

1 IN THE IOWA DISTRICT COURT FOR POLK COUNTY

2 -----

3 JOE COMES, JEFF C. JENNISON)
and RILEY PAINT, INC., an Iowa)
4 Corporation,)
) CASE NO. CL82311
5 Plaintiffs,)

6 vs.) TRANSCRIPT OF
) PROCEEDINGS

7 MICROSOFT CORPORATION,)
a Washington Corporation,)
8)
) Defendant.)

9)

10

11 The above-entitled matter came on for hearing
12 before the Honorable Scott D. Rosenberg, commencing at
13 8:30 a.m., July 6, 2005, Room 404 of the Polk County
14 Courthouse, Des Moines, Iowa, 50309.

15

16

17

18

19

20

21

22

23

24

Janis A. Lavorato
Certified Shorthand Reporter
Room 404B, Polk County Courthouse
Des Moines, Iowa 50309

25

2

1

A P P E A R A N C E S

2

For the Plaintiffs: ROXANNE BARTON CONLIN

Attorney at Law
317 Seventh Street
Suite 600
Des Moines, Iowa 50309

3

4

&

5

MICHAEL E. JACOBS
RICHARD M. HAGSTROM

6

Attorneys at Law
Zelle, Hofmann, Voelbel,
Mason & Gette
500 Washington Avenue South

7

8

Suite 4000
Minneapolis, MN 55415

9

For the Defendant: EDWARD W. REMSBURG

10

AHLERS & COONEY
100 Court Avenue

11

Suite 600
Des Moines, Iowa 50309

12
13
14
15
16
17
18
19
20
21
22
23
24
25

&
SHARON L. NELLES
JOSEPH E. NEUHAUS
Attorneys at Law
Sullivan & Cromwell
125 Broad Street
New York, NY 1004-2498

1
2
3

PROCEEDINGS

(The following record commenced at 8:30 a.m.,
on July 6, 2005.)

4 THE COURT: Let's go on the record. I think
5 we have first a motion to compel; is that right?

6 MS. CONLIN: Yes, Your Honor.

7 THE COURT: Is that the one you want to start
8 with first?

9 MS. CONLIN: Yes, Your Honor. Well, let me
10 say this, Your Honor. They are kind of inextricably
11 intertwined, and there are three issues with respect to
12 the motion to compel. One is the production of
13 materials from six other lawsuits, most of which are
14 settled, two of which are not.

15 The second issue on the motion to compel is
16 production of missing pages between Bates numbers and
17 documents already produced and already marked as
18 exhibits in two other lawsuits.

19 And the third issue is the identification of
20 handwriting on exhibits marked in the California and the
21 Minnesota lawsuit.

22 And these issues, Your Honor, are not the same
23 as the issues that Judge Reis dealt with in her
24 December 17th order. Not any of the three are issues
25 that -- the two issues with respect to the missing pages

1 and the handwriting were not ones that we were aware of
2 at that time.

3 I would also like to address at least one
4 issue with respect to the motion to strike because it's
5 based on a misunderstanding of what I said and the
6 purpose of one of the exhibits that we attached. And
7 because those issues are intertwined, you know, it might
8 be most efficient for me to start at the beginning and
9 go all the way through until the Court is so bored it
10 wants to strike me.

11 THE COURT: Okay.

12 MS. CONLEY: Not just strike the pleading, but
13 strike me personally.

14 THE COURT: So "motion to strike" has more
15 than one meaning.

16 MS. CONLEY: Yes, it does. In this courtroom
17 at this point in time, it may.

18 THE COURT: All right. I guess, first, I
19 should note for the record -- is it "Nelles"?

20 MS. NELLES: It is "Nelles," Your Honor.

21 THE COURT: I'm going to admit you pro hac
22 vice on the condition I have a motion and the motion is
23 proper and all the requirements by the Iowa Supreme
24 Court are met, and you will be admitted.

25 MS. NELLES: Thank you, Your Honor.

5

1 THE COURT: Did you want to respond briefly?

2 MS. NELLES: No. I agree that the issues are
3 very much intertwined, and I will concede that
4 Ms. Conlin had her motion first. I think she's entitled
5 to go first this morning.

6 THE COURT: All right. You may proceed. You
7 don't have to stand if you don't want to.

8 MS. CONLIN: I am going to have to beg the
9 Court's indulgence because this is going to take awhile.

10 I think that these facts are very complicated, and it's
11 essential that I make clear what the facts are so that
12 you can understand why we want what we want and why
13 we're entitled to have it.

14 THE COURT: Okay.

15 MS. CONLIN: And what I hope the Court will do
16 is, if I am not being clear, stop me, please, and help
17 me to be clear because I have to tell you, Your Honor, I
18 am in my fifth year of this lawsuit. I don't know
19 whether or not the Court has had an opportunity to read
20 Judge Jackson's 100-page, 412-paragraph decision, but I
21 have read it literally dozens of times. I now believe
22 that I have a grip on it, but it is very complicated.
23 I'm not going to bother the Court with well-settled
24 principles of Iowa law about what discovery is, stuff
25 like that, but let me talk about Windows and

1 applications and middleware and that sort of stuff.

2 An operating system, which is what Windows is,
3 is the nervous system of the computer. It is what makes
4 the computer go. If you have a computer without an
5 operating system, it will just sit there. It won't do a
6 thing. You have to have an operating system on every
7 single computer or the computer won't do anything. So
8 the operating system is the -- it allocates resources
9 within the computer. There's the operating system
10 within the computer.

11 The operating system -- there's another kind
12 of software. An operating system is software, and
13 that's Windows. Windows is the operating system used in
14 computers many years before I knew this, but Windows is
15 the operating system.

16 The applications software are the things that
17 let you do what you want to do with the computer, like
18 word processing and data processing and games. Those
19 are applications software.

20 The operating system software, Windows, has
21 APIs, little things that -- I think of them as sticking
22 up, but I don't know if they stick up or not, but APIs

23 are the things that let the application software connect
24 to the operating system and tell the operating system
25 what the application software needs from the operating

7

1 system.

2 So we've got the operating system. We've got
3 the APIs. We've got the application software fitting
4 into the APIs of the operating system, and Windows is
5 the operating system. Word, WordPerfect, dbase,
6 Ashton-Tate Operation, Excel, and then all these games,
7 those are all application software.

8 So what happened, Microsoft has, without
9 question -- nobody can argue with this anymore -- a
10 monopoly on operating systems. Something over 90
11 percent of computers have Microsoft Windows -- some
12 version of Microsoft Windows on the operating -- on the
13 machine as the operating system. And that has been true
14 for a very long time, I think, you know, the early '90s,

15 and maybe even before then. I can't quite remember when
16 the monopoly -- at least as of '94 there was a monopoly,
17 and there isn't any question about that because
18 Judge Jackson found that and that has been collaterally
19 estopped. And besides, it seems a little nonsensical to
20 argue that a company that has 90 percent plus of the
21 market would not be a monopoly under any definition.
22 Though Microsoft -- who is firing at me? Really, I want
23 that to stop.

24 THE COURT: We don't use lights here.

25 MS. CONLIN: All right. All right. Now, I'm

8

1 back to the exciting thing that we're talking about
2 here.

3 Sometime in about '94, Netscape Navigator came
4 along. Netscape had a Web browser. Microsoft was a
5 little late coming to the Internet, but this Web browser
6 permitted people to access all of the sites on the Web.

7 And this is pretty much at the very beginning of public
8 use of the Internet, and it grew very rapidly. And
9 Netscape Navigator was a piece of middleware, operating
10 system, APIs. Navigator fit kind of on top of the --
11 between the operating system, and Netscape Navigator had
12 its own APIs, its own little things sticking up that
13 software developers could use to develop applications.

14 One of the most important things about any
15 operating system is how many applications work on it.
16 That's what people care about, is the applications.
17 Without applications, again, it won't do anything of use
18 to people. So people care about applications.
19 Microsoft has thousands, tens of thousands, of
20 applications. There are other operating systems. Linux
21 is a free operating system, and MUNIX is an operating
22 system. There are others that have tiny percentages of
23 the market.

24 Netscape Navigator comes along, and it is a
25 phenomenon. It quickly develops a huge share of the

1 market, and Microsoft gets a little frightened about
2 this because there they are with their APIs sticking up
3 there and could potentially displace Microsoft's
4 operating system monopoly. And here is how:

5 Number one, Netscape Navigator doesn't care
6 what operating system it's on. It works on all
7 operating systems, so it makes Microsoft Windows
8 optional for people who wish to use the Internet.

9 The other thing about middleware, like
10 Netscape Navigator, is that it has its own APIs. Over
11 time it is possible, particularly with a huge market
12 share that Netscape quickly developed, that application
13 developers will say, "Well, we will just develop for
14 Netscape Navigator APIs, and then our applications will
15 work on every single operating system, every single
16 operating system."

17 Well, Microsoft didn't like that, and the
18 browser war ensued and that was what one of the main
19 issues was in the United States Department of Justice
20 case.

21 Besides Netscape Navigator, Your Honor, there
22 were other types of middleware that came along at the
23 same time. RealNetworks had a streaming media kind of
24 middleware, again, fits between the operating system and
25 the applications. So again, APIs and RealNetworks that

10

1 could become a platform that could make Windows
2 optional.

3 Burst dot com, which we're going to be talking
4 a little more about, Burst dot com. Burst dot com was
5 another type of streaming media software. And then
6 there was a -- Sun developed a programming language and
7 libraries called "Java." All of these terms will become
8 familiar to the Court over time. You will have no use
9 for them, Your Honor, except in connection with this
10 case. But Java is the name of another kind of
11 middleware that presented Microsoft with a challenge to
12 its operating system monopoly, despite the fact that it

13 was not an operating system.

14 One of the issues that I think we might not
15 have made terribly clear in the past is how it is that
16 Microsoft needs to attack these middleware companies
17 because, you know, an operating system is not a browser.
18 It's not streaming media. It's not Java. And the
19 reason is because they've got these APIs and they have
20 two areas of threat to Microsoft's operating system
21 monopoly, and that is, makes Windows optional and sticks
22 up these APIs that other software developers can use to
23 build whole sets of applications. So that's the basics.

24 We talk, Your Honor, about OEMs. That's
25 another thing that you'll see, I'm sure, in our work

1 product. That's an abbreviation for "Original Equipment
2 Manufacturers." It's the computer makers. It's Dell
3 and Gateway and lots of other ones, Micron. There was
4 lots of them. There are fewer now. Those original

5 equipment manufacturers almost always preload an
6 operating system, and, you know, almost all the time
7 it's Windows. And part of our lawsuit that you will be
8 hearing is how it happens that it's always Windows that
9 these OEMs get on their machines, but that's the
10 reality. And that reality is unlikely to change in the
11 near future, according to Judge Jackson's decision and
12 to all experienced, because Judge Jackson reached his
13 decision in 1999 and this is 2005 and the situation has
14 not changed very much.

15 In any event, Your Honor, so the OEMs
16 preinstall Windows and they also often preinstall
17 application software, and again, almost always Microsoft
18 application, software application, which is Word and
19 Excel, but often in the Office Suite.

20 Microsoft has a Suite called Office, and it
21 includes several types of software, the word processing
22 data, presentation, those are all incorporated together
23 and often preinstalled. And one of the cases I'm going
24 to talk about, Your Honor, has the Office Suite as a
25 part of it.

1 Microsoft has told the Court in these
2 proceedings and in these pleadings that middleware
3 products are not in the same market as Windows and so
4 they are not material.

5 The reason for all of this, Your Honor, is to
6 help the Court to understand -- that's just below me --
7 that the whole Department of Justice case was about
8 middleware, for the most part, about what Microsoft did
9 to products in adjacent markets so those products would
10 not develop into products that could compete with its
11 core product, Windows.

12 I don't know how long they are going to repeat
13 this misleading argument to the Court, but, now, Your
14 Honor, since I read Judge Jackson's opinions dozens of
15 times, you know, I'm not as dumb as I used to be about
16 this. Microsoft will try to kill anything that could
17 become a platform of APIs and that could attract

18 software developer attention and threaten its monopoly,
19 whether or not that product is in the same market. And
20 this pattern of behavior of Microsoft goes on and on and
21 on. It is, as far as we know, continuing to this day.

22 Now let me talk about the case documents, Your
23 Honor. We ask for the Court to give us -- to order
24 Microsoft to give us all of the documents -- exhibits,
25 depositions, pleadings -- every single piece of paper

13

1 they have -- but nobody has paper anymore -- but every
2 single document they have about six related cases.

3 Microsoft says in response, "For goodness'
4 sake, we gave you about five million pages already, and
5 then the third parties gave you 2.2 million pages of
6 documents and, besides that, there are 150 depositions." I
7 think there are really more than that. I think I've
8 read more than they say. And they say there are 43,000
9 pages of depositions. Now, where did those come from?

10 Here is where they came from. And, Your Honor, we don't

11 have them. They are supposed to be accessible to us.

12 There were two proceedings that preceded ours.

13 One was a piece of multidistrict litigation that

14 occurred out in Judge Motz' court in Maryland, and the

15 second was the California litigation. So those two

16 pieces of litigation -- we have a coordination agreement

17 which says basically we will cooperate and use what is

18 already there and try to save time and energy and that

19 sort of thing. It doesn't say, however, that we can't

20 do anything to get additional information. It doesn't

21 say that at all, but we do have all the stuff out there.

22 Now, when Judge Reis made her decision in

23 December, I think she believed and I think we believed

24 that somehow this was all in a centralized location,

25 these 7.2 million pages of documents and all of these

1 depositions. Well, it turns out nothing could be

2 further from the truth. We've been out scouting all
3 over the country in people's law offices to try to
4 gather up all of this information, and we do not have
5 it, Your Honor, we do not have it.

6 What Microsoft says to the Court is, "Well,
7 you know, you can have that 7.2 million or whatever."
8 But what Microsoft also admits, Your Honor, is there are
9 12 million pages of documents, 12 million pages of
10 documents that we don't have from these other pieces of
11 litigation, 12 million pages of documents.

12 Now, Your Honor, Microsoft never claims it
13 would be burdensome to produce these 12 million pages of
14 documents, and they couldn't very well claim that. And
15 I'm not sure how much technology the Court uses, but
16 this is all a revelation to me.

17 Your Honor, this is a DVD. See this little
18 gadget right here? DVD. On this little gadget you can
19 put up to 140,000 pages of documents, 140,000, right on
20 this. I've learned how to use these too. And then here
21 is an even more remarkable thing. This is an external
22 hard drive. And I have a law clerk, Your Honor, who
23 used to be a system administrator. He's been a great

24 gift to me. This little gadget right here, you hook it
25 into your computer. You can put on it 6 to 9 million

15

1 pages of documents, and it costs about \$250, \$250, and
2 you can plug that in at night and the next morning it
3 will have 6 to 9 million pages of documents on it. So
4 the burdensome argument, Your Honor, from my generation,
5 if I asked you to order a company to give me 9 million
6 pages of documents, I suspect the Court might be
7 concerned about the issue of burdensomeness. It just
8 doesn't exist in this litigation. Everything has been
9 scanned into computers, and they are all computer
10 documents and everything. You know, this is what I
11 need. Just fill up -- fill up a couple of these for me,
12 I'm happy.

13 So the real first question before the Court is
14 do Iowa citizens get any discovery in their lawsuit, any
15 independent discovery on the merits at all after

16 August of 2000? Why August of 2000? Because that's
17 when all the discovery ends. We go until September of
18 2006, and we do not have a document on the merits after
19 the year 2000.

20 Microsoft in resistance makes totally
21 inconsistent claims. First, it says the cases -- these
22 six cases involve unrelated claims. Then it says these
23 cases involve claims that are collaterally estopped.
24 Kind of hard to see how that works out. And if those
25 contradictory rationales don't work, then they say the

16

1 material is cumulative, it's duplicative, though they
2 admit 12 million pages are not duplicates because nobody
3 has got it. Nobody has those 4 million pages except the
4 companies that sued them, and we can't get them from the
5 lawyers who sued Microsoft because Microsoft extracted
6 draconian protective orders from those lawyers. So we
7 can't call them up and say, "Fill up one of these for

8 me," because they cannot do that under the protective
9 orders that Microsoft has in place.

10 Microsoft repeatedly contends that because the
11 petition in this case does not refer specifically to any
12 conduct that occurred after the year 2000, that we
13 cannot conduct discovery of Microsoft's anticompetitive
14 behavior after the year 2000. We couldn't very well
15 plead conduct after the year 2000, Your Honor. I filed
16 this claim in January of 2000, so some of the conduct
17 had not occurred. And we've amended a couple of times
18 since then after we won in the Supreme Court the first
19 time, but we do not have a piece of paper about
20 post-2000 conduct. So how could we plead specifically?
21 How could we say Microsoft on such and such date did
22 such and such a thing? because we don't know what they
23 did on such and such a date because we don't have the
24 documents.

