that
6 Microsoft made uncategorical statements that we were
7 dumb because they gave us the sources of all the
8 documents and they gave -- and every single exhibit
9 was marked "DEPEX," and some of the materials I
10 provided, presented to the Court, were designed to
11 show you that those categorical statements are not
12 correct.

13 We're also accused of, and I quote,
14 "constantly coming to Microsoft with requests." Your
15 Honor, we have made a handful of requests -- out of
16 these millions and millions of documents, we've made
17 a handful of requests for assistance. And some of
18 those, about half of them, were for illegible
19 documents. I think there are two letters from me
20 that request -- that make these requests, one on
21 November 7th and one on January 27th. They are both
22 in your materials, Your Honor. One is Exhibit 14 to
23 my materials. I think the January 27th letter is in
24 my materials too, but I couldn't find it there, so it
25 is Exhibit L in the defendant's material. There is

1 not a rude word in either one of these. There's no
2 accusations. It just says, "I'm looking at the
3 documents. This is what I see. Can you help me?"
4 That's what they say.

5 Microsoft seems stunned that we would have
6 the audacity to actually respond to their ongoing
7 attacks on our competence and our honesty. I know
8 from reading the documents and the hearings and the
9 like that this is a common way that Microsoft
10 receives and often there is no response. There is
11 going to be response, there has been a response here.

12 Let me tell you with respect to the issue
13 of whether or not Microsoft has categorized their
14 documents, their documents in order to respond to
15 requests that -- they have indicated that they do not
16 have indices, for example, for all third-party
17 documents. That would seem to me to say that they do
18 have these kinds of materials for some third-party
19 documents. Recently we got some Caldera ones, but we
20 don't have any others.

21 The "whrrr-whrrr-whrrr" assumes that when
22 we locate a document, it will be complete and it will
23 be in order. It won't be a part of the shuffled
24 deck.

25 Exhibit B, Your Honor, is Judge Reis's

1 report -- or I beg your pardon, it's actually --
2 Microsoft wrote this and submitted it as a proposed
3 order and Judge Reis adopted it. And they point out,
4 "It is not Microsoft's obligation to categorize the
5 documents previously produced in response to
6 plaintiffs' current request." It's quite -- even
7 though written by Microsoft, it was Judge Reis's
8 order, I do not doubt that for a moment, but it is
9 quite carefully circumscribed and refers only to the
10 documents previously produced in response to current
11 requests.

12 Exhibit E kind of speaks for itself, Your
13 Honor. This is the long list of deposition
14 transcripts; but remember, Your Honor, there are 1400
15 of them and of the lists -- I don't know how far it
16 would travel if it were laid in tandem, but it is a
17 pretty big list.

18 I'm looking at page 28, Your Honor. We
19 asked -- on that page we asked for, I don't know, six
20 or so, seven, eight, maybe, and three of them right
21 off the bat; on page 28, we didn't have -- we didn't
22 have the videos. I'm sorry. We did not have the
23 videos for three of those. You can leap through
24 this, Your Honor, and see that in many cases, in
25 fact, what we asked for was not produced or was not

1 timely produced or was not produced in a fashion that
2 we could use.

3 Microsoft also says we didn't produce an
4 order because they were not Microsoft-produced
5 documents. In connection, Your Honor, with the whole
6 issue of the missing exhibits, I would refer the
7 Court back to Exhibits 2 and 3 in the Bay production.
8 Those are Microsoft-created documents. One is called
9 "Microsoft Internet Strategy," and it is Mr. Bay's
10 work; and the other one is from a Microsoft
11 Interactive Media Conference and it, too, has Mr. Bay
12 as the author.

13 One other thing to look at in this
14 connection, Your Honor, is the Bates stamps at the
15 bottom. There are several sets of Bates stamps on
16 this document, but on both of these documents, the
17 Court will see the Bates stamp that says "MS-PCA."
18 That, Your Honor, means that this document was
19 produced in the California coordinated case. That's
20 the fact. We all accept. That's what that Bates
21 stamp indicates. So they were in Microsoft's
22 possession at the time that the documents -- that the
23 exhibits were produced to us.

