

1 IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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3

JOE COMES; RILEY PAINT)

4 an Iowa Corporation;)

SKEFFINGTON'S FORMAL)

5 WEAR OF IOWA, INC., an) NO. CL82311

Iowa Corporation;)

6 PATRICIA ANNE LARSEN;)

and MIDWEST COMPUTER)

7 REGISTER CORP., an)

Iowa Corporation,)

8) TRANSCRIPT OF

Plaintiffs,) PROCEEDINGS

9)

vs.)

10)

MICROSOFT CORPORATION,)

11)

Defendant.)

12

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14 The above-entitled matter came on for
15 hearing before the Honorable Scott D. Rosenberg,
16 commencing at 9:00 a.m., July 13, 2006, in
17 Room 404 of the Polk County Courthouse, Des Moines,
18 Iowa.

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JANIS A. LAVORATO

24 Certified Shorthand Reporter

Room 405B-Polk County Courthouse

25 Des Moines, Iowa 50309

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APPEARANCES

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1 PROCEEDINGS

2 (The following record commenced at

3 9:08 a.m., on July 13, 2006.)

4 THE COURT: All right. We have got a

5 motion to quash first.

6 MS. CONLIN: Yes, Your Honor, and that

7 would be mine.

8 THE COURT: You may proceed.

9 MS. CONLIN: Thank you, Your Honor.

10 This class action was filed in January of
11 2000, and initially the only class representatives
12 were Joe Comes and his little company then called
13 "Comes Vending Company." And as discovery proceeded,
14 it became apparent that Joe Comes had bought the one
15 computer at issue in his own name, and so Comes
16 Vending was dropped and Joe Comes is currently, and
17 has been since the beginning of this lawsuit, a class
18 representative as an individual and in no other
19 capacity.

20 He has been deposed now on two occasions.
21 He has answered the interrogatories and requests for
22 production of documents, all for himself as an
23 individual.

24 The last deposition that the Court ordered
25 was on June 13th. During the deposition, Your Honor,

1 Joe answered hours of questions on his business -- no
2 longer Comes Vending, now Comes Investments, Inc.
3 Microsoft says they get the records from Comes
4 Investments, Inc., a separate entity from Joe Comes,
5 individual human being. In part they say that they
6 get the records because I let them ask all these
7 irrelevant questions.

8 My understanding of the rule is that all
9 objections, except as to form, are reserved until the
10 time of trial. A relevancy objection doesn't, of
11 course, prevent the questioning, and so it's just a
12 waste of time and I don't waste time. If I had
13 objected to every irrelevant question that was asked
14 of Mr. Comes in his deposition, it would have
15 extended the time of the deposition by double. I was
16 certainly not under any obligation to make such an
17 objection and the rules are clear that there is no
18 waiver.

19 The defendants caused to be issued on
20 June 2nd, 11 days before the deposition, a subpoena
21 to Comes Investments, Inc. The defendants did not
22 serve that, nor did we know about it until the day
23 after the deposition.

24 Mr. Comes' company is easy to find and they
25 had the address. It was right on the deposition or

1 right on the subpoena duces tecum; and, of course, we
2 were not ever provided with a copy until we filed the
3 motion to quash, and, Your Honor, the subpoena is not
4 directed to Joe Comes. It is, of course, directed to
5 Comes Investments because it is Comes Investments
6 that they want records from. Obviously, Mr. Comes
7 called me immediately so I was aware shortly after
8 service. But failing to provide it to me, holding it
9 for 12 days after it was issued and signed by the
10 clerk, lends credence to our concerns.

11 And finally, Your Honor, the subpoena to
12 Comes Investments directs my client, Comes
13 Investments, an absent class member, to call
14 Chris Green upon receipt of the subpoena. Of course,
15 Comes Investments did not call Chris Green, but why
16 would a subpoena duces tecum to my client instruct my
17 client to call Microsoft's counsel?

18 Microsoft also says that we concede that
19 Joe Comes, the individual, is exactly the same as
20 Comes Investments because we filed a motion to quash
21 on behalf of Comes Investments. Microsoft apparently
22 overlooked the fact that Comes Investments is a class
23 member and -- an absent class member but a class
24 member, nonetheless, and this Court explicitly has
25 ruled that class members, absent or not, are the

1 clients of my firm and the Zelle firm. And we do
2 represent it. Without question, we represent Comes
3 Investments. Furthermore, as I understand it, a
4 party to an action can move to quash a subpoena
5 issued in the course of the action to whoever it's
6 issued to.

7 So after we filed our motion to quash,
8 Microsoft filed a cross-motion a week or so before
9 the close of discovery to, once again, do discovery
10 from an absent class member, Comes Investments. Why
11 can't they just subpoena up the records of Comes
12 Investments?

13 First, in the first place, Your Honor, they
14 argue that Comes Investments of which Joe Comes is a
15 49 percent owner -- not even a majority owner, a 49
16 percent owner and the president -- was just the
17 same -- as they are the same: Comes Investments and
18 Joe Comes, the same thing. This is such an -- it's
19 just an insupportable position. It tries to upend
20 centuries of law on corporations. I didn't do all
21 that well in corporations in law school, but I'm very
22 certain that shareholders are not the corporations,
23 and that's what they are trying to do here. They are
24 trying to pierce the corporate veil, which, of
25 course, can be done only under the most egregious

1 circumstances, none of which they even urge or
2 acknowledge that there is a corporate veil.
3 It's no different, Your Honor, than if they
4 had just up and subpoenaed the records of Banker's
5 Trust or Principal or some law firm. The fact that
6 Mr. Comes is a shareholder does not make the records
7 of Comes Investments available. The only rationale
8 Microsoft offers is that according to them Mr. Comes
9 is in possession of the records. He does go to the
10 office. He has them. But he is in possession of the
11 records as the president of the corporation, not as
12 Joe Comes, individual class representative.

13 Of course, Microsoft's unusual position is
14 not supported by a citation to a single case, and I'm
15 pretty sure that is because there is no authority
16 whatsoever that indicates in a civil case you can
17 serve a subpoena on an employee of a company and get
18 the company's financial records.

19 Microsoft, after having already served
20 the subpoena in violation of the Court's order,
21 now comes to the Court for ratification after
22 the fact. But once again, it utterly fails to
23 make the showing required by the rule, that this
24 Court has consistently declined to permit Microsoft
25 to circumvent Iowa Rule of Civil Procedure 1.269. In

1 several rulings on a series of motions and
2 cross-motions, the Court has indicated that it will,
3 in fact, require the defendant to follow the rule.
4 This is but the latest effort to circumvent the rule.

5 Your Honor, we have discussed with the
6 Court several times the requirements of 1.269 and the
7 fact that the burden of Microsoft is very heavy and
8 such discovery of absent class members is rarely
9 granted, and I'm just going -- I'm not going to
10 repeat what we've said before; but I do want to go
11 through the factors listed in the rule, the first of
12 which is timing.

13 This subpoena issued on June 2nd and served
14 on June 14th was served about two weeks before the
15 July 2nd close of discovery and three years after
16 Microsoft knew the relationship between Comes
17 Investments and Pizza Huts and Joe Comes. Joe has
18 been a vice president of Comes Investments which was
19 wholly owned by his mom until March of this year when
20 he and his brother, John, bought from his mother the
21 company; and the company owns Pizza Huts in small
22 Iowa towns, 13 Pizza Huts in small Iowa towns, and
23 Joe is now the president.

24 Microsoft says that it learned that
25 Mr. Comes was an owner and president at the

1 deposition on June 13th. First, Your Honor, they
2 gave you Mr. Comes' deposition and the questioning
3 indicates that they fully well knew that he was an
4 owner and the president at the time that the
5 deposition began, and, of course, they had already
6 gotten the subpoena several days before that.

7 What Microsoft claims is simply not true,
8 and their request for discovery of absent class
9 members' financial records made less than two weeks,
10 "two weeks," before the close of discovery is
11 untimely.

12 The second factor listed by Rule 1.269 is,
13 is Microsoft seeking the same type of discovery from
14 the absent class member as we've sought from it
15 concerning its financial performance? Microsoft's
16 financial performance is directly at issue, but we
17 did not, I know, Your Honor, seek any cafeteria
18 records from Microsoft.

19 The financial records of Comes Investments
20 is not at issue directly or indirectly and no amount
21 of creative words, I think, can make it so.

22 Microsoft's attempt to compare plaintiffs'
23 request for Microsoft's financial data to its own
24 subpoena duces tecum to an absent class member is
25 simply inapposite. Microsoft's financial data is

1 necessary to a computation of damages. This absent
2 class member's financial data has nothing whatsoever
3 to do with damages.

4 This Comes Investment sells pizzas in small
5 Iowa towns. Comparing that business to one of the
6 most profitable -- I guess, "the" most profitable
7 mega corporation on earth is ridiculous. Besides, if
8 Microsoft wanted this kind of data from a class
9 representative, Your Honor, we have two corporations
10 that are class representatives and they did not seek
11 that information from those appropriate class
12 representatives and now discovery is closed.

13 Microsoft says to the Court in its brief
14 that it wants to use Comes Investments as a
15 comparator or a benchmark and cast doubt on
16 plaintiffs' experts' opinions. At page 8 of their
17 brief, Microsoft says, and I quote: "Plaintiffs'
18 experts base their opinions that Microsoft
19 overcharged consumers for Microsoft software in part
20 on the assertion that Microsoft had high gross
21 margins." They attach, Your Honor, some material
22 from Jeff Mackie-Mason's report which does not say
23 anything remotely like that.

24 There is reference to Microsoft's net
25 margin, not gross margin. And, in fact, as a matter

1 of interest, Microsoft's net margin after deducting
2 all of its expenses is, in fact, roughly comparable
3 to Comes Investments' gross margin deducting only
4 cost of goods sold. That's an interesting sidelight.
5 Certainly has nothing to do with the case. But for
6 Microsoft to tell the Court that gross margins has
7 anything whatsoever to do with how damages are
8 calculated or how causation is established is just
9 plain wrong.

10 There are actual benchmarks. They know
11 them and we know them. Benchmark firms that
12 manufacture, that produce software, not pizzas, and
13 they have plenty of time to do discovery from actual
14 benchmark firms. They wanted such discovery and,
15 again, they did not do that.

16 The other reason that Microsoft offers is
17 that business records will demonstrate the value of
18 Microsoft's software to Mr. Comes's company.
19 Microsoft then makes nonsensical arguments and,
20 staying with the food analogy, comparing apples to
21 oranges. The question is not how the cost of
22 operating systems compare to the cost of a Coke or
23 what percentage the operating system is of total
24 technology and other costs.

25 It's like saying, Your Honor, you know, a

1 company that fixes prices on potato peelers, if the
2 price of the potato peeler is \$5, it can't be an
3 overcharge because cars cost \$20,000. It's exactly
4 that kind of a thing that Microsoft is trying to sell
5 the Court.

6 There's no relevancy whatsoever. What
7 there is, is annoyance, oppression and undue burden,
8 which the Court under the rule needs to guard
9 against. Here's what Microsoft has asked Comes
10 Investments for:

11 They've asked Comes Investments to gather
12 up and provide detailed financial records for several
13 years, including, Your Honor, weekly, monthly and
14 quarterly reports of gross sales for each of the 13
15 restaurants, all annual profit and loss statements,
16 apparently from the beginning of the corporation
17 because there is no time limit; and certainly that
18 will take enormous time and effort on behalf of this
19 small business with less than a half dozen office
20 employees. They've got 50 or so employees, but most
21 of them are waiters and waitresses and managers of
22 the local restaurants that are all over the state of
23 Iowa, and just -- I think there are five employees in
24 the office or thereabouts. That's an approximation.
25 I don't remember for sure.

1 Microsoft also seeks to force Comes
2 Investments to provide them all documents relating to
3 annual revenues and operating margins, also unlimited
4 in time, and which according to Microsoft's
5 definition includes -- and I'm quoting from
6 Microsoft's definition here -- "Every document
7 directly or indirectly mentioning, relating to,
8 constituting, identifying, discussing, describing,
9 pertaining to, or being connected with annual
10 revenues or operating margins."

11 And finally, Your Honor, and most
12 incredibly, they want the menus, every menu ever used
13 in any of these 13 restaurants. It's oppressive and
14 burdensome by its very terms, and Microsoft offered
15 no justification except they do mention to the Court
16 that the actual gathering of these will probably be
17 borne by Joe and me, which doesn't even address the
18 issue and displays its motion to oppress and harass
19 the actual class representative.

20 Here is Microsoft's problem, Your Honor.
21 It is Microsoft's burden to show under the rule that
22 it will not oppress -- or unduly burden the absent
23 class member, not ours. We do not bear that burden.

24 Microsoft offers four sentences, all
25 conclusory, that somehow gathering up these thousands

1 or tens of thousands of documents will not be unduly
2 burdensome. That hardly meets their burden of
3 showing that gathering these documents will not
4 unduly burden the absent class member.

5 Microsoft has for the fourth time tried to
6 do an endrun around the Iowa Rules of Civil Procedure
7 by seeking discovery from absent class members,
8 first, without Court order and then by seeking a
9 Court order without complying with Rule 1.269.

10 We urge the Court to reject this one as it
11 has all the others.

12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 Response.