25 Here is something that is very burdensome,

1 Your Honor: Iowa consumers will be bound -- you know,
2 this class period runs until shortly before -- I think
3 it's 60 days before the trial, sometime in the summer of
4 2006. Iowa consumers are going to be bound by what
5 happens in this Court, not in this courtroom, but
6 wherever we can find ourselves a place to sit, they are
7 going to be bound by what happens. But we don't have
8 any evidence of the wrongful conduct that Microsoft
9 engaged in, and what are they going to think? What is
10 the jury going to think when our evidence ends in 2000
11 and we say figure damages until 2006? It will not make
12 any sense to the jury, and I'm guessing, Your Honor,
13 that Microsoft is going to exploit that, that huge gap
14 in these -- in this evidentiary record. And I suspect,
15 Your Honor, we're going to hear about this ancient
16 history stuff.

17 Microsoft also says our experts -- our experts
18 say that we do not need post-2000 evidence. That is a
19 misconception of what they say and what they said
20 during the class certification stage. At class

21 certification Microsoft argued that there was no
22 commonality between pre- and post-December 2001 conduct
23 and here -- let me fill the Court in on this
24 December 2001 date. Every other case ended in
25 December of 2001. Every class period ended in 2001 or

18

1 before in some cases, I think, and the reason for that
2 was Microsoft entered into a settlement with the
3 Department of Justice and issued a press release in
4 mid-December of 2001 saying it was not going to do
5 anymore bad stuff.

6 Well, Judge Reis did not think that was very
7 significant for the purposes of ending the class period
8 and neither do we. But in the course of those
9 proceedings, our experts said, "Well, in figuring
10 damages we can use the same formulas." Experts didn't
11 say we don't need -- we don't need any merits discovery
12 after 2000 in order to prove the case. The experts have

13 to do with, you know, figuring out the damages, whether
14 or not there was pass-through and that sort of thing.
15 And, in addition, Your Honor, it turns out there are
16 surprising uniformity as to Microsoft's conduct from the
17 beginning of its existence, apparently, to the present
18 time.

19 The European union is currently in the process
20 of fining Microsoft \$613 million because of
21 its -- of the way it is handling Streaming Media, and
22 that's ongoing. That's -- as we sit here today, that is
23 ongoing. So let me talk, if I may, about -- do we have
24 any water?

25 THE COURT: Yes.

19

1 MS. CONLIN: Water would be good. Let me talk
2 about the six cases, the first of which is -- we asked
3 for all of the documents in a case called Be, B-e, v.
4 Microsoft. It was filed in February of 2000, and Be is

5 a little company that released its operating system.

6 This is an actual operating system competitor, and Be

7 released its operating system in 1998. This operating

8 system differed from Windows in some significant

9 respects. It was much better able to manipulate video

10 streams, real-time video streams.

11 Little Be tried to persuade OEMs, the computer

12 manufacturers, to install its operating system on their

13 computers before they shipped them out, along with

14 Windows, you know, the two together. They had this

15 little piece of software that permitted -- called a

16 "dual-boot system," and it permitted the user to choose

17 which operating system to start. When the user turned

18 on the computer, they could say, "Let's use the Be right

19 now, or let's use the Windows right now."

20 And, Your Honor, Be was willing to give the

21 operating system -- its little operating system away for

22 free. And it was, by all accounts, except for

23 Microsoft, technologically superior to Microsoft's

24 operating system. You would think, "Oh, my goodness,

25 operating system free. Really good. Wonderful for the

1 consumer." Computer manufacturers would say, "Oh, yes,
2 let's have that." Well, not at all, not at all. They
3 said, "We can't do that because Microsoft will punish
4 us. If we install Be, Microsoft will punish us."

5 Microsoft had such restrictive contracts with
6 OEMs that they were not permitted to install this free
7 operating system. Little Be got one company, Microtel,
8 to ship its operating system with the computer, but it
9 was in a clumsy form and it didn't work out.

10 Be also experienced Microsoft's infamous
11 "embrace, extend, extinguish" philosophy when it tried
12 to develop an Internet application for a handheld
13 computer, like -- you know, these are like the Palm and
14 BlackBerry and those little gadgets, and it is an
15 Internet appliance for those purposes.

16 And again, Your Honor, this is something you
17 will probably hear a lot of. Here is the "embrace,
18 extend, extinguish" philosophy of Microsoft. Microsoft

19 would first embrace what was supposed to be an open
20 standard, a standard that could be used across operating
21 systems. They would say, "Oh" -- and I'm paraphrasing
22 here, Your Honor, but, "Oh, we will be happy to adopt to
23 that as our standard, and we will be happy to use the
24 standard on our products."

25 But what they would do is once they embraced,

21

1 then they would add stuff to the standard stuff, usually
2 secretly, and send out software development kits to
3 software developers.

4 And I know you're looking surprised, Your
5 Honor, but this really happened. They did this with
6 Java, and it's all in Judge Jackson's decision, but they
7 would add stuff secretly to the open standard. And then
8 out would go these software development kits to these
9 thousands of developers of software applications on the
10 APIs, and the software developers would develop on these

11 software kits. And low and behold, without the software
12 developers even knowing it, they were developing an
13 application that only worked on Microsoft products.

14 They didn't even know it.

15 And so that, of course, resulted in
16 "extinguish" because those open standards were no longer
17 open. They were polluted. In fact, there's several
18 paragraphs in Judge Jackson's decision that actually
19 talk about polluting the Java standard, because Java was
20 supposed to be open source, was supposed to be across
21 all operating systems and servers and all that kind of
22 stuff, and Microsoft software development kits that was
23 supposed to have true Java on it did not. It had Java
24 on it that Microsoft had extended in such a way that it
25 didn't work on anybody else's product. So that little

22

1 Be had that happen to them as well.

2 In some cases, Your Honor, too, we did not

3 specifically say the name of the company in our
4 petition, but in the case of Be we did. We have all
5 kinds -- we have in our petition that these things
6 happened with respect to Be. They are paragraphs 103,
7 116 to 117, and 183 to 187.

8 The Be case is now settled, Your Honor, for
9 \$23 million. It was settled on September 5, 2003. But
10 it was too late for Be, Your Honor. Be was out of
11 business at that point in time. So the shareholders got
12 the money but Be is gone. Consumers will not ever have
13 the opportunity to use this technologically superior
14 operating system because Be is gone.

15 We have no documents about Microsoft's
16 behavior that literally buried this technologically free
17 competitive operating system. Microsoft in its pleading
18 doesn't really address Be at all, but it also doesn't
19 give us the case documents. We don't have the case
20 documents. That's why we need to come here to you.

21 Also, Your Honor, Microsoft designated
22 documents produced in the Be case as Minnesota trial
23 exhibits, but we don't have those documents otherwise.

24 That's Be.

25 The next one in alphabetical order is Burst.

23

1 Burst dot com. I've never heard of Burst dot com at all
2 until -- I don't know, sometime in the middle -- well,
3 towards the end of last year, I think.

4 Burst dot com is Streaming Media. The
5 Burst.com v. Microsoft case, which is material for
6 several reasons, was filed in June of 2002. And, Your
7 Honor, you have entered an order. This case was settled
8 quite recently, March 22, 2005, and the plaintiff asked
9 the Court to enter an order saying Microsoft could not
10 destroy any of the documents it had in connection with
11 Be. And they settled the case, Your Honor, for
12 \$16 million, and you have ordered the preservation of
13 all materials from that case.

14 The Burst technologies are for video storage
15 and manipulation and delivering video over network --

16 networks. The mechanism used by Microsoft to destroy
17 Burst is the same as what it did to a little company
18 called "Go."

19 In the late '80s and early '90s, Go developed
20 technology that permitted people to write on a tablet
21 and have the computer read the handwriting, handwriting
22 recognition software. It had both the software and the
23 hardware. And they -- Microsoft expressed an interest
24 in that technology. They were interested, and, of
25 course, Go was loving the idea Microsoft might be

24

1 interested in their handwriting technology, so they
2 invited Microsoft people, under a nondisclosure
3 agreement, to come to their facility and learn all their
4 secrets. Showed them everything: How the technology
5 worked, all their proprietary and business information.

6 A guy named Lloyd Frick spent some time at Go,
7 and after he had been there for a while, he went back to

8 Microsoft. And Microsoft said to Go, "We're not
9 interested in your technology," but, low and behold,
10 within a very short time, Microsoft produced its own pen
11 recognition software using technology that it had
12 learned from its visits to Go.

13 Go just recently filed a lawsuit against
14 Microsoft. Go didn't know about this until the
15 Minnesota -- the Minnesota trial, the Microsoft trial in
16 Minnesota. Jerry Kaplan, who was the president of Go,
17 came as a witness, and in the course of that proceeding
18 learned that Mr. Frick in one of his e-mails to, I
19 think, Mr. Gates, acknowledges in a sort of subtle way
20 what happened to Go.

21 That's what happened to Burst. Burst
22 Technology was called "Corona." They revealed it to
23 Microsoft under a nondisclosure agreement, and according
24 to the Burst petition, Microsoft/Corona used Burst
25 Technology, violated Burst's patent, violated the

1 nondisclosure agreement and used Burst's Technology.
2 Microsoft also used against Burst another favorite
3 tactic used against Netscape and others, and that is
4 Burst -- all software needs to work with Microsoft.
5 Ninety plus percent of computers are going to have
6 Microsoft on them. So Burst -- everybody else has to
7 know about Microsoft.

8 So Microsoft publishes these APIs -- some of
9 them, not all of them -- publishes these APIs for the
10 independent software developers, ISDs, to use to operate
11 with Windows. But, then, when a competitor like Burst
12 relied on the published interfaces, Microsoft would just
13 change them so that Burst would stop working. You know,
14 there they would be and then they wouldn't be there
15 anymore. So when Burst software went to call on these
16 APIs, they weren't there. And so Burst technology no
17 longer worked with Microsoft. This happened again and
18 again and again. It happened with Netscape, happened
19 with other software products that Microsoft considered
20 to be potential operating system competitors.

21 The Burst case, Microsoft says, "We cannot

22 have information about Burst because we didn't
23 specifically mention it for the same reason that Judge
24 Jackson did, most of the conduct hasn't happened yet."
25 I believe that we don't have a single piece of paper

26

1 pertaining to Burst. Of course, Your Honor, I have to
2 tell you there may be another reason for that, and that
3 is intentional spoliation of evidence to prevent
4 discovery.

5 Spoliation was an issue before the Court at
6 the time the Burst case was settled. It's a very
7 serious issue, and it would certainly affect us here in
8 Iowa if, in fact, Microsoft was doing what it appears
9 they were doing from the e-mails that we know about.
10 Microsoft says about this spoliation stuff that "it is
11 just the wild imaginings of a disgruntled competitor."

12 I have to tell you, Your Honor, when Microsoft
13 is talking to the Court, Microsoft calls Burst a

14 competitor, which, of course, it is.

15 Your Honor, what I have done, knowing this
16 courtroom as I do, I have given you a notebook -- may I
17 approach, Your Honor? -- I'm going to give it to them
18 too. This is for -- as we go through some of these
19 things, I thought that the Court might find it helpful
20 to have some --

21 The first thing, Your Honor, that I have put
22 in that is the Microsoft's reply memorandum. I thought
23 the Court would be interested in the fact that Microsoft
24 calls Burst a competitor. And, of course, it is.

25 Then, Your Honor, the next document is the

1 Court order on Burst's motion to compel and Judge Motz,
2 he's the MDL judge, who ordered after hearing -- lots of
3 hearings, apparently -- ordered Microsoft to provide the
4 information, and that is the only way we ever knew about
5 this because Judge Motz, when he granted Burst's motion

6 to compel, also ordered that all the documents with
7 respect to it be released.

8 Obviously, Judge Motz did not think that these
9 were the ravings of a disgruntled competitor.

10 The next document, Your Honor, is a part of
11 the brief. Your Honor, you've got the whole brief, and
12 what I've done here is -- because we have given you a
13 truckload of material, I have pulled out a few things
14 that I think are important enough for us to look at
15 together. And one of them is this -- a couple of pages
16 from the Burst brief, which is attached to my brief, my
17 affidavit on the motion to compel. It's "F."

18 One of the policies of Microsoft says, "Due to
19 legal issues, mail files cannot be stored on any
20 corporate servers that are backed up to tape. This
21 applies to all servers in the data center." The brief,
22 Your Honor, goes on about all of the different stories
23 Microsoft tells about what "due to legal issues" means
24 and what not being able to store to its server, what the
25 impact of that is.

1 The next page, page 13 of the brief, talks
2 about what Mr. Allchin says. Mr. Allchin is a very
3 high-level Microsoft employee, a senior vice president,
4 as I recall, and certainly a very influential guy that
5 people all over the company have to listen to and obey.
6 And what he tells people -- well, the first one is from
7 a guy named Brian Valentine, also a senior executive,
8 and he sends to Mr. Allchin he's concerned about the
9 fact
10 that -- well, here, Your Honor, in January 2000, weeks
11 after Judge Penfield released his findings, Jim Allchin
12 received this e-mail from Brian Valentine.
13 Mr. Valentine had learned that lower-level employees
14 were archiving e-mails, storing it on their personal
15 computer. They couldn't get it on servers, so they were
16 putting it on their personal computer.

17 So Mr. Valentine says to Mr. Allchin he wants
18 to get this practice stopped. "I mean this -- purge

19 every 30 days ... I personally only keep 15 days ... To
20 prove it here is a property page on my Sent Items
21 folders ... Get rid of it -- don't store it in PSTs,
22 don't keep it around -- just get rid of it."
23 Then Mr. Allchin responded the very next day,
24 and he says: "Being even more hardcore ... This is not
25 something you get to decide" -- telling other employees

29

1 this -- "This is a company policy. Do not think this is
2 something that only applies to a few people. Do not
3 think it will be okay if I do this; it hasn't caused any
4 problems so far. Do not archive your mail. Do not be
5 foolish. 30 days."

6 I don't know, Your Honor, looks to me like
7 that is saying "destroy e-mails." That's what it looks
8 to me like, and that would certainly be something that
9 we would like to know. At the time Microsoft paid Burst
10 \$60 million, these issues were pending before the Court,

11 and we would like to follow through and find out what
12 happened to all of these e-mails that were not stored
13 and not kept past 30 days.

14 That's the Burst case, Your Honor. The next
15 case is Lindows, and that is a case where Microsoft sued
16 Lindows. Lindows is another operating system. It's an
17 operating system competitor. It's based on Linux,
18 L-i-n-u-x, which is a free open-source software.
19 Computer software engineers around the world work on
20 this Linux product and anybody can access it, anybody
21 can get it on their machine, anybody can use it. And
22 this Lindows operating system is -- based on Linux is
23 what they call a "flavor" of Linux. That case was filed
24 on
25 May 5, 2002, and settled, and I don't know if any money

30

1 exchanged hands.

2 Lindows agreed to change its name to Linspire,

3 L-i-n-s-p-i-r-e. Lindows advertised that it is an
4 available and affordable software application or
5 software operating system and can run software
6 applications designed for Windows or for this Linux
7 operating system.

8 When we asked for these documents, operating
9 system competitor, Microsoft says, "Wait a minute. That
10 case is not about the operating system. It is Microsoft
11 suing Lindows for patent infringement. It has nothing
12 to do with your case here in Iowa; but then, Your Honor,
13 Lindows counterclaimed, and that has everything to do
14 with us, and Microsoft admits it.

15 Your Honor, the next page in your notebook is
16 from the Gordon case, the Minnesota Microsoft case that
17 we tried last winter. And in that case, Your Honor,
18 Microsoft wanted to access the depositions of a guy
19 named Michael Robertson, who was the CEO of Lindows.
20 Depositions were taken in the Lindows case. Microsoft
21 wanted access to the Lindows depositions, and so they
22 told the Court this: Their Microsoft brief for access,
23 and that is Exhibit H to the plaintiff's motion to
24 compel. They say, "The subject matter of

25 Mr. Robertson's anticipated testimony here directly

31

1 overlaps with the fifth counterclaim asserted by Lindows
2 dot com in the Lindows dot com case." In that
3 counterclaim, Lindows.com alleged: Microsoft has acted
4 unfairly to interfere with Lindows business to prevent
5 it from obtaining funding, developing, promoting and
6 releasing its product." So Microsoft wanted
7 Mr. Robertson's deposition because it directly overlaps.

8 Now, of course, I'm sure that the Court is
9 aware that the Gordon case is based on the same conduct
10 towards the people of Minnesota as our case is towards
11 the people of Iowa. So if it overlapped with the Gordon
12 case, it overlaps with our case, we get the documents.

13 Microsoft also said that it just seeks access
14 to existing discovery materials, and that's all we seek.
15 We didn't seek access to stuff they've already got.
16 We're not asking them to create anything. We're just

17 saying, "Give us what you have. Just plug in one of
18 these things and download it and send it."

