IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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

Plaintiffs,

vs.

MICROSOFT CORPORATION,

Defendant.

NO. CL82311

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing before the Honorable Scott D. Rosenberg, commencing at 10:05 a.m., September 1, 2006, in Room 404 of the Polk County Courthouse, Des Moines, Iowa.

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PROCEEDINGS

(The following record commenced at 10:05 a.m. on September 1, 2006.)

THE COURT: The record should reflect that this matter is Joe Comes, et al., vs. Microsoft Corporation, Polk County No. CL 82311. Several motions are to be heard this day. The parties are present by their respective counsel. Please make sure that the names of all counsel, if not provided before, be provided to the court reporter before you leave so she has your spellings and all of that.

The parties have agreed on an order presentation, which is fine with me, and the first one is motion by defendant to adjourn the trial or continue the trial for 90 days.

Are you ready to proceed?

MR. TULCHIN: Thank you, Your Honor. I hope I may stand. This is David Tulchin from Sullivan & Cromwell for Microsoft.

Your Honor, we concluded, somewhat reluctantly, that because of the really unanticipated state of affairs, the overall circumstances here, and in light of the trial date, which is just before Thanksgiving, that it really would not make sense and would not lead to efficiency in the way the trial

will proceed to start in November, and so we've asked for a 90-day adjournment. It's the first time that we've asked for an adjournment of the trial. And, I believe, Your Honor, it's the first time we've asked the Court for an adjournment of anything, and it's the only time that we will ask for an adjournment of the trial, at least unless there's some radical different circumstance that we certainly do not now anticipate.

I hope to be relatively brief, Your Honor, but there are a few important points that I would like to make in connection with this motion.

I want to come back, Your Honor, a little bit later to the question of getting a representative jury, a representative sample of the community, but I do want to mention at the outset that starting a trial about ten days before Thanksgiving within the holiday period in December, I think, unnecessarily complicates the already difficult task of getting a representative and fair jury in a trial that plaintiffs' counsel have said will take -- I believe they've said six months or more.

Clearly, it would be difficult for members of the community, for many members of the community, to serve on a jury for six months. That's just the

nature of the beast here. There's nothing that can be done about that. But we complicate things, I think, unnecessarily by asking people to serve on a jury in a trial that is going to go that long just before the holiday period.

I also think there's considerations here about fairness to the panel at all because of the disruption to the members of the jury if we start in mid-November from having whatever holiday recess the Court might grant.

And I want to go back, Your Honor, and just mention, if I could, why it is that we're here before you now and that we've moved for the 90-day adjournment, particularly in light of the fact that plaintiffs in their papers say that if we were going to seek an adjournment, we should have done so before now.

The trial date, Your Honor, was set in January of this year by Your Honor's pretrial order, and what has happened since then -- and I don't think you can take these in isolation. I think they really have to be considered together in the aggregate -- is, for example, the following: In February plaintiffs were given permission to file their fourth amended petition, and the petition has new claims

about new products and new time periods and new markets and new theories such as the denial of free choice and the denial of the benefits of innovation that were not ever made before early this year in this litigation and that inevitably complicates the kind of trial we're going to have.

I'm going to come back to that just briefly later, Your Honor, but certainly that was something that was injected after this trial date was set.

Reflecting the fact that the scope of this case, Your Honor, is so enormous is the fact that when plaintiffs filed their expert reports in June of this year, and those reports were originally due in April, plaintiffs said they couldn't get them done in April and they got an extension until early June. The plaintiffs submitted reports from nine different experts. Of course, Microsoft was required to respond to all of those, and we have many expert reports as well.

Just to give you a bit of a sense of the contrast, Your Honor, in the Minnesota case, which went to trial in 2004, the plaintiffs had five expert reports. Here again, they have nine, which gives you a sense of the sort of expanded scope of the case.

In addition, Your Honor, there were a

number of things that no one could have anticipated until recently. As I will get to later, the course of proceedings before the Special Master has now led to the point where the parties have lodged 8,000 objections, roughly speaking, about 4,000 each, to pieces of evidence, either prior testimony or exhibits. And the Special Master is working through that process. He's behind -- where we all thought he would be -- but there are an enormous number of appeals coming to this Court from rulings of the Special Master. Some of that you'll hear about a little bit later today. I might say that what you'll hear today is, I think, going to be just the tip of that iceberg. So there's just tremendous uncertainty that we're dealing with now about what evidence will be admissible at trial.

The Special Master has no authority to deal with questions of relevance by Your Honor's order appointing Mr. McCormick. The scope of his authority went to other evidentiary issues. So in addition to these 8,000 objections that now exist, there will undoubtedly be many, many issues concerning relevance. And none of this was anticipated at the time that the trial date was set in January of this year, nor was it anticipated until recently. On top

of that, Your Honor, of course, no one anticipated that the facts concerning the motion for disqualification would come to light. We had no way of understanding that early this year Ms. Conlin had sought and received documents from Mr. Howery.

And the question of who lead counsel will be in this case when the trial does commence, with all respect, I think, is a very serious and important one. Plaintiffs have asked for a very substantial delay in their time to respond to our motion, a delay that Your Honor gave to them, and so that motion won't be heard until approximately a month before trial.

Similarly, there's a motion to decertify the classes. That will also be heard on the same day, October 10. And, Your Honor, here I must say we, on the Microsoft side, were a little surprised to see that when the plaintiffs submitted their expert reports in June, the plaintiffs' experts in our view -- I don't expect that they'll agree with this -- did not make the kind of showing about pass-through that one would expect and that would be required to maintain an action as a class action in an indirect purchaser case.

And again, just briefly, Your Honor, to

explain that a little bit, as I think the Court knows, all the members of the class here purchased Microsoft software indirectly from someone other than Microsoft. And to use as one example the purchase of a computer from Dell Computer with a copy of Windows preinstalled, the computer could cost, perhaps, something in the range of $2,000, plus or minus, just using that as an estimate. The copy of Windows that Dell purchases from Microsoft cost something in the range of $50. If there was an overcharge, that is, if Microsoft charged Dell too much by $5 or $10, it is the burden of the plaintiffs to have common proof to show that Dell passed along that small overcharge in the price of the $2,000 computer.

On top of that, Your Honor, in the decertification motion, we pointed out that the four named plaintiffs are individuals who bought individual copies of software. Many of the members of the class are large businesses or large organizations who are part of volume-licensed programs with Microsoft and who buy very large numbers of copies at the same time with a very different price structure than an individual has. And part of our motion to decertify the class is to seek to eliminate these large-volume purchasers who

are not represented by any named plaintiff and whose circumstances are quite different.

And again, I'm not trying to argue that motion today, Your Honor, but merely to point out that there are some very serious questions that have to be resolved before the shape and nature of the trial can be determined. These are questions that were not before us back in January or this spring or until the plaintiffs submitted their reports in June and we took depositions of those plaintiffs' experts in July. We moved very quickly thereafter to put together the decertification motion, which I believe was filed on August 2nd or 4th, right around there.

The same is true with the disqualification motion. We took the deposition of Mr. Howery, of the person who had stolen the Microsoft documents on August 7 -- this is after the plaintiffs tried to delay it -- and within ten days -- and that also required some time to get the transcript -- we submitted our motion to disqualify. So we have not been dragging our feet, Your Honor.

And again, as I say, I think this is the very first time that Microsoft has asked the Court for any substantial adjournment of any deadline. The plaintiffs, on the other hand, have asked and

received a number of significant extensions. Not the least of which, Your Honor, was a request that they made way back in December of last year for an adjournment of the time to submit their expert reports. They said they couldn't get the expert reports done in time to meet the then existing deadline, and that's when the trial was first moved from September '06 until November.

As I mentioned earlier, in April the plaintiffs asked again for an extension of those deadlines from the end of April to early June. That was granted, and, in fact, even just, I think, a day before we submitted this motion in August to adjourn the trial date, the plaintiffs asked for more time to take depositions of Microsoft experts. So a number of events have occurred that make this motion very timely. We could not reasonably have submitted it earlier than now.

And just as another -- to touch on another point or two as to what is ahead of us, Your Honor, besides the matters that I mentioned, there are nine motions for summary judgment or partial summary judgment. I want to touch on those for a moment. There's a whole question of discovery of plaintiffs' experts. Your Honor will remember that on

August 21st -- I think it's about ten days ago -- the Court issued an order requiring the plaintiffs no later than September 1st -- that is today -- to provide Microsoft with copies of documents that their experts had reviewed or looked at in preparing their expert reports, and if things had been destroyed, to give us a list of what had been destroyed. Today, September 1st, we haven't gotten that yet. I assume we will today. But again, that may require more discovery of experts that hasn't been anticipated before now.

And what I would like to do, Your Honor, if I could, is just hand up a few sort of slides that we prepared on these subjects.

Would it be all right to approach the bench, Your Honor?

THE COURT: Sure. Thank you.

MR. TULCHIN: Thank you, Your Honor.

The purpose of these, Your Honor, is not to argue any of the upcoming matters, but just to sort of list them to give the Court an overall sense of what is ahead of us in the next few months. And as the first one says -- we're just listing some of the motions that are coming up. I think I've touched on all of them except the motions in limine and the jury

instructions, but motions in limine are due two weeks from today in accordance with the schedule. I know there will be a number of them. There were a significant number in Minnesota, and again, this case is so much broader than the case in Minnesota because of the new claims and the new time periods, the new products that weren't at issue in Minnesota. The Minnesota case had a class period that ended in December of '01. We have a class period that is five years longer than -- almost five years.

And, Your Honor, interestingly, the events that are due to take place, including these motions in the near future, also include a tremendous amount -- of course, for the lawyers, a tremendous amount of trial preparation. And I think it's very important to take just a second to talk about the consequences of collateral estoppel because, of course, Your Honor, we've litigated collateral estoppel and Your Honor has made a decision, a decision, of course, that both sides have to live with.

By Your Honor's decision, 146 paragraphs of Judge Jackson's findings have been given preclusive effect. And the point I want to make here, Your Honor, goes to trial preparation and evidence

because I think the law is very clear that once preclusion has been granted to a finding, that neither side, neither the party that had requested preclusion nor the party precluded, can submit evidence that goes to any of the facts covered by findings as to which collateral estoppel has been granted.

So just by way of example, if there's -- if there's a collateral estoppel finding in an automobile accident case that Mr. Smith was driving in excess of the speed limit, the black-letter law is that the party who is adverse to Mr. Smith cannot submit evidence to the jury about how fast Mr. Smith was going. If you ask for collateral estoppel, then that's the end of that inquiry on that factual matter.

The reason I emphasize this at this point, Your Honor, is that there are 146 paragraphs, many more than one sentence, as to which a preclusion has been granted. And it's just an enormous task at this point for both sides to go through the 10,000 trial exhibits that have been offered thus far by the two parties and to try to figure out which of them are covered by those 146 paragraphs and, therefore, under, I think, black-letter law of collateral

estoppel, not admissible to the jury at trial.

That's, again, something that wasn't anticipated. We certainly didn't anticipate that the scope of collateral estoppel would be as broad as it is. We thought it would be something closer to Minnesota. I'm not complaining about it, Your Honor. It is what it is. But it just is another reason why the period between now and November 13th is really an insufficient period for both sides to prepare for trial if the trial is going to be conducted in the most efficient and sensible manner that I think we would all like.