15 MR. GREEN: Thank you, Your Honor. That
16 would be me.

17 THE COURT: Okay.

18 MR. GREEN: First of all, with regard to
19 the profit margin of these Pizza Huts compared to
20 Microsoft, if you knew how much money they made at
21 those Pizza Huts we would both change our
22 professions. Just because Microsoft is big and they
23 are small, we're talking about margins here. We're
24 talking about overcharge, which is their -- which is
25 what they are claiming here and we think that it's

1 very, very relevant for us to get information about
2 what -- which is, in essence, a named class member
3 does with regard to margins because that's exactly
4 the way that their, quote, experts are doing this.
5 And, you know, just as a general proposition, Your
6 Honor, this case is filed under Iowa Competition Act
7 552. It says you have to have actual injury.

8 When this case was thrown out by Judge
9 Novak, it went out and the Supreme Court said, "No,
10 we're going to allow indirect purchasers to sue in
11 Iowa." Even though there wasn't any statute that
12 says that, they did it by judicial fiat. But Judge
13 Streit's reasoning in that case was clearly that he
14 wanted to go to the real world; i.e., consumers were
15 the people actually getting injured, so, "Yeah, I'm
16 going to let them sue." But he also made it very
17 clear in that order that you had to have real
18 evidence of it, not just these experts, and that's --
19 we have been literally thwarted at every opportunity
20 to try to develop some real evidence that we can put
21 in front of the jury which will show how an
22 overcharge worked, how people do business.

23 Here we have an opportunity to have an
24 actual -- and I know they say he's not a class
25 member. That's, frankly, just a fiction; that really

1 if you pierce it -- which we're not trying to pierce
2 the corporate veil. It's just that this particular
3 individual, Joe Comes, does have possession and
4 control; and, besides, we've asked for an order
5 pursuant to the class action rule to get it and we
6 can get it from an absent class member if the Court
7 would so allow.

8 But what happened was in a deposition,
9 yeah, he did answer questions about what he made on a
10 refund from, like, Pepsi-Cola and what he got for --
11 what he had to report for Pizza Hut and, you know,
12 what his margins were and that sort of stuff. But
13 when pressed about the overall effect on the
14 business, he said, "Well, you would have to look at
15 the records. The records would show that." And so
16 that's what we did.

17 Now, we did that the day after and we asked
18 on the record -- that is in our briefs -- "Please
19 give us the records." And counsel said, "No, you
20 can't have those because they are private and
21 confidential and Comes Investments is not a member of
22 the class." So we served the subpoena the day
23 afterwards.

24 Now, the subpoena was dated June 2nd, but
25 Roxanne knows and everybody who has practiced in Iowa

1 as long as Roxanne and I have know that you get blank
2 subpoenas from the clerk's office. You don't fill
3 them in until later. So this business about us
4 having this thing all filled out on June 2nd, she
5 knows that's not the truth and that's not what
6 happened. We filled it out. It was dated on the
7 2nd. We had subpoenas for other purposes for other
8 parties and we fill them out later, which we did.

9 Now, I admit we didn't serve it on Roxanne
10 and we should have, and that was a communication
11 problem between us and our national counsel. As soon
12 we discovered it, we did serve it upon her. And Kirk
13 Bainbridge, who is sit sitting here, wrote a letter.
14 But I don't think Roxanne is claiming or the
15 plaintiffs are claiming that she said that Mr. Comes
16 called her the day afterwards. So she had notice
17 right away. So that was a procedural defect that has
18 been cured.

19 But the point is they do use benchmarks in
20 their expert testimony, and we think we should be
21 entitled to at least develop some evidence as to how
22 businesses calculate margins, whether it be gross or
23 net, what are the percentages which they are under
24 and -- I don't care. You know, you can have -- they
25 say the only benchmarks is -- you can use is other

1 software. Well, that is benchmarks they pick, but
2 that isn't what the law says. And if it is
3 irrelevant, that's a fight we can have at the time of
4 trial.

5 We're going through all these Special
6 Master things now, and the plaintiffs have maintained
7 vehemently through that that Special Master McCormick
8 cannot rule on relevancy because that is all reserved
9 for you at the time of trial. We're talking about,
10 in essence, discovery here and, you know, give us the
11 information, which we use, whether it be through our
12 experts or our testimony through cross-examination of
13 Plaintiff Comes at trial.

14 If they want to object to relevancy, you
15 can say it's relevant or not, depending on what the
16 state of the record is at this point, but for them to
17 raise relevancy objections now is totally premature.

18 Now, what we sought -- I want to talk about
19 this burden issue. First of all, Mr. Comes admitted
20 in his deposition that, yeah, he uses Microsoft
21 software to do his financials and it's quite
22 effective, he likes it. And, you know, it's the old
23 business, this stuff we asked for. Presumably it's
24 "push a button and it goes whrrrr" thing, and there's
25 no burden whatsoever to it. If there is a burden, if

1 there is a burden to it, which I'm sure they will let
2 us know -- and we will have problems getting the
3 documents, but they haven't filed any affidavit.
4 They haven't made any showing that there is a burden.
5 Frankly, I think the fact that they say it is a
6 burden is total fiction.

7 A corporation of this size -- which I
8 forget how many millions of dollars, but several
9 millions of dollars annually -- is going to have
10 sophisticated systems on their financial keep records
11 and most of this stuff is stuff they would have to
12 prepare for their tax return and that sort of stuff,
13 so it's there. The burden thing is there. It's a
14 red herring. And they haven't shown -- I mean, we
15 filed a subpoena. They've got to make a showing it
16 is a burden, and they didn't really do it except
17 statements from counsel reading from our subpoena.
18 So there is no burden there.

19 Now let's talk about the distinction
20 between Comes Investment. Roxanne says "Comes." I
21 don't know how you pronounce it for sure, but Comes
22 Investments and Joe Comes, who is a named plaintiff
23 in this case. First of all, he's president of Comes
24 Investments. Second of all, he's already testified
25 about much of what we're seeking. He just didn't --

1 he just didn't have -- he said -- he volunteered,
2 well, if you want the total picture, you're going to
3 have to see our financial statements, and that's what
4 we asked for and that's all attached to our argument.

5 Now, whether he's an absent class member
6 of -- Comes Investments is an absent class member or
7 not, again, I think it's pretty fictional, but the
8 fact is that the class member, Joe Comes, has in
9 possession these documents that we are requesting.
10 He would have to have them as president of the
11 company. My guess is he probably goes over a lot
12 during his business dealings, and so -- but even if
13 the Court determines, "Well, okay, he's an absent
14 class member," we did file our cross-motion seeking
15 formal discovery from Comes Investments pursuant to
16 the Iowa class action rule which allows same.

17 Now, there's been no contact with
18 Mr. Comes. We haven't violated any prior orders or
19 anything like that. We did serve a subpoena and, of
20 course, in the subpoena you do say that the
21 plaintiffs' counsel -- or who the counsel for the
22 party serving the subpoena is. It's a requirement.
23 You have to do it. You have to put it on the form.

24 Now let's talk a little bit more about if
25 the Court treats this as a cross-motion under

1 Rule 1.269(1), the factors under that rule that we're
2 required to meet.

3 First of all, they say it's not timely
4 because it's up to the close of discovery. Well, we
5 did file it the day after we sought the documents
6 that are subject to the subpoena at the deposition,
7 which counsel refused to give to us. I don't know
8 how much more timely you can be than that.

9 Then they say that the subject matter is
10 not proper under that rule to be sought. The subject
11 matter that we're seeking, one of the criteria under
12 the rule: Is the subject matter that the defendant
13 is seeking the same as the subject matter that the
14 plaintiffs' class is seeking? The fact is that they
15 have sought from us all sorts of information about
16 products which are not the subject of this lawsuit,
17 and we have, in fact, given it to them or been
18 ordered to give it to them.

19 And as you probably heard ad nauseam, it
20 constituted 43 million pages of documents, so for
21 them to talk about burden, for them to talk about
22 relevancy, is pretty contradictory to what they have
23 done vis-a-vis us.

24 And again, the other issue is the cost of
25 Comes Investment has for their software products

1 compared to their margins, compared to how they do
2 overall, compared to other costs like labor costs. I
3 think that's very relevant, and we think it's very
4 relevant to go to the overcharge issue that they
5 asserted because if you get a comparison -- and one
6 of the things we've been telling the Court is if you
7 take the costs of the software, the operating system,
8 for instance, or the applications that are the
9 subject of this lawsuit and compare it with costs of
10 generally doing business, I think that it will show
11 that there is no overcharge and it's a very
12 reasonable product when compared to other costs that
13 people have for operating a business. So we think it
14 is very relevant for that purpose also.

15 They raise some issue about he didn't have
16 ownership until March of 2006, but -- so that's a
17 problem, but I guess they dropped that. I didn't
18 hear any argument from Ms. Conlin on that.

19 Oh, the last issue she raised, but I'm not
20 sure they are asserting that anymore; that is, this
21 is private, confidential information. Your Honor,
22 that is clearly covered by the protective order that
23 has been in place in this case and we've quoted at
24 page 1 of our opposition.

25 That is all I have, Your Honor. Just to

1 sum up, you know, whether it's through the fact that
2 the relationship between Joe Comes is such -- and
3 Comes Investments is such to say that he's an absent
4 class member is fictional; or, whether the Court
5 wanted to grant us a formal discovery pursuant to the
6 formal rule for discovery of absent class members,
7 either way this material is, one, highly relevant;
8 two, there's no burden, no burden, and there's really
9 no showing of burden; and, two, it is timely
10 considering the fact that we filed this after we were
11 told that we couldn't have it by counsel for the
12 plaintiffs at the deposition of Mr. Comes the day
13 before we served the subpoena.

14 So we would like at least, Your Honor, one
15 opportunity to present some real-world evidence about
16 the economics of doing business and what role
17 software plays in that, particularly Microsoft
18 software. And here we're trying to do it through a
19 person who is actually one of the named people
20 through the company, one of the named people who
21 brought this lawsuit, and we think we should be
22 entitled to this. We think that this is different
23 than our other efforts. It's not the same, and we
24 would like to have you consider it in that light.

25 Thank you.

1 THE COURT: Very well.

2 Anything further on this motion?

3 MS. CONLIN: Very briefly, Your Honor.

4 THE COURT: Yes, ma'am.

5 MS. CONLIN: Just as an aside, Your Honor,

6 the statute under which we bought this claim, class

7 action statute, says that any person can bring a

8 cause of action. The federal courts have interpreted

9 the word "any" person in a different way than the

10 Iowa Supreme Court did, and I think people, to me,

11 look like people like Joe Comes and that's what the

12 Iowa Supreme Court said was the law of Iowa, which,

13 according to Microsoft Corporation, are fiction.

14 It's hard for me to respond to that. I actually do

15 think that, but the fact is that the law of Iowa and

16 every other state recognizes that corporations are

17 distinct from shareholders.

18 Even shareholders that are 100 percent

19 shareholders are not the same as the corporate entity

20 that it has created and effective under the law. The

21 only way to get to an individual shareholder through

22 a corporation is by -- the only way is by piercing

23 the corporate veil, and you have to have fraud or

24 other things that aren't even alleged here to do

25 that. This is quite ridiculous.

1 Mr. Green says that I said that Comes
2 Investments was not a member of the class at the time
3 of Mr. Comes' deposition in which I was asked to
4 provide Comes Investments records. I did not. I
5 said quite explicitly and specifically Comes
6 Investments is not a class representative, thereby
7 hopefully cluing them into the fact that Comes
8 Investments is an absent class member which they had
9 to know because they questioned him on what kind of
10 computers he used. They knew that Comes Investments
11 was a class member.

12 What the plea is here, "Please, please,
13 give us Comes Investments records because we just
14 don't have anything else," well, that's because they
15 didn't ask the right people at the right time. They
16 didn't ask the Skeffingtons. They didn't ask Riley
17 Paint. They are corporations. They are class
18 representative corporations. They didn't ask other
19 software firms, benchmarks.

20 They had all kinds of opportunity to get
21 what they now say they can only get from an absent
22 class member and they simply didn't do it because
23 they know it's never, never going to pass muster in
24 this courthouse as relevant evidence in this lawsuit.
25 And in most instances it would be correct to say that

1 if it's not relevant, we will just handle that at
2 trial. Not, "not," when they are seeking evidence
3 under 1.269. They have to show relevance in order to
4 do that very rare, unusual thing. They cannot just
5 say, "Well, we will take care of it at trial." It's
6 their burden to show it now, today, not at the time
7 of trial.

8 What I'm going to be anxious to hear from
9 the defendant's experts is that Pizza Hut is, in
10 fact, one of the benchmark companies that their
11 experts are going to use to compare Microsoft with.
12 I don't think that's going to happen. I also do not
13 think that it would be very likely that we could come
14 to Court or just sign our names and get Bill Gates'
15 personal financial records. If Microsoft is right
16 about the fact that corporations are just fiction,
17 then on the same basis that they urge that they get
18 Comes Investment records, we should be able to get
19 those of Bill Gates. Don't worry, Your Honor, we're
20 not going to be doing that, but it is an analogy that
21 works.

22 We also do not have to show that this is an
23 undue burden on us. They have to show that it would
24 not be a burden. What Mr. Green is saying would be
25 true at every other kind of discovery dispute. This

1 is not an ordinary discovery dispute. It is covered
2 by a specific and explicit rule of Iowa Civil
3 Procedure that puts the burden on the defendant in
4 this one instance of discovery.