19 The next case, Your Honor, that we ask for
20 documents from is the Netscape case -- Netscape browser,
21 Navigator, ABIs -- first, the '94 Web browser that
22 became an instant overnight sensation and threatened
23 Microsoft's operating system monopoly. That case was
24 filed on January 22, 2002, and settled on May 29, 2003,
25 for \$750 million in actual cash monies. All the

32

1 settlements, Your Honor, with competitors appear to be
2 in actual cash money, although cash settlements with
3 consumers are in coupons. Here is what Netscape says
4 Microsoft has done, and what I have attached for the
5 Court is Attachment I. It's Netscape's complaint. It's
6 with my affidavit on the motion to compel, and I think I
7 will just go through this, Your Honor, because it does
8 set out a whole course of conduct.

9 The first thing that happened with respect to
10 Netscape that we know about is Microsoft simply tried to
11 horizontally divide the markets, called Netscape in and
12 said, "Here, we will take this part of the market and
13 you take that part of the market." And Netscape said,
14 "No," and then all this other stuff started. "Microsoft
15 forced original equipment manufacturers to accept
16 exclusionary license restrictions that caused them to
17 stop dealing with Netscape and instead use only Internet
18 Explorer." That's Microsoft product, is Internet
19 Explorer. "Microsoft threatened OEMs with the loss of
20 their licenses to the Windows operating system if they
21 did not comply with these illegal provisions."

22 Your Honor, no OEM can survive without access
23 to Windows. Their computers won't work if they don't
24 have Windows, so they have to have Windows. And what
25 they were saying to the computer manufacturers is, "If

1 you deal with Netscape, you will not have Windows. You
2 can't have Windows." Judge Jackson found that was
3 pretty illegal.

4 They then took their Internet Explorer --
5 "they," Microsoft -- took their Internet Explorer, Your
6 Honor, and made it a part of Windows. They bolted it
7 together with Windows, and one of the big issues in the
8 Department of Justice case was whether or not it was
9 really a part of Windows or whether Microsoft had simply
10 bolted it together with Windows so that Netscape would
11 have simply no market at all.

12 Then once it was together with Windows, of
13 course, everybody but Windows had a Web browser, and
14 people could not install it. Once they got their
15 Windows, they couldn't get the Internet Explorer off of
16 it, and the Internet Explorer became the default
17 browser.

18 Microsoft provided early information on
19 changes and upgrades to its system and other
20 preferential support only to developers that agreed to
21 these exclusionary arrangements with Microsoft. It

22 coerced exclusionary dealing arrangements with Internet
23 access providers. That's like AOL and those kind of
24 things, and then it forced Apple to replace Netscape as
25 its default browser. And, of course, the reason for

34

1 that was to destroy Navigator, and it worked pretty
2 good. That's what happened. This Web browser that had
3 been a phenomenon within a few years was what Microsoft
4 did, destroyed them, destroyed them, just simply
5 destroyed them.

6 Judge Jackson deals with these matters at
7 paragraphs 137 through 138 of his -- I'm sorry, Your
8 Honor, 137 through 178 and paragraphs 211 through 213.

9 Now, one -- I'm going to talk about collateral
10 estoppel in a minute, Your Honor, but one thing that I
11 want to stop right here and say is a part of the
12 allegations against Microsoft with respect to Netscape
13 was illegal tying, tying the browser to the operating

14 system. That is not collaterally estopped. That part
15 of Judge Jackson's findings was reversed by the
16 appellate court, and so the illegal tying of Netscape to
17 the operating system is not collaterally estopped. We
18 have to prove that. That is a part of our -- of the
19 necessary proof.

20 And then, Your Honor, in Netscape's cause of
21 action against Microsoft, they say that after the
22 Court's findings, after Judge Jackson's findings in
23 November of 1999, the conduct simply continued unabated.

24 Paragraph 32 of their petition says exactly
25 that, that they have engaged in further anticompetitive

1 behavior to further reduce Netscape's Navigator market
2 share and eliminate any risk of Netscape developing its
3 Web browser into an alternative platform. That's the
4 big issue here; not just little Navigator that became a
5 big Navigator and then got little again, but making

6 anything into an alternative platform that developers
7 can develop for that sticks up its APIs, that's what
8 Microsoft worries about.

9 Your Honor, it seems so clear to us that
10 Microsoft must produce these documents, must produce
11 these documents. We pled this.

12 Judge Jackson decided some of the issues, but
13 then the Circuit -- the Eighth Circuit reversed the
14 time, so we have things we have to prove about Netscape
15 as a part of our case. Plus, the conduct continues,
16 according to Netscape's petition, and tying is open. So
17 we need those documents.

18 RealNetworks, fourth case, Your Honor. And
19 RealNetworks and the European common market involve the
20 same kind of product. It involves the Streaming Media
21 product. Judge Jackson's findings of fact with respect
22 to Real are found at paragraphs 111 through 113 and 136
23 and 137, and we pled Real at paragraph 114 of our
24 petition.

25 With respect to the European common market

1 claim, there is not only the \$613 million fine, which is
2 on appeal, Your Honor, but also an injunction that made
3 Microsoft offer, as I understand it -- and I'm sure I
4 will be corrected if I'm wrong -- but at least as I
5 understand it superficially, made Microsoft in Europe
6 offer an operating system without a Windows Media Player
7 so that RealNetwork could still compete in Europe.

8 And with respect to Real, same course of
9 anticompetitive conduct as with Netscape. They offered
10 to divide the markets horizontally. Then they bolted
11 the Windows Media Player to the operating system and
12 gave it away for free; but with Real Microsoft did enter
13 into an agreement and they invested money in Real, but
14 somehow that didn't work out and then there was a war
15 and a legal tying of the Media Player to the operating
16 system between -- Your Honor, according to the Real
17 petition, which the Court can find at Attachment J to my
18 affidavit filed in connection with our brief on the
19 motion to compel, in October 2001 and March 2003, 95

20 percent of the PCs shipped with Windows Media Player
21 because 95 percent of the PCs shipped with Windows.
22 That doesn't leave very much of a market for
23 RealNetworks.
24 And, you know, another thing, Your Honor,
25 Microsoft targeted Real in its internal documents and

37

1 recognized that Real was a competitor.
2 This next page, Your Honor, page 22 of Real's
3 petition in paragraph 97, that shows that for
4 Microsoft's internal purposes there is no question about
5 the place of Real. A man named on paragraph 97, Your
6 Honor, David Britton, says, "Real is a very important
7 competitor to the company. It is important for
8 employees to recognize the threat Real represents and
9 the actions we have taken in forming a new division to
10 address a major new market." So inside Microsoft here
11 in this court they say Real is not a competitor. We

12 don't get the documents because it's an adjacent market,
13 and in their own documents, Your Honor, according to
14 this petition and, really, according to Judge Jackson's
15 decision, Real is recognized as a competitor because it
16 could become a platform.

17 Microsoft Vice President Will Poole proposed
18 that "Mr. Gates" -- this is paragraph 98 -- "explain at
19 a Microsoft company meeting that Real competes directly
20 with major components of the Windows OS," operating
21 system. And then Mr. Poole testified to that in 2002.
22 He said, "According to Mr. Poole, RealNetworks competes
23 directly with major components of Microsoft's for
24 consumers, for developers and for content providers."

25 Microsoft claims that in the action that

1 RealNetworks files that it has to do with servers.
2 There are eight paragraphs, Your Honor, of this
3 petition, the complaint that Real files, eight

4 paragraphs that do have to do with servers, eight
5 paragraphs out of 175 or so. Microsoft's conduct
6 complains that -- Microsoft also tells the Court that
7 the conduct that Real complains about started in 1999,
8 well after most of the conduct alleged in our petition,
9 and that, of course, is the point.

10 There is no dispute that we made allegations
11 about Microsoft's conduct towards Real. Judge Jackson
12 referred to it, and the conduct continued into the 21st
13 Century. We ought to get the documents.

14 We're not even on the downside, Your Honor.
15 Shall we take a little break? Am I boring you to death?

16 THE COURT: I think my court reporter would
17 like a break.

18 MS. CONLIN: Okay. That's a real excuse for
19 all of us, Your Honor.

20 THE COURT: Ten minutes.

21 (A short recess was taken.)

22 THE COURT: All right. Continue.

23 MS. CONLIN: Just one case left. I apologize,
24 Your Honor. I'm sorry that it's taking so long.

25 THE COURT: That's fine. No problem.

39

1 MS. CONLIN: But it has taken me so long to
2 get any part of this into my head that I want to share
3 with the Court what I've learned. I also want to make
4 sure that I haven't misspoken.

5 The middleware people are not potential
6 operating system competitors. Rather, Microsoft killed
7 their products so that they would not undermine
8 Microsoft's monopoly. I think I have made that clear,
9 but I may have misspoken and I don't want to -- I'm
10 trying not to misspeak, though I'm saying an awful lot
11 of words here.

12 Last case, Your Honor, is Sun. Sun vs.
13 Microsoft is the case filed March 8, 2002, settled
14 April of 2004, for, Your Honor, approximately two
15 billion -- with there being \$2 billion paid by Microsoft
16 to Sun. And this is the Java. Sun developed this

17 middleware called "Java." Judge Jackson details
18 Microsoft series of illegal acts against Sun, and we
19 also plead them, Your Honor. We plead at paragraphs 179
20 to 182 and 211 to 212.

21 The allegations in Sun's 2002 complaint
22 include Microsoft's anticompetitive conduct in the
23 Office Suite market. This is the first we have really
24 talked about the Office Suite market; but Sun's
25 allegations, to the best of my knowledge, and these six

40

1 cases that we're asking for documents in, this is the
2 only one that deals with the applications market and we
3 are dealing with the applications market.

4 We plead that Microsoft has engaged in
5 anticompetitive acts in the applications market and in
6 Word and Excel, and most people get Word and Excel
7 through Office. And Sun says Microsoft has engaged in
8 anticompetitive conduct with respect to Office.

9 As of 1999, according to Sun, Microsoft had
10 96 percent, 96 percent, of the worldwide market for
11 Office Suite, office-productivity software, a couple of
12 ways that Microsoft uses Office and Office uses Windows
13 to feed the monopoly that each product has.

14 Microsoft, for example, doesn't support
15 Office, doesn't make an office product that can work on
16 any operating system other than Windows, except also
17 Apple. Microsoft has an Apple Office Suite and it has a
18 Windows Office Suite, but it doesn't have a Linux or
19 Unix or any of those kind of things. That's one way.

20 Microsoft, according to Sun and according to
21 us, has also illegally tied Office to Windows. How did
22 they get their monopoly to start with? Well, one of the
23 ways we say they got it is because when an OEM bought
24 Windows, they could get Windows cheaper if they also
25 took Office; or when Microsoft got a little smarter

1 about this, they could get more market development funds
2 or other kinds of special treatment if in addition to
3 preinstalling the Windows operating system on their
4 computer, they would also take the Office Suite and put
5 that -- preinstall that on the computer that they were
6 selling to consumers. So we say that's illegal tie-in.

7 IBM is kind of an example, Your Honor, to use
8 that we know about. IBM has its own office productivity
9 software called "Smart Suite." And IBM also has, you
10 know, PCs. IBM sells PCs to the general public. IBM
11 needs Microsoft's operating system to sell its PCs to
12 the public. So Microsoft threatened IBM that if it
13 tried to put its own Office Suite, Smart Suite, on its
14 own computers, they would not get the same treatment for
15 Windows.

16 I'm not sure I made that clear, but basically
17 what they are saying to IBM is: "Yes, we know you've
18 got your own Office Suite, your Smart Suite. You can't
19 use it if you want us." And, of course, I am
20 paraphrasing here, Your Honor. I am not trying to say
21 that I know exactly what Microsoft people said to IBM,
22 but this is my version of what I think they said. This

23 is what the documents say. "So, IBM, if you want
24 Microsoft to let you have Windows Office on your own
25 PCs, you can't use your own product. You can't put your

42

1 own Smart Suite on your own IBM PCs."

2 So that's what they did to -- this is back in
3 '95, Your Honor. This is -- some of this is in
4 Judge Jackson's decision and some of it is precluded.

5 Microsoft says we don't get the Netscape
6 documents because the Netscape petition, Netscape
7 complaint, refers not only to the browser wars and
8 continuing conduct, but also to servers and to Passport
9 and Net. These are two new Microsoft products, Passport
10 and Net, and we don't include those in our petition by
11 name.

12 Now, Your Honor, we allege continuing conduct.
13 There is no question about that, and I'm going to point
14 the Court to a couple of places where we do that. But

15 we don't say "Passport" in our petition. We don't say
16 "Net" in our petition because they were not in existence
17 at the time we originally filed.

18 Network servers have to be able to talk to the
19 desk-top computers, and so that's -- there's a series of
20 steps that Microsoft took to make its SQL server a
21 dominant server in the Microsoft -- in the market, and
22 Microsoft's actions had to do with inoperability between
23 the desk top equipped with Windows and the backroom
24 server. So that seems to us, at least, to be a
25 perfectly legitimate request for us to look at server

43

1 documents and the way that Microsoft used its operating
2 system to leverage -- again, in an adjacent market, to
3 leverage its own server into a dominant market position.

4 Again, what we see is Microsoft illegally
5 using that monopoly to influence an adjacent market.
6 Now, Dot Net is Microsoft's own middleware. You know,

7 it's sort of -- it's different than Netscape, but it's
8 Dot Net, and it is a middleware.
9 Now, Passport is another anticompetitive
10 device to make the whole worldwide Web only available to
11 consumers who use Microsoft products. Both are part of
12 Microsoft's Web service strategy, and it's supposed to
13 directly rival Sun. That's why it's in the Sun
14 petition.

15 Web services have a potential to erode the
16 applications' barrier to enter. The reason why nobody
17 can make a frontal assault on Microsoft Windows is
18 because of the applications' barrier entry. The only
19 reason people want computers is because they have lots
20 of applications, they do lots of things. The only
21 applications -- the only operating system applications
22 developers will write for is the biggest one. They want
23 to make a lot of money. They want lots of access, so
24 they write for Windows, and it goes around and around
25 like that. So it's from the side or the back that

1 Microsoft could get knocked off, and Web services has a
2 potential for eroding that barrier because, again, ABIs.

3 Microsoft, right now as we speak, is engaged
4 in an effort to leverage its operating system monopoly
5 on to the worldwide Web, and that, we think, makes those
6 documents as important to us as any of the other
7 documents.

8 The general contentions of Microsoft with
9 respect to these six cases are that we did not plead
10 them sufficiently. Iowa has notice pleading. But, Your
11 Honor, we did -- four of them we did plead specifically.
12 We pled Be, we pled Netscape, RealNetworks and Sun.
13 Those are right in our petition. We did not mention by
14 name Burst. The Burst case wasn't filed until June of
15 2002, and we didn't know about it until much later
16 because everything was unavailable.

17 Lindows is also not -- we don't mention them
18 by name. Lindows is the operating system competitor.
19 Burst is the Streaming Media. And it wasn't filed until

20 March 2002. We had and have no documents concerning
21 Windows or Burst except the ones that Judge Motz ordered
22 released. And we, without question, pled operating
23 system continuing conduct in a general way, and we pled
24 middleware also.

25 Here, Your Honor, at 104 of our petition, we

45

1 say that Microsoft recognized that the applications
2 barrier to entry could be eroded by middleware and that
3 those products could support or become alternative
4 platforms to Windows.

5 In paragraph 111 we say, "Whenever middleware
6 has threatened to undermine or eliminate the barrier" --
7 the application of barrier to entry -- "Microsoft's
8 response has been swift and predatory."

9 And in 128, "Microsoft engaged in continuing
10 violations of the Iowa Competition Law by means of
11 exclusionary and predatory conduct."

12 And there are others, Your Honor. Those are
13 examples of our pleading.

14 Microsoft tells the Court in its response that
15 no plaintiff -- no Iowa plaintiff has pled that he or
16 she bought a server or bought Streaming Media or the
17 other products. Well, that's -- that is very
18 misleading. It's purposely misleading, and based on
19 Microsoft's belief -- you understand, Your Honor?

20 THE COURT: Yep.

21 MS. CONLIN: Okay. -- this is based on
22 Microsoft's belief that it can say anything and we're
23 going to believe it. I mean, we don't believe it. What
24 we say is Microsoft's conduct in these adjacent
25 markets -- servers, browsers, Streaming Media -- is what

1 let it keep unabated its operating system monopoly which
2 makes Iowa consumers pay more money for their operating
3 system because there's no competition. That's what we

4 say. We don't say that our people bought servers and
5 stuff like that. We say Microsoft killed competition in
6 adjacent markets so those adjacent markets could not
7 develop into alternate platforms with APIs and they
8 could keep their core monopoly together. That's what we
9 say.

