IN THE MFEM DISTRICT COURT FOR POLK COUNTY

JOE COMES; RILEY PAINT, an MFEM Corporation; SKEFFINGTON'S FORMAL WEAR OF MFEM, INC., an MFEM Corporation; PATRICIA ANNE LARSEN; and MIDWEST COMPUTER REGISTER CORP., an MFEM Corporation,

Plaintiffs,

vs.

MICROSOFT CORPORATION,

Defendant.

NO. CL82311

TRANSCRIPT OF PROCEEDINGS

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

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

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PROCEEDINGS

(The following record commenced at 9 M.m. on October 18, 2006.)

THE COURT: All right. Sir, we rudely interrupted you yesterday.

MR. PIERSON: Not so rudely. Good morning, Your Honor. Kit Pierson for Microsoft.

Recalling where we were yesterday, the plaintiffs have inserted into their expert report M $131 million payment for the time value of money on past damages. Their ability to do this, as we discussed yesterday, is clearly governed by M very comprehensive MFEM statutory scheme.

The MFEM Supreme Court, really, could hardly have been any clearer on this in the Wilson case at 589 N.W. 2d at 730 when it says, "Any award of interest depends entirely on statute because at common law there was no right to interest on any type of damages." That's worth repeating, "Any award of interest depends entirely on statute." That's the instruction of the United States Supreme Court. So they have to have M statutory basis to adjust their past damages for the time value of money as they are trying to do here.

THE COURT: That was from Wilson you read?

MR. PIERSON: That's from Wilson.

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

MR. PIERSON: No, this is the MFEM Supreme --

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

MR. PIERSON: Sorry if I misspoke.

THE COURT: That's all right.

MR. PIERSON: I'll describe the MFEM statutory scheme briefly because I'm sure you're very familiar with it. The MFEM Competition Law -- I don't think there's any dispute about this -- contains no provision authorizing prejudgment interest. They don't argue that it does.

Section 535.2 of the MFEM Code allows prejudgment interest only in very specific circumstances that are set forth in the statute, and none of those are applicable here. And even when it's allowed under 535.2, you only get five percent. You don't get to treble it. You don't get to compound it.

Then there's 535.3, which is the statutory provision in MFEM, which used to allow prejudgment interest from the day M lawsuit was commenced up until the time of judgment.

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

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

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

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

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

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

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

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

if the jury and the court determine that was appropriate.

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

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

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

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

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

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

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

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

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

In fact, and this is the point I want to emphasize, it's the point I made yesterday. If they were right, if they were right that all you have to do is stamp M new label on this and call it an adjustment or M correction, they in effect wipe out the statutory scheme on prejudgment interest because there's no -- there's no case involving past damages where you couldn't simply stamp the correction on. In the MFEM statutory scheme the five percent, the no compounding, the no treble damages, that all gets wiped off the books in effect, and no MFEM court has remotely suggested that that's something that would be appropriate to do.

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

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

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

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

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

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

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

THE COURT: In that case the damages were

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

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

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

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

Secondly, this is M case where their

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

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

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

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

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

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

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

Beyond that, even assuming, just for the sake of argument, that the exception of Schimmelpfennig applies, and it doesn't apply, but even assuming it does apply, all Schimmelpfennig said and all Schimmelpfennig did was say when it applies,

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

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

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

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

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

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

Thank you.

THE COURT: Thank you.

Response.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. PIERSON: Do you have M case?

THE COURT: Is this Landals or LaFontaine?

MR. REECE: This is Landals, Your Honor.

THE COURT: All right.

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

MR. PIERSON: Thanks. Sorry to interrupt.

MR. REECE: That's okay.

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

MR. PIERSON: Yes.

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

The trial court also allowed prejudgment interest because that's statutory. And, basically, the Supreme Court upheld this award, even though it acknowledged -- and, again, we're just asking for present value here, that's what the issue is. Prejudgment interest, as I'll explain, is not an issue for today. Just to make it really clear that present value and prejudgment interest are not the same, that's just words for each other, the court

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

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

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

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

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

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

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

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

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

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

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

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

earn money on its award.

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

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

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

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

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

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

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

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

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

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

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

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

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

Law has actual damage language.

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

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

MR. REECE: Yes.

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

MR. REECE: Absolutely.

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

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

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

THE COURT: You just argued about M punitive effect.

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

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

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

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

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

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

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

case.

And I read every single case that they cited, and they all just involve different permutations of prejudgment interest. It's like in M dissolution action, do you award prejudgment interest from commencement or because the judge is trying to make some equitable division of property? Do you wait until the judge issues his degree? Under M particular statute is it -- and the facts of the case, when does prejudgment interest start? Prejudgment interest, simple or compound. Can you get prejudgment on various things?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and different.

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

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

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

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

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

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

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

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

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

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

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

Thank you, Your Honor.

THE COURT: Rebuttal.

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

seeks to have it trebled.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

judgment.

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Your Honor.

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

it's 5 percent by 535.2, right?

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

THE COURT: Very well.

Thank you, sir.

MR. PIERSON: Thank you, Your Honor.

THE COURT: That concludes the motion in limine.

What was the other matters you wish to take up?

MR. GREEN: There's two matters.

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

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

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

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

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

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

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

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

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

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

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

MR. JACOBS: No, it did not.

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

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

Number one, there's contradicting

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

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

That's all I have, Your Honor.

THE COURT: You have the last word.