5 And the products -- first of all, Your
6 Honor, I don't think we have 40 million pages of
7 documents. We only have only -- and I say that -- 25
8 million or so. We do have and have requested and do
9 have products made by Microsoft that are not the
10 subject of the lawsuit, that are not covered
11 products. The reason for that is to compare
12 Microsoft's profits on those non-monopoly products --
13 which, frankly, are not very good -- with Microsoft's
14 profits on its monopoly products which are
15 outrageous. And so that is the reason for that, Your
16 Honor.

17 What Microsoft is saying is that there
18 ought not be class actions because the harm might be
19 small relative to other kinds of costs; and that, of
20 course, is the very reason for class actions. The
21 very, very reason is when a million people lose a
22 dollar, that's a million dollars; and when a million
23 people like the million people or so who bought
24 Microsoft's products lose 50 or 60 or 100 dollars,
25 that turns out to be like about \$400 million.

1 So to compare that to Comes Investments' 13
2 little Pizza Huts is a very false comparison.

3 THE COURT: Very well.

4 Next motion, motion to compel discovery and
5 interrogatories by the plaintiff.

6 MR. JACOBS: Your Honor, I'm going to be
7 handling this motion. The motion that we originally
8 filed has now been narrowed considerably, and the
9 fact is, I believe, a portion of it this morning.
10 Mr. Neuhaus and I have reached agreement in concept
11 on the portion that would be 22 through 26, subpart
12 G -- or, I'm sorry, subpart H. Yeah, we will not be
13 pursuing 22 through 26, subpart H.

14 MR. NEUHAUS: If I may.

15 MR. JACOBS: Yes, go ahead.

16 MR. NEUHAUS: That's correct. And in the
17 list that was handed up to you where it says
18 "Plaintiffs' Motion to Compel Discovery and
19 Interrogatories 22 to 26G," the H has been crossed
20 out, so the only thing left is 22 to 26G which has to
21 do with market share which Mr. Jacob's will talk
22 about. And the second piece of the motion is the
23 EDGI documents, which are 180 and 181. That's all
24 that is left on this motion.

25 THE COURT: Okay.

1 MR. JACOBS: Okay. Your Honor, plaintiffs
2 served Microsoft with a fourth set of interrogatories
3 which were attached as Exhibit A to our original
4 motion back in December of 2005, and then Microsoft
5 responded with a series of objections, and we brought
6 a motion to compel on those some time back. We
7 withdrew that motion in part as part of an
8 arrangement that we reached with Microsoft in a
9 stipulation that included Microsoft's commitment that
10 it would respond to these interrogatories that are
11 now at issue before the Court. That stipulation was
12 entered on April 9th of 2006. That was attached as
13 Exhibit C to our original motion.

14 Microsoft provided us with supplemental
15 responses to these interrogatories on June 8th, and I
16 would like to walk the Court through just to get a
17 sense what it is that we're asking for with these
18 remaining interrogatories and then how Microsoft had
19 responded to these interrogatories, we believe,
20 improperly.

21 Exhibit D to our motion includes
22 Microsoft's responses or supplemental answers to the
23 interrogatories. Interrogatory No. 22, subpart G,
24 that is at issue, plaintiffs ask that Microsoft,
25 quote, State your estimate of Internet Explorer's

1 share of the browser market at the time of launch of
2 each version of the Internet Explorer.

3 23 through 26G asks a similar question, but
4 for 23 it's with respect to Microsoft Office and its
5 share of the Office suite market.

6 24 is Microsoft's operating system
7 software's share of the operating systems market.

8 25 deals with Word, Microsoft Word, and its
9 share of the word processing software market.

10 Interrogatory 26 deals with Microsoft's
11 estimate -- with Microsoft's Excel and Microsoft's
12 estimate of the spreadsheet software market at the
13 time of the launch of each version of Excel.

14 So those are the only -- right now the only
15 interrogatories at issue in this motion. We want
16 Microsoft -- we want to get Microsoft's estimate of
17 its share -- of its market share at the time of the
18 release of various products.

19 Now, Microsoft's response, and I will read
20 their relevant portions to their response to subpart
21 G in Interrogatory No. 22, which is dealing with
22 Internet Explorer. Microsoft responds that for
23 purposes of this interrogatory and the remaining
24 interrogatories in the series, that's 22 through 26,
25 Microsoft understands "share" to mean shipments or

1 distribution of units of a product offered for sale
2 as a percentage of all shipments of products of a
3 specified type and a specified time.

4 So what Microsoft does is says, "Okay.
5 Here's how we're defining how you, plaintiffs, are
6 using 'share.'" And "we," -- Microsoft goes on to
7 state that "Microsoft employees use a variety of
8 measures of the deployment or use by customers of
9 Internet Explorer for a variety of purposes with
10 varying degrees of accuracy depending on the purpose.
11 Microsoft has not developed a Microsoft estimate of
12 Internet Explorer's share of the browser market."

13 Basically what Microsoft seems to be saying
14 here is that, "Well, we're defining 'share' in a
15 certain way that we've -- we admit that Microsoft
16 employees develop estimates of market share, but
17 that's different than how we're defining how you
18 plaintiffs are using 'share' in these."

19 So we say we have nothing. And
20 furthermore, there's no Microsoft official estimates
21 of these market shares. That's how I understand
22 their response to be here.

23 Now, what Microsoft seems to be doing is
24 confusing -- and, then, so Microsoft doesn't provide
25 us with anything else in response to these -- to that

1 portion of the interrogatories.

2 Microsoft is confusing these
3 interrogatories with request for production of
4 documents. Microsoft is saying, "Well, we don't have
5 documents that specifically identify what you're
6 looking for so, therefore, there's no official
7 Microsoft response and we're not providing you with
8 anything."

9 Now, Microsoft must provide the figures
10 because it has knowledge and means available to
11 answer these interrogatories.

12 We provided the Court in our briefing with
13 citations to several cases. One was Moore v. Lange,
14 107 B.R. 130, 133. The Court says, "A party cannot
15 refuse to answer an interrogatory simply because he
16 would have to consult books or documents in order to
17 prepare a response." And similarly, in O'Neal vs.
18 Safeway Ins. Co. of Alabama, 713 So.2d 956 at 960:
19 "We reject the argument that information is
20 unavailable because records in which it would be
21 found are not kept in the ordinary course of
22 business."

23 But Microsoft makes no claims anywhere that
24 it cannot calculate these estimates of market share
25 and, in fact, Microsoft admits that it can be done.

1 Microsoft repeatedly states that its employees -- and
2 this is in its response "that its employees use a
3 variety of measures of sales or deployment of the
4 various software products for a variety of purposes
5 with varying degrees of accuracy." So it's saying,
6 "Yes, these estimates" -- "in fact, we do these
7 estimates."

8 Microsoft even goes so far as to say in its
9 briefing that its experts may develop precisely the
10 estimates we're asking for. But we're asking for
11 Microsoft's estimates. We're not asking for
12 Microsoft's experts' estimates. We want Microsoft's
13 estimates for these various market shares. And so
14 that is actually -- since the other portion we
15 dropped, that is all I have on the interrogatories.

16 The document requests -- actually, do you
17 want to respond to the interrogatories first or --

18 MR. NEUHAUS: Sure.

19 MR. JACOBS: -- or should we go ahead to
20 the documents?

21 MR. NEUHAUS: Why don't I respond.

22 On the interrogatories, Your Honor, first
23 of all, what is different about this interrogatory
24 from the case that he's cited is that this is not
25 data that is in the files that -- where you can just

1 pull it out. The cases he's cited have to do with
2 what are your assets and liabilities a certain date
3 when you are bankrupt, or tell me when you ask an
4 insurance company when you have been sued. That's
5 not this case.

6 This is about a request for -- he kept on
7 saying "Microsoft's estimate." At the very end he
8 said, "I want Microsoft's estimates, not the experts'
9 estimate." But Microsoft doesn't estimate what they
10 are asking for here. What they are asking for here
11 is a share of the operating system software market at
12 the time of launch of each version of Microsoft
13 operating system software. Microsoft doesn't do
14 that, and that involves getting estimates,
15 guestimates, of your competitors' sales and that's
16 not something Microsoft generates or figures out.
17 There are publically available estimates of all
18 different kinds in publication that you then have to
19 decide, well, which one do you trust? which one is
20 comparable to what figure in Microsoft's own data?

21 So this is not at all like the cases he's
22 cited where it's just a matter of going to the files.
23 It's a matter of judgment and estimations to generate
24 this figure.

25 Mr. Jacobs mentioned that we had

1 interpreted the interrogatory. Let's go back a
2 little bit here. He also said that we had agreed to
3 respond. That is not true. The stipulation says
4 very clearly that all -- all that happened in the
5 stipulation is that they would withdraw their motion
6 to compel, the parties would "meet and confer" to
7 resolve the issues with respect to these
8 interrogatories and it says explicitly, "Microsoft
9 reserves the right to oppose any further document
10 discovery request of any kind."

11 What happened here is they propounded these
12 interrogatories. Microsoft objected and said that
13 the interrogatory was vague and ambiguous, and as
14 plaintiffs say in their motion, the parties met and
15 conferred, but plaintiffs did not amend their
16 response in any way. It's vague and ambiguous
17 because of the term what is the share of the
18 operating system software market. It could be sales.
19 It could be any of a number of other measures, as
20 written. The most natural interpretation of it is --
21 because it's speaking of the share of the operating
22 system software market at the time of launch, is they
23 are talking about unit sales. That's how we
24 understood it. That is how we interpreted it in the
25 thing. They never narrowed it. They never made it

1 more specific. They insisted that it be answered as
2 written, and that is what we did.

3 And he says, "Well, it couldn't" --
4 "Microsoft has interpreted to mean these unit sales."
5 They have never in their papers anywhere objected to
6 that interpretation. Not in their motion and not in
7 their reply brief do they say, "Oh, that's not what
8 we meant. We meant something different." All
9 through here they have, (a), insisted on the language
10 as written; and, (b), when we said, "All right. If
11 you're not going to explain it further" -- because we
12 did object on this ground -- "If you're not going to
13 explain it further, we will answer it with the most
14 natural interpretation, which is a share of unit
15 shares of all products" -- "of your products compared
16 to the shares of all products of the similar type,
17 all other operating system products." That is a very
18 natural interpretation. It doesn't -- it's a very
19 natural interpretation.

20 So that's how we answered it. We went and
21 looked all through Microsoft to find out whether
22 anyone did this, and the answer is, "No, people do
23 not do this." They don't generate this share. They
24 do things that are different. For example, in our
25 papers we pointed out that Microsoft estimates the

1 percentage of personal computers that are shipped
2 with Microsoft's Windows. That is a share estimate,
3 but it's not -- it's not what the interrogatory
4 seeks. The interrogatory sought Microsoft's share of
5 all sales of operating system software.

6 If you just look at what PCs are shipped,
7 which is what Microsoft does calculate for its own
8 personal business reasons, you're leaving out shares
9 of retail shares of shrink-wrap software. Microsoft
10 doesn't develop a share that has all of that
11 together. To do that you have to go and make some
12 kind of guesstimate of competitors' sales and
13 Microsoft doesn't do that. So that's -- we
14 interpreted in the natural way. We objected first
15 and said it's vague and ambiguous. They never
16 specified. They declined all through the terms. We
17 then answered it in the natural interpretation. We
18 told them what our interpretation was. In their
19 motion -- even in their motion you will not find a
20 single word that says that's not what we meant. And
21 we looked for responsive information, and it wasn't
22 there.

23 This is not a situation where you can go to
24 the files and pull out Microsoft's estimate of the
25 competitors' sales because it doesn't exist. That's

1 not -- Microsoft hasn't made those judgment calls
2 that are required to decide, all right, is this
3 third-party estimate of the competitor sales the
4 right one to take when Microsoft does do, for
5 example, this -- share PCs. It's a relatively
6 complicated endeavor and done with some level of
7 sophistication.

8 Now they say -- and I should add they have
9 what Microsoft does do in this regard. There are two
10 document requests that are attached to our papers,
11 Request for Production 100. There are several of
12 them, a whole series of these. For example, Request
13 for Production 100: "All documents that evidence,
14 refer or relate to estimates of market share for
15 Microsoft or other publishers for operating system
16 software, word processing software, spreadsheet
17 software and office productivity suite software for
18 all this time period from 1994 through and to
19 including 2005."

20 There was some limitation of that on time
21 periods, but we have produced -- Microsoft has
22 produced thousands of pages of documents relating to
23 the market share estimates that it does do. So what
24 what they are asking for is not, "You go to those
25 files" -- you know, "You pull things out of those

1 files," that you've already done -- which the cases
2 that they've cited, they are asking for us to have
3 our people decide for purposes of this litigation
4 what is the right measure of competitive shares and
5 produce something, generate something that isn't done
6 ordinarily and that's not what the cases they cited
7 say. The cases that are applicable are the cases we
8 cited that say if you don't have what is sought, the
9 proper answer is that they don't have it.

10 So that, Your Honor, is our submission on
11 this part. The interrogatory has been narrowed
12 substantially and this is the sole remaining issue.
13 We have properly answered the interrogatory that was
14 propounded. We objected to it as vague and
15 ambiguous. They declined. They did not narrow it.
16 We answered it with a perfectly natural -- I think
17 the most natural interpretation. We've looked for
18 the responsive information. It does not exist, and
19 we're not required to make judgment calls in order to
20 answer an interrogatory like this.