24 With respect to the October 13th production
25 letter where we got those missing exhibits is our

1 Exhibit 15, Your Honor. It says, "Here are the
2 third-party transcripts and exhibits," and let me
3 tell you we've got a lot of disks that said that very
4 thing, but what it doesn't say, "Look in here for the
5 exhibits that went with the August 25th production."

6 Now, Your Honor, on Exhibit 25, that's Bay
7 Exhibit 25, that's the one with the attachments.
8 That was not present. I read the deposition. I knew
9 it was not present, and what the lawyer said -- what
10 the Burst lawyer said is, "We will get that for you
11 if we don't already have it." When I made my
12 request, I didn't even know if that document had ever
13 been produced at all.

14 With respect to my Exhibit 22, which is the
15 document that has to do with the incomplete
16 sentences, I did highlight for the Court on my
17 copy -- and I think I did not mention this, sorry --
18 "Sent before completing the message. Here's the real
19 one." I meant to say that to the Court, but I didn't
20 do so. And if, in fact, Mr. Neuhaus is right about
21 the fact that this is -- 15 and 16 was a complete
22 document, then that was stupid on my part. I should
23 have picked that up and I did not. And so in this
24 respect, I apologize to Mr. Neuhaus for asking for
25 something that I should have realized I had and I

1 didn't.

2 So it is -- you know, Microsoft has made
3 dozens of mistakes. I don't think they are stupid.
4 I don't think they are lying. I don't write rude
5 letters, as a general rule, though I have been known
6 to write a few in this case. It is -- human error
7 occurs. We make them. They make them, and it would
8 be nice to have a more congenial atmosphere in which
9 to make the mistakes that we all make.

10 In May of 2005 we did, in fact, receive
11 from Microsoft old expert reports from other cases
12 which were held under a protective order. That is
13 not what I think of as merit discovery. I'm thinking
14 more along the lines of documents from the parties
15 and things of that sort.

16 And we're then criticized also, Your Honor,
17 for not looking for the missing things. When
18 Microsoft makes a mistake and we discover it -- and I
19 have to say, Your Honor, despite my overall
20 reputation, that even I get tired of receiving nasty
21 letters on a daily basis -- and so we looked and
22 looked and looked for the missing jewel box and we've
23 looked and looked and looked for pages. And for
24 Microsoft to turn that around and make it a reason
25 for you not to grant our motion to compel seems

1 ironic to me.

2 Personnel files: We've asked for them over
3 and over again, according to Mr. Neuhaus. We've had
4 two requests that have to do with two times where
5 we've requested personnel documents in Minnesota, at
6 a time when I believe I was not in the case, and what
7 Judge Peterson said was that the request came too
8 late and ordered only five. And besides that, Your
9 Honor, we can't be bound by the Minnesota agreement
10 in this case.

11 Let me -- and the second time was with
12 respect to Judge Reade's order, which is quite
13 different. I have had several cases where personnel
14 files of every single witness were produced. I'll
15 mention those that come to mind. Channon vs. UPS,
16 right here in this courthouse; Madison vs. IBP, which
17 was tried in the federal courthouse and which the
18 judge ordered the original personnel files to be out
19 of the plant; and Ayres vs. Jimmy Lynch. Those are
20 the ones that come to mind, but in many, that have
21 been the orders in other courts.

22 With respect to the Burst case document
23 retention notices, Mr. Neuhaus said we've now
24 resolved that issue because they gave us the Burst
25 materials. That's not our request, Your Honor. Our

1 request is for the document retention letters or the
2 lists of the sort they gave in Burst, which I think
3 you have, Your Honor, from me -- which they gave in
4 Burst for the other cases including our own. We
5 don't have that information for our own case.

6 It is simply not true that witnesses were
7 permitted to testify about the value -- Your Honor,
8 I'm just going to have to say one word about the
9 other -- about the Gates testimony. Can you read the
10 one he gave you, Your Honor?