And on the second slide, Your Honor, where we list the motions that have been made for partial summary judgment -- I won't spend a lot of time with these, Your Honor, but again, the outcome of these motions will affect in a very substantial way the kind of trial we have, the kind of evidence that the jury will be permitted to hear.

Now, I know in their papers the plaintiffs say, "Well, these motions are no big deal. The Court can rule on them simply. Some of them are similar to motions that were made in Minnesota and, whatever, we can handle this." But I just want to give the Court very quickly, examples, the first two on the list, as

to what these motions have to do with.

The first one, of course, was not involved in Minnesota because there were no claims there for damages due to some supposed denial of free choice or for lack of innovation. That's entirely new. And there is a lot of evidence, I dare say, that will come in from both sides if this claim remains in the case as compared to the circumstances where it doesn't.

We think the law here is very strong for us in our motion for partial summary judgment. We cite a case from the United States Court of Appeals for the Fourth Circuit. It's a case against Microsoft. It's a case that I argued, Your Honor, in the Fourth Circuit, where the claims were almost identical to the claims made here: denial of free choice and lack of innovation. And that federal court threw those claims out as not stating a claim under the antitrust laws. Of course, here we're dealing with the Iowa competition law, not federal law. But the Iowa competition law includes a direction from the Iowa legislature that the courts of Iowa harmonize Iowa competition law with the federal antitrust law.

There is law from the Supreme Court of Iowa that the Iowa courts must use the same substantive

law as is used in the federal courts when interpreting the Sherman Act. So again, I don't want to argue this point, but the outcome of this motion will very much affect trial preparation and the shape and nature of the trial.

The second motion -- I will just touch on it briefly. I won't go through all nine of these, Your Honor. The second motion really is very similar. It was not until October 7, 2002 that the plaintiffs in this case made any claim concerning applications products, word processing software, spreadsheet software and office suites. Before that their claim had been only with respect to operating systems, and the Iowa competition law has a four-year statute of limitations period.

Our motion is based on the argument that that four-year period applies, and that there is no claim, legitimate claim, in this case by the plaintiffs for damages for the period prior to October 7, 1998, the beginning of the limitations period under Iowa law.

Now the plaintiffs have arguments about tolling the plaintiffs' point of fraudulent concealment. All of these things are complicated and difficult issues. They are briefed to the Court.

I'm sure they will be argued -- I believe it's three weeks from today, Your Honor, that we have a scheduled argument of the summary judgment motions. And again, I'm not trying to argue who is right, only that the outcome of this motion, like the others, will make a great deal of difference to the way the trial is conducted.

At present we have all of these events compressed into a very, very short period. And as I said earlier, this is an occasion -- I think it's the first one -- where Microsoft stands before the Court and says, "We need the time. We need the time to prepare. We need the time to absorb the Court's rulings on all of these motions: decertification, disqualification, the motions for summary judgment, the other matters that we've mentioned."

We need that time in order to be prepared for trial, and, I think, in order for the trial to go more efficiently and sensibly. Maybe, most importantly, Your Honor, we have this -- it's our next slide, if you will. We have the proceedings before the Special Master. You'll hear a little bit about that later today from my colleague, Mr. Chapman, and from Mr. Cashman.

There are just so many objections. The

parties seem to be at loggerheads on so many different evidentiary issues. Four thousand objections by each side, a total of 8,000; and the Special Master is a long, long way from completing this process. It's scheduled to be completed by September 22, and all appeals to Your Honor from the Special Master's rulings are supposed to be heard on October 27. That's the last hearing date on appeals. That's just two weeks before the scheduled start of the trial. I dare say this will be an extensive process, and again will very, very much shape the nature and scope of the trial. On top of that, as mentioned earlier, there were other motions in limine that have yet to be made.

And then, Your Honor, in the next slide we point out there is more expert discovery to go. In addition to the fact that the Court ordered plaintiffs to provide additional expert discovery, the plaintiffs' experts by agreement are entitled to submit rebuttal reports. The date on which they submit their rebuttal reports, I believe is -- I hope I'm right -- the end of this month, and then we take depositions, if we believe them necessary, of plaintiffs' experts. That's to be concluded by November 1st.

Each of these events in isolation, no doubt, we could all handle. When you add them together in the aggregate, Your Honor, I think there's a compelling case to adjourn the trial for just a really short period of time, 90 days, so that we avoid the holiday season entirely.

And our last slide, Your Honor, is nothing controversial. It's a calendar showing dates in November and December. And, of course, Your Honor, I don't pretend to know how the Court would handle holiday recess, but if one assumes a week for Thanksgiving and two at the end of December, there are literally 19 possible days of trial, assuming that the Court sits on every other business day. From November 13th -- or maybe it's 20. Maybe I miscounted -- from November 13th until the beginning of 2007. And we don't think that with the kind of schedule that we're all facing, with Microsoft's need to be prepared for trial, with the uncertainty that lies behind many of these important motions and many of the evidentiary issues, that it makes sense to rush to trial by November 13th for the sake of those 19 or 20 days.

And perhaps the most important reason, Your Honor -- certainly it's very, very important; and by

leaving it to last, I don't mean to say that it has the lowest priority -- is the question of what kind of jury we will get and whether it not -- or whether or not it makes sense for the jury itself to go on the schedule that we now have set before us.

Your Honor, a six-month trial is asking a lot of any member of the community. It's asking an awful lot. We recognize that there will be many citizens of this county who will be willing to serve for a six-month trial, but we also anticipate -- and this occurred in Minnesota where the trial was expected to last we told the jury, I believe, 12 weeks, which would be about half of six months -- we also expect that a number of potential jurors will find it a terrific hardship to sit on a jury for that length of time.

There is law in Iowa, statutory law, about selecting a jury from a fair cross section of the population, Section 607A.1, and on top of that there is law from the Iowa Supreme Court about the importance of trying to get a fair cross section of the population. There's also Article 1, Section 9, of the Iowa Constitution, which talks about preserving inviolate the right of trial by jury. And the Supreme Court has interpreted that to mean and

emphasizes the importance of getting a jury that is disinterested, impartial, fair and without any restrictions in the processes on how they're picked.

And as a practical matter, Your Honor, impaneling a jury in mid-November when it's, let say, likely that a good number of them will have a personal or family commitment that they will very much want to keep over holiday periods -- some of which may involve travel -- just makes it less and less likely that we can get the kind of fair cross section of the population that Iowa law aims for. It makes it tougher to ask people to serve; and again, what we're getting -- we may be giving up a truly representative jury, and what we're getting is the marginal benefit of really just 19 or 20 days that includes the days necessary to pick the jury before the first witness is called, before the beginning of the new year.

So, Your Honor, all of these factors, we think, are important. We haven't asked before, and I might just say one other thing. It may not be the most relevant, Your Honor, but I remember last December -- and I have the letter here -- Ms. Conlin writing a letter to us saying that her holiday had been "ruined" -- that was the word that she used --

as a result of the work that was going on with the Special Master process then.

Some of us, at least for the Microsoft side, are from out of town, and we have our own personal and family lives as well that go on around the holiday period. It's not an important factor here, Your Honor. I suppose the other factors are more important, but it is one additional point that I didn't want to fail to mention; that starting in November does create some hardship for individual lawyers, not nearly as important as the jury, not nearly important as the other factors, but it is something that I thought I would mention.

So in conclusion, Your Honor, thank you again for your patience. It just seems to us by far the most sensible thing to do, to have this one really short adjournment of the trial date. As we have said before, we have no intentions of ever asking for another one. We want to be fully ready for trial. We want the trial to start. We're ready to go, but there is so much to do, Your Honor. It would be far more efficient and the trial would go, I think, in a more intelligent way if the issues before us such as those that I've raised and those that are indicated in the slides were resolved sufficiently in

advance of the trial date, that trial preparation could occur in a more intelligent way: what motions will be granted, which will be denied, whether or not particular pieces of evidence run afoul of the rule about collateral estoppel, that neither side can prove facts that are the subject of precluded findings. All of these are complicated and difficult issues that require some time for resolution. On top of that is the jury issue, which, again, I think maybe is the most important. And so we respectfully ask this one time for a 90-day adjournment, Your Honor.

Thank you.

THE COURT: Response.

MS. CONLIN: Yes, Your Honor. Thank you very much.

This case was filed nearly seven years ago. It has taken three trips to the Iowa Supreme Court. It would have taken six if Microsoft had its way. It's time to try it. Besides the incredible burden that this case has presented for the Court and for the parties -- there is not a person in this courthouse that hasn't been affected, I don't think, by the pendency of this lawsuit. I mean, it has had a significant impact. In a case this massive, there

is always going to be more to do -- more investigation, more to read, more motions, more arguments -- but that's just not an excuse for delaying this anymore. It's simply time to fish or cut bait.

THE COURT: What about the time for the Court to rule on all these matters?

MS. CONLIN: Well, Your Honor --

THE COURT: I have other cases too.

MS. CONLIN: That's one of the things that I think is pretty stunning to all of us, that the Court is being required to not only handle this massive litigation, but also to handle, apparently, a pretty full caseload of other matters. And obviously, Your Honor, if the Court needs more time, that's different than Microsoft asking for more time. And I assume the Court, if it needs more time, will grant itself a continuance. I think, however, Your Honor, that what is happening here is really not unanticipated and that what Microsoft has done is multiply the Court's caseload and then used that as a way to delay the day of reckoning.

So again, Your Honor, as I indicated, we're kind of stunned by what is happening to the Court. And, obviously, if the Court needs more time, that's

different than Microsoft coming here and asking for more time for mostly things that it has done itself.

There are also, Your Honor, four things that I think make this motion either unnecessary or unwise. One of the reasons that Microsoft originally offered for this motion was there's no way in the world to get class notice out. As the Court is aware, that has been resolved. Class notice is going unless Microsoft does something to stop it.

Second, the defendant said that we needed to wait for the Supreme Court to rule on the collateral estoppel motion. It happened last Friday. The Court's order was sustained, and we're good to go.

Third, their motion with respect -- their motion to compel with respect to experts. That was another of the reasons that they offered and that, too, has been resolved.

And finally, Your Honor, there is something external to the Court that needs to be taken into account, and that makes this motion for a 90-day continuation particularly inappropriate.

On January 30th, according to news reports of yesterday, Microsoft will release its long-delayed new operating system called "Vista." January 30th.

It will no doubt be accompanied by hundreds of millions of dollars in advertising not only extolling the virtues of the new operating system, but extolling the virtues of Microsoft.

If the jury is impaneled and instructed before that enormous wave of advertising takes off, then the jury will be instructed not to pay attention to these kinds of things: advertisements or news stories about Microsoft. If the jury is still out there someplace, there won't be any control over that at all and we will come to Court here facing this huge, massive advertising campaign that will have gotten off the ground just immediately before a delayed trial time.

It's just not fair to the plaintiffs. We don't have hundreds of millions of dollars to do an advertising campaign and we don't have a product to advertise. It took us awhile to understand all of the implications of Microsoft's 90-day request, but it surely cannot be fair to the plaintiffs. Unless, of course, Microsoft is willing to forgo any advertising that might reach Iowa jurors and taint them, this case needs to be well under way before that begins.

Microsoft offers other reasons, of course.

We've dealt with them in the brief. I'm going to just, hopefully, lightly touch on some of them.