21 Thank you.

22 THE COURT: Response.

23 MR. JACOBS: Just a brief couple of points

24 I would like to make, Your Honor.

25 We are asking that Microsoft make some

1 estimates here, and they may not be able to just pull
2 them out of a filing cabinet, but that is why this is
3 an interrogatory and not a document request.

4 We're asking for Microsoft's estimates of
5 market share that are -- these requests are relevant
6 to this case. There's no dispute of relevance of
7 these issues. These are issues that are very
8 important in this case, and we're asking for
9 Microsoft -- "What is your position on what your
10 market share has been over the years?"

11 Now, this notion that you can't just pull
12 this out of a file, well, these interrogatories
13 really aren't at all different than what you would
14 ask in a breach of contract claim case, for example,
15 where you ask the opposing party, "What is your
16 position on your contract damages that you suffer?"
17 You can't just go and pull it out of a file. You
18 have to make some judgment calls on those issues.

19 That is what we're asking that Microsoft do here.

20 So the fact that they might not do some of
21 these things in the normal course of business,
22 really, is irrelevant to this request.

23 Now, Microsoft says, well, the only natural
24 interpretation of these requests was that "market
25 share" must mean "units shipped" at a specific period

1 of time, but yet Microsoft admits that its employees
2 have other means of estimating market share, such as
3 deployment or PC shipments and the like.

4 Now, the argument that PC shipments isn't
5 responding directly to the requests for operating
6 system estimates, it's a pretty darn good starting
7 point; however, since Microsoft knows apparently if
8 it's making these estimates and Microsoft also knows
9 approximately what percentage of these operating
10 systems are shipping through the OEM channel versus
11 the retail channel and it's a huge percentage that
12 are shipped through the OEM channel, they certainly
13 have the ability, then, for purposes of these
14 interrogatories to make the kinds of estimates that
15 we're asking for.

16 And then, finally, Microsoft argues that --
17 we produced a lot of documents that have all of this
18 information in it. Plaintiffs have propounded
19 document requests seeking information of this sort.
20 Well, the problem with that response is if Microsoft
21 wants to answer these interrogatories with documents,
22 the rules require -- 1.509(3) requires that Microsoft
23 give us -- specify the documents in sufficient detail
24 to permit the party serving interrogatories to locate
25 and identify as readily as can the party served, the

1 records from which the answer may be ascertained.

2 They haven't done this in this case.

3 That's all I have on that.

4 THE COURT: Very well. Motion to compel.

5 MR. JACOBS: Oh, I'm sorry.

6 THE COURT: Oh, I'm sorry. The RFP.

7 MR. JACOBS: Yeah. There's a second

8 request for production, 180 and 181.

9 THE COURT: 181.

10 MR. JACOBS: Now, these are requests for

11 production that deal with Microsoft programs called

12 "EDGI," E-D-G-I, Education and Government Incentive,

13 and another program called "Partners in Learning."

14 Now, plaintiffs have some limited

15 information on these programs that were contained in

16 some of the document requests, some of the earlier

17 document submissions that Microsoft had made. Based

18 on that limited information that plaintiffs have, we

19 believe that Microsoft is using this EDGI program --

20 may be using this EDGI program and this Partners in

21 Learning program in an anticompetitive manner.

22 What we believe might be happening, Your

23 Honor, is that Linux, L-i-n-u-x, which is an

24 open-source operating system -- it's out there. It's

25 being used and adopted in certain locations,

1 oftentimes in some poorer countries; that Microsoft
2 may be going around to various countries and using
3 these programs as sort of a way to undercut and to
4 make sure that Linux is not adopted by these various
5 governments and various institutions in these
6 countries.

7 During the deposition of Kevin Johnson,
8 plaintiffs asked information, asked questions, based
9 on these documents. Mr. Johnson provided some
10 responses that we believe were inconsistent with our
11 understanding of what the documents were saying. So
12 we followed up with further requests for these
13 documents.

14 Now, Microsoft's response is basically
15 twofold. One is that these are just -- these
16 documents are irrelevant to plaintiffs' case. In
17 this case we are alleging that Microsoft is violating
18 the antitrust laws up to the present, that it's
19 engaging in continuing monopolistic conduct and
20 maintaining its monopoly in what has been defined as
21 the market for Intel-compatible PC operating systems.
22 And Your Honor will recall in the motion for
23 collateral estoppel that that market was defined in
24 the government case, and it's been accepted here, is
25 the worldwide market for licensing of

1 Intel-compatible PC operating systems.

2 In other words, it doesn't matter that this
3 conduct might be going on in Malaysia or Thailand or
4 Vietnam or other parts of the globe. We're talking
5 about a worldwide market and the fact that conduct is
6 occurring in Europe or in Asia or somewhere else has
7 an impact on that market or, at least, may have an
8 impact on the market. So these are clearly relevant
9 to plaintiffs' case.

10 Now, the other issue that they've raised is
11 a stipulation saying, "Well, these issues weren't
12 unanticipated because there were some EDGI documents
13 in these earlier document productions by Microsoft."
14 These documents, yes, there were, that were mixed in
15 with all of the other productions. We found some
16 documents. We questioned Mr. Johnson on them; and as
17 a result of that, issues arose that we decided we
18 needed to go forward and seek additional information.
19 And that's what we're asking, this information on
20 these EDGI documents.

21 So what we would like, Your Honor, is an
22 order compelling Microsoft to respond to these
23 requests.

24 THE COURT: Thank you.

25 Mr. Neuhaus.

1 MR. NEUHAUS: Your Honor, if you would
2 like, I would like to hand up the stipulation as part
3 of plaintiffs' papers, Plaintiffs' Exhibit C, because
4 I'm referring to them while referring to other
5 documents. I would like to give you a separate copy
6 if that's all right.

7 THE COURT: Thank you, sir.

8 MR. NEUHAUS: These requests, Your Honor,
9 are barred by this stipulation. On April 9, 2006,
10 Your Honor, the parties entered into a stipulation to
11 resolve discovery disputes. Plaintiffs got five
12 weeks' extension on their expert reports. Microsoft
13 was at that time quite concerned that this extension
14 would lead to the continuation of what had been very,
15 very burdensome document requests, and sought and
16 obtained an agreement from plaintiffs that is
17 contained in this stipulation -- and, in particular,
18 in paragraph 4 -- to limit the burdensome document
19 requests that we've been having.

20 And if you look at paragraph 4, it says
21 that "Plaintiffs agree to serve no further
22 interrogatories or requests for production of
23 documents on Microsoft except" -- as an exception --
24 "that plaintiffs reserve the right to serve such
25 isolated and limited interrogatories or requests for

1 production of documents that are particularly
2 necessary in order to resolve unanticipated issues
3 that may arise between the date of this stipulation
4 and the close of fact discovery in this action."

5 It is essential, Your Honor, that the Court
6 enforces written stipulations of this kind as they
7 are written. Discovery limiting stipulations are
8 favored and encouraged by the Iowa rules and federal
9 rules. They are construed like a contract. They are
10 a matter -- they are a product of bargaining between
11 parties, sophisticated parties, and they should be
12 applied as written.

13 This limitation permits document requests
14 only if they are: One, isolated and limited; two,
15 particularly necessary to resolve unanticipated
16 issues; and, three, those issues arise after the date
17 of the stipulation.

18 The two document requests, Your Honor, that
19 plaintiffs are seeking to enforce are Requests for
20 Production 180 and 181, and let me see if I can
21 remember where they are. I'm sorry. I'm trying to
22 find it so I can put the language in front of you.

23 Yes. It's Plaintiffs' Exhibit H.
24 Plaintiffs' Exhibit H has their language, and it's
25 180 and 181.

1 And 180 is -- these are precisely the kind
2 of sweeping requests that Microsoft had sought to
3 end. They were served on June 5, 2006, more than
4 eight weeks after the April 9 stipulation. 180 seeks
5 documents concerning "All grants, loans, rebates or
6 other things of value made through either EDGI" --
7 E-D-G-I -- "or Partners in Learning," so any loans,
8 any of the grants and so forth that were issued under
9 this program.

10 181 is even broader. It says "All
11 documents pertaining to the EDGI and Partners in
12 Learning programs, including but not limited to the
13 originating documents and any changes thereto,
14 requests for funds, and documents concerning the
15 purpose for and use of any funds from the programs.
16 See" -- and I'll come back to this -- "See, e.g., J-15
17 and J-17." Those are references to exhibits used in
18 the Kevin Johnson deposition that plaintiffs have.

19 Just as an aside, Your Honor, the theory of
20 relevance here is fairly strained. What these
21 programs are, are programs to assist schools in
22 underdeveloped countries to get software by providing
23 discounts or grants to the schools. The theory that
24 this is anticompetitive is extremely strained because
25 price cuts by anybody, including a company in the

1 position of Microsoft, are not anticompetitive as
2 long as they are not predatory pricing. As long as
3 they are not predatory pricing, they are, in fact,
4 pro-competitive.

5 So these are price cuts in less-developed
6 countries like Malaysia, and so the theory here is --
7 that these are relevant to this case or that these
8 are evidence of anticompetitive practice is extremely
9 strained and highly at the very margin of this case.

10 But that is not the test. The test under
11 the stipulation is what I said to you earlier: Are
12 these isolated and limited, the requests for
13 production, that are particularly necessary to
14 resolve unanticipated issues that arise after the
15 date of the stipulation? These are, first of all,
16 not isolated or limited. These are extremely broad.
17 These are all the documents that pertain
18 essentially -- I mean, you know, to these programs,
19 every single grant, rebate or other thing of value
20 that was ever issued -- extremely broad request, not
21 even remotely isolated or limited.

22 Secondly, these are certainly not -- this
23 is not an unanticipated issue; that is, plaintiffs
24 have had since the fall of 2005, if not earlier,
25 documents relating to EDGI and the Partners in

1 Learning program. They took Mr. Johnson's
2 deposition, came loaded with bear with documents to
3 mark. They asked Mr. Johnson about this for some 80
4 pages.

5 Their explanation for why this is an
6 unanticipated issue is that -- they said, as I
7 understand it, that Mr. Johnson gave answers that are
8 inconsistent with the documents. If that was the
9 test for what is an unanticipated issue, the test
10 would be meaningless. It can't -- because anybody
11 could come in and say, "Well, you didn't answer the
12 document. You didn't accept my interpretation of
13 this document. That is an unanticipated issue, so
14 now I have to go back and get more discovery."

15 In truth, if you read the deposition, they
16 don't provide you any evidence of this supposed
17 unanticipated issue. There's not a single page of
18 Mr. Johnson's deposition in the record -- I read it
19 and I don't think he's being inconsistent with the
20 documents at all. I think Ms. Conlin took the
21 position and was trying to say the only purpose of
22 this program was to beat competition from Linux, and
23 Mr. Johnson kept saying over and over again, "I don't
24 remember the program that way. I didn't write these
25 documents. I recall the program involved and that

1 later the program was particularly focused on serving
2 schools in developing countries."

3 They offer none of this evidence. The only
4 basis for their claim of an unanticipated issue was
5 that Mr. Johnson said something inconsistent with the
6 documents, which there is no evidence in the record
7 whatsoever; and it cannot be that a mere lawyer
8 walking in and saying, "Well, Mr. Johnson said
9 something today I didn't quite expect," entitles them
10 to this kind of broad discovery.

11 So under the stipulation, Your Honor, if
12 this stipulation means anything -- and it is a
13 hard-fought, bargained-for stipulation -- this set of
14 requests has got to be denied, Your Honor. It is the
15 kind of sweeping "Give me everything about this
16 program," that was exactly the kind of document
17 request we were seeking to end.

18 Thank you, Your Honor.

19 THE COURT: Thank you, sir. Response.

20 MR. JACOBS: Just a quick response from
21 this "mere lawyer."

22 One, I would like to remind the Court that
23 the entire Johnson deposition was provided to the
24 Court in connection with the prior motion to take a
25 second day of his deposition. A lot of these issues

1 were the subject of that motion on whether or not he
2 was actually answering inconsistently or not and the
3 need for plaintiffs to take a second day of that
4 deposition.

5 Mr. Johnson's deposition was taken in -- I
6 believe it was around June 2nd. It was early June.
7 So this document request came almost immediately
8 after that deposition was taken in response to
9 those -- some of the answers that he had given at
10 his deposition. So these were issues that were
11 unanticipated. If Microsoft's interpretation of
12 "unanticipated" basically would mean there was
13 absolutely no way anyone could have ever foreseen any
14 issue coming up, that was in no way dealt with in any
15 one of these documents that have been produced by
16 Microsoft.

17 What "unanticipated" means -- the only
18 reasonable interpretation of "unanticipated" here is
19 issues arising, such as in a deposition like this,
20 where we have located certain documents that we
21 decide to use in the course of the deposition, the
22 responses are inconsistent with those documents. The
23 unanticipated part is, "Okay, well, given
24 Mr. Johnson's response to these documents," which was
25 very near what Mr. Neuhaus -- how he described the

1 program, which really is inconsistent with the
2 documents.

3 Okay. Let's explore this EDGI program. It
4 is a limited, targeted response to the EDGI program,
5 and Microsoft despite its claims of burden provides
6 nothing in terms what would be the burden, what would
7 be the scope of the production in this case. So
8 these are targeted requests that are just seeking
9 information regarding this program.