10 And so I wish Microsoft would stop saying, you
11 know, "These are adjacent markets." They don't matter
12 because we've got it now. At least, I've got it now,
13 and it's not going to work to tell us again and again
14 that it's irrelevant because it's an adjacent market.

15 Collateral estoppel is another reason that
16 Microsoft offers for its absolute refusal to give us
17 these 12 million pages of documents we don't have.

18 Your Honor, did we mention to you that the
19 interlocutory appeal has been accepted by the Iowa
20 Supreme Court? Did you know that?

21 THE COURT: I think someone told me that
22 awhile back.

23 MS. CONLIN: Okay.

24 THE COURT: Was that a month ago or so?

25 MS. CONLIN: Yeah, I think it was about a

1 month ago, and we're on an accelerated briefing
2 schedule. But I tell you that because while I have
3 every reason to believe the Supreme Court will, in fact,
4 affirm the order, it might not, and that should be kept
5 in mind by all of us -- or it might take some of it and
6 not others of it, but it is on appeal.

7 Microsoft tells us that the material requested
8 from Sun and Netscape and Real need not be produced
9 because of the collateral estoppel, but here is what I
10 understand that means: Microsoft has to show that the
11 documents relate solely to an issue that has been
12 collaterally estopped, and they don't even make an
13 attempt to do that, Your Honor. They just tell you,
14 "collateral estoppel," so we're going to keep these
15 12 million documents because they might be collaterally
16 estopped. They have to make a showing. They can't just
17 tell us. They have to make a showing that there is a

18 reason, and I don't think they can make that showing
19 because, in fact, the documents are relevant to issues
20 that are currently pending before the Court with or
21 without collateral estoppel.

22 They also say that the -- well, at least --
23 let me return for a moment. It doesn't seem to us that
24 these 12 million documents that no one ever saw --
25 except these, apparently, no one ever saw. I don't know

48

1 whether other people saw them. I know I have not.
2 These 12 million documents were not in the Department of
3 Justice case, Your Honor, and that is the case from
4 which Judge Reis entered her order of collateral
5 estoppel. So that -- how can we be -- how can there be
6 collateral estoppel with respect to 12 million pages of
7 documents that the Department of Justice -- and that
8 even in the coordinated case, the California case, they
9 are not out there? No one has seen these documents. So

10 it seems hard to make that work.

11 Also, Your Honor, the Department of Justice --
12 what Microsoft says with respect to collateral estoppel
13 is there is collateral estoppel only from 1995 to 1998,
14 that time frame, and only for operating system software.
15 We -- our lawsuit class period starts in May of '94, a
16 year before 1995, and goes on until the summer of 2006.
17 So some -- well, that would be eight years. It's eight
18 years beyond what Microsoft says this period of time --
19 and, of course, also with the applications. We have
20 applications. The DOJ case only had to do, Your Honor,
21 with the operating system software.

22 I expect, Your Honor, that Microsoft will not
23 be willing to concede every issue raised in the
24 pleadings in the lawsuits that we're talking about here.
25 There are several lawsuits, and I don't think they are

1 going -- if they are, if they want to concede that all

2 of the allegations in those complaints are true and that
3 collateral estoppel applies, then we don't need the
4 documents. But I'm thinking they are not going to do
5 that, and failing that, we do need the documents and we
6 are entitled to the documents.

7 Moving on, Your Honor, to, really, finally, to
8 the second part, the missing page, the "missing page"
9 controversy.

10 We notified the defendant, Your Honor, in
11 February that some of the exhibits from California and
12 Minnesota appeared to be missing pages between the Bates
13 numbers. And the first thing they said to us is, "Well,
14 no, there are no missing pages." Your Honor, in your
15 notebook at page 6 of Microsoft's Brief in Opposition to
16 our Motion to Compel, they say it again. They say, "As
17 Microsoft explained to the plaintiffs in March 2005,
18 before they filed their present motion, the documents
19 they have identified had contained no missing pages."
20 They say it again on March 9, "Microsoft advised the
21 plaintiffs that the supposedly incomplete documents
22 identified in their February 28th letter contained no

23 gaps."

24 At Attachment B, Your Honor, to my affidavit,

25 I give you the whole list. There are about 55 exhibits

50

1 on that list -- and by "exhibits," I mean offered in
2 California, offered in Minnesota -- 55 exhibits that we
3 think might be missing pages. There might be hundreds
4 and hundreds of them, but these I can tell.

5 Microsoft, then, says, apparently,
6 alternatively that the pages are not responsive to any
7 prior requests. Well, wait a minute. These are
8 exhibits. You gave them to us in response to some
9 request. So how could it be that the missing pages are
10 not responsive? And then they tell us that even though
11 I might in my naivety think there are pages missing from
12 the e-mails, really, I'm wrong, because Microsoft was
13 kind enough to remove all the immaterial stuff so I
14 would not be bothered by it.

15 So we've had three different excuses. I have
16 to tell you, Your Honor, the idea that they have removed
17 immaterial stuff and that they just left parts of
18 e-mails that were immaterial on the pages is not
19 consistent with what I've seen in the documents. There
20 are more than -- almost 9,000 actual exhibits were
21 offered in the Gordon case, Your Honor, and I've read
22 every one of them and I have found many where when
23 material is redacted because it's immaterial -- that's
24 what the document says, that's what it's supposed to
25 say -- if material is removed from a document, you're

51

1 supposed to say that material is removed from a
2 document. You're not supposed to just pretend like the
3 whole thing is there. This is not the way that we do
4 it. You have to make apparent, you know, that
5 something is missing. Then you can argue about whether
6 or not it should be missing or not, but you're not

7 supposed to conceal the fact that stuff is missing.

8 Your Honor, if we could look at Exhibit 299.

9 Now, keep in mind what the excuses have been so far: No

10 gaps, no pages missing. Well, this is pretty easy.

11 This is a PowerPoint presentation, Your Honor, and you

12 see at the top there it says, "page 39"? The next page

13 is 41, and the next page is 43.

14 Now, up to this point, pages 1 through 38 are

15 all there, but pages 40 and 42 are not there. But it

16 seems -- really, I thought this was easy. Now, if you

17 look down, Your Honor, at the bottom, the Bates numbers,

18 the Bates numbers go in order, 63, 64, 65, and when I

19 say pages missing between Bates stamp, that's what I

20 mean. They stamped these pages consecutively, but, in

21 fact, page 40 is missing, page 41 is missing. So, you

22 know, I really did think this was pretty easy, but --

23 "just give me these missing pages." But, "No, no," they

24 said, "there are no missing pages." Well, that doesn't

25 work out very well for this, I got to say. This seems

1 so clear.

2 So now what they say to me is, "Well, this is
3 not a very important document, Roxanne. This is not" --
4 "we don't think you really need these pages because we
5 don't think this document is important." Well, it was
6 important enough for it to be offered as an exhibit in
7 two other states. So, you know, I want all the pages.
8 I just want all of the pages.

9 What they say -- I have to say an additional
10 thing. They say, "Well, it can't be all that important
11 because nobody referred to it. No witness was asked
12 about it in Minnesota, and nobody referred to it."
13 Well, here's why -- this may come up again, Your Honor.
14 Here's why: We were not permitted to bring Microsoft
15 witnesses to court as a part of our case in chief. We
16 asked. The Court said no. We asked too late. We won't
17 make that mistake again. We also -- in a ruling unlike
18 any I have ever seen before, the Court said we could not
19 refer to exhibits. We couldn't have, you know, document
20 dates like we did in the asbetos cases where we just

21 read documents to the jury. We had a witness -- before
22 we could use a document, a witness had to refer to it or
23 we had to use it in argument. This is going to be the
24 longest closing argument in the history of the world,
25 Your Honor, because that's where we were going to refer

53

1 to the documents, but we settled, you know, in our case,
2 we settled.

3 So when Microsoft says to the Court in support
4 of the fact that this is not an important document,
5 "Well, they never referred to it." Well, we couldn't.
6 The Court would not permit us to refer to it except in
7 very limited ways, and so that doesn't mean this is not
8 an important document. And I got to say, pretty clear,
9 it is missing pages. Here's 552.

10 Now, in 552, Your Honor, that's our next
11 exhibit, it appears that the defendants no longer deny
12 that there are pages missing. What they say instead is

13 they took those out because they were not material.

14 Look, Your Honor, at the bottom of page 7906.

15 Okay. This is an e-mail. I'm not sure how familiar you

16 are with e-mail traffic, but "adamb" -- Adam Burrillo,

17 I think -- writes to -- right at the top, Your Honor,

18 "From Adam B., Thursday, February 7th to 'davem.', with

19 a carbon copy to "Mikem-a-p" -- who is Mike Maples, who

20 is also a very high-level employee. The subject:

21 "Please answer this mail tonight." Right away I say to

22 myself, that is probably important. They want an

23 instant answer.

24 So what are they asking here? What is he

25 asking? He is saying, "Is there someone at Borland who

1 would be willing to talk to me about their development

2 process?" Borland is a competitor of Microsoft, Your

3 Honor, an applications competitor; and an internal

4 Microsoft guy is asking around to find out who at

5 Borland will talk with him about Borland's process.

6 "2) How are the projects organized?"

7 "3) how are the development teams organized?"

8 Okay. So there is three things about Borland.

9 If you turn the page, next in order, you will

10 see there's half a sentence there. It says, "is

11 this?" Okay. And that cannot go with this page,

12 cannot, because it's half a sentence. So I say, "Okay.

13 Where is the rest of this e-mail from "adamb" about

14 trying to find out about Borland things?" They say,

15 "Well, we took it out because we did not think you

16 needed it. It was not material. That's what we say."

17 This is an excellent illustration as well,

18 Your Honor, of why these missing pages were not

19 discovered earlier. I discovered these because I read

20 them word for word, line for line, every page of every

21 exhibit.

22 Now, if you were just looking at this, no way

23 in the world that you would find out because there's

24 nothing here, Your Honor, that indicates that there's

25 anything left out, nothing at all. But there is

1 something left out. This urgent e-mail marked to
2 "davem" with a "cc" to Mike Maples says: "Answer
3 tonight." Now, Microsoft doesn't tell me why this is
4 not material. Let me put Microsoft's conduct in
5 context.

6 Microsoft has settled several cases which
7 accused it of stealing intellectual property from other
8 companies. What legitimate reason does a Microsoft
9 employee have for casting about for a contact within a
10 competitor to see how they go about doing their
11 business? Given Microsoft's propensity from its
12 conduct, a jury might say, "Well, that can't be right."
13 Microsoft may have a perfectly legitimate excuse for why
14 Mr. "Adamb" is trying to find out all about Borland. So
15 let them offer it to the jury, but give me the rest of
16 the document. Let me see what was happening at that
17 time.

18 Again, Your Honor, you will see that the Bates
19 pages go in order, 706 -- or 906, 907, but the e-mails
20 do not.
21 553 is really puzzling to me. Microsoft's
22 response with respect to 553 is, first of all, "No pages
23 missing," "You've lost your mind," or, "We took it out
24 because we didn't think you needed to be bothered with
25 these pages." Well, now they point us to another

56

1 exhibit and say this is the end of the e-mail in
2 question. Okay. So let's look at this. This is
3 Exhibit 553, Your Honor, and at the bottom it is a
4 request for a lunchtime presentation. It says, "You
5 might have" -- that's the end of 18. The next sentence
6 is a full sentence, so right off it looks to me like
7 there's something missing. And, Your Honor, there is no
8 question whatsoever about what this top e-mail here is
9 of significance. This is talking about penetration of

10 applications on Windows. "How many do we have out
11 there?" It's material.

12 So they say, "Well, how stupid of you not to
13 realize that you have that." And it turns out we do,
14 Your Honor, Exhibit 3520, which is in Exhibit G to my
15 reply of May 5, 2005 -- is this an e-mail?

16 Look down at the bottom, Your Honor.
17 Different stamps on here, but down at the bottom you
18 will note, "Billg." That is "the" Bill Gates, Your
19 Honor. It is the president, CEO, biggest big guy of
20 Microsoft writing an e-mail. Now, that's not in Exhibit
21 553. It isn't there, Your Honor. We don't know who
22 writes this next -- see at the top, Your Honor? That's
23 where you'll see, "There is some contradiction
24 somewhere." That is in Exhibit 3520, and that is Bill
25 Gates talking about penetration, but I don't have that

1 page of Bill Gates. Why don't I have that page?

2 Microsoft says it removed that page because I didn't
3 really need it from Exhibit 553.

4 Now, as it turns out, they have a better
5 system for identifying this stuff than I do yet. Mine
6 will get better. But so they say, "Well, how dumb can
7 you be? You know, in the millions and millions of pages
8 of documents, you got one that's complete." Well, okay.
9 Why don't I have one -- why isn't 553 complete? Why did
10 you remove those pages and how many pages did you remove
11 from Exhibit 553, and how in the world can you come here
12 to this court and say it's not material?

13 "We took those pages out because they are not
14 material." That cannot be true. That cannot be true.
15 So that, Your Honor -- and I want to show you one other
16 page because that's also of importance. I gave the
17 Court the page before -- in Exhibit 3520, the page
18 before the one that has the Gates' e-mail on it, and
19 Your Honor, it is not the same as the page, this page,
20 the page before in Exhibit 553. I don't know how many
21 pages are missing, but I'm absolutely sure pages are
22 missing. And Microsoft said they took them out on
23 purpose, and they said they took them out because they

24 were not material and that's clearly wrong. I don't
25 know what other pages they took.

58

1 Exhibit 914. Exhibit 914, the first -- there
2 are two pages missing that we know about from
3 Exhibit 914. The first page is about undocumented APIs,
4 "Applications Programming Interface," APIs. Microsoft
5 uses APIs it doesn't tell anybody else about. It uses
6 it internally for their own applications. Big
7 controversy about that. The Court will hear all about
8 it.

9 Here is what the subject matter is:
10 "Undocumented stuff used by apps groups," and then they
11 say -- they go on down with a list of what each
12 application uses. "MS Money" is an application, and
13 they -- you know, they use them and Excel uses some and
14 WinWord and so on. That is about undocumented APIs.

15 At the bottom here, Your Honor, the thing is

16 not signed. There is no signature. I have looked at
17 probably millions and millions of e-mails. Almost all
18 of them are signed. This is not. Look up here, Your
19 Honor. See where it says "EDH" right up there? That's
20 a signature. Okay. Turn the page. There's no
21 signature down here. At the top of this, they are
22 talking about some kind of meeting. They are going to
23 meet with Sea-Land Services. The reason I know it's a
24 meeting is because there's a little schedule for it,
25 "Opening and Welcome" and so on. Undocumented APIs just

59

1 not there. Now we're real sure undocumented APIs
2 matter. And, Your Honor, see "Sue Frink"? She signs
3 her e-mails. Sometimes there are lines over here when
4 e-mails are enclosed and they are not all signed, but
5 I'm betting that this one is.

6 Then there is a -- Oh, Your Honor, with
7 respect to 914 also, one of the things Microsoft says is

8 that the author of this e-mail authenticated it,
9 authenticated it. Well, he doesn't. What he says about
10 it is it's a business record, and no one asks him if
11 it's complete. And, you know, really, how are they
12 going to know if it's a complete? When someone hands an
13 author of a document a document during the middle of
14 deposition and says, "Here, does this look like
15 something you've seen before," well, unless they are
16 going to read it like I did word for word, line for
17 line, they are not going to know.

18 Microsoft also says with respect to 914 that
19 our experts refer to it. Again, without a word-for-word
20 and without a deep familiarity with how Microsoft
21 e-mails look, you wouldn't pick that up. Microsoft has
22 hidden for years and years the fact that these documents
23 are missing pages by pretending that they are complete.

24 There is another -- there is another page that
25 I identify as missing from 914, and that's because I

1 understand now how Microsoft e-mail headings look.
2 Right at the bottom of page 5418 of Exhibit 914, it
3 says, "From glennt, Friday, August 16," "To:" with a
4 "Cc:" and a "Subject." But, Your Honor, there's no date
5 there. If you look up above to the ones -- the two
6 above, you will see Microsoft's customary heading for
7 its e-mail after the subject line includes a date line.
8 No date line there.

9 Then you turn the page, and what they are
10 talking about at the bottom is not "OEM Briefing." When
11 you turn the page, they are talking about -- and it's
12 not -- the person talking is not "glennt." It's Vlad,
13 V-l-a-d, and David. And what they are talking about I
14 could tell you, Your Honor, is bug fixes. That's what
15 this top -- whatever this OME briefing is, we're missing
16 it. We don't have it. Whatever the first part of this
17 bug thing is, we don't have that either.

18 And the reason I know that, Your Honor, is
19 because I know there is supposed to be a date line here,
20 and I also know this is about bug fixing. Your Honor,

21 here is an example of one without a signature. You see
22 the signature of Dave, and then down there's a line next
23 to this. Well, that means that that e-mail is enclosed
24 in another e-mail. I do not have a complete
25 understanding of this. Sometimes those are not signed

61

1 or so it seems to me. Most of them are.