First of all, Your Honor, Microsoft insists on saying that we have new claims. We do not have any new claims. We have two claims. We've had two claims since the beginning. We have two claims today. Two claims for violation of Iowa's law. We have new evidentiary allegations resulting from new conduct. We filed the amended petition in September -- I mean, it was granted in February, but the Court will recall we took a little sojourn over to federal court in connection with that.

All of Microsoft's motions on which it bases this motion are without merit. Most of them are quite repetitive. Most of them have been denied in other courts at other times on the basis of exactly the same arguments. They have filed, in fact, eight motions for summary judgment; but, in fact, they've done so in violation of the rules. It should have been one motion for summary judgment with a subpart perhaps.

Our responses are due today. They will be filed today. We will be hauling them over in a cart. The Court has set its hearing for September 22nd. That's seven weeks before the trial. And, Your

Honor, it's the very same date that you set at the very beginning back in July of 2005. Nothing has changed about the date that you set for the hearing on these motions for summary judgment.

Microsoft has filed -- of these motions, six of them are virtually identical to the motions that Microsoft has previously filed in other cases that have all been denied.

The motions concerning damage issues are equally without merit, but they will be more interesting. It's not plaintiffs that purposely multiplied the Court's workload, it is the defendant; and they can't use that to seek a continuation of this already long-delayed trial.

Having said that, Your Honor, once again, if it is too much for the Court, you should grant yourself a continuation.

Let me -- Mr. Tulchin, while saying to the Court he wasn't going to argue the motions -- the merits of the motions, did say a few things that require of me that I say a few things back.

He says that on the innovation damages that the Kloth case -- I don't know for sure how you pronounce it. It's K-l-o-t-h, which is a 4th Circuit case. It deals with that issue and denied those

plaintiffs innovation damages. That is wrong, just flat wrong. First of all, it was up there on a motion to dismiss. It was not pled in the way that we have pled it. It was not formulated in the way we have formulated.

And in addition, Your Honor, federal law is different than state law on damages. The Iowa Supreme Court has already said that federal law does not control who gets to sue in Iowa. The Iowa legislature has specifically said that federal law does not control what damages the people who sue get. Iowa law differs by its very language from federal law. In Iowa we say people get actual damages. In federal law they say you get damages only for damage to business or property. Federal law you automatically -- on proof of the violation, you get treble damages. In Iowa you have to prove what amounts to intent in order to get those damages. We will be filing our brief, Your Honor, and we will be filing it today.

In terms of the applications claim, the law is clear that wherever -- any part of the state case brought by the State of Iowa against Microsoft is a part of our case. It's tolled. The statute is tolled. You read Judge Jackson's decision, Your

Honor. One of his findings was that one of the reasons Microsoft did all of its illegal acts was to protect its applications monopoly. So again, Your Honor, we filed that today and provided an answer to all of Microsoft's various motions, which as I said, should be just one.

And I do think, Your Honor, that -- I mean, we're giving you this huge bunch of stuff to read and that is -- that presents difficulties. And we hope that the Court is able to do that, but I think that's the argument -- the briefs and arguments of the parties will help, but the oral arguments will be most helpful to the Court in connection with dealing with these motions.

Decertification is certainly not something we anticipated. It happened in Minnesota as a last-ditch effort to avoid responsibility for their acts. It's without merit. They are trying to decertify a class that the Iowa Supreme Court has already said is a class, and they are trying to do so on the basis of various things that they say changed, which did, in fact, not change.

The ruling on the decertification also, Your Honor, doesn't affect trial preparation at all. It has nothing to do with trial preparation. If the

Court, as we expect it to do, overrules the motion, it just goes on as it would have anyway. If the Court by chance grants the motion, the case is over. You know, it's dispositive. The four class representatives are not going to be able to finance a lawsuit against Microsoft. So, there you go. It's over. We do not think it has any merit whatsoever, but it doesn't affect trial preparation.

I'm not going to address the pass-through or the volume purchasers, except to say with respect to volume purchasers, the Iowa Supreme Court has said that these class representatives are appropriate representatives of the class and the class has always included volume purchasers. This is a silly argument.

Motions in limine. I don't even understand that, Your Honor. It's the same day. It's been the same day, September 15th. It's been the same day for a year. You know, nothing has changed. So it's a date they agreed to.

Jury instructions. Again, there's been no change in that date whatsoever.

In terms of the Special Master appeals, you know, there is a massive amount of evidence here, without question. The Special Master -- I know the

Court has gotten occasionally somewhat impatient with the whole Special Master process, but it's working real well. We're going to be here today, Your Honor, on simply a handful out of the thousands of rulings that the Special Master has only -- has already made. We're here on, I think, 15 maybe, and Microsoft has a few more.

Here is the fact, Your Honor: Some of these issues arise because we have not gotten the Court's view on reoccurring issues that affect a whole bunch of exhibits: trade press, press releases. There's just a whole bunch of things that are in a category. And once the Court tells us its view with respect to that, it handles a whole bunch of stuff. We will know what to do and we won't have to ask again. Some await a trial record and won't be resolved until that happens. Again, not a surprise.

Whether the trial starts as it's scheduled to start or sometime later, it's going to be the same. Relevance issues have to be decided in light of the trial record. The Special Master is not behind. The process is moving along well.

Let me say a word about collateral estoppel. While there are many exhibits and some testimony that the plaintiffs will be withdrawing,

some of the evidence about Microsoft's conduct in connection with middleware will be presented to prove the plaintiffs' entitlement to treble damages. Mr. Smith driving down the road and running into somebody is one thing. Mr. Smith driving down the road on the wrong side drunk as a skunk is another. And so we have an issue -- we have the issue of treble damages and the requirement that we prove our entitlement to those, and some of the outrageous things that Microsoft did in connection with middleware will be proven to the jury for that purpose.

Again, Your Honor, the bulk of that process falls on the plaintiff, bulk of selection and deselection. It's ours and we can do it and we don't seek a continuation as a result.

The 8,000 objections that Microsoft -- I don't have any idea how they counted those, Your Honor; but again, they fall into categories and deciding one decides hundreds, if not thousands. Microsoft never anticipated that the Court would be ruling on relevance issues during the trial, but it is right in the order.

The number of objections is misleading, Your Honor. The parties followed different objection

approaches, Lord knows. The Special Master himself has never said he cannot finish on time, and so far he has met every deadline. Again, Your Honor, if that happens, that's a little bit different than Microsoft coming in here and begging the Court's -- begging the Court to delay its day of reckoning.

The motion to disqualify me, I've avoided discussion of this with the Court. I've hired competent counsel. I will say that I did not violate the code of ethics and I did not lie to the Court. Again, Your Honor, the burden of that falls on the plaintiffs, not on the defendants. It's just absurd for them to seek a continuation on the business that they are disqualifying lead counsel.

Experts. The Court is familiar with the timing issue surrounding the expert witnesses and the reasons for them. One thing that I think is clear to the Court is that we had to get a continuances because Microsoft failed to follow your rules of discovery and the Court's orders. The Court ordered them to produce stuff and they didn't do it in a timely fashion. Our experts didn't have it. They couldn't write their reports. That's what has happened here. You know, it's not Microsoft's innocence here that -- Microsoft is not innocent

here. In fact, in virtually every instance where we have been forced to seek some extension, it is because Microsoft has failed to follow the Court's orders.

Mr. Tulchin said that the Gordon case was only going to be 12 weeks. The Court will recall, there were hour limitations, but my best recollection is that the jury was told that it would be about six months; but subject to correction, I would have to go look at that transcript and, frankly, I'm not too interested in doing that because I'm not sure that matters very much.

I think -- let me say another thing, Your Honor. While the trial may start on November 13th, we've got to get us a jury. That took three weeks in Minnesota to do that. I've got some ideas about how we might shorten that up; and I certainly hope we can get a jury much, much more rapidly. I hope we can time qualify jurors in advance and do things that will shorten it up, but once we get a jury, then we have opening statements. Much of the evidence to be presented by the plaintiffs, unfortunately, is by videotape. So neither the Court nor the counsel have very much to do while the jury is watching movies.

So it's not as though on November 13th

everything happens. On November 13th we get started. We get rolling. But there are lots of things that will happen after that time. I think the earliest we could probably take evidence starting on November 13th is about the 1st of December after jury selection and opening statements. But we're going to have to do that, Your Honor. Whether we do it starting promptly on November 13th or whether we do it not so promptly at a later time, we still have to have jury selection and we still have to have opening statements, so getting those things done will be necessary whenever we begin.

The defendants also seem surprised that the close of discovery was not until July 2nd, which was also a date set last July -- well, no, that was set in January by the Court.

Microsoft pretends to be concerned about the jury and complains that its constitutional rights will be somehow violated if the trial starts November 13th because there are some holidays in November and December.

First of all, Your Honor, Microsoft agreed to this holiday and -- I mean, let me start again. Microsoft agreed to the trial date. It was a negotiated trial date. You'll recall all of that.

November 13th has always been the same number of days before Thanksgiving and the same number of days before the December holidays. Nobody moved those holidays. This was an agreed-upon trial date, and there are those holidays and they've been on the calendar for a long time. It's just a ridiculous excuse.

There may be a need to adjourn for some period of time over the December holiday season for a few days, depending on who is on the jury, but we're going to need to know if we need to accommodate individual jurors' plans. We need to know who those individual jurors are. I just have never heard of this kind of adjournment of a trial, Your Honor, never. I mean, Microsoft's argument would seem to say that we can't try cases here in November and December, and I've done it and so have a bunch of other people and certainly the Court. I don't know why they think there is going to be three weeks of vacation in here because it would be kind of a surprise.

What they've done, I think, is latch onto these holidays as yet another reason to delay trial, and I'm particularly surprised at their crocodile tears here for the jury when, in fact, they've

rejected all the proposals that we've made to fairly compensate the jury. It's just another rationale to delay the trial. As I said, I am concerned about the burden on the Court and stunned that there's not been complete relief from all other matters. Obviously, if the Court requires an adjournment, a continuance, if it becomes unmanageable, then the Court certainly should grant itself a continuation, but not because Microsoft complains about its burden with its hundreds of lawyers and unlimited resources.

We want a trial, Your Honor. We want the trial on the date set, if at all possible. And it's been nearly seven years. The plaintiffs in this case have waited seven years for their day in court. Defendants want to delay that as long as they possibly can, and if it's delayed until February 1st, we run right into these hundreds of millions of dollars of advertising for Vista which I think is massively unfair to the plaintiffs. It's time to go to trial, and we ask the Court to overrule Microsoft's motion to continue this trial in its entirety and hold firm to the November 13th trial date.

THE COURT: Thank you. Response.

MR. TULCHIN: Very briefly, Your Honor.

First, as to the advertising and the new product called "Vista," presumably, Your Honor, if, in fact, this occurs on January 30th of 2007, it will be more desirable to have this done before there is a jury than during the middle of trial when, indeed, if there's advertising that the plaintiffs' lawyers are concerned about, that would be advertising that would go to the jury during the trial. Many people pay very little attention to advertising in any event, and if there's no trial starting yet, presumably it will just be what it will be.