10 I would just like to touch very briefly on
11 Mr. Neuhaus's claim that this is really
12 pro-competitive. This is -- really, this is not just
13 a pro-competitive program in our opinion. Microsoft
14 is using, we believe, the EDGI program and the
15 Partners in Learning to extend Microsoft's monopoly.
16 EDGI can only be used where Linux is a threat. It's
17 not something that is just used for poor countries or
18 poor districts. It's used where Linux is seen as a
19 threat and also price discrimination, which is what
20 this ends up being. It can be indicative of monopoly
21 power. So notwithstanding these claims that are
22 discounts and, therefore, they are pro-competitive,
23 the fact that Microsoft can price discriminate in
24 this way can also be indicia of monopoly power, which
25 is clearly a relevant issue here.

1 MR. NEUHAUS: Your Honor, one sentence or
2 two. The whole point of what he said, he said the
3 issue, "Now let's explore the EDGI program." They
4 were in a position to explore the EDGI program and
5 did prior to April 2006 and this kind of opening a
6 new front is exactly what the stipulation was
7 intended to prevent.

8 THE COURT: Next motion.

9 MS. CONLIN: You want to do that, Your
10 Honor, or a break?

11 THE COURT: Ten minutes.

12 (A short recess was taken.)

13 THE COURT: We're on plaintiffs' motion to
14 compel --

15 MR. NEUHAUS: Your Honor, if I might,
16 Mr. Jacobs and I thought it would be sensible to put
17 on the record the agreement in which we only reached
18 in this court this morning with respect to
19 Interrogatories 22 to 26H.

20 THE COURT: Go ahead.

21 MR. NEUHAUS: So I would just read it into
22 the record. Again, the agreement in principle is
23 that the plaintiffs withdraw subpart H of
24 Interrogatories 22 through 26 and will seek only unit
25 share figures for G if that were granted, and

1 Microsoft will stipulate to unit figures for
2 Tables 2, 3a and 3b up through June 30th of 2006 on
3 the same basis as we have stipulated to the figures
4 for 2005 and prior years in the stipulation dated
5 June 25, 2006.

6 Thank you, Your Honor.

7 THE COURT: You're welcome.

8 You may proceed.

9 MS. CONLIN: Thank you, Your Honor.

10 There are two things remaining for the
11 Court's consideration in the second motion to compel.
12 One is the Lucovski memo and the second is source
13 code.

14 The Lucovski memo deals with Windows 2000.
15 Mr. Lucovski was a high-level Microsoft employee and
16 sent a memorandum or an e-mail around to people that
17 said -- and I've given the Court a copy of this, but
18 I thought it would be helpful to look at it. It's
19 Exhibit D to our motion, Your Honor.

20 THE COURT: Thank you.

21 MS. CONLIN: This is the only press report
22 that I have, but I understand there may have been
23 others concerning this matter, but he sends a memo
24 to, or an e-mail to, his -- to the people that work
25 with him saying, basically, We sent out this product,

1 Win2000, with 63,000 bugs, and that is the subject of
2 this e-mail that we seek to get.

3 Microsoft refuses to provide us with this
4 memo despite the fact that Microsoft's defense
5 includes its contention that DRI, an operating system
6 competitor, failed because it put out buggy
7 products -- probably not 63,000 bugs -- but
8 Microsoft's contention is DRI fails not because
9 Microsoft engaged in illegal, anticompetitive
10 conduct, but because some of the software that DRI
11 released had bugs in it.

12 Well, that seems to me to call for the
13 production of a memorandum internal to Microsoft to
14 confessing to having released a product in the year
15 2000 with 63,000 bugs.

16 The Court is familiar with the pretrial
17 procedures order. We have avoided, Your Honor,
18 repropounding RPDs already asked by some other
19 plaintiffs at some other time and place. In our
20 stipulation of April 9th, which you may be getting a
21 little tired of hearing about, we agreed to limit our
22 discovery to -- and I quote, and you already have it
23 up there, and you probably know it by heart already:
24 We agreed to limit our discovery to isolated and
25 limited RPDs particularly necessary to resolve

1 unanticipated issues. Microsoft has seized on the
2 word "unanticipated" and uses its interpretation
3 devoid of any context whatsoever to insist we are not
4 entitled to this document.

5 For fun last night, Your Honor, I looked up
6 under Microsoft's -- Microsoft Word has a thesaurus.
7 And so I looked up what Microsoft says
8 "unanticipated" means and the synonym for
9 unanticipated, according to Microsoft, is
10 "surprising" and "unforeseen." Both are used as
11 synonyms by Microsoft. And the context in which we
12 understood the word "anticipated," as we agreed to,
13 was 25 million documents; 14, 15, 1600 depositions;
14 Lord knows how many pleadings and orders and the
15 like. Your Honor, we just don't know what is on
16 every single page of those 25 million pages or in
17 every deposition or in every pleading and sometimes
18 we're surprised.

19 Microsoft admits that we requested the memo
20 on June 20th before the close of discovery and on the
21 very day, the very day, we were able to confirm
22 that -- we did not have it among our 25 million
23 pages. Searching for Mr. Lucovski's name in our
24 database produces many, many, many thousands of
25 documents, Your Honor. He was a very long-term

1 Microsoft employee. Word searching, phrase searching
2 is imperfect. And as the Court is aware, I have been
3 maligned for not finding elusive things in my
4 documents, and I tried to make sure it wasn't there.

5 During this same time frame, Your Honor,
6 we're also getting documents all the time from
7 Microsoft, late documents all the time from
8 Microsoft, and we're trying to get them into our
9 database, Your Honor. We're OCR'ing them and adding
10 them to the database, and I kept thinking it's got to
11 be there. This important, relevant document has to
12 be in there. It's just not possible, it's not; but
13 it isn't. We know it isn't. Microsoft knows it
14 isn't. It's just not there. Microsoft has it. It
15 cannot be more than a few pages. It is clearly
16 relevant. We requested it before the close of
17 discovery. We were surprised that we did not have
18 it, and we asked the Court to ask Microsoft, make
19 Microsoft turn it over to us.

20 Then there is the source code issue. I
21 call it the "Saga of the Source Code."

22 Your Honor, we've properly propounded a
23 request for the production of source code on
24 December 22nd of 2005. Microsoft says that what we
25 asked for was the source code for hundreds of

1 products, but we asked for lots of products back to
2 about 1990, as I recall.

3 We dealt with that request in our "meet and
4 confer" process along with many, many others in this
5 time frame. And we were not able to reach any
6 conclusion with respect to it. In our -- however,
7 what I thought was -- I was confused. In our
8 briefing to the Court on the motion to compel and a
9 motion to compel long ago, long, long ago, the one on
10 which the Court ruled on April 10, I told the Court
11 both in the briefing and in my oral argument that we
12 had reached agreement on it. I told the Court that
13 we -- that Microsoft had agreed to produce the source
14 code for 10 to 15 products, products of our choice.
15 I was wrong, and Microsoft said in the oral argument
16 that I was wrong.

17 When I went back and checked my notes, I
18 was wrong. What we had reached agreement on, Your
19 Honor, was that Microsoft would provide us with 10 to
20 15 products, not source code for products. So I was
21 confused. And pursuant to the stipulation before I
22 come back to the Court and say they won't give me
23 source code, I went -- we went, again, through the
24 "meet and confer" process to see if we could reach
25 agreement on these matters.

1 You did not, Your Honor -- Microsoft tells
2 you that you denied the request for source code.
3 That's not so. Because I confused you, you didn't
4 rule on it at all. You didn't deny it. You thought
5 it was moot. So did I. But now I come back because
6 we weren't able to reach agreement and I asked the
7 Court for a very limited subset of source code.

8 At the time that we were arguing that, that
9 was April 7th, we had no source codes, none at all.
10 We should have had lots of source code at that point.
11 We didn't know it. When I was standing here in the
12 courtroom, I didn't know I was supposed to have
13 source code. I assumed that no source code had been
14 otherwise produced. Well, it started coming. Some
15 of it was months late, some of it was years late.
16 Microsoft produced source code in Caldera, which we
17 should have had long ago. You ordered the production
18 of Caldera material in July of 2005.

19 Microsoft produced source code in the DOJ
20 case, which we were already supposed to have as a
21 part of our, you know, mass material in the
22 coordinated case. We didn't have it. Microsoft
23 produced source code in any number of other cases and
24 we did not -- we did not have it.

25 We started getting it, some of it, as I

1 said, several months late, some of it several years
2 late. And, of course, we never know what today's
3 mail may bring.

4 When we started getting it, Your Honor, I
5 have -- the Court has met Andrew Smith, who is a
6 Drake law graduate and also happens to be a technical
7 expert, and he took the source code as my staff
8 person and started -- and loaded it specifically to
9 see what source code we actually had. And the Court
10 is aware that some of that source code came with a
11 very virulent, live virus on it. We didn't get -- it
12 was June 26th when we finally got that source code
13 replaced. We also had a corrupted disk and then we
14 found a dead virus. We didn't know for sure it was
15 dead, so, of course, you know, this just -- we are
16 very fortunate to have Mr. Smith because he has set
17 up a security system, the likes of which no one has
18 ever seen, and it detected the dead virus.

19 In any event, Your Honor, only two weeks
20 ago did we get the corrupted disk replaced. It was
21 even more recently than that that we determined that
22 the virus that was in the -- some of the source code
23 was dead.

24 As of today our technical experts, our
25 outside technical people, have not seen a single line

1 of source code, not one single line of source code
2 that's been examined by the technical experts.

3 Microsoft has insisted on imposing what we
4 think are unworkable and onerous conditions on the
5 review by our experts, and we still hope that we can
6 work that out. We're working hard to find a
7 solution. Lord knows, we do not want any breaches of
8 security with respect to this source code. We
9 probably do not want any breaches even more than
10 Microsoft doesn't want any breaches. We keep -- it's
11 kept under lock and key.

12 You know, we've taken every precaution to
13 assure that there is no breach of security. But I'm
14 telling the Court this because we're -- we've not
15 been at all dilatory in our brief of this matter.
16 After much angst, we finally learned what we got
17 late, what was on those disks. We got the disks that
18 were uninfected. And what we now seek, Your Honor,
19 are two versions of Office, the Office Productivity.
20 We seek Office XP released in 2001 and we seek
21 Office -- I'm sorry, wrong decade, 2003. We also
22 seek releases of Word, Excel and Internet Explorer
23 from 2001 on.

24 Microsoft says that Internet Explorer is
25 part of Windows and therefore -- and I don't quite

1 understand this -- therefore, what we're really
2 seeking is Windows source code, but we've got Windows
3 source code, so I don't know -- I don't get that
4 point.

5 What we're seeking, Your Honor, is
6 Microsoft has a stand-alone Internet Explorer Beta
7 called IE 7, Internet Explorer 7.0, that is now --
8 the product itself is now available for public
9 downloading. Anybody who wants it can go get it.
10 That's the source code that we seek in terms of
11 Internet Explorer, and then we seek, as I said, Word
12 and Excel and two versions of Office.

13 Okay. Why do we need Office source code?
14 We believe with some very good justification that
15 Microsoft Office developers and developers in the
16 Microsoft applications division called secret
17 undocumented APIs in Windows. We believe that the
18 Windows platform developers, you know, applications,
19 operating systems -- that the operating system
20 developers put secret APIs into the Windows source
21 code so that the Office people can use those secret
22 things and don't tell anybody else. So the Office
23 product has access to features and functionality that
24 competitors can't use, that competitors don't have
25 access to. Knowing about these secret APIs that the

1 operating system people have put into the operating
2 system, permits Office a clear advantage. We want to
3 check the Office source code ourselves
4 and -- not me, Your Honor, someone on my behalf --
5 and see if they are calling undocumented APIs or have
6 other such features that only somebody with source
7 code knowledge could get to.

8 We have exhibits, Your Honor, that show
9 Windows developers do put features into the operating
10 system for Microsoft Office only. It makes Microsoft
11 applications boot faster, you know, come up faster,
12 run quicker than competitor software. We believe
13 that it's calling for secret undocumented APIs, and
14 the only way that we could prove this beyond a doubt
15 is by access to that source code. We don't have any
16 Office source code. We've got no application source
17 code for Word or Excel. We need to have it. No
18 doubt it's relevant. We made the request long, long
19 ago. I take responsibility for confusing this issue.
20 After I realized I made a mistake, I did seek to
21 follow the stipulation and meet and confer and try to
22 get agreement without success.

23 Microsoft disingenuously suggests that we
24 can't use the lay-produced source code, all produced
25 after June -- produced, most produced, not all, most

1 produced after June 2nd. That's the the day the
2 expert reports were due. Now they say we can't. Why
3 do we want this? Because we can't use this. Well,
4 it takes a lot of Chutzpah to delay court production
5 of source code until the expert reports are already
6 done and then claim that the expert can't use it even
7 now, you know, the experts haven't been able to look
8 at the source code. You do expect to supplement the
9 expert reports with all this lay-produced stuff that
10 Microsoft keeps doing. Anything else, Your Honor,
11 would reward Microsoft's negligent, perhaps
12 intentional, delay of court-ordered production of
13 documents and other things.