2 All right. Your Honor, on the downside with
3 the missing documents -- because I didn't do all 55.
4 There are 55 like this that I know about, but I only
5 brought you six. I'm sure you're disappointed not to be
6 able to go through all of them with me.

7 222: They might be correct about that, but
8 here's the deal. If they had told me that before, I
9 would be happy. You know, if they had pointed out that
10 they had taken and transposed the pages and said, you
11 know, "You should have picked that up," I probably
12 should have, Your Honor, but I didn't. If they had told

13 me, I would have been happy.

14 The 1796, the last one, Your Honor: Look
15 here. The last page or the last -- it begins with a
16 sentence fragment. The fragment is: "Issue here is
17 IBM's sanitization issues." And I know about the
18 subject matter of this. Again, Your Honor, no question
19 about whether or not this is material. Microsoft's
20 response is that the plaintiff is mistaken, that that is
21 a capital "I." Well, I don't know. I got my little --
22 you want Microsoft -- this is a dot-matrix printer and
23 here is a little -- I've been using this all the time,
24 Your Honor. I really am trying to preserve what is left
25 of my eyesight. When I look at that, there is a little

62

1 glob of ink at the top. It looks to me like it's a
2 dotted "i," and the other -- if you look down, you'll
3 see "IBM" and "ISVs," and they don't look like that.
4 I'm not prepared to go to the mat on that one. I'm just

5 asking that they go back to the original documents and
6 look and see whether or not that document is missing
7 pages. That's what I want them to do. It seems quite a
8 reasonable request under the circumstances.

9 Also, Your Honor, the other ones have little
10 roman numerals before them as well, but it might be on
11 the page before. I don't know.

12 So, Your Honor, that's the documents. In
13 several cases Microsoft says to me, "Well, the author
14 authenticated them." I already said to the Court, "No,
15 no, no, the author didn't authenticate them." And all
16 I'm saying, Your Honor, is go back to the original
17 source documents, which they are under an obligation to
18 keep, and give me what is between the pages I've
19 identified so far.

20 And, Your Honor, I ask the Court also to say
21 to Microsoft so we do not have to come back over here,
22 at least, on this issue again -- if I find others like
23 this and want to see what's between the Bates stamps --
24 as I said, 55 so far -- and I have completed my entire
25 review of the 9,000 documents, but if you give me 12

1 million more, Your Honor, I'm going to look at those as
2 well.

3 All right. Now, let's do the handwriting. We
4 ask Microsoft to identify the handwriting on 14
5 exhibits. These are actual exhibits marked for
6 California, marked in the Gordon case, and Microsoft
7 just says, "No. No, we're not going to do this."

8 Why? The documents are not important enough?
9 We offered them as exhibits. The handwriting is not
10 important enough?

11 Well, I get to decide that. I'm the
12 plaintiff's lawyer -- or no one asked us before, and
13 that, I know, is probably true.

14 The last thing they say to me is, "Look,
15 somewhere in the 43,000 pages of depositions, somebody
16 may have already identified that handwriting. So go
17 look."

18 I don't think we have to. They are

19 Microsoft's documents, Microsoft's documents and
20 Microsoft's employees' handwriting; and if they know,
21 they got to tell me. Unless you sustain it, then, of
22 course, they don't have to tell me. I would ask that
23 the Court make them tell me.

24 The defendant says that we asked them to
25 identify handwriting on all the trial exhibits. Your

64

1 Honor, I would estimate of these 9,000 or so, probably
2 10 percent have some kind of handwriting on them, and
3 most of the documents we asked them to identify the
4 handwriting on are all in handwriting. The entire thing
5 is in handwriting, or there's very critical handwriting
6 on it. Like, here's an example. "If we tie" -- this is
7 in handwriting, "tying" -- tying something to
8 something -- Oh, I've got it. "Tying something to the
9 OS could be illegal," or something like that. You know,
10 this -- I'm not messing around here. I'm not trying to

11 put them to extra work. I just want to know who wrote
12 the handwriting that we deem to be material, and there
13 is just no reason for them not to tell us.

14 They say Minnesota went to trial without that
15 information. There wasn't any choice. Defendant also
16 refers the Court to Mr. Werner's depositions in its
17 reply affidavit filed -- now, I just had to give the
18 Court this, Your Honor, because this is the kind of
19 stuff that drives me nuts.

20 First of all, they give us that, Mr. Werner's
21 deposition, in their third brief. Well, wouldn't it
22 have been easier to have told me that in the beginning?
23 Then when they give me Mr. Werner's deposition, he
24 refers to Exhibit 815 of his deposition. They don't
25 tell me which of mine -- what my exhibit number is. So

1 in order to find out what 815 is, I got to go back and
2 look at all my 14 and figure out which one of the 14

3 that is. In the case of Mr. Werner -- and I gave you
4 Mr. Werner's deposition because I was kind of irritated
5 about that. In the case of Mr. Werner, at least, they
6 tell me the numbers, the Bates numbers, so that was
7 easier.

8 Then they give me -- the next one is Mike
9 Maples, and he identifies handwriting on a document as
10 his own; but, Your Honor, they don't even tell me the
11 document. They don't even tell me the exhibit number in
12 this exhibit. So what I have to do in order to figure
13 out the answer to this question -- and in their third
14 thing -- I've got to go back. I've got to find
15 Mr. Maples' deposition, Your Honor, among the hundreds
16 and hundreds, and he's got 12 or 15. Then I got to find
17 his deposition. Then I got to go to the pages before
18 and find out what the number is. Then I have to go back
19 and look at all my exhibits and find out which one this
20 matches up with. Now, I'm going to do -- but why would
21 I be put to that work? Why would I -- I mean, why?
22 It's just not usually the way we do it here. That's my
23 complaint about that.

24 Clearly, Microsoft knows whose handwriting is
25 on most of the documents, and we have propounded a

66

1 perfectly proper interrogatory and we believe we are
2 entitled to have it answered. Microsoft says that we
3 have to show that the handwriting, and I quote, "is
4 highly important to plaintiff's case and further that
5 the handwriting could not have been explored during the
6 coordinated discovery process," to which I say, "Why?
7 Why would that be?" Neither of Microsoft's criteria
8 finds any support in the law as far as I know. In fact,
9 Microsoft documents, Microsoft employees' handwriting,
10 Microsoft has identified it. It just doesn't want to
11 tell the plaintiffs. And under Iowa rules of discovery,
12 we think they have to tell us whose handwriting is on
13 their documents if they know it. Now, if they don't
14 know it, then they don't have to.

15 In its attempt to avoid any discovery on the

16 merits ever, Microsoft relies heavily on some words in
17 Judge Reis's December opinion, and those words are
18 "particularized good cause." And I say to the Court, if
19 we need particularized good cause, we have it. It means
20 directed at a specific request, not especially good
21 cause.

22 We acknowledge, you know -- Your Honor, we
23 propounded a lot of requests that we have abandoned
24 because Judge Reis told us we couldn't have them. We
25 would like to have had them, but we can't. So we have

67

1 significantly narrowed -- we have tried very hard just
2 asking for stuff they already have and they can just put
3 on these drives and hand to us. "Particularized good
4 cause" were Microsoft's words. We don't find any
5 definition in Iowa law for that, but it cannot mean, it
6 cannot mean, that Iowa Rules of Civil Procedure are
7 suspended for Microsoft's benefit. The most it can mean

8 is that we have to take account of the available
9 discovery in the coordinated cases and act responsibly,
10 and we think that we have done that. The rule permits
11 discovery of material related to the subject matter of
12 the lawsuit, and everything we have requested is related
13 to the subject matter of the lawsuit.

14 Your Honor, I also need to talk a little about
15 the timing. Microsoft keeps saying, "Well, you could
16 have gotten this. If you wanted this stuff, why didn't
17 you ask for it in the coordinated discovery?" Well,
18 here is the reason for that:

19 First of all, there is no discovery in the
20 coordinated case after August of 2000. I think that's
21 undisputed. None of the documents pertain to any
22 activity that occurred after August of 2000; but we,
23 Your Honor, the State of Iowa, the citizens of Iowa --
24 real lawsuit, real people -- we did not have an
25 opportunity to participate for one single hour in

1 coordinated discovery. We believe that we have met the
2 requirements of Judge Reis's order, but if we haven't,
3 we believe this Court has the power and the duty to set
4 it aside if that's what is necessary to give Iowa
5 consumers the limited-merits discovery we've requested.

6 Here is what happened, Your Honor: We filed
7 the Comes case in January of 2000. Microsoft messed
8 around. We didn't do anything. They filed their motion
9 to dismiss in May, and Judge Novak dismissed it. Now,
10 May 1, 2000, Microsoft files its motion to dismiss the
11 Iowa consumer class action. Coordinated discovery in
12 California begins May 12. Twelve days later coordinated
13 discovery begins in California. The MDL discovery
14 begins June 26, 2000. We got the motion to dismiss
15 pending in Iowa, no discovery is going on. Coordinated
16 discovery starts.

17 Judge Novak dismisses the Iowa consumer class
18 action on July 11th of 2000, and we take our appeal to
19 the Supreme Court.

20 The Supreme Court reverses on June 12th
21 of 2002, June 12th. Now, this Court is well aware of

22 procedendo. Seven days later, June 19th, MDL discovery,
23 it's over. Procedendo has not issued yet. Even if I
24 knew anything, at that point I couldn't have done
25 anything. Procedendo had issued. California discovery

69

1 ends June 20th. Procedendo -- and I put -- it's in the
2 court file someplace, Your Honor, but I put it in your
3 notebook. Procedendo issues from the Iowa Supreme Court
4 July 9th. It's all over.

5 Coordinated discovery is over by the time we
6 have any chance. Then we don't really have any chance,
7 anyway, because at that point we've got the class
8 certification, and discovery is stayed for the entire
9 period when we're messing with class certification. We
10 can't do any discovery, and we were really not
11 irresponsible about that, Your Honor, because the moment
12 we could do discovery, we did it. We filed our
13 discovery immediately when the class certification was

14 issued.

15 Now, they say, "Well, but the lawyers" -- you
16 know, Mr. Hagstrom was in the Minnesota case, which was
17 on appeal or stayed most of the time during the
18 coordinated discovery as well. Then I was in the
19 Minnesota case. Well, I entered the Minnesota case a
20 few weeks before the trial, Your Honor. I'm not going
21 to be doing any discovery at that point. You know, I'm
22 trying to learn the facts. Mr. Hagstrom entered his
23 appearance in Iowa January 23rd, six months after the
24 end of all merits discovery in any case anywhere. We
25 could not -- neither of us could have ever secured one

70

1 single document for Iowa consumers.

2 Microsoft says that the consumers of Iowa are
3 bound by the actions or inactions of antitrust lawyers
4 that they didn't hire, that they don't know, and that
5 they don't trust to do their legal business. We're the

6 ones that they trust to do their legal business. We're
7 the ones that they hired to do their legal business, the
8 consumers of Iowa. We proceeded to trial in Minnesota
9 with these documents because we did not have any other
10 choice.

11 Here in Iowa we have liberal rules of
12 discovery. We have discovery. We have notice
13 pleadings; and we have enough time, Your Honor, to do
14 discovery, to make a record, to have what we need to
15 have to prove our case.

16 What Judge Reis's order does not say and what
17 the defendant says over and over does say -- here's what
18 the defendant says: Judge Reis said every discovery
19 request must be grounded in allegations of specific fact
20 in the third amended petition. That's what they say.
21 Gave it to Your Honor in your notebook. That's what
22 they said over and over, she directed any further
23 discovery in this case must be grounded in allegations
24 of specific fact. Not so.

25 That's not what she said, Your Honor, and I

1 give you the Court's order and I underline for you what
2 she actually said. She says in connection with specific
3 interrogatories and requests, that those allegations
4 were not sufficiently grounded in any specific
5 allegations. That's what she says. And those were
6 damage allegations, so they are misquoting Judge Reis.

7 I want to say a few words about the protective
8 order, and I truly am on the downside. I probably
9 missed -- kind of an unusual retaliatory move, to ask
10 for a protective order to prevent any discovery, but so
11 be it.

12 In support of its effort to get this Court to
13 protect it from valid discovery requests, the defendant
14 cites State v. National Director of Research where,
15 interestingly enough, the Supreme Court said Judge Ryan
16 should not have issued a protective order. They also
17 cite Jones v. Swenger, but I don't know why because it
18 has to do with an attorney-client privilege and says in

19 support that the case has been pending for five years.
20 That is correct, I filed this case in January of 2000.
21 But you know the history, Your Honor. I have not been
22 dilatory. I have been desperately trying to represent
23 the people of the State of Iowa in connection with this
24 matter in the face of some pretty serious obstacles.
25 Microsoft says that the consumers of Iowa

72

1 should be happy with what it has provided because it was
2 the same material it has provided in dozens of other
3 cases. But, Your Honor, only one of those cases
4 proceeded to a partial trial, and that's Minnesota. The
5 other cases settled for what we believe to be pennies on
6 the dollar in coupons, not in cash. The rights of Iowa
7 citizens cannot, cannot turn on what others with
8 different goals and different expectations and different
9 levels of experience and commitment may have done or
10 failed to do in other cases.

11 So we ask the Court not to issue a protective

12 order that says we can't do discovery.

13 And, Your Honor, with respect to the motion to

14 strike, defendant claims that we've ignored the rules in

15 four respects. First of all, we brought stuff to

16 Judge Reis's court on our motion to compel that we had

17 not previously made a part of the record. It was a part

18 of the record. Defendant knew all about it, but

19 Judge Reis did not approve of that.

20 They say, number two, we filed massive

21 additional discovery after Judge Reis's

22 December 17th order.

23 Three, they say we failed to confer about some

24 of the new material in the second response.

25 And, four, they say we obviously haven't

1 reviewed all the material that they have given to -- not

2 to us, but to the coordinated discovery.

3 I filed the response, you know, the one they
4 want to strike, because I thought the Court said we
5 could. You know, you said we could file stuff up to two
6 days before. I filed it long before two days because I
7 wanted them to have plenty of chance to respond. I
8 thought maybe they would respond in some sort of
9 substantive way, but instead they moved to strike my
10 response.

11 We brought material to Judge Reis's court and
12 the Court disregarded it and so we didn't want that to
13 happen again, and you authorized additional filings and
14 so we made an additional filing.

15 I think the defendant misunderstands what is
16 permitted by Iowa rules -- your motion and your brief,
17 your resistance, your reply -- and it doesn't say
18 anything about additional pleadings. Over the course of
19 the years, Your Honor, I'm sure the Court has seen
20 plenty of additional filings. We call them different
21 things. That such a thing is not specifically noted
22 doesn't mean that I can't provide the Court with proof,
23 and that is what I tried to do in this filing that the
24 defendant seeks to strike. I wanted the Court to see

25 the documents, you know. I wanted the Court to know

74

1 that I have not lost my mind; that, in fact, there
2 appears to be pages missing here, and that's mostly what
3 that was about.

4 The second thing the defendant -- the second
5 or the second thing the defendant says we did that was
6 wrong was that we filed massive additional discovery
7 requests after the December 19th order.

8 Well, Your Honor, we filed -- and the Court
9 has these -- a request for production of Documents 63
10 through 67, and they were served in September before the
11 December ruling. They were not the subject of the
12 ruling, but they were filed before the ruling. And the
13 only thing we filed since is, "Give us the missing
14 documents and identify the handwriting." That is the
15 massive new discovery that we filed.

16 The failure to confer, that was not a part of

17 the previous responses because we did confer like crazy
18 about these issues, but that -- I think, perhaps, my
19 wording was clumsy when I gave the Court that list of
20 depositions. I did not -- what I said was, "Here is a
21 list of the depositions," and it says whether we have
22 the depositions, do we have the videotape? Do we have
23 the exhibits? That's what that says. I gave you that,
24 Your Honor, and I said in the thing we expect defendants
25 to give us what we're missing without the Court ever

75

1 having to intervene.

2 All I was trying to say is, "Gosh, Judge Reis
3 thought we had all of this stuff. We don't. Trying to
4 assemble it has been a bear," and that's all I was
5 trying to say. I'm not -- I'm not complaining about the
6 defendants' conduct in connection with not giving us
7 those depositions, and I think -- I didn't say that very
8 clearly, but that's what I did say. I attached the list

9 of missing depositions as an illustration of the
10 difficulty, and then I say, you know, "We think
11 Microsoft will give us what we can't otherwise find, but
12 here, Judge, this is what it looks like from our side.

13 I mean, we're struggling -- and we've got the
14 kind of situation with the Bates numbers, with the
15 millions of documents. We're missing maybe as many as
16 half, and we're struggling to get them, as I said, from
17 some backroom of some lawyer's office someplace -- and
18 they could be 20 or 30 lawyers' offices. So we're doing
19 our very best, but Judge Reis thought we could go
20 someplace and get this stuff and that turned out not to
21 be true, and so I did want to clarify that.