Secondly, Ms. Conlin says that the decertification motion can affect the trial preparation. I mean, that's completely wrong, Your Honor. The Iowa Supreme Court in its decision about the certification of the class specifically said the class certification should be revisited by the trial court on a full record after the close of discovery. And the issue about whether large-volume purchasers can be members of this class, I know Ms. Conlin says we're going to lose on that, but I don't think this can be brushed aside quite so easily. It's a serious and important issue, and if the large-volume customers are eliminated, then the case goes on for individuals but the nature and shape really does

change considerably.

Collateral estoppel. I think the Court can see that there are going to be significant arguments. Plaintiffs' counsel seems to concede in her remarks that she can't put in evidence that which lies behind a precluded finding. She says she wanted to put in some of the same evidence for another purpose; and, indeed, these are the kind of evidentiary issues of which I'm afraid there will be many, that it would make more sense to try to work out either between the parties in the first instance, and if necessary, with the Court's assistance before we start the trial, not in the middle of it where we're taking an enormous amount of time for sidebar conferences or at the close of each day to argue about evidence. If we get the 90 days, Your Honor, for whatever reason, whether because it's convenient for the Court or any other, then many of these issues can presumably be worked out before the trial starts.

In addition, Your Honor, I accept what Ms. Conlin says that on November 13th we won't be starting with evidence, that there's a period where we will have to spend some time to pick the jury. That's correct. There will also be opening statements. Sure, that's true. And it will be a

little while before the evidence actually starts going in to the members of the jury. I think that fact makes it even less sensible to start in the holiday period, just before we have a Christmas break. And perhaps plaintiffs' counsel is right, that the break will only be a few days. I just assumed a two-week period, Your Honor. I don't know what the Court's pleasure would be in that instance. But again, it doesn't seem sensible to start the evidence just before there is some significant break of time when people are on holiday. That problem can be avoided.

Ms. Conlin says that there isn't any rule in Iowa that you can't try cases in November or December. Of course, she's correct. We've all tried cases in November and December. But I dare say, not cases where the plaintiffs' lawyer predicts that the trial will take six months. Those cases ordinarily start after the turn of the year.

So we don't ask Your Honor for this continuance lightly. Again, I don't think we've made any other requests for any significant delay at all. We need the continuance here. We need the adjournment to be properly prepared for trial. But more importantly, Your Honor, I think it's sensible

for the Court -- with all the burdens that are coming down the road, I think it's sensible for any jury to start this case in 2007. Yes, the case has been pending for a long time. One might say that an extra 90 days won't make or break anything, Your Honor. And here it's just so sensible to start after the beginning of the year, particularly with the problems that we will face in picking a jury in any event. To multiply them by having a holiday period facing the jury right when the selection process occurs does not seem to be sensible.

And finally, Your Honor, we did not delay bringing this motion. We brought it as soon as all these events, the confluence of all these events, together arose. Most of the matters on which we've relied and referred were not matters that we anticipated months ago. Indeed, most of them have come up recently, as I said earlier.

Thank you again, Your Honor.

THE COURT: Very well.

Just a comment. I didn't mean to infer that the Court cannot rule on all of the motions of the parties between now and November 13th. I was just noting that there are some motions here that have been filed that are not subject to

predictability as to filing such appeals from the decision of the Special Master and the motion for disqualification of plaintiffs' counsel. Those are something you just can't predict, and the Court did not mean to infer that it cannot and will not give each of these motions its fullest attention.

I will take whatever time is needed to read, review, research and rule on all the motions. And the Court recognizes its duties to the parties, and it will complete its duties in a timely fashion and it will not skip or cut corners in doing so. So no matter how this motion goes on the continuance of trial, I just wanted to state that for the record.

We will proceed to the second motion, if that's okay.

MR. CHAPMAN: Thank you, Your Honor.

My name is Jeffrey Chapman. May it please the Court. I would like to argue Microsoft's appeal to the Special Master rulings.

The parties are here today on Phase I of VII of the Special Master rulings. The parties commenced pretrial designations in the winter of 2005. There are six more phases that may generate additional appeals. Today we will talk about the first of seven.

Your Honor, I prepared some exhibits and a little agenda, if you will, of where I'm going to go.

May I approach the Court with that, Your Honor?

THE COURT: Yes. Thank you, sir.

MR. CHAPMAN: Your Honor, to give you an overview, most of these objections that are at issue on appeal concern "hearsay" or "embedded hearsay." That's the terms the parties used to describe hearsay within hearsay.

I've divided my argument into three different categories, the first of which concern objective information in compressed releases; the second of which concern product reviews and commercial publications. And the third is a category of a certain limited number of documents that don't fall into any particular category.

On press releases, Microsoft has designated certain objective information in press releases and I've given those to Your Honor. It is factual information. I do not even believe it is disputed by the plaintiffs, the accuracy of that information. We provided that information as part of our pretrial designations, and it's very important to us because it responds directly to certain allegations that the

plaintiffs will make.

For example, Your Honor, the plaintiffs have said that it is wrong for Microsoft -- "anticompetitive," if you will -- to take certain of its products, applications products -- Microsoft Word, Microsoft Office -- and offer them together in a suite of products called "Office."

In response we offer Defendant's Exhibit 700. That's Tab 7 in the materials before you, Your Honor. That reflects the Lotus Corporation, a competitor of Microsoft, was offering SmartSuite, it's own suite of applications; Lotus Amipro and Lotus 1-2-3. And no one has said that it's wrong or anticompetitive for Lotus to do that.

In addition, an important part -- or I believe what they perceive is an important part of their case is allegations that Microsoft shut off distribution channels for Netscape. Netscape's products were Navigator and Communicator.

In response to that, Your Honor, we offer Defense Exhibit 1160, and that's Tab 13 in the materials before Your Honor. The plaintiffs will say that Microsoft has prevented Netscape from offering its products to original equipment manufacturers, Internet service providers. But here is an objective

announcement: That the Fujitsu Corporation, a large corporation with 37 billion dollars of revenue, is going to offer the Netscape product on its laptop computers and that they have approximately 12,000 Internet service providers.

THE COURT: Just a quick comment. These are for me?

MR. CHAPMAN: Yes, Your Honor.

THE COURT: Can I make notes on them if I want to?

MR. CHAPMAN: Yes, Your Honor.

THE COURT: Okay. Thank you. I'm sorry to interrupt you.

MR. CHAPMAN: Not at all, Your Honor. As to the specific evidentiary issue, we have a hearsay issue, and the Special Master has sustained hearsay objections to these press releases. We believe that that was in error for two reasons: Because they satisfied -- each one satisfies one of two exceptions to the hearsay rule.

The first is business records. These press releases meet the requirements of the Iowa business records exception to the hearsay rule. They certainly were generated in the ordinary course of business. They are certainly periodically and

regularly made, and they certainly reflect the business activities of the companies. These are about companies that are offering their products for sale, announcements of mergers and alliances in the software industry. Several of the witnesses whose deposition testimony will be provided to the Court have said that, and also it's quite obvious from the face of the document that these are certainly ordinary business records.

The only issue in dispute, Your Honor, is whether there is something about a press release that makes it unreliable, and there most definitely is not. Press releases typically are carefully vetted for accuracy by many different people within a business, including the business people themselves, their lawyers, their auditors.

In addition, there's also a very strong and a very serious duty of accuracy imposed by the federal and state securities laws. There are civil penalties. There are criminal penalties. There are administrative penalties for making a false statement in a press release. That duty of accuracy, Your Honor, is what distinguishes a press release from the newspaper articles that were at issue in Fanning vs. Mapco. That was a case that the plaintiffs rely on

and the Special Master also cited in support of its ruling:

"A newspaper author does not have a legal duty as a result of the federal securities laws to be accurate, however, an issue or a press release does have that duty."

Plaintiffs do not dispute that these laws place upon issue press releases this duty of accuracy. They say, Your Honor, that the laws do not punish puffery or forward-looking statements. That misses the point by quite a wide mark. We are not citing these press releases for any of the puffery in them. We've highlighted certain objective information that we do not even believe is fairly subject to dispute in terms of accuracy, and we're offering them only for this objective information.

For example, in Defense Exhibit 681 -- that's Tab 6 for Your Honor -- Lotus and WordPerfect announce a technology partnership under which the two companies are working together on a user interface for their OS/2 presentation manager software. It does not sound at all like puffery to me, Your Honor. We have redacted anything that might be puffery from these documents.

The plaintiffs have also said that we

haven't shown that this motive ensures the accuracy of every press release ever issued. That is not our burden, Your Honor. There is no authority for the proposition that you must tie this accuracy and reliability to every document of its kind or every document of its type.

And, Your Honor, as to the issue of the power and motive of its duty to be accurate, I can assure Your Honor there are several people who are sitting in a jail cell right now because they've made false statements in press releases. And I submit to you that that is a much more powerful motive than a business duty to be accurate to ensure that you have the appropriate number of products in your inventory.

There is authority both thus in the rule itself, Your Honor, and also in several cases that we've provided to you that discuss the government records exception. The government records exception is very similar to the business records exception, Your Honor, in its language. I believe it reports of regularly conducted and regularly recorded activities of a government agency. That is very similar in language and similar in spirit to what is the business records.

The plaintiffs have offered no authority

for the proposition that press releases are categorically inadmissible. The cases that they cite -- either the press release was cited for a nonhearsay purpose so that exception wasn't at issue, or, although the press release was found to be inadmissible, there's no indication that the author of the evidence -- Microsoft in this case -- laid the foundation and made the argument that this was a business record that we have made.

In addition, Your Honor, to business records, we also think that this is appropriate for the commercial publications exception. In a case that both plaintiffs cite and Microsoft cite, State vs. Heuser -- I'm terribly sorry if I'm mispronouncing that -- the Court held that a list of ingredients on battery labels and cold medicine was admissible to prove the contents of those products.

We submit to you, Your Honor, that is exactly what some of these press releases talk about. The ingredients of a computer are the software that is preloaded on it. The ingredients of a software product are the components, features and functionality.

So as in the Heuser case, Your Honor, if a label of Psudophed is admissible to show that the

product contains Pseudoephedrine, so too is a press release. Tab 7 that I referred Your Honor to before, Defense Exhibit 700, is admission to show that the Lotus SmartSuite contains the ingredients, if you will, Lotus Amipro and Lotus 1-2-3.

Moving on to product reviews in commercial publications. There are 77 of these. They are very heavy to lift. I will not provide them to Your Honor, but Your Honor does have them with our briefing, and these are reviews in software -- about software in commercial publications that is widely read, has a high degree of credibility, and is very reliable.

Plaintiffs are going to great pains to try to distract you from some of these core evidentiary issues raised in the commercial publications that we've put before you. They've said that it's a lot like something in the National Enquirer about whether Brad Pitt should stay with Angelina Jolie or go back with Jennifer Aniston. But one of the witnesses, Your Honor, that they've offered is a gentleman named David Reed -- Dr. Reed, pardon me -- from the Lotus Corporation, and they've offered his testimony in this case as part of their pretrial designations. And Dr. Reed of the Lotus Corporation has said that

the publications offered by Microsoft -- one of them specifically, PC Link, that we offer a lot of our evidence from -- has a high degree of editorial credibility and it's one of the leading publications in the industry and the Lotus management regularly reads that publication.