11 THE COURT: Yes.

12 MS. CONLIN: Okay. Good, because I cannot,
13 but he goes on to describe those people, and again
14 the agreement was -- the so-called "agreement" was
15 Mr. Tulchin's -- was at Tulchin's request and
16 Mr. Gates knew who those people were and I suspect he
17 still does. It is not true that witnesses were
18 permitted to testify about the value of stock, not a
19 one of the witnesses that I have personally read --
20 and I'm up to several hundred now -- to say that the
21 Microsoft stock is a significant portion of net worth
22 doesn't really tell us very much unless we know what
23 the net worth is. And even if the witnesses were not
24 asked, and I think at some point along the way
25 because Microsoft would not permit answers, people --

1 they stopped asking. They did stop asking.

2 I'm asking here, even if they were not
3 asked there because of Microsoft's inconsistent
4 positions, that Microsoft employees could not be
5 required to testify about stockholdings and Caldera
6 people could be asked about every single thing they
7 wanted to ask them about.

8 I'm asking in discovery under a
9 confidentiality agreement. I don't think it's going
10 to require a bodyguard of any kind. This is an
11 important fact about bias. The Minnesota approach
12 was not, not in the least bit, balanced. It was
13 heavily skewed towards Microsoft, and it would have
14 and it was unfair not to be permitted to tell the
15 jury what the witness's stockholdings were. We're
16 not asking about wealth here, general wealth, Your
17 Honor. We want to know what the witness's holdings
18 are in the company. That's the defendant in the
19 lawsuit.

20 Those are our requests. I'm going to stop
21 now and --

22 THE COURT: Very well. There's two more
23 motions. Do you want to take them up Monday?

24 MS. CONLIN: Only one, Your Honor, I
25 believe.

1 THE COURT: I show two. Maybe I'm wrong.

2 MS. CONLIN: I think we have the appeal

3 from the Special Master.

4 THE COURT: Oh, that's right.

5 MS. CONLIN: And we have Mr. Hagstrom's

6 response to Mr. Neuhaus' material as well.

7 MR. GREEN: I'm okay Monday. I'm going to

8 handle that probably for us.

9 THE COURT: Very well.

10 MR. GREEN: Monday morning. I've got

11 something Monday afternoon.

12 MR. NEUHAUS: Could we just have

13 Mr. Hagstrom's -- because I'm obviously not going to

14 be here. I'm heading back home and --

15 THE COURT: How long will you take,

16 Mr. Hagstrom?

17 MR. HAGSTROM: Five minutes.

18 THE COURT: Oh, okay.

19 MR. HAGSTROM: I don't think it will be

20 very long.

21 THE COURT: Go ahead.

22 MR. HAGSTROM: First, on the Document

23 Requests of 106 and 107, as I mentioned, those are,

24 you know, street pricing, profitability, market

25 share. These are internal documents that Microsoft

1 has. They produced them prior to 2001. It's not an
2 excuse for Microsoft to say, "Well, these aren't some
3 sort of standardized documents." These are
4 Microsoft's own internal views of these issues --
5 market share, street pricing, profitability of these
6 products -- both at issue and not at issue. They
7 produced them before. They should be compelled to
8 produce them again, and there's simply no issue that
9 they are not highly relevant here. They are used by
10 the damages experts. They've been used previously.
11 They want to use them again. It should -- just
12 should be a simple matter of updating.

13 109 to 110, again, I brought that up
14 because I thought we had -- I think there was some
15 confusion. Mr. Neuhaus suggests that, well, of
16 course, we understood that these requests didn't
17 cover this U.S. sales issue. That's why we submitted
18 another request in the seventh request for
19 production. Well, the reason we did in the seventh
20 request for production is because Microsoft was
21 taking the position that this request didn't cover
22 what we had needed. So if we wait until we go
23 through a motion to compel and get a ruling and so
24 forth, we've gone through a whole number of weeks.
25 And so out of an abundance of caution, we issued that

1 additional request.