22 We have, in fact, had limited access, and
23 Judge Reis did not order the defendants to give us
24 stuff. She said what we understood we were supposed
25 to do, is try to find it. When we have asked for

1 specific things from the defendants -- like, just
2 recently they gave me a disk or several disks that has
3 all of the attorney-client stuff because we could not
4 assemble that. So they have been -- they have been
5 responsive when we've asked, so I hope that clarifies
6 that.

7 We're not asking the Court to intervene in any
8 way in connection with the depositions. I just wanted
9 you to see what it looked like from our side.

10 The fourth thing they say is we have obviously
11 not reviewed the 6 million pages of documents and the
12 43,000 pages of depositions already provided. It's
13 true, we haven't, Your Honor. I have not reviewed
14 6 million pages of documents and 43,000 pages of
15 depositions. I may -- you know, I may get that done
16 before we get there. But why in the world does the
17 defendant think I have to go through every deposition
18 and try to figure out if that deponent was deposed on a
19 particular document identified in some way, not by Bates
20 numbers? Asking that question is a proper purpose for
21 interrogatories, we think.

22 The defendants say in support of their motion
23 to strike that we pile on these arguments at the last
24 minute when, in fact, all we've done, Your Honor, is try
25 to produce for the Court some of the documents that -- a

77

1 few, very few, that we think illustrate our problem.

2 Then they say we've done three new things:

3 One, the deposition lists, which they
4 misunderstand and misread; the second is the Microsoft
5 exhibits used in Minnesota, which we attached, which
6 comes from a competitor case. No question about that,
7 Your Honor. I gave it to you. It is Exhibit 506, and
8 that's a document they offered in Minnesota that we say
9 comes from the Sun case. And the reason we say that is
10 because right on it it says, Sun v. Microsoft. That is
11 why we thought that.

12 And the third new argument we make, according
13 to Microsoft, is there are pages missing from the

14 documents, to which I say what we've been telling you
15 since February: Yes, there are pages missing from the
16 documents. That is not new. The letter from
17 Mr. Hagstrom, which we gave to the Court, is dated
18 February 28th. That's Exhibit B, and it attaches -- it
19 attaches the list. Defendants only authority for its
20 motion to strike are in opposite rulings from the
21 Seventh Circuit and one from some district court in
22 Texas.

23 Also of interest -- I knew the Court would
24 find this of interest. Just as I was looking for stuff,
25 I realized -- I remembered Microsoft filed a surreply

78

1 brief. Microsoft filed a surreply brief on plaintiffs'
2 motion to modify the protective order without leave of
3 court, just filed it, just like I did, without leave of
4 court, on October 15, 2004. You can look it up. I
5 didn't put it in there, I don't think, but Microsoft

6 filed a surreply brief on October 15, 2004. So my
7 filing might come under the goose/gander rule: If they
8 can do it, so can I. There might be others that they
9 filed. It seems as though they always have to get the
10 last word, Your Honor, but that was one I just happened
11 to remember.

12 So we ask the Court either to just look at it,
13 or, if not, give us leave to file it and file it.

14 Your Honor, the defendants -- I'm done, almost
15 done. The defendants say the documents that plaintiffs
16 have are, quote, more than sufficient to allow
17 plaintiffs to proceed to trial. How arrogant for
18 Microsoft to assume that they know such a thing. More
19 importantly, Your Honor, we don't want to just proceed
20 to trial. We want to win. We want to secure a full
21 verdict for the consumers of the State of Iowa. If
22 Microsoft thinks we have sufficient documents to win,
23 then they should confess judgment and pay up.
24 Otherwise, they should make the discovery that we have
25 requested, and that's what we ask of the Court.

1 Please order Microsoft to give us the
2 pleadings and documents from those six cases, identify
3 the handwriting and give us the missing pages, deny the
4 protective order and deny the motion to strike.

5 I thank you very much for your patience, Your
6 Honor. I will promise I will probably never be this
7 long again. Thank you.

8 THE COURT: Ms. Nelles.

9 MS. NELLES: Thank you, Your Honor.

10 I guarantee you I will not be quite as long as
11 Ms. Conlin. She had quite a bit to say. A lot of that
12 went to, as she put it in her own words, her version of
13 what she thinks has happened here. I'm not going to go
14 through and recount and refute all of the various
15 accusations that were put out here today -- and there
16 were a lot of adjectives used -- but I will simply ask
17 the Court to remember that there are two sides to each
18 story and make sure we have our chance to tell our side.
19 I don't think that's what this motion is about today,

20 however, and I would like to try to bring it back to
21 what I think this motion is about.

22 I agree with Ms. Conlin's very first statement
23 this morning, that this is a very complex class action,
24 very much intertwined and based upon findings of fact
25 that were issued by Judge Jackson.

80

1 As she correctly notes, this action was
2 commenced quite a bit of time ago, five years ago, and a
3 lot has happened along the way. There have been class
4 certifications. There have been collateral estoppel.
5 And, of course, there's been discovery. And we're now
6 at a point where -- from what I understand Your Honor
7 said this morning, that we're approximately 14 months to
8 trial. And I'm again confident that both sides of this
9 dispute will agree that this is going to be a big and a
10 complex trial.

11 Ms. Conlin, Mr. Hagstrom, Mr. Jacobs and I

12 were all in Minnesota last year, and we were all very
13 much in the -- all the work that was necessary to
14 prepare for that trial -- and it was very long and very
15 grueling along the way, and there were many, many late
16 nights. And in order for us to get ready to try a case
17 that is going be, as conceded, very similar to that
18 case, we have a lot of work to do over the next year.
19 We all know just how much work there is left to do here.
20 We are going to be very, very busy. And there's much to
21 do it with.

22 Ms. Conlin tells you that she doesn't have
23 discovery, that they don't have documents, that she's
24 not sure that she has what she needs in order to try
25 this case. This is not right. Plaintiffs have

1 discovery and plaintiffs have gotten it through the
2 coordinated proceedings, they've gotten it through their
3 own requests and, just as they agreed to do, to work

4 through the coordinated process; and they've gotten it
5 through other plaintiffs with whom they have worked
6 closely in the past.

7 And, I think, as Ms. Conlin was just
8 explaining to you, if they have had trouble and, in
9 fact, asked for any particular set of materials,
10 Microsoft has never said no. Microsoft will try to work
11 with them to get them the materials they need. If we
12 have it and they don't and they are entitled to it, we
13 will get it to them. And it's nice. It's very nice.
14 And Ms. Conlin will send me an e-mail, "I would like to
15 know if you have a better copy of a particular
16 deposition. If you do, will you send it off to me?" Of
17 course, of course, we will. This is not about not being
18 cooperative.

19 Let's just step back for a minute and think
20 about what it is that the plaintiffs already have here.
21 They have all the discovery, all the exhibits, all the
22 hearing transcripts that were done in the liability
23 phase of the government action. This is the action, as
24 Ms. Conlin explained in the very beginning of this

25 hearing, of which the crux of her third amended petition

82

1 is based, these findings of fact. They have all the
2 discovery from the earlier government investigations.
3 They have discovery from what we refer to as the
4 "Caldera" case, which is the case that involved one of
5 the competing operating systems, DR-DOS. And Microsoft
6 does not dispute that all of those actions generated
7 discovery relevant to claims that were asserted by
8 plaintiffs in this case. We don't dispute that. And
9 that's 3.5 million pages of documents, as conceded, more
10 documents than anybody has been able to get through yet.

11 Ms. Conlin said she has not had a chance to
12 read them all. I guarantee I've not read them all
13 either. I'm not sure if there is anybody out there who
14 has. It's a lot of paper, and that is why it's a lot of
15 work. And then there's more.

16 Separate from the prior production, they have

17 1.5 million pages of newly requested documents, and I
18 think you'll see when we get to the "missing mail"
19 discussion why this is important to keep in mind, what
20 came first, and then what came in addition. 1.5 million
21 pages of newly requested documents that were not
22 produced in any of these prior proceedings, another
23 2.2 million pages of additional documents that were
24 produced by third parties like Hewlett-Packard, various
25 OEMs; and more than 150 depositions, more than 43,000

83

1 pages of deposition transcripts, which comes with 5,000
2 marked exhibits. That's months and months of testimony
3 if it was played or read to a jury -- and much of it
4 will be, as we know -- and this has been available to
5 them. They've had rights to all of this through the
6 Pretrial Procedure Order No. 1. And this is a lot, this
7 is a lot of stuff. And as Judge Reis found last
8 December, it is enough for them to go forward, with

9 certain exceptions.

10 This case, which both sides agree is very big
11 and very complex and, in the context of a trial this
12 big, headed very quickly to a long and complicated
13 trial.

14 Ms. Conlin and I were just discussing while we
15 were on break how she has a very interesting trial
16 coming up on August 1st, and how when a trial -- when
17 it's July 6th and you have a trial coming up, August 1st
18 is just a week way. Well, with a trial this size, Your
19 Honor, that September 2006 is not very far away. Those
20 of us who have lived through it before can attest to
21 that, how much there is to do. And when both sides
22 agree that we have a very big and very complex case that
23 is headed very quickly to a long and complicated trial,
24 we need to make sure it gets there in some kind of
25 manageable fashion. There has to be some rules, and

1 there just has to be some procedure.

2 What they are, we will play by them, but we
3 need the rules. We need some management and some
4 process, and there are rules. We've got some rules.
5 There were rules at discovery, fact discovery, that the
6 plaintiffs may now engage in. Judge Reis set these
7 rules. Plaintiffs were in here last year. There was a
8 motion to compel. Were the requests identical? No, the
9 requests were not identical. There were parts of
10 broader discovery and the requests that we're facing now
11 are parts of the earlier -- as Ms. Conlin pointed out,
12 earlier propounded discovery, but discovery that was
13 stayed. It was agreed that would go forward while
14 Judge Reis was ruling on the last motion to compel. And
15 in reviewing that motion to compel and in putting out
16 her order, which we didn't hear very much about until
17 the end -- and I would encourage you to take another
18 look at it because there's some very pertinent pieces in
19 there, but these are the rules. These are the rules
20 that Judge Reis set out that are to govern what we're
21 supposed to do from now until we get to trial, and this
22 is how we're trying to move forward and get to that

23 trial.

24 Plaintiffs may seek discovery now on Iowa-
25 specific issues. Absolutely. To the extent Ms. Conlin,

85

1 Mr. Hagstrom, Mr. Jacobs, any other counsel that
2 represent the Iowa consumers were unable to get Iowa-
3 specific discovery in the coordinated proceeding, they
4 are, of course, entitled to get that Iowa-specific
5 discovery. We do not dispute that. That was not what
6 the coordinated proceedings were about.

7 So they may seek discovery now on Iowa-
8 specific issues. They must -- they are also entitled to
9 get continuing updates of the damage database
10 production. They have a class. They have a class that
11 has been certified for 60 days prior to trial, I
12 believe. There will be damage calculations that need to
13 be done, and they are entitled to get updated damage
14 numbers from this database. We agree with that.

15 But there's a third rule. This is the rule:
16 Other discovery is only to be permitted upon a showing
17 of particularized good cause. This is exactly what
18 Judge Reis said.

19 Well, plaintiffs are entitled to discovery on
20 Iowa-specific issues and to updating of damages database
21 production in light of the extended class period in this
22 case because there's an extended class period for Iowa.
23 Other discovery, discovery going to the allegations in
24 the complaint -- this is what she said -- "other
25 discovery will be permitted only upon a showing of

86

1 particularized good cause."

2 We hear a little bit about, well, what does
3 that mean and what it can't possibly mean. Well,
4 Ms. Conlin said it can't possibly mean that discovery is
5 done. Well, discovery is not done. There is an
6 entitlement to certain discovery under certain

7 circumstances, including a showing of particularized
8 good cause. But if Judge Reis's words, "other discovery
9 will be permitted only upon the showing of
10 particularized good cause" mean anything, they must mean
11 that plaintiffs cannot come in after coordinated
12 discovery is closed, demand 12 million pages of
13 documents relating to matters that are not alleged in
14 the complaint that go to time periods upon which the
15 class has not been certified in the hopes of finding
16 something new. Documents pertaining to issues such as
17 trademarks and patents and documents relating to events
18 that postdate the conduct that is at issue here.

19 Your Honor, I want to discuss more how the
20 class period -- and Ms. Conlin's explanation of how
21 continuing conduct within the class period relates to
22 discovery, and I'm going to get there, but I would like
23 to just stop for a minute and go back to where I opened.

24 This is really not an argument today, and
25 though we've heard a lot of argument and a lot of

1 adjectives, this is not an argument about what this case
2 is about or what other cases are about. This is a
3 matter of case management. This is what this is about.
4 We have an order. We have a rule. We have things that
5 need to be done, and we have a trial coming up.

6 Judge Reis's rule is reasonable and is
7 necessary and it should be enforced and not ignored.
8 It's a matter of practicality. It's a matter of trial
9 management.

10 Judge Reis stated the plaintiffs have very
11 substantial amounts of discovery and that putting an end
12 to a broad fishing expedition was a pretrial judgment
13 that she made based on the realities of the issues in
14 the case and the discovery already had and available to
15 the parties.

16 As Ms. Conlin said, and we don't disagree,
17 this is essentially an identical case to the case that
18 was tried last year in Minnesota. That case went to
19 trial for seven weeks before it was settled. Those

20 seven weeks were all case in chief put on by plaintiffs,
21 the Minnesota plaintiffs represented by Ms. Conlin,
22 Mr. Hagstrom. If that case had not settled, that case
23 would have lasted 15 weeks, and it would have lasted
24 only 15 weeks because that was the time that had been
25 allocated by the Court.

88

1 And nobody will disagree that both sides, same
2 people sitting across the table, are ticking off every
3 second and every minute as we went through every single
4 day. We were running on a clock. Each side had a
5 certain amount of time, and we were -- neither side had
6 as much time as they needed or as much time as they
7 could have used to put on their case. And in that case
8 we were working on the very same record, the record that
9 plaintiffs already have, and it was a struggle on that
10 record to stay within the allotted time.

11 Pretrial: During trial there is a lot of

12 material that needs to be managed, and a wholesale
13 request for a production -- simply a production of
14 12 million pages that were produced in other matters
15 without showing of particularized cause as to what is in
16 there that is needed is not practical. A case of this
17 size needs both sides to engage in practicalities. We
18 need discovery to be tied to the allegations in the
19 complaint, just as Judge Reis said.

20 Plaintiffs have received more than 5 million
21 pages of documents, hundreds of depositions, all
22 focused, focused, on the conduct that has been alleged,
23 the same conduct alleged -- essentially identical
24 conduct alleged in 150 cases all represented by
25 extremely competent lawyers, lawyers that these counsel

1 here have worked with. Mr. Hagstrom was involved in
2 California, which was one of the most aggressive
3 discovery states out there, and -- his firm was -- and

4 we've got these very focused yet still huge, huge, so
5 huge that nobody -- and we're going to hear this from
6 both sides.

7 Ms. Conlin says, "Why is it such a burden? I
8 can't find these things. Why can't you just find it for
9 us?" It's a burden for us too. She may not believe it,
10 but it is true. We struggle with the same issues and
11 knowing the documents and being ready on the documents,
12 responding to documents that she does.

13 Practicalities: It simply is not reasonable
14 and it's outside the rules to start working to simply
15 say, "Just give me 12 million additional pages. Maybe
16 they are focused on the complaint, maybe they're not. I
17 want them now. Just give me them now, but they are
18 not -- just give them to me now. I'm going to go
19 through them." It's not tenable. We can't go to trial
20 if we start reviewing and working with these kinds of
21 sets and these kinds of numbers on materials that have
22 not been shown to be necessary through particularized
23 good cause.

24 Let me see if I can be a little bit more
25 specific. We heard quite a bit about five, seven -- the

1 cases. I can't remember what the number is, I
2 apologize. Be first, Netscape, Suns, Windows, Lindows,
3 and how these cases are somehow related to the third
4 amended complaint, a complaint which alleges conduct
5 occurring between May 18, 1994, and December 15, 2001.
6 And they want all the documents produced by or to
7 Microsoft and all the hearing and trial and deposition
8 transcripts, wholesale production on these other cases,
9 cases brought by varying competitors, regulatory
10 agencies, one brought by Microsoft, one is a trademark
11 infringement case, one is a patent case. To the extent
12 there are issues that overlap in those cases, well, that
13 is a course of concession or recognition that there are
14 many, many issues in those cases that have nothing to do
15 with this case. Those plaintiffs aren't entitled to
16 those documents. They have nothing to do with this
17 case.

18 But more importantly, the request clearly,
19 clearly contradicts the December 17th order. As noted
20 in that order, and as I just noted and has just been
21 noted again by the Supreme Court, the class in this case
22 is certified based on allegations relating to conduct
23 from May 1994 to September 15, 2001.