14 Microsoft also says we don't really need
15 the source code to discover undocumented APIs, and
16 they are right. One of our experts has written books
17 on Microsoft's undocumented APIs, but he's done so
18 without access to any source code. And I believe
19 that we've talked about this before, Your Honor.
20 Source code doesn't just include, you know, numbers.
21 It includes words, the developer's words about the
22 purpose, the documentation for the call; in other
23 words, as I said, I've not seen the source code
24 myself because it doesn't seem appropriate for me to
25 look at. But my understanding is that there will be

1 a call and the developer of the call will say, "I'm
2 doing this because." Well, that would be certainly
3 very useful information and important information and
4 relevant information for us to have and, indeed,
5 Microsoft itself has admitted in its documents and
6 otherwise that the source code internal documentation
7 is essential to determining functionality. I have
8 accepted responsibility for making a mistake. It's
9 not the first one that I've made. I dare say it
10 won't be the last.

11 THE COURT: So the mistake that was made
12 you believe, is you got something that --

13 MS. CONLIN: What I believed, Your Honor,
14 at the time of the hearing was that we had reached an
15 agreement on source code, that they were going to
16 give us 10 to 15 --

17 THE COURT: Right, but it was actually an
18 agreement on something else?

19 MS. CONLIN: Right, it was 10 to 15
20 products.

21 THE COURT: But the request was made
22 December 15 of 2005?

23 MS. CONLIN: Yes.

24 THE COURT: For all source codes?

25 MS. CONLIN: Yes. And I've apologized to

1 Microsoft. I apologize to the Court, but I don't
2 think that we should be deprived of the opportunity
3 to have source code because I made a mistake about
4 what agreements we had reached. I've in good faith
5 attempted to straighten out the confusion and follow
6 the stipulation and, you know, we needed -- we got
7 all this light source code. We needed to find out
8 what we had. I wasn't even sure whether we might
9 even have Office source code until we got through all
10 of this, and, I mean, this is big pile of disks.
11 Source code is very, very extensive. Window source
12 code is estimated to have 20 million lines of code.
13 So we needed to do that before we could come to Court
14 and say what we needed. Now we know what we need.

15 It's very limited, very limited, and I
16 think that we're entitled to have it. We ask the
17 Court to grant our motion for this limited amount of
18 source code.

19 THE COURT: Are you saying that part of
20 your mistake is you told Microsoft that you no longer
21 need the source code?

22 MS. CONLIN: No, no. Here is what I did:
23 I thought we had reached an agreement. Microsoft
24 will give me 10 to 15 product source codes. Wrong.
25 I was wrong. Microsoft said it would give me 10 to

1 15 products, not product source codes. So when I
2 came to court, I told the Court we reached an
3 agreement. The Court did not rule on that at all.
4 We had not reached such an agreement, so I went back
5 and said, "Can we reach agreement?" And, in fact, we
6 can't.

7 THE COURT: What I'm trying to get at is
8 the discussion wasn't about source code at all?

9 MS. CONLIN: Oh, no, Your Honor. We did
10 discuss source code. Along with everything else, we
11 had this huge -- I can't remember how many at-issue
12 requests when we were having this "meet and confer"
13 that we went through. Microsoft said, as I recall --
14 I'm sure I can be corrected if I'm wrong. As I
15 recall, they said they would get back to us on the
16 issue of source code and did, in fact, get back and
17 say pretty much, "No."

18 THE COURT: Okay.

19 MS. CONLIN: And then I reported something
20 different to the Court.

21 THE COURT: Gotcha. Okay. Mr. Neuhaus.

22 MR. NEUHAUS: Yes, Your Honor.

23 Both of these issues do turn, again, on the
24 stipulation that we believed that there's been a
25 constant ignoring of the stipulation and the deal has

1 been just pretending like it didn't exist, and
2 continued requests for -- requests and requests for
3 documents. We've been able to work some out. We've
4 provided some, but, you know, we believe that the
5 stipulation should be and needs to be enforced
6 because otherwise parties will not agree to settle
7 discovery disputes if they can't rely on the courts
8 enforcing them.

9 On the Lucovsky memo, this was, I think, as
10 Ms. Conlin admitted, first requested on June 20th,
11 ten weeks after the April 9th stipulation. What
12 Ms. Conlin says, Well, she didn't know that she
13 didn't have it, she left out a crucial point which is
14 that it's absolutely clear that plaintiffs have
15 focused on this Lucovsky memo for years. We
16 attached -- they admit that there was trade press on
17 it going back to 2000. And if you'll look, Your
18 Honor, at Exhibit E, which is Professor Martin's
19 expert report, not in this case but in the Gordon
20 case in 2003, he specifically cites some of that
21 source code; specifically cites some of the trade
22 press that refers to the Lucovsky memo.
23 Incidentally, his point when he points this out is he
24 says that in February of 2000 the computer trade
25 publication reported that an internal Microsoft memo

1 had stated that then-forthcoming Windows of 2000
2 would ship with 10,000 potential known defects.

3 He says, "The point is software frequently
4 ships with some known problems."

5 Ms. Conlin and Mr. Hagstrom were lead
6 counsel in the Gordon case. They submitted this
7 expert report in 2002, more than four years ago. So
8 this is not some obscure thing. They made the same
9 qualms in their expert report in this case filed on
10 June 2nd. So this is clearly not in any way an
11 unanticipated issue, and until what we heard today,
12 there's nowhere in their paper does it suggest it
13 was.

14 In their papers on this motion all the way
15 through, all they argue -- they first argue, well,
16 that this was responsive to a document request served
17 way back in 1998 in the Caldera litigation. We show
18 that is just wrong, that they have, in fact,
19 misquoted the -- or misparaphrased, I should say, the
20 document request. They've left off a crucial
21 limitation in their argument. They no longer make
22 that argument.

23 Then they also say in their papers, "Well,
24 then you should be required to update that prior
25 discovery." And we point out in our papers in the

1 stipulation they explicitly agreed not to require
2 supplementation of discovery from prior cases because
3 that was another issue between the parties. They no
4 longer pressed that, and so now it's just, "Well, I
5 didn't know I didn't have it." And, Your Honor, if
6 you can't get a better trail of evidence that they
7 were aware of the documents, they were citing to
8 documents that refer to the documents long ago in
9 2003. This is again one of those -- as I say, most
10 of these things have been worked out. That if the
11 stipulation is to mean something, they shouldn't be
12 allowed to just say, "Oh, well, I didn't realize it
13 wasn't there," when they've signed the stipulation
14 and said, "I'm not going to make any more document
15 requests except in very limited circumstances."

16 On the source code, this was -- as
17 Ms. Conlin said, the source code has clearly been an
18 issue that has been in the case for a long time.
19 It's not unanticipated at all. She's been fully
20 aware that she wanted the source code. She wanted
21 source code from December of 2005. The parties met
22 and conferred. We did not reach agreement, as she
23 now admits.

24 What happened there, as she said in the
25 reply brief, is that we offered 10 to 15 products;

1 and on April 7th in the argument here, again, in open
2 court on the record, I said that -- I said, "In their
3 reply brief, plaintiffs say that the request is
4 satisfied because Microsoft offered to provide source
5 code for 10 or 15 products." And they were going to
6 take us up on that offer. We never offered that. I
7 don't know where they got that, and I put this on the
8 record and went out of my way to clarify that.

9 It would also be extremely burdensome to
10 produce, and there's not been an offer by Microsoft
11 to let them pick and choose. This is right in the
12 middle. I made absolutely clear that there have been
13 no deals on source code.

14 THE COURT: So you never provided the
15 request for source code from December 22, 2005?

16 MR. NEUHAUS: We did not, Your Honor.

17 THE COURT: So how is this stipulated as
18 unanticipated? This is something prior to the
19 stipulation.

20 MR. NEUHAUS: Exactly.

21 THE COURT: So you either provide the
22 source code or you state why you shouldn't give it.

23 MR. NEUHAUS: Your Honor, at that point
24 they then said that they would no longer pursue -- on
25 April 9th they then agreed that no more document

1 requests on this point and, Your Honor --

2 THE COURT: The document request was
3 December of 2005.

4 MR. NEUHAUS: I understand, Your Honor.
5 And there was a motion to compel in which they sought
6 to enforce this and Your Honor ruled on that, and
7 essentially what she's saying is that she didn't
8 argue as well as she should have. She didn't say,
9 "Well, you know, when I said" -- she said, "there's a
10 deal," and I said "there's no deal," and she
11 proceeded with the motion.

12 If she wanted to reconsider your ruling on
13 that, she knew on April 7th that there had been no
14 deal. She knew that. She could have brought
15 promptly a motion for reconsideration. She did not.
16 She didn't raise this with us until May 19th and long
17 after the source code, long after the stipulation and
18 this Court's ruling.

19 THE COURT: I didn't rule on it, did I?

20 MR. NEUHAUS: Your Honor granted in part
21 and denied in part the motion and --

22 THE COURT: Was that based upon what I was
23 told erroneously?

24 MR. NEUHAUS: Well, it was based on a list
25 of requests that did not include 113, which is the

1 request that they are talking about.

2 THE COURT: Okay.

3 MR. NEUHAUS: But they did not -- when I
4 said, "Look, there's been no deal," they didn't seek
5 to put it back. They didn't say, "Well, wait a
6 minute, Your Honor. We have to do it." And I, in my
7 oral argument, argued the merits of the point. They
8 left it and then they signed the stipulation on
9 April 9th saying that they wouldn't make any more
10 requests. The question of the production of other
11 source codes, Your Honor, I don't think has anything
12 to do with it.

13 And just so that I get on the record as
14 well, yes, there were viruses produced on two of the
15 disks and Microsoft is extremely concerned about
16 that. It turns out they were also on its copies of
17 the disks. We are doing -- and they have been there
18 apparently for a long time. Of the documents that
19 were produced in earlier cases, no one has ever
20 raised it with us. We weren't aware of it, and
21 Microsoft feels -- has apologized and is doing
22 everything and I think already has fixed, replaced,
23 the material that was the subject of those viruses by
24 going back to underlying materials. If it hasn't
25 happened yet on those disks, it certainly happened on

1 one and we're fixing it and it shouldn't happen and
2 we're, obviously, taking steps to make sure it
3 doesn't happen again in producing things to
4 plaintiffs.

5 But, as I said, Your Honor, this request is
6 also not very limited or isolated. It is a quite
7 significant request that remains on the table.

8 Thank you, Your Honor.

9 THE COURT: Thank you.

10 Anything further on the motion?

11 MS. CONLIN: Extremely briefly, Your Honor.

12 In Gordman, which the defendant refers, we had only
13 the coordinated case documents. In this case we have
14 documents from lots and lots of other cases, and I
15 think we had every reason to believe that this
16 relevant document would be among those that the Court
17 has ordered produced.

18 We're not saying we didn't know that there
19 was such a document. Your Honor, we didn't know that
20 such and such would not have been produced by
21 Microsoft in one of the other cases that the Court
22 has ordered Microsoft to produce to us.

23 On April 7th Microsoft did, in fact, tell
24 the Court and us that there was no deal, but just
25 because Microsoft says it in court does not mean

1 necessarily that it's true. I had to go back and
2 check about that. And, Your Honor, you issued your
3 ruling in three days. You know, April 7th was the
4 hearing. April 10th you had that ruling out. So
5 there wasn't really time for us to regroup about
6 that. And then the source code starts coming, and
7 that had everything to do with this. How could I
8 come to court and tell you what I needed until I had
9 a chance to figure out what they were sending to me
10 in terms of the source code, this light-produced
11 source code.

12 So that's why we're here today on this
13 issue that goes back to December of 2005.

14 THE COURT: How burdensome is it for the
15 defendant to produce this source code?

16 MS. CONLIN: I can't really answer that,
17 Your Honor. They have it. They have it on disks.
18 You know, it would seem to me not to be terribly
19 burdensome because, you know, it's all together in
20 one place.

21 THE COURT: Did you get it in the Gordon
22 case?

23 MS. CONLIN: In the Gordon case --
24 remember, Your Honor, in the Gordon case, the judge
25 did not let us do any discovery of any kind.

1 MR. NEUHAUS: If I may.

2 It's certainly not true that they were not
3 allowed to do discovery in the Gordon case. The
4 reason it's burdensome is a historical problem of
5 going back and identifying every version of Word and
6 Excel that has been released over the years and then
7 attempting to locate the source code. For the
8 relatively recent period, it's not that difficult.
9 For further back in time, as this goes back quite --
10 several years, it is quite difficult.

11 On Internet Explorer she's today, I take
12 it, limited the request in Internet Explorer to just
13 one, the Beta of IE 7, as opposed to what her request
14 said, which, I believe, Internet Explorer for every
15 release from something like 2000, which is much
16 broader because Internet Explorer is a part of the
17 operating system and there have been at least nine
18 releases of the operating system since those or since
19 the period covered by this request. But the
20 problem -- the difficulty is that delving back into
21 time for defining the source code.

22 THE COURT: How far back are you
23 requesting?

24 MS. CONLIN: Your Honor, only to 2001, and
25 I think there were one or two releases of Word.

1 There were just a couple of releases of Excel. And
2 Office is just two, and one of them is a current
3 product. Office 2003 is a current product. Office
4 XP came out at the end of 2001. We're not going back
5 into the annals of history here. We're talking about
6 a couple of products or a couple of versions per
7 product and including current products, and I think
8 one or two versions behind current existing products.

9 THE COURT: I'm curious, maybe I heard this
10 and I apologize if I'm reasking it. What was the
11 original answer to your request for the source code
12 back in December?

13 MS. CONLIN: "No."

14 THE COURT: Just "No"?

15 MS. CONLIN: Yes.

16 THE COURT: Anything else on this motion?

17 MR. NEUHAUS: Your Honor, I don't remember
18 quite what it was, but it was "no" because it was
19 extremely broad and burdensome to go get highly
20 sensitive -- and because their experts had
21 consistently said that they -- that you don't need
22 source code.