I don't think, Your Honor, that they regularly read the National Enquirer. This isn't gossip column material. The product reviews are very important. They are very important to the Microsoft Corporation because plaintiffs have said and will continue to say, Your Honor, in this lawsuit that Microsoft has achieved the success it did because of anticompetitive activities. Microsoft says just the opposite. These product reviews -- there are 77 of them. I'm sure there are more -- show that time and time again, Microsoft's products beat the competition. It was better, faster, better features, more features, more reliable, better price. Directly contradictory to the allegations that plaintiffs have made, and that is why we have offered this, not because we're interested in gossip, Your Honor.

There are two evidentiary issues here that I would like to talk about. The first is foundation. The Special Master has sustained a foundation

objection and we've appealed that. The only issue we submit with foundation is whether the trade press reviewers and authors have personal knowledge to make the statements about the product that they do. And we submit that that is obvious from the face of the documents in which the reviewers state in great detail that they've used the product, they've tested it, they've compared it with other versions with competitors' products and they are stating their views on it.

Plaintiffs point to the fact that there are conflicting views about the accuracy of trade press. Your Honor, "conflicting views" goes to weight of the evidence, its probative value before the jury. It does not go to the threshold issue of admissibility.

I want to talk also about the hearsay exception which the Special Master sustained and which we appealed. Plaintiffs do not take issue with the fact that the product reviews in these trade publications were widely read and were relied upon by the public and by people in the industry.

This is very important because it's that widespread use and reliance that makes the documents reliable, make the evidence in them reliable. What plaintiffs do seem to say is that this is not

admissible because it's not a list and it's not a compilation, that the commercial publications rule is limited to telephone books; but there's no authority that the rule is so limited, Your Honor, and the list in practical terms simply means a list. And in our reviews and in the documents that we've offered you, there are many lists, compilations of products and features, the views of those features, and that's what we've provided to you.

Once, Your Honor, that we're within the rule, we think it is plaintiffs' burden to show that there is something about these documents that makes them unreliable. Plaintiffs try to do this, and we don't think they do it sufficiently by saying they point to one or two examples where Microsoft disagreed with a press release or Microsoft tried to influence a trade press reviewer. But certainly, Your Honor, there is nothing wrong with trying to get across your views about your product to someone who is reviewing it, and I believe the one example that they cite in their brief -- and that's on page 13 -- the influence was completely unsuccessful. And again, Your Honor, our view is that these issues deal with weight and probative value, not admissibility.

Finally, Your Honor -- and I appreciate

Your Honor's indulgence -- we come to the last issue to discuss on appeal: documents that don't fall into any category. The first of those is Defense Exhibit 560. This is a memorandum that a gentleman named Mr. McCahan at the IBM Corporation wrote, and he reported on a series of meetings that he had with independent software vendors and customers about the OS/2 product being offered by IBM.

Plaintiffs do not take issue that the memorandum and several attachments to it are business records. They have not appealed on that or they did not object on that basis. What they do seem to object to is certain parts of the memorandum that are highlighted before Your Honor where Mr. McCahan makes certain summary points made during these meetings that he had with independent software vendors or customers. These are not hearsay, Your Honor. He's not quoting people. He's not attributing statements to people. He's making his own observations in the course of his business about these meetings.

He's saying things like, "The Windows product that Microsoft is offering is not an operating system for the long term." "We, IBM, are not leveraging our strengths." "Our customer support is inadequate." He's simply making statements and

observations, and we don't think it's hearsay for that reason, Your Honor.

In addition, I just have a few plaintiffs' exhibits to talk about. Plaintiffs' Exhibit 271. This is a memorandum, Your Honor, that describes a conversation that IBM employees had with Mr. Gates, the chairman of Microsoft, at a bar over drinks, after a game show called the "Computer Bowl." The Special Master has overruled our hearsay objection, and the plaintiffs contend that this document is a business record because it reflects ordinary business activity and that it was an informal meeting; however, drinks at a bar is not ordinary business activity, Your Honor. Microsoft and IBM do not hold meetings in bars, and the hearsay objection should be sustained for that reason.

In addition, Your Honor, we have Plaintiffs' Exhibit 747. This is a legal memorandum written by the chief executive officer of Go Corporation to a lawyer at Go in which he tells about a visit at a law firm that he had. The Special Master overruled our hearsay objection.

I want to discuss briefly the Palmer vs. Hoffman case. It's a U.S. Supreme Court case. It says that documents, even though it may be part of

some business's practice to make these documents, that if the documents "primary utility" is in litigation, it is not within the business records exception. And we submit to you, Your Honor, that this is a crystal-clear example of that. The CEO of Go Corporation goes and he meets with a law firm, Brown and Bain. They do an investigation. They report on their investigation. They say, "We think we've got a great claim for trade secrets against Microsoft." They contemplate various litigation options: Should we settle? Should we try to demand a concession from them? Should we sue them now? Should we wait?

This is a document whose primary purpose is in litigation. The plaintiffs say that this is simply -- that this document would have been generated even if there wasn't the prospect of litigation, but I submit to you, Your Honor, that you do not go to a law firm, presumably pay them, have them do an investigation and evaluate your options unless you're anticipating litigation. And, indeed, Your Honor, the Go Corporation did bring a lawsuit against Microsoft. Plaintiffs point out that they did not bring it until 2005, but this comes as no surprise that it was dismissed shortly thereafter on

statute of limitations grounds; hence, it should have been brought earlier if they wanted to bring it in a timely manner.

There are just three more exhibits, Your Honor, that I want to discuss and then I will finish. These are Plaintiffs' Exhibits 1095 -- that exhibit was withdrawn, and so we think that you should overrule the Special Master's ruling because it is moot. In addition, PX 1185. In this case I believe the plaintiffs have indicated that they do not intend to offer the statements that we say are hearsay for their truth and you should overrule it on that basis.

Oh, I'm sorry, they did say that there is one statement in there, Plaintiffs' Exhibit 1185, that should be offered for its truth because they don't believe it's an out-of-court statement. We believe that it is, Your Honor, that the quoted language says, "Dodge cannot find any press releases that hint at this but did find an interview with one of DRI's people where this is stated as a direction for company." We don't think this was an overly broad designation. We think it really depends on what "this" means, and we think from the context of the document, the "this" refers to an effort to clone the Windows product and, hence, it is a substantive

statement.

THE COURT: So you want all of it out?

MR. CHAPMAN: Pardon?

THE COURT: You want all of 1185 out?

MR. CHAPMAN: Only the highlighted portions on the exhibit that we provided, Your Honor. This is an embedded hearsay objection. I'm sorry. I should have made that clear.

Finally, Plaintiffs' Exhibit 1537, the plaintiffs have indicated that they do not intend to offer that document -- the hearsay in that document for its truth; and, hence, that issue is not before Your Honor. We believe the appropriate response is to overrule the Special Master's ruling because that is, in essence, sustaining a hearsay objection.

On two of these exhibits, Your Honor, the plaintiffs have said they intend to offer the hearsay statements in there for context. I don't think that issue is before Your Honor. Suffice it to say, we don't agree with that and we don't think that's appropriate. But other than, perhaps, responding to something other that Mr. Cashman may say, I'm done for now.

Thank you.

THE COURT: Wouldn't the appropriate ruling

be no ruling should be made because it's now moot?

MR. CHAPMAN: Well, I think, Your Honor, the Special Master's ruling sustained a hearsay objection which in a sense would allow one to offer it for its truth unless you disagree with that. So we think that overruling the sustaining -- overruling the hearsay objection is the appropriate ruling, Your Honor.

THE COURT: Okay.

Response.

MR. CASHMAN: Good morning, Your Honor. Michael Cashman for the plaintiffs.

I will address each of the categories of documents raised by Mr. Chapman in turn, so we will talk about press releases first.

What Mr. Chapman fails to acknowledge which should be made explicit is that it is crystal clear that all of these press releases which are included in the first category of documents mentioned by Mr. Chapman are, in fact, hearsay. So the presumption is that these documents are inadmissible, and they are inadmissible for obvious reasons, all of which were recognized by Special Master McCormick, who heard all the arguments that Mr. Chapman has just made and has heard those arguments twice and rejected

them each time.

First of all, press releases are not subject to any hearsay exception. Let's talk about the business records exception. Clearly, these are not business records under the rule that is applicable in Iowa. These are -- these press releases are more in the nature of advertisements. That's apparent on their face. They are full of puffery, self-serving claims and such. It is not the duty of the people who prepare these press releases to be completely 100 percent factually accurate. They do not have the duty to report accurately as required under the business record exception.

Press releases are, obviously, generated as propaganda tools. That's the purpose of a press release, unlike the business record exception which requires a duty to report accurately internally because you know that your fellow employees or people in your organization are going to be relying on the accuracy of your statements. That's not the case in the press releases.

With respect to the business records exception, we really have Mr. Chapman relying on the alleged contention that the securities laws impose a duty for these people to be accurate; and, therefore,

they should be subject to the business record exception. That's not the law. The securities obligations that Mr. Chapman mentions do not impose and do not coincide with the rationale for the business record exception.

It is difficult -- as we've pointed out in our brief, it's difficult to imagine the situation where the methods or circumstances of preparation are more likely to indicate a lack of trustworthiness which would be required for these to be admissible in any circumstance. The Special Master recognized this, and we submit that the ruling with respect to the business record exception should be sustained.

Mr. Chapman then claims that these should be admitted under the market records exception or the commercial publications exception. It appears that the primary reason for this contention is that these documents have to be accurate, but the problem is that the data in the press releases are not objective and they are not compilations of factual data which is required under the commercial publications exception.

The Special Master recognized in any case where Microsoft made the claim that the market records exception applied to any piece of evidence

that this is a narrow exception, not nearly as broad as Microsoft would like it to be to include public announcements such as contained in these press releases.

What is really going on here is that Microsoft, after acknowledging that the press releases are hearsay, wants to pick and choose pieces of those press releases which it wants to have admitted for its truth, and that's clearly not applicable or appropriate under Iowa law.

The Special Master considered this notion that portions of press releases could be redacted and that other portions should be admitted for their truth, and he rejected that contention because if the entire document is hearsay, you cannot cure that problem by redacting the whole -- the majority of the document and trying to get excerpts admitted for their truth.

The correctness of this conclusion, I think, is underscored by Iowa law, which precludes the admission of -- or requires that every level of the documents satisfy a hearsay exception and the Special Master concluded here that nothing did. The efforts by Microsoft to redact those portions of the press releases which were clearly hearsay did not

cure the defect and make the document admissible when you're just talking about the excerpts that Microsoft is now trying to have admitted for their truth.

Let's turn to trade press. Trade press is a special case. Microsoft -- what they're really trying to do here is offer trade press on sweeping substantive issues in the case, and their objective is to cut off plaintiffs' right to cross-examine on some of these substantive issues in the case; for example, product reviews, which is the specific category that these trade press articles fall into.

Again, it cannot be disputed that trade press is hearsay, and Special Master McCormick even issued a memorandum, which I will provide a copy to the Court, which underscored his reasoning as to why the --

THE COURT: Thank you.

MR. CASHMAN: -- trade press is hearsay and not subject to any of the objections that Microsoft alleged should make it admissible. He considered the market reports exception and the commercial publications exception, both of which were alleged by Microsoft, and rejected those.

Mr. Chapman attempts to make light of the fact that these aren't the National Enquirer. Well,

he tries to make the standard for admissibility whether these articles are widely read. That's not the standard under the exception -- under the market reports exception or the commercial publications exception.