24 The class is certified based on allegations in
25 the petition. The liability theories underlying

91

1 plaintiffs' discovery requests, any requests going
2 forward as set forth in that December 17th order, must
3 be grounded in the allegations of specific fact in the
4 complaint for that very reason. Otherwise, despite what
5 Ms. Conlin says about all markets are somehow the same
6 market, we are indeed expanding a case into new markets
7 and new conduct that could only affect more recent
8 purchasers. And to do this, as Judge Reis very
9 correctly noted and as is implicit in the Supreme Court

10 opinion where they note the conduct time, it raises
11 questions as to whether the class remains properly
12 certified.

13 Judge Reis notes that in her order, and it's
14 important. In these circumstances, if we're going to
15 get ready for trial, we're not going to be doing new
16 class certifications arguments, and we're going -- if
17 we're going to proceed and going to get this done, it's
18 just important that we stick with the rules. It's
19 reasonable. It's reasonable to ask that discovery be
20 tied to allegations in the complaint and a broad request
21 that simply says, "Give me everything out there," is
22 not. It's not even close. It's just a hope of finding
23 new conduct to complain of.

24 But we're past that point now, and to the
25 extent that the conduct at issue in those other

1 complaints, other lawsuits, not coordinated lawsuits,

2 lawsuits brought by other competitors, others --
3 Microsoft is, as you well know, not immune to suit. It
4 is quite the magnet. And to the extent that an issue in
5 this suit that Ms. Conlin has picked upon touches upon
6 any issue in her complaint, in the plaintiffs'
7 complaint, there's been no showing here that the same
8 issues were not adequately explored in coordinated
9 discovery or raised new issues of such importance as is
10 required by Judge Reis's order.

11 So when we think about the other complaints --
12 when I think about the other complaints and what
13 Ms. Conlin is asking for, I see two pieces of it. There
14 are cases -- Netscape is such a case -- where clearly
15 allegations brought by Netscape -- and we've seen some
16 of those allegations. Of course, we didn't see any of
17 Microsoft's defenses, but we did see some of the
18 allegations, but the allegations there clearly overlap
19 and arise out -- some of it arises out of the findings
20 of fact. This is not new information. These are issues
21 that were explored and explored and explored again in
22 the coordinating proceedings process.

23 To the extent the issues touch upon the
24 conduct alleged, there was every opportunity for that
25 conduct to be pursued in the coordinated proceeding

93

1 process. To the extent it touches upon conduct, the
2 continuing conduct that Ms. Conlin speaks of, occurring
3 after the conduct actually alleged in the complaint, is
4 not appropriate, and it's not reasonable for it to be a
5 matter of discovery now.

6 Ms. Conlin says of course it is because it
7 goes to her continuing class and it goes to damages for
8 her continuing class; but, again, this is a class based
9 on conduct, conduct alleged between this very specified
10 period. And when this class is being considered in
11 terms of what should be the cutoff period for class
12 certification, plaintiffs and their experts came in here
13 and they said they can prove continuing damages based on
14 common proof. Based on the conduct alleged, their

15 experts can take that information and they can
16 extrapolate it out and they can apply it, and on that
17 basis they -- the class was certified through 60 days
18 before trial. It is not an invitation to explore
19 continuing conduct. What it was was an agreement and an
20 understanding that the conduct alleged -- that the
21 plaintiff would have the opportunity through their
22 experts to show that the conduct alleged had a
23 continuing effect, that does not disturb class
24 certification; but to bring in now new conduct most
25 certainly does, and Ms. Conlin said this is not about

94

1 that commonality. It's not about some formula. This is
2 not about a formula. They say we can apply the same
3 formula to new conduct, but this is not about a formula.
4 It's about common proof. A conduct that happens later
5 does not go to common proof.

6 In fact, I'm looking at page 12 of

7 Judge Reis's order. This is paragraph 26. And this is
8 what Judge Reis says: "In obtaining class
9 certification, plaintiffs advised the Court that their
10 experts would be able to prove impact of the alleged
11 wrongdoing on the entire class by common proof that
12 involved comparing various 'benchmarks' of profits or
13 prices to the profits and prices in the software markets
14 at issue here."

15 THE COURT: Ms. Nelles, I hate to interrupt,
16 but my court reporter needs a break.

17 MS. NELLES: Are you able to indulge me the
18 end of the sentence?

19 THE COURT: Sure.

20 MS. NELLES: Thank you so much. "Indeed" --
21 this is the next sentence, same paragraph -- "Indeed,
22 plaintiffs' experts said they had already done that
23 analysis in other states. Microsoft has agreed to
24 produce updated revenue and cost data. The damages data
25 base. Rule No. 2, plaintiffs have not shown how the

1 documents sought by these requests, the last motion to
2 compel, would be relevant to the damages calculation
3 that plaintiffs advised the Court they would do -- in
4 fact, had done in obtaining class certification."

5 THE COURT: Thank you. Let's take about 15
6 minutes.

7 (A short recess was taken.)

8 THE COURT: Ms. Nelles, sorry for the
9 interruption.

10 MS. NELLES: No problem, Your Honor, thank
11 you. I'm not, unless the Court would like me to, going
12 to go through and explain Microsoft's view of the
13 various cases. We've heard the plaintiffs' view. I
14 don't think it's necessary in order to decide the
15 motions before you, and I think to the extent there are
16 some issues of -- what I would say we see issues
17 strongly differently or questions of who asked for what
18 when, I think we've covered them in the briefs, and if
19 that's sufficient for you, I will leave it at that and
20 move on with the vague hope of making things a little

21 bit more clear, move on to the issue of documents --

22 THE COURT: Okay.

23 MS. NELLES: -- the missing documents. And,

24 in fact, I think there is an excellent illustration of

25 one of -- how the discovery worked that before I explain

96

1 why there are these so-called "missing documents" or

2 what are perceived to be by the plaintiff as missing

3 documents -- explain to the Court how the coordinated

4 discovery and how it worked exactly as it was supposed

5 to and there's no need here for these continuing

6 productions with the hope of finding more.

7 Ms. Conlin has given you Defendants'

8 Exhibit 506. It's the Hewlett-Packard doc. It's behind

9 the -- at least in my version, it is behind the page of

10 Judge Reis's order to compel. I don't know if you've

11 got it there. Counting from the back, it's the fourth

12 page from the back.

13 THE COURT: Okay.

14 MS. NELLES: Ms. Conlin suggests -- here we
15 are. Here is a document that is clearly shown to be
16 from Sun, a document that Microsoft put forward and used
17 and were marked at somewhere -- I'm not sure if it was
18 in Minnesota -- and here this shows that we need
19 discovery from Sun. Look at the various pages -- the
20 various Bates numbers down at the bottom shows you
21 exactly what happened here.

22 This document was produced in the Sun v.
23 Microsoft case -- this is something Microsoft won --
24 which is a contract action. It was produced by
25 Hewlett-Packard. The "HP" stands for Hewlett-Packard.

1 Two -- and then was produced again in this case, in the
2 coordinated proceedings, stamped: "Microsoft Private
3 Cases Highly Confidential." This is a document they
4 have. This is a document that they wouldn't need to go

5 to a Sun production to get because to the extent there
6 was an issue in the Sun production or the Sun 2
7 production or the Netscape production that is relevant
8 to the allegations in their complaint, there was every
9 opportunity to get that also in the coordinated
10 proceedings.

11 There's 12 million pages of production in
12 other cases. This doesn't mean that every single
13 document in those cases is different from every document
14 that was produced in the coordinated proceedings. Of
15 course not. To the extent there would be overlap,
16 there's going to be some documents that may be seen on
17 both sides.

18 But they were produced for different purposes
19 to different plaintiffs in response to different
20 requests and where documents produced in one case and it
21 becomes relevant in a second case, it's re-Bates stamped
22 and reproduced. So we see -- this is not an
23 illustration of something plaintiffs can't get their
24 hands on. This is an illustration of exactly how the
25 coordinated proceedings worked to make sure they get

1 their -- and did get their hands on the documents that
2 are relevant from other proceedings.

3 Now we've got these missing pages. I'm going
4 to do my best to explain it. It's not easy, but I think
5 I can get through it. Ms. Conlin sort of helped me by
6 showing the technology that is available now. We've got
7 the CD and the external hard drive on which you can
8 store, you know, so many images and so much information.
9 And though Ms. Conlin confesses to not being that
10 technically savvy and she knows neither I am, it's hard
11 to imagine our world now without that kind of access,
12 the instant e-mail and the ability to just store and
13 hold everything on your computer, but that is not always
14 the way, and it's not always been the way this has
15 worked.

16 Now, remember, in the beginning we talked
17 about the structuring of the production, and the first

18 piece was the prior production.

19 The initial production, as I say, goes back to
20 this Caldara lawsuit and the early FTC investigations of
21 Microsoft's. This is early 1990s. All the private
22 investigations are at least a decade old, some closer to
23 15. Technology was not the same, and Microsoft was
24 among the first -- probably one of the very few big
25 companies that had big sets of e-mail. Their people

99

1 were using e-mail back then, which is very much a part
2 of plaintiffs' case now.

3 And when various requests came in that were
4 not propounded by the Iowa plaintiffs or the plaintiffs
5 in any of these coordinated discovery -- this far
6 precedes any of that -- there was responsibility to
7 respond to those requests and provide what was relevant
8 in those requests. And how do they do that?

9 Well, this wasn't the day where you could

10 snap -- as they say, snap in a hard drive, take a
11 picture of someone's computer, download it on to some
12 larger server. You put everyone's mail together, use
13 search terms and look for it. It didn't work that way.
14 What they literally did was take -- and you can see this
15 as you look through some of those pages that Ms. Conlin
16 has put out and provided to you -- what they were able
17 to do was literally just take a person's -- capture a
18 set of a person's e-mail that they had, bring it to a
19 place where they could print it out and just run it. It
20 was just a one-time run printout. So there was no
21 electronic search terms, there was no weeding for
22 relevance and they couldn't save it there and move on to
23 the next person because there wasn't enough memory space
24 at that time to do that kind of thing.

25 So I don't know if Your Honor was in private

1 practice at that time at all or had been involved in

2 large document productions. I remember large document
3 productions from those years, and it was a paper intense
4 process, an extremely paper intense process. The only
5 way you could do it was on paper. So you sat there and
6 they would print up the run of somebody's inbox, just
7 like yours, in all the mail they had stored, and the top
8 e-mail may be something that was relevant to a request.
9 And the next e-mail might be an e-mail from somebody's
10 husband saying, "Honey, can you bring home a loaf of
11 bread?" And the mail behind that would be a meeting
12 request. "Come meet with us" unrelated to whatever was
13 relevant, and then the mail below that might be an
14 answer to the first mail that somebody had put forward,
15 and then behind that, again, a whole line of things that
16 might not matter, and there was no way to cut through
17 that and simply print out and search for the ones that
18 were even potentially responsive. So they just pushed
19 it out, pushed out, pushed it over into boxes of paper,
20 put the next person's material on the server, printed
21 that out and pushed it out. And people sat around, just
22 like I'm competent Ms. Conlin remembers doing, and went
23 through it and said "responsive" or "not responsive,"

24 "responsive" or "not responsive." And if it was
25 responsive, responsive to the FTCs request or responsive

101

1 to a request from -- in the Caldera suit -- but this was
2 not -- far before the coordinated proceedings. That's
3 what they went through, and they did. And there was so
4 much more that was not responsive than was responsive.

5 And I agree with Ms. Conlin, this is not the
6 way it's done now and it hasn't been done this way for a
7 while. If I'm producing a document, I'm producing a
8 document in paper form. Microsoft does the same. She's
9 right. This is why the productions looked different
10 because Ms. Conlin has in her possession a lot of pieces
11 of paper from a lot of different productions and over
12 time things got better and things got smoother and
13 discovery and discovery requirements have changed along
14 the way. We're all struggling now with various
15 requirements related to electronic discovery, but here

16 we were in a paper -- a technology company in a paper
17 world pushing a lot of paper, a lot of irrelevancies.
18 This is how they did it, so they went through, "this
19 mail is responsive." If there was something a little
20 above and a little below it that wasn't, they left it.
21 If the next page was nothing but "Honey, bring home the
22 bread," they took it out. Was that necessarily the best
23 way to have done it? I don't know. It's the way it was
24 done.
25 And the agreement that was made was that this

102

1 is the way it was produced. It was the way it was
2 produced to the FTC, it was the way it was produced to
3 Caldera, and whatever issues there may have been that
4 those plaintiffs had with that production, they were
5 resolved. Whatever relevancy problems there may have
6 been, they were resolved in those proceedings. And when
7 the time came for the coordinated proceedings and there

8 were requests for these materials, the agreement was
9 that the production would be reproduced. So it's not
10 incomplete. This is what we mean when we say there are
11 no missing pages.

12 The coordinated discovery required Microsoft
13 to produce the prior productions. The prior productions
14 were produced, and the fact of -- as Ms. Conlin knows,
15 that something has sequential Bates numbering on it
16 shows there is not a gap in the production of the
17 production. Does this make sense so far? Anyway, if it
18 doesn't, I know it's slightly confusing. So the prior
19 productions were reproduced in this case in their exact
20 form.

21 And, in fact, e-mail looks different now than
22 it looked then, and there's so many -- and it's exactly
23 why there are these vagaries that Ms. Conlin sees. But
24 what is not possible and not reasonable to do and to
25 look at some of these pieces of paper and say, you know,

1 from what I see people usually sign theirs, usually put
2 a name on the bottom of their e-mail. "So you know
3 what, Microsoft? Go back and just let me know, is this
4 complete or is this not complete? You know, I can't
5 tell. Is this a Capital 'I' or not a Capital 'I'?"
6 And, in fact, Your Honor, we have given to you and to
7 plaintiffs another copy of that document that shows
8 perfectly clearly that it was a Capital I that the
9 so-called sentence fragment is repeated throughout.
10 It's the way the headings are done. The roman numerals
11 are in there. But to ask us to go back and figure out
12 now whether a document that was adequately produced in a
13 different case and to which we agreed to produce in this
14 case and which we have, has, in fact, something above it
15 or something below it that might also be relevant, is
16 unreasonable. Because if I can be really graphic about
17 it, however many pages, hundreds of thousands, millions
18 of pages of production came out of this review process,
19 well, there had to be multiple more that were considered
20 not relevant. And where did that go? Well, quite

21 honestly, people -- the laws of that are not that clear.
22 People don't log what is considered and agreed by the
23 parties to be not relevant. There is warehouses and
24 boxes and documents. We don't do it in this case. We
25 wouldn't do it in discovery what we're doing now.

104

1 That's not what was done, but there was relevant --
2 there was relevant decisions made, whatever they were
3 they were. They were done in another case. They were
4 produced in another case. Those plaintiffs are
5 satisfied. We agreed to turn over the production. We
6 did turn over the production. We cannot go back on
7 hundreds of requests and try to find an original and try
8 to figure out whether or not there may be something
9 above it or something below that indeed Ms. Conlin or
10 Mr. Hagstrom would believe to be potentially relevant.
11 It is not a simple job. It's an enormous job. It would
12 take an unbelievable amount of time to dig through

13 warehouses of boxes and try to find it, if it could be
14 found at all. If it could be found at all. They were
15 not productions. We were not a production to these
16 plaintiffs at this time. It's very important to
17 remember that.

18 And when, in fact, as shown, as the examples
19 Ms. Conlin -- or plaintiffs put in their brief, you
20 know, on a first glance, some of them, they are not
21 incomplete. The pages are not mixed up -- the pages are
22 just mixed up. They are not incomplete. The little "I"
23 is really a cap, is not a capital "I." We can't simply
24 go back and confirm. The process is too big. It's not
25 reasonable. It's not necessary. And, in fact, on some

105

1 cases, the "HP" may be one example. There's another
2 example, I think, that Ms. Conlin gave you where she
3 showed you the pieces of it, "Here is a bit of a snip of
4 an e-mail. Here's a larger snip of that same e-mail,"

5 and, "Yes, defendants showed me. Indeed, I do have the
6 entirety of the mail."

7 Well, why is that? Because pieces of it
8 weren't relevant for perhaps the FTC. Maybe a larger
9 portion of it was produced in a different matter, but
10 when it came down to the coordinated discovery piece, if
11 people thought it was relevant, it was asked for. If it
12 fell under a specific request for other documents, it
13 was produced. That's why it will show up in different
14 forms.

15 We're not saying that if there is something
16 that after some kind of reasonable investigation by
17 plaintiffs they can't find and they think they need,
18 that we won't help. We will help. We've always tried
19 to be helpful. We do give them documents they are
20 unable to find or obtain from their plaintiffs. It's
21 not, as suggested, some kind of campaign to hide
22 relevant materials or keep them from having facts.

