IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JOE COMES; RILEY PAINT)
an Iowa Corporation;)
SKEFFINGTON'S FORMAL)
WEAR OF IOWA, INC., an) NO. CL82311
Iowa Corporation;)
PATRICIA ANNE LARSEN;)
and MIDWEST COMPUTER)
REGISTER CORP., an)
Iowa Corporation,)
) TRANSCRIPT OF
Plaintiffs,) PROCEEDINGS
)
vs.)
)
MICROSOFT CORPORATION,)
)
Defendant.)

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

JANIS A. LAVORATO
Certified Shorthand Reporter
Room 405B-Polk County Courthouse
Des Moines, Iowa 50309

APPEARANCES

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PROCEEDINGS

(The following record commenced at 9:08 a.m., on July 13, 2006.)

THE COURT: All right. We have got a motion to quash first.

MS. CONLIN: Yes, Your Honor, and that would be mine.

THE COURT: You may proceed.

MS. CONLIN: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

circumstances, none of which they even urge or acknowledge that there is a corporate veil.

It's no different, Your Honor, than if they had just up and subpoenaed the records of Banker's Trust or Principal or some law firm. The fact that Mr. Comes is a shareholder does not make the records of Comes Investments available. The only rationale Microsoft offers is that according to them Mr. Comes is in possession of the records. He does go to the office. He has them. But he is in possession of the records as the president of the corporation, not as Joe Comes, individual class representative.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Your Honor.

THE COURT: Thank you.

Response.

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That is all I have, Your Honor. Just to

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

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

Thank you.

THE COURT: Very well.

Anything further on this motion?

MS. CONLIN: Very briefly, Your Honor.

THE COURT: Yes, ma'am.

MS. CONLIN: Just as an aside, Your Honor, the statute under which we bought this claim, class action statute, says that any person can bring a cause of action. The federal courts have interpreted the word "any" person in a different way than the Iowa Supreme Court did, and I think people, to me, look like people like Joe Comes and that's what the Iowa Supreme Court said was the law of Iowa, which, according to Microsoft Corporation, are fiction. It's hard for me to respond to that. I actually do think that, but the fact is that the law of Iowa and every other state recognizes that corporations are distinct from shareholders.

Even shareholders that are 100 percent shareholders are not the same as the corporate entity that it has created and effective under the law. The only way to get to an individual shareholder through a corporation is by -- the only way is by piercing the corporate veil, and you have to have fraud or other things that aren't even alleged here to do that. This is quite ridiculous.

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

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

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

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

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

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

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

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

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

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

THE COURT: Very well.

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

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

MR. NEUHAUS: If I may.

MR. JACOBS: Yes, go ahead.

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

portion of the interrogatories.

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

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

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

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

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

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

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

MR. NEUHAUS: Sure.

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

MR. NEUHAUS: Why don't I respond.

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

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

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

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

Mr. Jacobs mentioned that we had

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

THE COURT: Response.

MR. JACOBS: Just a brief couple of points I would like to make, Your Honor.

We are asking that Microsoft make some

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

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

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

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

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

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

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

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

records from which the answer may be ascertained. They haven't done this in this case.

That's all I have on that.

THE COURT: Very well. Motion to compel.

MR. JACOBS: Oh, I'm sorry.

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

MR. JACOBS: Yeah. There's a second request for production, 180 and 181.

THE COURT: 181.

MR. JACOBS: Now, these are requests for production that deal with Microsoft programs called "EDGI," E-D-G-I, Education and Government Incentive, and another program called "Partners in Learning."

Now, plaintiffs have some limited information on these programs that were contained in some of the document requests, some of the earlier document submissions that Microsoft had made. Based on that limited information that plaintiffs have, we believe that Microsoft is using this EDGI program -- may be using this EDGI program and this Partners in Learning program in an anticompetitive manner.

What we believe might be happening, Your Honor, is that Linux, L-i-n-u-x, which is an open-source operating system -- it's out there. It's being used and adopted in certain locations,

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

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

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

Intel-compatible PC operating systems.

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

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

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

THE COURT: Thank you.

Mr. Neuhaus.