This data is not objective and it's not a compilation of data. It's nothing but opinion by the person who wrote the article. That is hearsay. That does not fall under any exception.

With respect to the foundation objections for the trade press, the Special Master again found these objections well taken. Foundation was lacking in multiple respects. None of these -- none of these authors of trade press were deposed. Plaintiffs do not have an opportunity to depose them. They will not have an opportunity to depose them. Nobody knows how these articles were prepared. Nobody knows the methodologies that were used in assessing the performance of these products.

And, in fact, it is clear and we've pointed out in our brief and Mr. Chapman has acknowledged that the trade press -- the trade press authors were at the mercy of the product -- the companies that provided the products in the first instance. And Microsoft was the number one offender when it came to

try to improperly -- improperly influence trade press reviewers.

In fact, the record is complete -- or replete with evidence of Microsoft attempting to influence the coverage that its product received in the trade press. I'm going to provide the Court with another exhibit, Plaintiffs' Exhibit 5419. You'll see, for example, this is in the article that was prepared -- or in an exhibit that was prepared by Microsoft's PR firm, Waggener Edstrom, talking about its public relations plan -- this is just an example of one of many -- but page 7 under "Strategy and Tactics" in the middle of the page, it's noted "Actively influence coverage for MS-DOS and DR-DOS including reviews." Again, along with the evidence we've already supplied in the brief, this is another -- yet another example of how Microsoft has tried to influence improperly the content of the trade press reviews. And more importantly, that underscores the inherent lack of trustworthiness and the lack of foundation for trade press reviews.

The bottom line is that trade press is simply not reliable and should not be admitted for its truth for any purpose and the Special Master's objections in that regard should be sustained.

With respect to some of the specific exhibits referenced by Mr. Chapman, Defendant's Exhibit 560, the embedded hearsay within Defendant's Exhibit 560 we contend does not satisfy the business exception to the hearsay rule, the business record exception.

If you look at the content of that exhibit, you'll see that it's clearly a summary of comments made by independent software vendors and the actual comments made by those ISVs. Those third parties are not under a business duty to be accurate when they were expressing their opinions during those meetings. That's why it does not fall under the business record exception.

Mr. Chapman references Plaintiffs' Exhibit 271. This is the meeting in which Mr. Gates met at a hotel. We submit that this report definitely falls within the business record agreement between the parties. The meeting, though less formal than if it had transpired in an office, is still something that is conducted in the regular course of business. The content of the meeting was something that was still conducted in the regular course of business.

Plaintiffs' Exhibit 747. This is the

memorandum that Microsoft objects to because it was prepared in anticipation of litigation, the memorandum from Mr. Kaplan. Mr. Chapman cites you to the Palmer case; however, this is not the law in Iowa. The law in Iowa is stated by the Wells Dairy case, which was -- which is cited in our brief. That's an Iowa Supreme Court case from 2004. There the Iowa Supreme Court pointed out that the standard is whether something was prepared because of pending or anticipated litigation. It's clear that the memo from Mr. Kaplan was not prepared because of pending or anticipated litigation. Instead, Mr. Kaplan was evaluating options. The options that Go would have, including doing nothing or undertaking litigation.

So under the Wells Dairy case, it's clear that the Special Master's decision was correct.

With respect to the Plaintiffs' Exhibit 1185, Microsoft's determination of what was embedded hearsay in that exhibit was overly broad. What we have there is Mr. Myhrvold's summarization of his conversation with Mr. Dodge. Those thoughts and conclusions were made in the course of his business activity internally where he's just summarizing to others the content of those conversations. So the Special Master's decision was correct and should be

sustained.

Lastly, Plaintiffs' Exhibit 1537. We believe that the Special Master correctly recognized that again those -- that exhibit satisfied the business record because, again, the summarizing statements from outside weren't -- that were made internally in the regular course of business. So we believe and submit that the Special Master's rulings on Microsoft's -- the exhibits that are part of their appeal for Phase I should be sustained.

THE COURT: Very well.

Mr. Chapman, before I let you respond, I'm going to take our break now. I have to go to an appointment at noon and I need time to drive there. Can we retake this up at 1:15?

MR. CHAPMAN: Sure, Your Honor.

THE COURT: Okay with everybody? Again, I apologize for the delay this morning. I didn't realize that hearing was going to take an hour and a half. See you at 1:15.

(A noon recess was taken.)

THE COURT: Mr. Chapman.

MR. CHAPMAN: Thank you, Your Honor.

Just a few very brief points in reply.

Mr. Cashman has said that it is somehow

problematic that we are seeking to offer only the objective information in these press releases. I think if you look at the press releases we've offered and you look at what a press release typically is, there's certainly nothing wrong with that. No problem with that. What a press release does primarily in the first couple of sentences or first couple of paragraphs is it conveys objective information. It also includes some background information, and it includes some quotes from people. We've redacted out our -- we understand, everything except the unredacted -- or everything except the objective information and that's the factual information we seek to offer.

Mr. Cashman has told you that the laws of the federal securities law and the state securities law don't do anything to ensure accuracy of press releases and they are unrelated to the business records exception in that rationale.

I think I would just note in response there that if someone in the course of a business gets an inaccurate business record, they don't complete the inventory control sheet correctly, they might get a bad review. Their boss might be angry with them. However, if you get a press release materially

inaccurate, you go to jail. And I think that is why, we submit, that that federal securities law is very important and why it provides reliability for press releases.

I want to briefly also touch on trade press. Mr. Cashman knows -- states that there was no opportunity to depose the trade press authors. That's simply the nature of hearsay issues, Your Honor. Of course, it's within an exception. There's an understanding that that information is reliable.

And finally, I want to say very briefly, Mr. Cashman pointed out that I did not mention the Wells Dairy case. There's a reason I didn't do that. It has no applicability to the hearsay rule. It is a case about the attorney work product doctrine. I think even if the Wells Dairy case somehow articulated the standards for the unreliability of documents whose primary utility is litigation, it does not -- I think we would still meet that standard under Wells Dairy because clearly the documents that we refer were prepared in anticipation of litigation. And I want to just read very briefly from Plaintiffs' Exhibit 747. That's a document that the CEO of Go wrote to a lawyer at Go. He says -- his recommendation is to "Pursue the trade secret issue

now." That's that case, that great trade secret case he had. "Try to settle, but absolutely without giving up our ability to bring a patent case later. Don't bring it to trial. If it gets that far, drop the issue due to the cost of the case." Clearly, as evident from this document, they are anticipating litigation.

I have nothing further. Thank you, Your Honor.

THE COURT: Anything else, Mr. Cashman?

MR. CASHMAN: No, I don't think there's anything further that needs to be said. The briefs articulate the issues pretty will.

THE COURT: Are you handling the appeal of your special master's rulings or is that --

MS. CONLIN: That's me, Your Honor.

THE COURT: Okay. Go ahead.

MS. CONLIN: I have separated out for the Court the few exhibits that we will be discussing, and I know, of course, that the Court is very well familiar with rules of evidence. So is the Special Master. Hard to believe that he went wrong on these, but he did. Your Honor, we have, of course decided to live with all but -- of the thousands of rulings, these are the ones we think are critical and these

are the ones we think are provably wrong. And I'm going to have to take them up one at a time, Your Honor.

The parties stipulation is also set forth in the briefs. Microsoft seeks to reinterpret by suggesting that somehow the words of the agreement don't mean anything if there has been what they interpret to be different practice. We think we have tried very hard to be consistent in our approach to these exhibits following the Iowa "goose and gander" rule, but these exhibits that we appeal, Your Honor, are clearly admissible and should not have been excluded by the Special Master.

All of the objections that were sustained by the Special Master are hearsay objections, Your Honor, so that is all I'm going to be dealing with, the really fun hearsay rule.

Starting with Exhibit 87, Your Honor. These are the handwritten notes of IBM executive, Gary Norris. The Court will remember from its rulings on collateral estoppel the situation with IBM in 1995 when IBM sought to load its very own products, SmartSuite, onto its very own computers, and Microsoft withheld from IBM the Windows Beta. So that, in fact, IBM -- not Windows -- the Windows

product, they didn't have a contract to load the Windows product until like 15 minutes before it was launched or something like that. In any event, these are those negotiations that Mr. Norris is writing about in his notes.

Mr. Norris testified at the Department of Justice case against Microsoft, and we designated some of that testimony. And quite a bit of it, Your Honor, is going through these notes which were admitted into evidence without objection from Microsoft. The document is a business record. Mr. Norris lays foundation for that to a degree in his testimony but, of course, there wasn't any objection so there wasn't any need to lay a careful foundation. His testimony makes little sense without the document which was displayed and commented on throughout his testimony.

Microsoft says this is just idle musings, and, in fact -- and it's also kind of hard to read, Your Honor, but it's not the worse thing we've ever seen. But he does in his testimony, he reads it, and he says what the words are and the like, but he sets out beginning -- he talks about options. He talks about quotes. I'm on the second page, Your Honor. And these are the discussions that Microsoft and IBM

are having.

He spells Mr. Kimpen's name wrong, but he's talking about what Mr. Kimpen has said to IBM and what IBM has said back to Mr. Kimpen and the others with whom they are negotiating. I mean, it's just clearly a report of these various negotiations that went on for months and months, so that they were created over months is hardly surprising that they went on for months and months.

One of the things that the Court will see as we go through these documents is that for reasons that are not entirely clear to me, there seems to be a view on the part of Microsoft and a little bit on the part of the Special Master that if you're not a good typist and you have to write in hand, that that makes it not a business record. I don't know that rule. But the rules don't distinguish between the way in which a business record is created. This is a business record no less than a typed written record, and because it is in handwriting does not change the fact that it is a recordation of what was going on between IBM and Microsoft created contemporaneously with those things. Of course, with this and other documents, Your Honor, we are stuck with the record that is made in the deposition or that is made in the

trial transcript; and whereas here Microsoft made no objection, there's clearly some truncated foundational questions.

The second one is Exhibit 93 on which we seek the Court's ruling. Exhibit 93 are handwritten notes about a meeting that occurred on May 3rd. The second page -- I beg your pardon -- the third page has the date at the top and these are all of a piece, these notes.

It was not shown -- the only person -- this is a Go document, Your Honor. The Court will recall the Go story. I might be telling you just a bit differently than Mr. Chapman did, but it was Mr. Kaplan -- two people founded Go. One was Jerry Kaplan and the other was Robert Carr. Mr. Carr's testimony was never taken and this document wasn't shown to Mr. Kaplan either during his deposition testimony nor during his trial testimony in Gordon.

And while the handwriting appears to be his, that is not established; nonetheless, plaintiffs say this document is admissible. Mr. Kaplan was required by subpoena to produce all his business records. He did so, and at the bottom of the business records, Your Honor, you will see that they

are Bate stamped. "KAP" is obviously an abbreviation for "Kaplan," and these, like all the others, bear that Bate stamp and these were included.

And we know what happened on May 3rd. We know from other documents and testimony what happened on that day. Go created a tablet computer, Your Honor. This is Mr. Kaplan's invention and his creation along with a guy named Mitch Kapor, K-a-p-o-r. And the idea was, you know, a flat computer that you could write on with an electronic pen. And this is back in 1987. And while Mr. Kaplan did not see Go as a competitor of Microsoft, Microsoft saw Go as a competitor and here is why:

Go was creating its own operating system for this little-bitty computer that did not have a disk. They were writing their own operating system and their own operating system had to interoperate with Microsoft's operating system. But it could also run on the desktop; so Microsoft, always paranoid, is thinking that Jerry Kaplan is after the desktop, you know, their franchise, their monopoly, and so they go after him like crazy.