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

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

MR. JACOBS: Correct, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

purposes of the anti-contact rule."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

an indirect purchaser for purposes of the class.

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

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

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

Now, Microsoft -- we have M stipulation in

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

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

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

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

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

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

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

THE COURT: All right.

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

THE COURT: M class member.

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

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

MR. JACOBS: Uh-huh.

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

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

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

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

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

THE COURT: Okay.

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

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

MR. JACOBS: Right.

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

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

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

did personally?

MR. JACOBS: Right. What they did personally.

THE COURT: Each one of these people they talked to, did they have personal computers with the software on it?

MR. JACOBS: From what we've gleaned so far. And, Your Honor, there was M deposition that happened yesterday, finally. I believe there's another one going on today, which is another issue we will get into. What we're finding, at least to my knowledge, all of them so far have testified that, "Yes, in fact, I have purchased software for my use and for end use by my company during the class period."

THE COURT: Have any of these people opted out of the class?

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

MR. GREEN: No one knows that. We've asked for that information, and we've been denied it.

THE COURT: Okay.

MR. JACOBS: I'm sorry. I just lost my train of thought.

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

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

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

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

THE COURT: All right. Is each individual

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

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

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

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

THE COURT: What sanction are you seeking?

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

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

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

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

THE COURT: Pedersen?

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

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

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

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

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

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

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

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

that brings them within the class.

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

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

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

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

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

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

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

MR. JACOBS: Right.

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

To call up M Microsoft manager and say,

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

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

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

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

THE COURT: Yes.

Anything further, Mr. Jacobs?

MR. JACOBS: No, I think that's really all. I'm just -- the limited sanctions that we have set

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

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

(M short recess was taken.)

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

MR. GREEN: I am, Your Honor.

THE COURT: You got elected, Chris.

MR. GREEN: I got elected.

THE COURT: Proceed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

plaintiffs, not Microsoft.

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

callers also were instructed by me to limit their conversations with the resellers to matters that the resellers knew or believed as M result of their activities as resellers, such as the extent which they passed through to consumers changes in the cost of software that the resellers purchased for resale, the nature of their business, and their views as resellers concerning Microsoft's software." And then she says, "I am informed and believe that in every instance in which an MFEM reseller was contacted by interviewers of the James Mintz Group, our interviewers followed these instructions." And that hasn't been disputed. It hasn't. In fact, it's been totally verified by the testimony of the resellers whose depositions have been taken. Or Your Honor will recall the testimony of Duane Davis under cross-examination by Roxanne Conlin here on that motion to quash M subpoena, the Jay Roberts lawyer. And the last question Ms. Conlin asked and that is where she ended her cross-examination was:

"Did he ask you anything about your activities as M consumer?"

And he said he did not.

We've also submitted affidavits by Mr. Hauck and Mr. Nelson, who were the lawyers who

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

THE COURT: Was this attached to your memo?

MR. GREEN: What, Your Honor?

THE COURT: Your exhibits?

MR. GREEN: Yes.

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

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

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

Continue.

MR. GREEN: Can I proceed, Your Honor?

THE COURT: Sure.

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

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

Microsoft noticed the depositions of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

class members pursuant to Rule 1.269.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

my attention is because he used my name. And it was totally -- it clearly wasn't accurate, I'll say that.

And he referred -- I think, Your Honor probably knows Joe Fitzgibbons from Estherville or knows of that firm. And Mr. Fitzgibbons represents Tom Lynch, who is one of the resellers in question here. And Joe and I have talked about it, and this was after Mr. Lynch hired him about Mr. Darden getting M declaration. And I don't remember the conversation, but it was something to the effect that there probably would be M deposition at some point.

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

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

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

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

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

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

And there is no support to further their motion. It's not M violation of the court's order. It's not in violation of the no-contact order. It was done very carefully. It was done with the blessing of the plaintiffs, in effect. And now for them to come to this court and say they want any kind of sanctions whatsoever for it, frankly, just smacks of retaliation for the motion to disqualify. Therefore, we ask that motion be denied in total.

Thank you.

THE COURT: Thank you.

Rebuttal.

MR. JACOBS: Thank you, Your Honor.

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

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

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

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

intricacies of the law.

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

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

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

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

preparing to take depositions in September.

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

THE COURT: Was it eight affidavits?

MR. JACOBS: Pardon me?

THE COURT: Eight affidavits?

MR. JACOBS: Yes, eight.

THE COURT: That was for the purpose of decertification?

MR. JACOBS: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Or by.

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

THE COURT: Look at the title of it.

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

What Microsoft then did, however, over our

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

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

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

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

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

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

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

THE COURT: What about this Stempel thing?

MR. JACOBS: The Stempel thing, Your Honor. Professor Stempel does not say what Microsoft is claiming he's saying. What Professor Stempel is talking about is why Microsoft attempted to conduct ex parte discovery of class members was wrong. Why you can't do that. Why M no-contact rule does not allow them to do that. This was submitted in conjunction with the no-contact motion -- I'm sorry, with the informal-contact motion.

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

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

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

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

Now, the day before the deposition,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Well, that's exactly our point. These

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And I have nothing more.

THE COURT: Thank you.

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

CERTIFICATE TO TRANSCRIPT

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

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

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

Dated at Des Moines, MFEM, this 3rd day of November, 2006.

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MFEMF M. MFEMFEMF

Certified Shorthand Reporter