23 The production was made. We're dealing with
24 production from a long time ago. There was opportunity
25 to supplement that production, and it was quite

1 supplemented. And if there are real questions here and
2 we can find the answer, we will do that. But to give us
3 lists of 100 plus documents and say, "Can you just go
4 back and confirm that this 'I' is a capital 'I'?" And
5 that this person, in fact, didn't -- that there may not
6 be more to this by going through warehouses and boxes
7 and boxes and see if you can find the original," it's
8 not tenable. It's not doable and certainly not
9 required. It's not the groundrules.

10 I keep going back to groundrules, but the
11 groundrules -- we start with the coordinated discovery
12 and if, in fact, there is particularized good need of --
13 a showing of a particularized need for something for us
14 to do that, then make that showing. That's the rule now
15 and we will go and do it. But it's just not reasonable,
16 it's not fair to have us be subjected to, if I may be so
17 bold, it's almost a death by a thousand cuts, Your
18 Honor.

19 We need some reasonable procedure here so that
20 we can get through this. That's the only way. And
21 Ms. Conlin says, "Well, why should I have to look
22 through" -- again, moving on, think about the
23 handwriting. The same thing with the handwriting:
24 There are documents produced, documents that have
25 produced with handwriting on them. Some of them have

107

1 been marked as exhibits, lots of them have been brought
2 up in depositions.

3 People have had opportunity to ask people
4 about these documents in deposition, and in our glance
5 on her motion we were able to find some of those
6 documents through a search of the deposition database.
7 They have the same database. We don't have better
8 technology. We don't have less work to do. If they
9 can't find it in a reasonable way and we can, we will do
10 it; but it's not unfair for Microsoft to ask them to

11 make a reasonable effort to look through the materials
12 that they already have before they come and ask us to do
13 the same.

14 We're not trying to hide handwriting
15 information. To the extent there is a question about
16 who wrote some document and we have the answer easy, we
17 will give them the answer. But it is no less work for
18 us to dig it out than it is for them to dig it out.

19 Perhaps Mr. Jacobs remembers because -- or Mr. Hagstrom
20 because we did go through quite a process in Minnesota
21 trying to get handwriting figured out, and ultimately
22 from most documents we just all agreed it didn't matter.
23 It didn't go to admissibility. Nobody was going to
24 object on those grounds. They were little checkmarks.
25 They were little side comments. Some -- we went through

1 an entire process of chasing down, both sides. As it
2 turned out they were plaintiffs' counsel's handwriting

3 on some of these documents. The idea that we somehow,
4 of course, know somehow better than the plaintiffs know
5 is just false.

6 We're not trying to hide the ball. We're not
7 trying to be noncooperative. We want to get this done
8 the right way, but we need and ask that we do this with
9 some parameters, with some basic rules of conduct, where
10 both sides put in the effort.

11 Your Honor, may I take just one moment?

12 Thank you. Your Honor, I really don't have
13 much more to say, though if our histories together prove
14 me right, I'm confident I probably provoked some words
15 that Ms. Conlin would like to say; but, again, I don't
16 think this is the time or place to debate the merits of
17 this case. I don't think this is the time or place to
18 be focused on adjectives and adverbs and accusations
19 that really are going nowhere.

20 I think -- I hope, we've tried before, I've
21 explained why the document production looks the way it
22 does. It simply is a function of time, history and
23 boxes. It is complete. It's a complete representation

24 of what Microsoft and plaintiffs agree would be

25 produced.

109

1 On handwriting on critical documents, we are
2 happy to help. We simply ask that in going forward,
3 that we proceed with procedures, that we play by the
4 rules, the rules that have been set down, that we
5 have -- there's Iowa-specific discovery needed, that
6 should be provided.

7 Updating of damages: That should be provided.
8 And if other discovery is needed, it should be tied to
9 the allegations of the complaint and a showing should be
10 made that there is good cause, that it should not be a
11 matter of handmade 12 million more pages, which is
12 not -- I don't want to get off on a tangent here, but it
13 is simply not quite so simple as handing over a CD. And
14 if you would like me to explain, I would be happy to
15 explain, but I think Your Honor can appreciate that

16 producing 12 million pages from other pages that each
17 has their own restrictions and third parties and
18 protective orders is not going to be a simple matter.
19 But again, simply a side note.

20 Let's just do this the right way. Let's do it
21 the way Judge Reis instructed. We're happy to help. We
22 will help when it's necessary; but, otherwise, let's
23 make appropriate showing, let's get the discovery that
24 is really critical to moving forward to trying the case
25 and let's not -- either side -- bury each other in

110

1 irrelevancies and extra work and necessities that are
2 not -- have not yet been authorized.

3 Thank you.

4 THE COURT: Thank you, Ms. Nelles.

5 Ms. Conlin, you have the last word.

6 MS. CONLIN: And I will make it as brief as
7 possible. I promise less than two and a half hours. I

8 really think that I spent two and a half hours making a
9 particularized good-cause showing. That's what I think.

10 Your Honor, also, before I forget, both sides,
11 I'm sure, would be happy to provide the Court with
12 proposed orders if that would be helpful. We've done
13 that in the past, and I'm not sure what the Court's
14 desire is in that regard but we have done that.

15 THE COURT: You can if you want. It's not
16 necessary.

17 MS. CONLIN: We won't if you don't feel like
18 you need it.

19 THE COURT: I don't need it.

20 MS. CONLIN: Well, let me just say, Ms. Nelles
21 has said lots has happened in this case, and then she
22 says, and I quote, "Of course, there has been
23 discovery." Huh-uh, There has not been discovery here.

24 Here's what we have, Your Honor:

25 In five years we have one thing from

1 Microsoft, one thing for Iowa consumers, and that is
2 what purports to be a computer -- a small computer file
3 of resellers of computers, of companies that buy
4 computers from the computer manufacturers and then
5 resell them; and on that list the Ahlers Law Firm is
6 listed, and so we think it might not be accurate but
7 that is all we have.

8 There has not been any merits discovery here,
9 not any at all. Not a page exists. We have nothing
10 after August of 2000. This case goes to July 23, 2006.

11 Why do we need these? Why do we need these 12 million
12 documents? because you know we can't get through them.

13 Here is why we need them:

14 We feed them to the computer. The computer
15 sorts them all out, and then we ask the computer
16 specific questions. A computer, we say, "Show me
17 everything you've got about a particular thing that
18 happened with Netscape." And "whrrr-whrrr-whrrr,"
19 that's what it does, and that's how we're going to use
20 these 12 million documents and even the 6 million that
21 we hope some day to actually accumulate our ownelves.

22 That's how we're going to use them. We're going to
23 search the word searches just like you do with Westlaw
24 or whatever, only these will be different search terms
25 that we will use. This is the problem of reviewing

112

1 them. Frankly, that's our problem, Your Honor, and
2 we're willing to assume the responsibility.

3 Microsoft has already seen these documents.
4 You know, they've got them all cataloged. We're the
5 ones who are assuming the burden here. They've had
6 hundreds of lawyers working on these various cases, and
7 they are all cataloged. We're going to get it figured
8 out. And Ms. Nelles mentioned an arbitrary time limit
9 that Judge Peterson imposed on us, which I hope this
10 Court won't impose. I want to get that in right now,
11 Your Honor. There was a time limit the Court imposed.
12 That is why we had a clock going on.

13 THE COURT: For the trial?

14 MS. CONLIN: For the trial.

15 THE COURT: Is there any grounds or precedence
16 for that in the State of Iowa?

17 MS. CONLIN: Oh, no, no, no. I'm not sure
18 there's in Minnesota either, but that's what we're
19 dealing with.

20 THE COURT: Then there won't be any time
21 limits.

22 MS. CONLIN: I assumed that would be the case,
23 but I did want to mention that.

24 Iowa-specific issues: That's what Judge Reis
25 said we could discover, but we don't know for sure what

1 that means. According to Microsoft, this only means
2 about Iowa businesses. They get discovery from us about
3 Iowa businesses and Iowa citizens. We don't get any
4 discovery from Microsoft according to Microsoft. We
5 think it should mean discovery in the Iowa case, not

6 just, you know, what Iowa citizens bought from
7 Microsoft, but what Microsoft did to Iowa citizens. The
8 fact that they did it to lots of people at the same time
9 doesn't really matter.

10 Producing the additional discovery is no real
11 burden on Microsoft's part. It's going to require us to
12 do a lot. In the Microsoft -- in the Minnesota case we
13 used the coordinated record again because we didn't have
14 any other choice, but once again, Your Honor,
15 Microsoft -- that class period ended December 15, 2001,
16 2001.

17 August 2000: That's when the coordinated
18 discovery period ended.

19 2001: December 2001 is when the class period
20 ended.

21 We don't -- the petition dates are also wrong.
22 It's not from 5/18/94 to 12/15/01 as Ms. Nelles said.
23 We say in the petition beginning at least by 1988 and
24 continuing to the present: Today. That's what we say
25 in the petition. The Supreme Court did not -- that's

1 just not the class period.

2 The only class action that went to trial -- I
3 may have already said this; and, if I did, I apologize
4 for repeating. But California, the only discovery --
5 that is the only discovery. No discovery in Minnesota,
6 no discovery in those other cases that settled for
7 pennies on the dollar in coupons. Only discovery in
8 California. That's the only discovery for any consumer
9 class action. We want Iowa to have discovery in a
10 consumer class action. Miss Nelles has the class period
11 wrong. It is not December of 2001.

12 All right. Back to the six cases being
13 related. We gave the Court all the complaints. We
14 didn't take little snippets out. We've got the whole --
15 you can just look at those complaints until your heart's
16 content because every word is right there for you.

17 Judge Reis said three categories that we get,
18 Iowa-specific damages and particularized good cause,

19 whatever that may mean, but it has to mean something.
20 It can't just mean Iowa-specific and damages. It has to
21 mean something. We think it means those six cases and
22 make the exhibits complete and tell us about the
23 handwriting. They say that what we're doing here we're
24 doing because of the hope of finding new conduct. It is
25 not a hope, Your Honor. We have alleged some known

115

1 conduct, importantly, the complaints in these cases, the
2 six cases show continuing conduct on Microsoft's part.
3 Remember, Your Honor, for which Microsoft paid literally
4 billions and billions and billions of dollars in
5 settlement? I'm assuming they were not frivolous
6 lawsuits.

7 With respect to the class certification, the
8 experts that we have that they are talking about --
9 Jeffrey Mackie-Mason. And what he said, Your Honor, is
10 that it doesn't say don't explore post-petition conduct

11 as Ms. Nelles read from the paragraph of Judge Reis's
12 order. It refers to what our experts are calling
13 "benchmark" methods, how you prove damages. We prove
14 damages -- they did not say that we don't -- that's
15 damages, not merits. There's a difference and we want
16 merits discovery.

17 And, Your Honor, with respect to
18 Defendant's 506, I'm telling you we do not have that
19 document in our possession except as a defendant's
20 exhibit. Now, I said to the Court we have not yet
21 accumulated all of the stuff in the coordinated case,
22 maybe it's there someplace, but the only time we saw it
23 was as a defendant's exhibit.

24 Your Honor, also, I'm quite confused here
25 about what Microsoft's contention is with respect to

1 these 12 million pages of documents. At one point it
2 seemed to me as though Ms. Nelles were saying some of

3 these are duplicates, but here's what they tell the
4 Court in their memorandum in opposition to our motion to
5 compel, quote, page 4: "Microsoft estimates that these
6 requests seek production of more than 12 million pages
7 of documents not previously produced in the consumer
8 overcharge actions against Microsoft."

9 "Not previously produced," 12 million -- I
10 thought we were not talking about duplicates. I thought
11 we were talking about new documents.

12 And, you know, in terms of these boxes and
13 boxes of documents and these missing pages, everything
14 that Ms. Nelles said today is kind of news to us because
15 that's not been their defense, Your Honor. Their
16 defense has been "no missing pages," "there are no
17 gaps." "What are you talking about?"

18 "And if there are gaps, it's because we took
19 them out because they didn't matter."

20 That has been the defense so far.

21 Now, I don't know what this looks like, but
22 they have to be organized in some fashion. I mean, they
23 can't just be sitting there in stacks. So I don't know
24 if they are by producer or if they are by date, but

25 let's go back there and take a look at these things.

117

1 And they say the other plaintiffs are
2 satisfied. Well, that's because they probably didn't
3 realize what had happened to them, and this way of
4 producing was not agreed to by the parties. It was
5 Microsoft's people sitting there and deciding these
6 issues. No other party was present and certainly nobody
7 from Iowa was present.

8 You cannot in Iowa tell the Court this is way
9 too burdensome without proving it. The case, Your
10 Honor, I'm sure the Court is familiar with
11 St. Paul Reinsurance -- it's Judge Bennett's decision
12 where it goes through all of this stuff pretty
13 explicitly and cites Iowa cases and cases from around
14 the country. It's one of his usual law-review type
15 opinions that we all reply upon. Basically, you've got
16 to have an affidavit. You have to prove "burdensome."

17 You can't come into the court, describe a bunch of
18 documents and expect to prevail.

19 Ms. Nelles says it will -- "we will help."

20 Well, judge, look at the nice letter we sent them. We
21 sent them a really nice letter saying, "Here. Pages are
22 missing, you know, "tell us about this." Well, they
23 didn't. They didn't provide -- that is why we're here.
24 If they would help, we wouldn't be here. That's the
25 fact.

118

1 Then we sent them a nice interrogatory about
2 the handwriting, and I just have to tell the Court this
3 handwriting is not on the important handwriting. Here's
4 from 534, and this is to Brad Silverberg. This is very
5 bad. Number one, less money. I was telling you about
6 this. Nunmber two, chance of lawsuits trying to tie the
7 shell with it up. That's what some of the handwriting
8 we wanted to have identified.

9 We're not messing around here, Judge. The
10 handwriting we seek to have identified is handwriting
11 that matters to the consumers of Iowa. We are making
12 plenty of effort, let me tell you, and I'm uncertain
13 what we are told today, "We're happy to help" -- well,
14 we told them about this and they just said no.

15 That is all I have. I hope the Court will
16 grant our motion to compel.

17 THE COURT: Thank you.

18 Ms. Nelles, anything further?

19 MS. NELLES: Your Honor, I want to clarify
20 very briefly a few points.

21 Ms. Conlin is correct, there are 12 millions
22 pages of not-previously-produced material related in the
23 other matters. I'm sorry if I was unclear. There was a
24 great deal more that has also been produced in those
25 matters. There is overlap already. These are the 12

1 million pages that have not previously been produced and
2 for which there absolutely has been no particularized
3 showing that all of those pages for which there are many
4 related -- many unrelated -- acknowledged unrelated
5 allegations to which the documents are responding to.

6 It's also a little bit unfortunate to hear
7 Ms. Conlin say this is the first time she's heard about
8 these boxes and the way these missing, purportedly
9 missing, pages worked. It's very frustrating. We feel
10 it's been explained multiple times by Mr. Neuhaus and
11 others.

12 I'm happy, if it would help the Court, to
13 provide some affidavits or some explanation of how the
14 storage capabilities are and the material from another
15 matter from long ago that has been shown to be -- that
16 was produced and has now been produced -- that was
17 produced in other cases where the materials that were
18 considered irrelevant were otherwise stored to the
19 extent they were and to which the production was
20 produced in discovery as agreed by the parties, not
21 solely by Microsoft, if that would be of help.

22 And, of course, is there -- and what I mean
23 when I say, "We will help," is if there is
24 significant -- and there is handwriting that goes to
25 substantive matters to which these plaintiffs are unable

120

1 to find through their own -- the record for, and if we
2 have the information, we will provide it.

3 But there are rules. There is a procedure
4 here. I would also ask, Your Honor, that plaintiffs be
5 told they need to abide by them through this protective
6 order and not hope to expand now a case that will,
7 indeed, result in a lot more work and a lot -- and a
8 potential expansion of matters that are not at issue in
9 contravention of an order of this Court.

10 Thank you.

11 THE COURT: Thank you.

12 Anything further?

13 MS. CONLIN: Too late for an affidavit, Your

14 Honor. Today was the date for the hearing.

15 THE COURT: Very well. Ms. Conlin and
16 Ms. Nelles, thank you very much for your excellent
17 presentations, your patience. You obviously did a lot
18 of hard work to get ready for today, and I appreciate it
19 very much.

20 MS. CONLIN: Thank you, Your Honor.

21 MS. NELLES: Thank you, Your Honor, very much.
22 It was a pleasure.

23 (Record closed at 12:15 p.m., on July 6,
24 2005.)

25

1 CERTIFICATE

2 The undersigned, one of the Official Court
3 Reporters in and for the Fifth Judicial District of
4 Iowa, which embraces the County of Polk, hereby
5 certifies:

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

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

16 Dated at Des Moines, Iowa, this 20th day of
17 October, 2005.

18

19

20 _____
21 Janis A. Lavorato, CSR
22 Fifth Judicial District of Iowa

21

22

23

24

25