2 But if you look at Request No. 110, it
3 clearly says, you know, we want these MS sales data
4 extracted like we got before for U.S. sales, and it
5 says in the request we don't want the data for sales
6 to end users outside the U.S. because that's not part
7 of the formula. They deposed these experts plenty of
8 times. They know what the formula is, and, you know,
9 maybe there's somebody new that did the data pull, I
10 don't know. Maybe there's some confusion, but the
11 bottom line is I think I heard -- well, I heard
12 Mr. Neuhaus state before we started this morning that
13 we're going to work it out. I think I heard that
14 today as well. But then what troubled me at the end
15 is, "Well, the request should be denied."

16 It shouldn't be denied, Your Honor. I
17 think at worst it should be reserved with the
18 understanding that there's a representation that this
19 material will be provided.

20 As to this issue about why we were squeezed
21 on the expert deadline and Professor Netz knew about
22 this, Professor Mackie Mason knew about this problem
23 with the P&L documents back in 2001 as a result of
24 the deposition of Taylor Hawes. Keep in mind when
25 that deposition was taken, that was taken in cases

1 for which there were class periods ending as of 2001
2 and we couldn't get documentation post-2001. So even
3 though at the deposition it was stated that, "Yeah,
4 we're changing our P&L statements," we couldn't do
5 anything about it then. We timely made a request
6 here, and Microsoft said, "Well, okay. We're only
7 going to do this once, so you should wait a little
8 bit." We waited until the first of the year, and
9 here we are. Unfortunately, there were surprises
10 with regard to U.S. sales, some of the segments and
11 so forth. So we're working through those.

12 As to 117, that's the request about
13 settlement agreements. We have an understanding that
14 at least in the competitor case, there are some
15 issues about some cooperation agreements, but we
16 haven't seen those agreements and we're asking for
17 the right to take a look at those. It isn't a
18 fishing expedition, but when it comes to trying to
19 get cooperation from some competitors -- whether it's
20 Novell or whoever -- to try to get witnesses and
21 there's this great reluctance to have any
22 cooperation, it would be helpful to know if, in fact,
23 there is some noncooperation agreement because I
24 think that is highly relevant.

25 So that's all I have on that.

1 THE COURT: Thank you.

2 MR. NEUHAUS: Your Honor, there were a
3 couple of misstatements that were made. The
4 documents, the Bay documents, say "Intel
5 Confidential." They were marked "Confidential" by
6 Intel, and so we had to deal with that. We had to
7 deal with third-party --

8 THE COURT: Marked by them?

9 MR. NEUHAUS: Marked by them. It says
10 "Intel Confidential." I'm sure Ms. Conlin knows
11 that. And there's one from the server that can't
12 deal with the PSGs. That's a single-server issue.
13 That doesn't govern servers generally. It was all
14 hashed out at some point. Presumably it will be
15 hashed out, but her statement that e-mails are not on
16 servers is just completely false.

17 There are other things I could respond to,
18 but I realize we're out of time.

19 THE COURT: Very well. What time Monday?

20 MR. GREEN: I was going to raise with
21 Roxanne -- we have a hearing on the 17th on
22 collateral estoppel, and I don't know who is arguing
23 that motion. We've only got a very small part of
24 your appeal left.

25 MS. CONLIN: That is correct, but I think

1 we better do it Monday because I think the hearing on
2 the 17th -- remember, Your Honor, we've cut this way
3 down and I apologize to the Court for the length of
4 our presentation.

5 THE COURT: I wasn't limiting time. That's
6 why I'm giving you Monday --

7 MS. CONLIN: I think that's exactly right.

8 THE COURT: -- if you want Monday. I don't
9 limit anyone time on anything on motions, but 4:30 is
10 usually when we stop. My court reporter is tired.

11 MR. GREEN: Monday is fine.

12 THE COURT: Monday we will continue. What
13 time?

14 MS. CONLIN: Is nine good?

15 THE COURT: 9:00 a.m. Thank you.

16 (Record closed on April 7, 2006 at
17 4:35 p.m.)

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CERTIFICATE TO TRANSCRIPT

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

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

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

Dated at Des Moines, Iowa, this 14th day of April, 2006.

JANIS A. LAVORATO
Certified Shorthand Reporter