23 Thank you, Your Honor.

24 THE COURT: What products are you limiting
25 it to?

1 MS. CONLIN: Office XP in 2003, IE 7 Beta,
2 and then the public releases only of Word and Excel
3 since 2001. So that would be like the Word XP that
4 came out with Office XP.

5 That's all, Your Honor.

6 THE COURT: Anything else on this?

7 MS. CONLIN: No, Your Honor.

8 Mr. Neuhaus, anything else on this?

9 MR. NEUHAUS: No.

10 THE COURT: Last motion.

11 MR. GREEN: Thank you, Your Honor.

12 That's our motion, Microsoft's motion for
13 leave to contact and depose representatives of
14 non-Iowa corporations.

15 Your Honor, this is a motion that we
16 agonized over whether you would have the file or not
17 because what we're trying to do is talk to
18 corporations who are not incorporated in the state of
19 Iowa or nor have their principal place of business in
20 the state of Iowa but who have facilities in the
21 state of Iowa. I suppose Firestone would be an
22 example. Caterpillar, you know, John Deere, those
23 kinds of places that would have a plant or a sales
24 office or something in the state of Iowa, but clearly
25 are not incorporated in the state nor are they --

1 have a principal place of business in the state.

2 We determined that out of an abundance of
3 caution and we, of course, first tried to just
4 contact absent class members, which was denied, and
5 we thought that was a good motion and we filed for an
6 application of interlocutory appeal that was denied.
7 Had that been granted, however, or had this -- you
8 know, we wouldn't have needed to file this motion
9 because, obviously, we could have contacted these
10 people then.

11 THE COURT: Are these absent class members?

12 MR. GREEN: No.

13 THE COURT: Who are they?

14 MR. GREEN: Well, we say they are not class
15 members at all. They are not -- the way that they
16 and Judge Reis in her ruling, Your Honor, on the
17 certification defined the two classes, which
18 definition was literally written by the plaintiffs
19 were, "Consistent operating system class consists of
20 any person or entity who at the time of purchase was
21 a citizen of the state of Iowa," and the same with
22 Microsoft's application of software class. That is
23 all contained on page 3 of Exhibit A to our motion,
24 Your Honor.

25 THE COURT: Why do you want to depose the

1 non-Iowa corporation?

2 MR. GREEN: Okay. Why? Because we think
3 they have very relevant information about their --
4 first of all, they have Iowa facilities so they have
5 relevant information about -- the three issues that
6 they raise, Your Honor, are overcharge, lack of
7 choice and innovation. Now, these are sophisticated
8 purchasers. They resisted our motion to take these
9 non-Iowa consumers, which you didn't allow us to do,
10 on the main -- their main argument was, "Well, they
11 don't know what they get paid anyway because" -- and
12 they cited an example of a plaintiff up in Minnesota
13 in their own named plaintiffs here. That since
14 Microsoft -- since OEMs do not list the price on
15 there, so that taking these would be a burden as
16 opposed to relevance and information you can get
17 da-da-da-da.

18 That's not true with these people, Your
19 Honor. These people buy their software on a volume
20 basis as most large corporations do. They have
21 probably a discount. They know exactly what they
22 paid for their operating systems and for their
23 applications, including what they paid for the ones
24 that were in the state of Iowa, for their facilities
25 in the state of Iowa; but they are not members of the

1 class, at least that's our contention.

2 Now, in the fourth amended complaint, which
3 is the operative -- or "petition," I should say --
4 which is the operative pleading in this, the way the
5 class is defined by the plaintiffs, although this
6 wasn't ever part of the ruling on the certification,
7 is they are anybody who -- an incorporated person is,
8 in fact, people, who were incorporated in or reside
9 in." That's how two words are, "incorporated" and
10 "incorporated or resided." None of these are going
11 to be incorporated in that we wish to contact and
12 depose.

13 There is a fight between us about what
14 is -- what does the term "residence" mean. Are these
15 corporations -- for instance, is Firestone a resident
16 of the state of Iowa? Obviously, they have a huge
17 plant out on Second Avenue and they got a bunch of
18 stores around the state, but are they a resident of
19 the state of Iowa? Well, the law is a little bit,
20 you know, gloomy on that. And the cases that we've
21 cited show that you can be a resident for purposes of
22 venue and not be a resident for purposes of, say,
23 making a claim against the Iowa Guarantee Funds if
24 you're an out-of-state insurer, even though you have
25 offices and facilities in the state.

1 There's a lot of other examples, but we
2 think that it's pretty clear that the class that
3 these plaintiffs went to Judge Reis and eventually to
4 the Supreme Court and said that they wanted to
5 represent are people who are -- actually have -- are
6 citizens of the state of Iowa. And clearly the cases
7 say if you're not -- if you don't have your principal
8 place of business in this state and you're not
9 incorporated in the state, you're not a citizen of
10 the state. Now, you may be a resident for purposes
11 of -- some purposes; but all that being said, I don't
12 care whether you use "citizen," "resident," whatever,
13 these aren't corporations. These aren't corporations
14 that they intended to say they represented. If these
15 are members of the class, then there's some very
16 absurd results because, for instance, the class up in
17 Minnesota I'm sure had -- I'm sure Honeywell was
18 defined to be a member of that class and yet
19 Honeywell has facilities here in Iowa. So they would
20 be members of both classes, and thus would be
21 double-dipping for recovery.

22 So, you know, for purposes of these
23 corporations, I think you have to look at principal
24 places of business or state of incorporation, and we
25 don't want to talk to any of those -- anybody like

1 that, but we do want to talk to people who have
2 facilities in Iowa because we think that that is
3 going to be relevant and for the charges of the
4 overcharge, the innovation charge and the lack of
5 choice charge that are in the complaint or in the
6 petition by the plaintiffs.

7 They are particularly relevant for these
8 type of organizations, again, I said, because they
9 know exactly what they paid. They buy in volume, so
10 they know -- I think we talked about the overcharge
11 issue. They are sophisticated and have knowledge of
12 other software choices that were out there and they
13 can explain why Microsoft product was or was not what
14 they chose and why, and they can talk about
15 innovation because they've got people in-house who
16 are IT experts and whether there was a thwarting of
17 innovation by the activities of Microsoft.

18 One of the biggest arguments that I made
19 against this is, "Well, look, the fact that discovery
20 closed" -- as a matter of fact, as part of this
21 motion, we do ask, Your Honor, that if you allow us
22 to depose these out-of-state corporations, that for
23 the limited purpose only of taking these depositions,
24 we be allowed to do that within 60 days of the time
25 of your order and extend the discovery fact deadline.

1 Again, we're not asking for extension of the trial
2 date, and that's if you grant us the order, Your
3 Honor.

4 The reason it is timely, contrary to what
5 they assert, Your Honor, is we've been making an
6 effort. We started out in February of 2006 when
7 we -- when we started our effort at contacting the
8 absent class members on April 26th and April 27th,
9 that's when we put out our notices to take the
10 out-of-state consumers, the individuals, and that was
11 denied on 7/5, which just, you know, was last week.

12 We filed a discovery -- on June 12th we
13 filed our motion to take formal discovery of absent
14 class members pursuant to Rule 1.6 -- whatever it is,
15 and you denied that on July 5th, just last week.

16 This effort -- you know, this is a
17 different -- a different animal, which had we been
18 able to do any of the other things may not have been
19 necessary or we would not have been concerned about
20 getting an order from the Court allowing us to do it,
21 particularly if you granted our motion to contact the
22 absent class members.

23 So, thus, this motion as filed on the 12th
24 and -- well, I'm sorry. This motion was filed on
25 June 23rd, and it's before it got put off and set for

1 hearing today. We think it is timely. We think we
2 have been diligent in our efforts, and we've been
3 extremely cautious about how we approach this whole
4 question so we don't get accused of doing something
5 which is improper under the no-contact rule and Code
6 of Professional Responsibility.

7 We think that we have shown that these
8 people aren't members of the class, so it doesn't
9 violate your previous order saying, no, you can't
10 contact absent class members. We think we've shown
11 since they have Iowa facilities, that contrary to
12 your ruling about it wasn't -- I'm not sure what the
13 basis for your ruling was, but I know during oral
14 argument you were just wondering why would somebody
15 from South Dakota have anything that is relevant to
16 Iowa. These people -- these corporations would have
17 relevance to Iowa because they do have facilities in
18 Iowa, so we think it's testimony that an Iowa jury
19 should and could consider, and they are of such a
20 nature that they can talk directly about the kinds of
21 charges that are being made by the plaintiff against
22 Microsoft in this case and their views on them.

23 Obviously, there are several corporations
24 who are a member of the class with an Iowa base. For
25 instance, Principal would be a member of their class

1 because it's an Iowa-based principal place of office.
2 So that, you know, assessing damages, we are talking
3 about at least a group of their class which is
4 similarly situated to the people that we're trying to
5 get the deposition of and we think that would be
6 important for a jury to consider.

7 Now, in their opposition they've listed
8 several things in their opposition, some of which I
9 touched on and some of which I haven't. They
10 complain that we failed to disclose to them who we're
11 going to talk to and what kind of information we want
12 to get, and we didn't do it in our motion and we --
13 well, first of all, Your Honor, conceptually we want
14 to make sure that we're allowed to go ahead and make
15 the contact and set up the depositions.

16 Obviously, when we do that, they are going
17 to have an opportunity to cross-examine, and they
18 can -- you know, they can depose them to their
19 heart's content, object to the depositions, raise the
20 issues, do whatever they want to do; but right now
21 we're trying to approach this on a conceptual basis,
22 saying to Your Honor these people have facilities in
23 Iowa so they have relevant testimony, but yet they
24 are not members of the class. We would like to talk
25 to them.

1 They say it's improper because it directly
2 infringes upon the Court's April 10th order denying
3 Microsoft's motion for leave to contact class
4 members. That's exactly what we're trying not to do.
5 That's why we filed the motion first because we're
6 trying to avoid infringement of that order.

7 With regard to this other issue about not
8 telling them, actually the burden is on them. I
9 mean, the burden is not on the party seeking
10 discovery to say what they're seeking discovery of.
11 The burden is on the party exposing discovery,
12 explaining why it shouldn't go forward, so they've
13 got that reversed.

14 They again talk about relevance and burden.
15 It's not going to be -- I mean, relevance, again,
16 they keep wanting to raise relevance at the wrong
17 time except when it suits their purposes. You know,
18 once we take these depositions, if that's what
19 happens, you know, they can object all they want to
20 at time of trial about the relevancy of the
21 information. We think it's proper discovery, and the
22 burden -- I don't know why it would be a burden.
23 We've taken all sorts of depositions all over the
24 place. So I don't think there's any merit to their
25 argument on that.

1 The last thing: They somehow think that we
2 should have made a good-faith attempt to resolve this
3 prior to filing our motion. Well, you know, we're
4 not talking about the kind of discovery dispute to
5 which 1.5, a good-faith-effort-to-resolve rule
6 applies. We're talking about a concept and trying to
7 get approval of the Court to just do this.

8 Now, when we notice the depositions, if we
9 do, and if there's a discovery problem, like a date
10 problem or a subject matter problem, and we get into
11 a fight about that, yeah, then we have a good-faith
12 effort to resolve; but they've got the cart before
13 the horse on that, and, frankly, we didn't even it
14 address in our reply because it would seem to us to
15 be something without merit because we don't think
16 that rule applies to the concept we're trying to put
17 forward here.

18 So anyhow, Your Honor, this is -- we think
19 that based upon -- we know that you've been very
20 reluctant to allow us to contact absent class members
21 and do discovery against class members, formal
22 discovery against class members, and to do an
23 out-of-state deposition of consumers that we noticed,
24 but we think this is an entirely different concept
25 because we're talking about out-of-state people who

1 have Iowa facilities, but yet who are not members of
2 the class, who can't give meaningful testimony that
3 should be considered by the jury because they
4 represent the same types of corporations who have --
5 who are based in Iowa and have these facilities in
6 Iowa.

7 Thank you, Your Honor.

8 THE COURT: Thank you, Mr. Green.

9 Response.

10 MR. JACOBS: Yes, Your Honor.

11 I don't want to go over everything that
12 we've raised in our brief, but I just -- I guess I
13 want to touch on some points that were made here this
14 morning.

15 First of all, Microsoft made no effort, as
16 Mr. Green says, to comply with Iowa Rule 1.517(5)
17 because they believe it didn't apply here, but the
18 rule says that: "No motion relating to depositions
19 or discovery shall be filed with the clerk or
20 considered by the court unless the motion alleges
21 that counsel for the moving party has made a
22 good-faith but unsuccessful attempt to resolve the
23 issues raised by the motion with opposing counsel
24 without intervention of the court." I think the rule
25 is pretty clear that it would apply to this kind of

1 discovery motion.

2 And Mr. Green suggests that while -- when
3 the rule would apply is after they would decide,
4 perhaps, to serve subpoenas, deposition notices on
5 various parties. So basically what this does is will
6 force us to -- if we need to come back again,
7 postponing the issue until a later date. These
8 issues -- many of these issues that were raised by
9 this motion perhaps could have been addressed in some
10 sort of "meet and confer."