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

THE COURT: Thank you, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Your Honor.

THE COURT: Thank you, sir. Response.

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

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

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

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

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

program, which really is inconsistent with the documents.

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

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

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

THE COURT: Next motion.

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

THE COURT: Ten minutes.

(A short recess was taken.)

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

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

THE COURT: Go ahead.

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

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

Thank you, Your Honor.

THE COURT: You're welcome.

You may proceed.

MS. CONLIN: Thank you, Your Honor.

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

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

THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We started getting it, some of it, as I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. CONLIN: Yes.

THE COURT: For all source codes?

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Gotcha. Okay. Mr. Neuhaus.

MR. NEUHAUS: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. NEUHAUS: We did not, Your Honor.

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

MR. NEUHAUS: Exactly.

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

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

requests on this point and, Your Honor --

THE COURT: The document request was December of 2005.

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

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

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

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

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

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

request that they are talking about.

THE COURT: Okay.

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

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

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

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

Thank you, Your Honor.

THE COURT: Thank you.

Anything further on the motion?

MS. CONLIN: Extremely briefly, Your Honor. In Gordman, which the defendant refers, we had only the coordinated case documents. In this case we have documents from lots and lots of other cases, and I think we had every reason to believe that this relevant document would be among those that the Court has ordered produced.

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

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

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

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

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

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

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

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

MR. NEUHAUS: If I may.

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

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

THE COURT: How far back are you requesting?

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

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

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

MS. CONLIN: "No."

THE COURT: Just "No"?

MS. CONLIN: Yes.

THE COURT: Anything else on this motion?

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

Thank you, Your Honor.

THE COURT: What products are you limiting it to?

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

That's all, Your Honor.

THE COURT: Anything else on this?

MS. CONLIN: No, Your Honor.

Mr. Neuhaus, anything else on this?

MR. NEUHAUS: No.

THE COURT: Last motion.

MR. GREEN: Thank you, Your Honor.

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

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

have a principal place of business in the state.

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

THE COURT: Are these absent class members?

MR. GREEN: No.

THE COURT: Who are they?

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

THE COURT: Why do you want to depose the

non-Iowa corporation?

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

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

class, at least that's our contention.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Your Honor.

THE COURT: Thank you, Mr. Green.

Response.

MR. JACOBS: Yes, Your Honor.

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

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

discovery motion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

here.

And it would not lead to absurd results.

The Honeywell example, for instance: Microsoft says, "Well, Honeywell was" -- Honeywell, I guess, is no longer actually incorporated in Minnesota, but let's say you have a Minnesota corporation. We will just take Honeywell for an example. They have presence down here in Iowa. Well, in Minnesota what happened was the Minnesota settlement was limited to -- was limited to persons or entities who purchased software for use in Minnesota. So, for example, this Minnesota Corporation that purchased these volume licenses for use in Wisconsin, for use in Iowa, for use in surrounding states, those purchases were not included in the Wisconsin -- I'm sorry, in the Minnesota class. So there's no double-dipping here.

This isn't something that would lead to some sort of absurd result by including corporations in the Iowa class who are perhaps headquartered elsewhere but are doing business in Iowa. In fact, it would be consistent with just about every other settlement that I'm aware of around the country where corporations have been told, "You make a claim for your licenses that are used in that state, and if you want to make claims elsewhere, you have to go

elsewhere."

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

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

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

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

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

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

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

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

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

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

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

Microsoft shows that it wants to obtain from these depositions.

THE COURT: Thank you. Thank you, sir.

You have the last word, Mr. Green.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you for your attention.

THE COURT: Thank you.

Thank you, everyone.

MS. CONLIN: Thank you, Your Honor.

THE COURT: Have a good day.

MS. CONLIN: Thanks, Your Honor. I note, Your Honor, that today is four months to the day from the day we begin the trial.

(Record closed at 12:05 a.m. on July 13, 2006.)

CERTIFICATE TO TRANSCRIPT

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

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

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

Dated at Des Moines, Iowa, this 25th day of July, 2006.

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JANIS A. LAVORATO

Certified Shorthand Reporter