But before they go after him, they try to fool him. They have interaction with him, and one of meetings occurs on May 3, 1989. And on May 3rd of

1989, people from Microsoft come to the Go -- the Go business and they have a full-day meeting. And during that meeting, what Go wants from Microsoft are two things: They want Microsoft to develop applications for this small computer, and they want to be able to interoperate with Microsoft's operating system on the desktop. Those are the two things that Go needs or wants from Microsoft. So Go needs to cooperate.

Microsoft signs an "NDA," a nondisclosure agreement, and down comes an engineer named Lloyd Frink, F-r-i-n-k, and a woman named Cathy Schoenfeld, and I don't know how to spell that. They sit with Mr. Carr and Mr. Kaplan for a day. They go around, they tour. And the reason that these are important, Microsoft says these are random diagrams.

What happened later makes these notes important. What happened later is Mr. Frink goes back to Microsoft and is assigned to work in a new Microsoft division, and the new Microsoft division is going to develop, guess what? Handwriting software. Mr. Frink is assigned to do that, along with others. And eventually Microsoft comes out with a prototype product that looks really quite a lot like Go's and eventually they sell this all over. They market it

to OEMs and that kills Go. And then Microsoft never produces a handwriting product. They don't need to anymore. They have defeated their one competitor, and so there's no need for them to go forward and put on the market there little tablet computer. So consumers don't get the tablet until 2002. That's kind of the story.

But the reason these are important is because these show that there were technical discussions. These show that Go under the NDA told its secrets to Microsoft, and that Microsoft then took those secrets and used them to develop -- to say that they were going to develop a competing product. That is a reason that these documents are admissible. They are not musings. They are nobody's little private diary. These are notes of a meeting that occurred in which Mr. Frink was present and which applications and other matters of a technical nature were discussed.

There was an appeal on 174, Your Honor, and that is resolved. The Court need not make a ruling on that. There's an agreement between the parties on Exhibit 174. We've withdrawn the offending part, and Microsoft and we agree that the nonoffending part can come in.

The next -- as I said, there is a theme here, Your Honor. The next group of documents all in handwriting are 377, 385 and 436. Let me identify who these folks are. Different products, kind of the same time frame, but this is a different product. I know I've talked to the Court before about DR-DOS, which was a Microsoft operating system competitor. And Mr. Dixon. Mr. Dixon is also, apparently, not a typist. He was also -- during the time that he was sending these three exhibits, he's over in Korea. So he couldn't type, apparently, and he couldn't find anybody that spoke English who could type and so these are his handwritten reports to the president of the company.

Now, what is he doing in Korea and why does it matter to this case? He's in Korea trying to sell DR-DOS to OEMs in Korea. And it matters to this case because, as the Court will recall, there is a worldwide market for OEMs of which Iowa is one small part. In any event, there he is over in Korea trying to sell to OEMs their operating -- their superior operating product. And, Your Honor, these are only three of what -- we have hundreds of these reports from Mr. Dixon. Mr. Dixon was pretty prolific and everything he did in handwriting and he sent by fax

literally everything he did.

He reported these meetings on a regular basis to Mr. Richards, the president, and all of Mr. Dixon's business records are in handwriting. That does not make them not a business record. What he writes about, as the Court will see, are his visits to the Far East OEMs, Hyundai, Juko. He testified at length in his deposition about those meetings, about the records. We've designated the deposition testimony of Mr. Williams that deals with these.

Microsoft seeks to exclude these as prepared in anticipation of litigation, and in doing so they cite the Palmer case, a 1943 United States Supreme Court case, which is a year older than I am. Microsoft says in its brief, Your Honor, that Mr. Dixon spent months in the East, quote, gathering evidence for a lawsuit by DRI. In fact, as the documents show, he was desperately trying to sell a superior operating system into a market which Microsoft had locked up with illegal for processor licensees; and that in trying to sell his product, he ran headlong into Microsoft's predatory tactics which he reported to the company president hardly makes these business reports -- these business records

inadmissible.

There was never any litigation with DRI, never. DRI in the late -- I think -- sorry that I don't have the -- years later, Caldera bought the rights to DR-DOS and filed the lawsuit against Microsoft and these were a part of the lawsuit, but it was years after Mr. Williams' trip to the Far East.

Some of the language does -- some of the language may need to be redacted; and when he refers to things like "litigation," as we've done with other business records which also happen to refer to litigation or its possibility -- but these are not the -- these are not documents, created together, evidence. These are documents created to tell the company president what was happening in the Far East when Mr. Williams was there for the purpose of selling DR-DOS to OEMs in the Far East and ran into the processing licensing problems. Those are those three documents, Your Honor.

682. This one is very, very puzzling to me why this would not automatically come into evidence without even an objection under not only our stipulation but under the common rules of evidence. This, Your Honor, is an internal Microsoft document.

It is an e-mail between two Microsoft employees. Mr. Barry is the supervisor and "PercyT" is the supervisee. Mr. Barry, Phil Barry, was in charge of MS-DOS from a technical standpoint. He was the big boss of MS-DOS from a technical standpoint.

Now, what this says is that "PercyT" tested DR-DOS, used DR-DOS, and just loved it to death. You can see why Microsoft would not want this as a part of the record, but the fact that Microsoft doesn't want it doesn't, of course, make it excludable. What Microsoft says -- they really say a lot of things, but what Mr. Barry says is that "PercyT" was a tester and he was, and I quote, quite qualified to make the statements that he made and did so.

Mr. Barry says -- it was part of Mr. Barry's practice to ask for such reports and that they had an incredible value from a business standpoint. It was admitted over Microsoft's same objection in Gordon, even though Minnesota law is interpreted narrower.

In its brief, Your Honor, Microsoft cites the correct rule, but it cites the wrong section of the rule. A statement is not hearsay, according to the rule, if it was made by the party's employee -- that's "PercyT" -- concerning a matter within the

scope of his employment. The guy was doing exactly what his supervisor told him to do, what he was specifically directed to do, and what was for business purposes. So that's within the scope of his employment and it was during the time he was employed.

Those are the only three things that we have to prove to make this document admissible, and they are apparent from the face of the document and from the testimony of the witness. This is clearly admissible and must be admitted as an admission under Iowa's interpretation of the hearsay rule.

761, Your Honor, is a letter from a man named Paul Grayson, who I believe was a CEO -- yeah, CEO of Micrografx. Micrografx had a tool that they developed called "Mirrors" which was supposed to help make things cross-platform, but in this letter he is talking to Mr. Gates after they've had a conversation at the big press -- or the big COMDEX meeting of all the computer people. Grayson, who might have had a cause of action but never, ever, ever filed a cause of action, Microsoft seeks to exclude it because Mr. Grayson suggests -- and the only sentence in here, Your Honor, that could possibly be something that would be connected to litigation is this. He

says here:

"Although we believe that bundling of software products can be an anticompetitive tactic, if we are given appropriate access to products being bundled by Microsoft, then this tactic could become a fair means of competition that would benefit consumers."

In this document, Your Honor, there are no threats. There's nothing about a lawsuit. There are no accusations. There are straightforward, declarative sentences; and Microsoft might have had a corporate guilty conscience about what happened to Micrographics, but that can't make these straightforward, declarative sentences into anything other than what they are.

911. More handwriting, Your Honor. There is a little theme here, as the Court will note. This is -- this handwriting is not some stranger. This is a man named Richard Fade, F-a-d-e. Richard Fade is a high-level Microsoft executive. In these handwritten notes, he talks about Microsoft business.

Now, Microsoft says that -- Microsoft seeks to turn this handwritten business record recounting meetings and plans and negotiations into a private diary. He addresses business issues. He says this

is how he does it. You know, he keeps this in his own handwriting. He's not talking here -- this is not out of a diary. He's not talking here about his hopes and his dreams or what he had for supper. He's talking about what Microsoft is doing in terms of business. He's talking about what Microsoft might do in terms of business.

The one -- what Microsoft uses to support its idea that this is some kind of a diary and therefore, inadmissible is a 1983 3rd Circuit case which, as it happens, squarely holds that business diaries of this sort are admissible. Microsoft keeps saying that Microsoft did not authorize Mr. Fade to make these notes. It doesn't matter. It doesn't matter a bit.

They are using subsection (c) when we're offering it under subsection (d), and it's 1.508(d)(2)(d), and the three things and the only three things that we have to show -- there's nothing in there about authority. Three things: Was Mr. Fade the parties' employee? Absolutely. Was Mr. Fade -- were these things in here Microsoft's plans and negotiations? Were those within the scope of his employment? They couldn't possibly contest that. And number three: Were these statements made

while he was an employee? Of course they were. We have met the three requirements of 508(d)(2)(d). The document comes in.

I'm going to do the next ones -- well, I guess I have to do them separately.

The next one is 1020, October 14th fax. And it is from a guy named Greg Ewald. This is a DRI document, and it has to do with the acquisition by DRI or the attempted acquisition by DRI of a thing called "VxD" driver. Again, Microsoft says this is hearsay because it was prepared for litigation, but the fact it goes to a lawyer does not make it automatically fall under that provision. This, Your Honor, is kind of a summary document supported not just by DRI documents, but by Microsoft's internal documents.

There is no question that they denied DRI this "VxD" driver. They talk about why they did it. Microsoft talks about doing it for anticompetitive reasons; but what he says has detail, it has context, and it will help the jury to understand the situation more clearly.

And all it does, Your Honor, it talks about what he did. Your Honor, one of the things he says is, you know, he had these conversations with

Microsoft people and Microsoft after messing around with them for quite a long time finally sent him a disk, and he got the disk loaded into his computer and it was blank. What was supposed to be -- there was nothing on it at all. Now, there's a factual -- you know, that's just a factual statement that the guy makes in the course of his employment while he's employed. It has nothing to do with litigation, and it meets the requirements of the rule.

1261 is a similar type of document excluded for the same reason. It is the business report of -- this is Lotus, Your Honor. We're switched companies now. We're now to the application company Lotus. As I recall -- yes, it's a Lotus document, and these are all Lotus folks that are the "To" and the "From" and the "CC" and this is -- this talks about the testing of a Lotus product with a team of technicians who test that product with a Microsoft product and these are the results.

Now, it can hardly be argued that the testing of products together is not an ordinary business activity for the developer of software. It has nothing to do with the litigation. There's not a word in here that talks about litigation, but here is why Microsoft says it has to be excluded: Microsoft

says that this document and a few others that are coming up has to be excluded as bearing on litigation because sometime later there was a legal memorandum that included these facts. It ended up in a legal memorandum and, therefore, it is excludable.

If that were a rule, the writer of complaints and briefs would have to be very careful not to cite any documentary evidence for fear of providing opponents with objections to the admissibility of the very evidence. This is just quite remarkable.

Microsoft makes exactly the same argument based on the same reasons for Exhibits 1226, 1301 and 1305. They don't say a thing about litigation. They did, in fact -- the facts that are included in here turn up in a legal memorandum later. I'm uncertain how Microsoft was able to persuade this Special Master otherwise, but to adopt Microsoft's reasons for excluding evidence would create a wholly new rule and we would sure want to go back over all of Microsoft's briefs to seek to exclude all the documents they cited or even as to the documents they seek to introduce because the facts in the documents were subsequently cited in some legal document.