11 In terms of talking about the burden, we
12 have no idea how many companies Microsoft wants to be
13 talking to. We have no idea who they are. Before
14 this motion was filed, we had no idea of what
15 reported relevance any of this information that they
16 now seek might have. These are the issues that could
17 have been addressed beforehand, before bringing this
18 motion to the Court. That's precisely what this rule
19 is intended to do. Now, instead, they want you to
20 grant this motion and then we can revisit all of
21 these other issues at a later date.

22 So just on that basis alone, the Court, I
23 believe, should deny this motion.

24 Secondly, this motion is coming way too
25 late. Microsoft, even in its opening brief, concedes

1 that there was no way that this motion would have
2 been heard and decided before the July 2nd cutoff
3 date at the end of discovery.

4 Microsoft vehemently opposed plaintiffs'
5 efforts to extend discovery past July 2nd, when we
6 were seeking to move the deadlines for the disclosure
7 of plaintiffs' expert reports. They insisted that it
8 be no later than July 2nd, and now they come in
9 saying, "Well, for this limited purpose, we want to
10 extend discovery by up to 60 days."

11 Well, if this information was so important
12 to Microsoft, they had months and months when they
13 could have been -- all of last year they could have
14 been seeking information of this sort. Why did they
15 have to wait until the end of June with a July 2nd
16 cutoff to make this motion?

17 Furthermore, they could have made this
18 motion back in April after the Court's April 10th
19 order. There really was no reason to wait until the
20 end of June to file this motion. It just -- it's
21 going to extend discovery past the date that they
22 insisted upon, and there's no valid excuse for them
23 not proceeding any earlier.

24 Now, in terms of the relevant information
25 that Microsoft claims they want to obtain in this

1 motion, this is the same argument that the Court has
2 now rejected on three occasions. It's this notion
3 that these companies are going to be able to provide
4 testimony on overcharge, lack of choice and
5 innovation, as Microsoft characterizes what we're
6 asserting here.

7 What these companies cannot provide
8 relevant evidence on is in terms of overcharge. For
9 instance, what would the price have been in a "but
10 for" world in a market that is unencumbered by
11 Microsoft's anticompetitive conduct. They can't
12 testify about that. They have no idea whether the
13 \$100 that they may have paid for their software in a
14 world where there was competition would have been
15 \$75. There's no -- absolutely no way they can
16 testify about that. They can testify about, perhaps,
17 what price they paid. Simply, "Yes, we paid \$100."
18 Could they testify that, "Yes, we saw that as a
19 decent value?" Perhaps. But even in a monopolized
20 market, people will only pay what they believe is a
21 reasonable price for a product.

22 Now, the point is that in a nonmonopolized
23 market that price would be lower and more people
24 would have purchased at a lower price. So the fact
25 that somebody may have said, "Well, I purchased this

1 product for \$100 and I thought it was a decent value
2 for \$100," doesn't answer the question, "Well, what
3 if it was \$75," which essentially is what this
4 overcharge case is about: Lack of choice.

5 Again, they can't talk about what were the
6 choices they had in the real world encumbered by
7 Microsoft's anticompetitive conduct versus the sort
8 of choices that they would have had in an alternative
9 world. Same thing with innovation.

10 Now, the point was raised about, "Well,
11 some of these people may be IT experts." Well, if
12 they want experts, Microsoft's expert disclosures are
13 due on August 2nd -- August 4th, rather. They can --
14 certainly will have experts who can testify on these
15 issues if they want.

16 Microsoft certainly had other ways they
17 could have obtained all of this information. They've
18 had months and months and months when they could have
19 gotten the information they seek. Are they just
20 looking to find what corporations paid for their
21 software?

22 Well, if they wanted that, they could have
23 subpoenaed volume licensures, assuming that Microsoft
24 itself doesn't have that information. It certainly
25 knows where their volume licensures are out there,

1 who their volume licensures are, and could have
2 subpoenaed that information. That would have told
3 Microsoft everything they needed to know, not just
4 about a few handpicked corporations, which seems to
5 be what we're talking about here, but it would have
6 told them marketwide, "Hey, here are the prices that
7 these corporations are paying for this software." So
8 this notion that they need this discovery to find out
9 prices that these people were paying just doesn't
10 hold up.

11 This argument about class definition and
12 whether or not these Iowa -- these corporations that
13 have a presence in Iowa are class members, first of
14 all, I don't think the Court even needs to get into
15 that question at all here. It can deny the motion on
16 numerous grounds, the same grounds that it's denied
17 your earlier motions on contacting out-of-state
18 residents on and the like without having to get into
19 this, but I would just point out that class
20 definition in plaintiffs' third amended petition and
21 its fourth amended petition is identical. There was
22 no change in the class definition. This is the first
23 time that Microsoft has raised this argument now that
24 somehow it doesn't apply to entities that are doing
25 business in Iowa that are not perhaps headquartered

1 here.

2 And it would not lead to absurd results.

3 The Honeywell example, for instance: Microsoft says,

4 "Well, Honeywell was" -- Honeywell, I guess, is no

5 longer actually incorporated in Minnesota, but let's

6 say you have a Minnesota corporation. We will just

7 take Honeywell for an example. They have presence

8 down here in Iowa. Well, in Minnesota what happened

9 was the Minnesota settlement was limited to -- was

10 limited to persons or entities who purchased software

11 for use in Minnesota. So, for example, this

12 Minnesota Corporation that purchased these volume

13 licenses for use in Wisconsin, for use in Iowa, for

14 use in surrounding states, those purchases were not

15 included in the Wisconsin -- I'm sorry, in the

16 Minnesota class. So there's no double-dipping here.

17 This isn't something that would lead to

18 some sort of absurd result by including corporations

19 in the Iowa class who are perhaps headquartered

20 elsewhere but are doing business in Iowa. In fact,

21 it would be consistent with just about every other

22 settlement that I'm aware of around the country where

23 corporations have been told, "You make a claim for

24 your licenses that are used in that state, and if you

25 want to make claims elsewhere, you have to go

1 elsewhere."

2 And in one instance -- well, that is
3 basically Microsoft's position, that they needed to
4 go, you know, "You make your claim. You're a
5 Minnesota Corporation. You make your claim for your
6 Minnesota licenses, and you have licenses in other
7 states. You need to make your claims there." So
8 there is no double-dipping. There's no
9 inconsistencies here.

10 Going back to the question earlier about
11 who are these people exactly. Who does -- who does
12 Microsoft want to depose? We have no idea.
13 Microsoft hasn't told us who they want to depose and
14 they say, "Well, we don't really have to tell you.
15 In fact, we couldn't tell you because we wanted to
16 get the Court's guidance, first of all, before we go
17 about contacting these companies."

18 Well, Microsoft certainly could have said,
19 "Hey, we want to depose Companies A, B, C and D, and
20 these are the companies we intend to depose as part
21 of this motion." But what it suggests is that what
22 Microsoft wants to do, Your Honor, is not go about
23 and just depose corporations to see -- to test, as
24 they say, plaintiffs' theories here. What they want
25 to do is they want to go out now with leave to

1 contact these corporations and handpick some
2 corporations that they believe will end up providing
3 friendly testimony to Microsoft.

4 What they are really looking for are
5 testimonials, not testimony, here. They are not
6 looking for relevant evidence. They are looking for
7 somebody to come in and sing the virtues of Microsoft
8 software and handpicking those entities.

9 Now, Microsoft's argument in its reply
10 memo that its defense is based on, Microsoft page 6,
11 as, quote, Microsoft contends that its success has
12 resulted from the purchasing decisions of millions of
13 end users who have chosen Microsoft software over
14 competing products because Microsoft has consistently
15 offered high-value and innovative products at an
16 affordable price.

17 And the brief goes on to say: "Microsoft
18 should have the opportunity to develop testimony from
19 such end users to test plaintiffs' theories of injury
20 and to present the jury with a complete picture of
21 the factors that have led to Microsoft's success."

22 Well, if Microsoft's position is that -- if
23 its position in the market has resulted from millions
24 of purchasing decisions from numerous individuals and
25 corporations over time, handpicking five or six or a

1 dozen corporations that it's apparently going to
2 prescreen before it decides to question them, is not
3 the way one goes about to test a theory such as that.
4 There are, I would submit, perhaps scientific methods
5 by which one would try to achieve that result, but
6 this is certainly not one of those methods. Again,
7 this is just an effort to obtain testimonials about
8 Microsoft software, not any sort of relevant
9 evidence.

10 The bottom line -- I don't want to really
11 harp on the class definition issue, but these Iowa
12 Corporations are -- as we point out in our briefing,
13 they are residents of Iowa. They are class members.
14 They are absent class members who, according to
15 Microsoft, must make their claims in Iowa regardless
16 of where the corporation is headquartered if it was
17 purchased for use in Iowa. So it's really -- it's
18 not inconsistent. It's not unclear at all that
19 that's been the position throughout.

20 But as I've said, there's no reason that
21 Your Honor even needs to go to that, reach any
22 decision on class definition or anything. There's
23 absolutely no reason for granting this motion. There
24 was no "meet and confer." It's too late in the game,
25 and there's absolutely nothing of relevance that

1 Microsoft shows that it wants to obtain from these
2 depositions.

3 THE COURT: Thank you. Thank you, sir.

4 You have the last word, Mr. Green.

5 MR. GREEN: Thank you. I don't get that at
6 home.

7 Yeah, Your Honor, I guess I plead guilty.
8 We plead guilty. We do want testimony. If testimony
9 is a testimonial, we're guilty. Isn't that what you
10 do when you go out and talk to witnesses and take
11 their depositions? It's usually -- you talk to them
12 and they are not going to -- and they are not going
13 to be favorable to you, you're not going to take
14 their deposition.

15 Now, these are out-of-state witnesses, and
16 we may have to take their deposition because they may
17 be unavailable at the time of trial and we obviously
18 don't have subpoena power over them. But the fact
19 is, yeah, we want to contact people; and if we find
20 people who we think have relevant testimony that will
21 support our case, that is what we're going to do. We
22 have every right to do that. They have the whole
23 world. They can go and talk to anybody they want to
24 in the state of Iowa and get them to come testify.
25 They can talk to anybody. You know, it's one of

1 these deals that, "We can talk to anybody we want to,
2 but you can't talk to anybody."

3 I mean, it's just -- they can call
4 Principal. They can call the IT people at Principal.
5 They can call the IT people at any of these insurance
6 people based in Des Moines, you know, list them as a
7 witness at trial when they have to do their witness
8 lists. Then, I suppose, we would have a fight about
9 whether we would have a right to depose them or not.
10 But, you know, they could develop this testimony if
11 they want to. If they don't want to, that's up to
12 them. If they want to rely totally on experts
13 because their main plaintiffs haven't a clue -- they
14 don't know what they paid for anything except for
15 maybe Comes Investment, which we hope to get, which
16 we hope you allow us to get to today.

17 On this good-faith "meet and confer" thing,
18 I think it's kind of ironic. They say these people
19 are members of their class. They already told us we
20 can't talk to absent class members. They told us
21 that back when we tried to do the informal contact.
22 They know that the rule doesn't apply to this sort of
23 thing, like the motion we made to contact to do
24 formal discovery of class members. That's not the
25 kind of thing that Rule 1.570(1), or whatever it is,

1 applies to. They know it. That's just strictly a
2 red-herring argument. They know not only the rule
3 applies, they know what the answers would have been
4 if we asked because they said it before and they've
5 said it in their papers today.

6 Too late: They say we're too late, Your
7 Honor. I explained why we did this properly as we
8 thought we needed to in view of the efforts we were
9 trying to make before, and we don't think it's too
10 late. We don't think it will cause any delay in the
11 trial.

12 Relevant information: I think we've beat
13 that horse pretty hard. Again, this is something
14 that could be decided later. It's clearly
15 discoverable information.

16 And they talk about how you get this
17 information by other ways, and we didn't do it.
18 Well, we want witnesses. We're not talking
19 information. We're entitled to some witnesses that
20 have real testimony about what really happens in the
21 real world that has connections in the state of Iowa.
22 This is our last chance to do that, and we think --
23 we think we should have that chance.

24 They talked about the class definition.
25 They ignore the certification ruling. We've talked

1 about citizens of the state of Iowa. It's their
2 language. They want to talk about the third and
3 fourth amended petition. Those are just allegations.
4 The ruling defines who the class was, the class
5 certification ruling; and that says "citizens" and
6 yet none of these people we're going to talk to in
7 any interpretation are called "citizens" of the state
8 of Iowa.

9 The settlement, the fact that it doesn't
10 result in double-dipping: The only thing I can say
11 about it is he keeps talking about settlement
12 language. Well, we're not talking about settlement
13 language here. This case hasn't been settled. We're
14 talking about what is in their petition, whatever it
15 means, and we're talking about allegations. So all
16 this language about what was done and what wasn't
17 done in the settlement doesn't apply to this
18 particular point because we're not talking
19 settlement.

20 I think I've addressed all the points that
21 he raised in his opposition, Your Honor, and I don't
22 have anything further.

23 Thank you for your attention.

24 THE COURT: Thank you.

25 Thank you, everyone.

1 MS. CONLIN: Thank you, Your Honor.

2 THE COURT: Have a good day.

3 MS. CONLIN: Thanks, Your Honor. I note,

4 Your Honor, that today is four months to the day from

5 the day we begin the trial.

6 (Record closed at 12:05 a.m. on July 13,

7 2006.)

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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 25th day of July, 2006.

JANIS A. LAVORATO
Certified Shorthand Reporter

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