It just doesn't make any sense at all, Your

Honor. These are not documents that had anything to do with litigation. They report the ordinary things that were going on in the business, and that they turn out to be cited by a lawyer at a later time as evidence doesn't mean they were created to be evidence and that's what the lawsuit is to guard against. That is what makes something unreliable, is that it was created to be evidence. These were created as a part of the ordinary and customary business of Lotus and they became evidence because of what happened far later.

And finally, Your Honor, 1259A. Microsoft -- these are from a bulletin board, an Internet bulletin board, and I'm sure I will be corrected if I'm not expressing this quite correctly, but I've never used CompuServe and I'm a little uncertain exactly how it works, but this is my best understanding.

CompuServe was a place where people could gather on the Internet. You had to be able to get into it. You had to know the code. You know, you had to have a right to be there; but, you know, people exchanged remarks and reports and Microsoft set up a way for people who were Beta testers to communicate with Microsoft and with one another on

this CompuServe forum, and these are from the CompuServe forum.

Microsoft included in the December 1991 Beta what was called the "Christmas Beta" of Windows 3.1. Internal Microsoft documents show that in order to create problems for DR-DOS and to suggest to people that DR-DOS was, in fact, incompatible with Windows, a man named Aaron Reynolds put code into Windows that would detect -- first they said they were going to detect DR-DOS, but they changed that now and now they -- what they wanted to do was test whether or not MS-DOS was present. And if MS-DOS was not the operating system running on the machine, that would pretty much automatically mean it was DR-DOS if the machine was running. A warning popped up in front of the eyes of the computer user and said there was a nonfatal error.

Now, the intended purpose of that was to create the impression of incompatibility between DR-DOS and Windows 3.1 and part of the way that happened was through the use of this CompuServe forum. If the Court looks, it will see that there are people who had DR-DOS on their machines. They get their Windows 3.1 Beta and they try to load it on to the machine running DR-DOS and they get this

warning, and so they go to the forum and they talk about it.

Now, when people would call up product support, we have documents indicating that Microsoft would just say to them, you know, "If you want to solve your problem, buy MS-DOS," and they said some of the same things here. They said things like, you know, "We don't test with DR-DOS," when, in fact, they were testing it like crazy. And it's not only what Microsoft said on the forum that is admissible here, it's what this forum was for people who used computers. It was a way to exchange and spread information. It was a part of Microsoft's plan to create the impression that DR-DOS was a bad product and couldn't run Windows 3.1.

Now, this is the best we can do, this document right here. And I will tell you to the best of my knowledge how it was created. I think in the documents, the Court will see the original one. This stuff was taken off the CompuServe forum by a group of lawyers who were suing Microsoft in the Caldera case. I don't think that we have anything other than this compilation. I don't think that -- I'm virtually certain -- I hesitate to say that because I've really not looked at all 25 million pages, but

using every means at our disposal, we've been unable to find anything that -- there are some of the individual entries in this document that are also in our documents in a more original form, but not all of them. I don't know why that is, but that is the fact. And if I'm wrong about that, I'm sure that I will be corrected. But this is the best we can do, and it is -- part of it is Microsoft's admission and part of it is Microsoft's creation, purposeful creation, of "FUD" -- "fear," "uncertainty" and "doubt" -- against DR-DOS.

And, Your Honor, those are the few exhibits that we seek the Court's ruling on overruling the Special Master's sustaining of Microsoft's objection. We don't think a single one of these documents is hearsay. We think that we should be able to introduce them, and we think that they are critical evidence for our case and we ask that the Court overrule the Special Master in these very, very, very, very few instances.

THE COURT: Response.

MR. CHAPMAN: Thank you, Your Honor.

Ms. Conlin seemed to suggest that the rationale behind many of the Special Master's rulings were that these documents were handwritten. There is

nothing in his rulings or any commentary he made or argument made to the parties that suggest that that is the basis for his ruling. I presume that he applied the Iowa Rules of Evidence in accordance with the order that appointed him.

I want to speak briefly about Plaintiffs' Exhibit 87. These are Mr. Norris's notes. Ms. Conlin points out that there was no objection when these notes were offered in the government case. That is because it was a bench trial, Your Honor, not a jury trial; and, of course, the Court could establish whatever appropriate weight would be offered on those, and bench trials and jury trials are, of course, very different.

These are Mr. Norris's owns thoughts and his own ideas and his own goals. If the plaintiffs had been able to sort of identify specific meetings and there was some way that those -- we could determine whether those notes were accurate, we might not have that issue, but that is where we are, Your Honor. It is the plaintiffs' obligation to lay foundation, and they have not done so for these notes.

With respect to these handwritten -- these drawings that the plaintiffs say are Mr. Kaplan's,

that's Plaintiff's Exhibit 93, Mr. Conlin notes that they were not shown to Mr. Kaplan during his deposition and were not shown to him during the Gordon trial. So we're simply left to guess what these are and what these mean. We have absolutely no idea. Plaintiffs have not laid any foundation for any applicable business records or other types of exception.

They say that this is a record of what happened on May 3, 1989, but other than the one date in the corner on these drawings, there's no indication that that is, indeed, what happened. And absent that important evidence, that necessary evidence, the Special Master appropriately sustained the objection.

With respect to some of the documents about DR-DOS that Ms. Conlin first discussed: 377, 385 and 436, she says that what this gentleman was doing in the Far East is he was simply trying to sell his product. He was not doing that, not by a long shot. He was trying to drum up support for a lawsuit against Microsoft. And when you're doing that, you naturally have an incentive to only gather and only report those facts which you believe will help that lawsuit. The documents on their face indicate that

that is exactly what Mr. Dixon was trying to do. One of them that Ms. Conlin showed you, 377, indicates that the OEM will cooperate with us, and he's sending a letter to testify to the above facts. Clearly, litigation is contemplated by that document.

In addition, Plaintiffs' Exhibit 436 notes, Mr. Dixon writes: "Hyundai agrees to join DRI in legal action against Microsoft for this unfair price increase." Again, that is what makes clear what Mr. Dixon's motivation was in making these records. They are not business records. Their intention and their primary utility is in litigation and that is exactly what the Palmer v. Hoffman case indicates is unreliable and inadmissible for that reason.

Ms. Conlin also points out that DRI did not sue Microsoft, although she does acknowledge that Caldera did eventually bring that exact same lawsuit just a few years later.

We appreciate the offer to redact certain of those litigation references, but it doesn't get plaintiffs where they need to go, Your Honor. Those references to litigation reveal the motivations of the author for drafting the document. They are what make the document and all that follows unreliable.

Plaintiffs' Exhibit 682, Your Honor, seems

to be -- the question is who is Percy? Percy was a low-level tester of MS-DOS. He was, I believe, as Mr. Barry said, a little wild-eyed. And Mr. Barry, in his deposition testimony, said that he asked Percy, whoever he is, to write this document solely to go to people who were developing MS-DOS or developing some other product, not for a business purpose.

Also, one of the things that Ms. Conlin did not tell you is that when Percy used DR-DOS, he was not working at Microsoft. He was employed as a DOS tester -- an MS-DOS tester, pardon me. The document, Plaintiffs' Exhibit 761, the letter from Mr. Grayson to Mr. Gates, in which Mr. Grayson says, "The bundling of software can be an anticompetitive tactic," Ms. Conlin says that's not a specific threat or reference to litigation. Strangely enough, it seems to mirror many of the same allegations in the fourth amended petition, Your Honor. And indeed, the reason why this and other documents of this kind are inherently unreliable is when Mr. Grayson is writing a letter to Mr. Gates, he's trying to get something. He's trying to leverage. He wants to negotiate. He wants to posture, and so he'll include a threat -- explicit in my view, perhaps, implicit if not --

about what he's going to do if he doesn't get what he wants, and that incentive to posture and negotiate is what makes the document unreliable. And for that reason, the hearsay objection should be sustained.

Richard Fade's diary, Your Honor, Plaintiff's Exhibit 911, is not a business record and it is not a party admission. A party admission must have some force of the company behind it; and clearly, if Mr. Fade, for his personal use, decides to keep a diary, he can do that. That's his choice. But it does not mean that it has the force of Microsoft behind that particular diary. If he wants to write down goals or what he's thinking about, he can do that, but it does not mean that it is of evidentiary quality.

In addition, Your Honor, it's also very problematic that this diary spans two months. So it's very difficult to look at the diary and can parse of what might possibly relate to a meeting, might possibly be what was on Mr. Fade's mind at the time.

Exhibit 1020, which Ms. Conlin referred you to, is a memorandum from Greg Ewald to Linnet Harlan, who was an in-house lawyer at DRI. Ms. Conlin says that Mr. Ewald was simply providing this document to

general counsel and that it has nothing to do with litigation at all. I do note, Your Honor, that the top of the document is labeled "Confidential Client Attorney Privilege," and people tend to do that because they believe that the document relates to legal advice, specifically, you know, the possibility of bringing a lawsuit.

I also note that in the beginning of the document what Mr. Ewald says to Ms. Harlan is: "Per your request, and based on our discussion of last week, the following is my best recollection of the events leading to our acquisition of 'VxD' driver functions directly from Microsoft."

There is a reason why he is informing the general counsel of this. She asked him to do that. She's going to get that information because she's going to try to use it in litigation against Microsoft. A memo to the general counsel usually contemplates litigation, Your Honor.

The series of Lotus documents -- I believe it's 1261, 1226, 1301 and 1305 -- that actually is quite troubling. I think there may be some misunderstanding of the position we're taking. We are not saying, Your Honor, that the fact that an ordinary business record is referred to in a brief

makes it inadmissible. That's not what we're saying at all. You need to look carefully at these documents. And what happened was before Lotus asked the government to bring a claim against Microsoft, it asked its employees to marshal all of the evidence that they could marshal: memorandum to file, e-mails to file, things of that nature. And as far as -- I think an important point, something Ms. Conlin didn't mention to you, is Exhibit 1226. That's a memorandum to the file by someone named Steven O'Neill.

At his deposition Mr. O'Neill was asked the following question: "Did you do this" -- meaning prepare this memorandum -- "in the normal course of business at Lotus?"

And he answered: "At the recommendation of a lawyer."

So it's quite clear what is going on here, Your Honor. Lotus is asking its employees to write memos to file to try to marshal evidence. These are not ordinary business records, and they should not be admissible for that reason.

Finally, Your Honor, 1259A. Again, the redaction of the documents is -- does not, I think, get plaintiffs where they want to go. This was a

memorandum, as Ms. Conlin said, prepared during litigation by Caldera's outside counsel. They were, quote, extracting things from the Internet. In other words, Your Honor, they were extracting information that they believed was helpful. There is nothing in the document and there is no foundation for the notion that that -- that what they did was complete, accurate and reliable. They may have excerpted only parts of it, and it is this type of sort of marshaling of the evidence that is not an ordinary business record in our view.

Thank you, Your Honor.

THE COURT: Any further comments?

MS. CONLIN: Yes, Your Honor. If I may make just very brief remarks.

With respect to 87, the issue before the Court is not foundation. Foundation was raised. It is whether or not these notes made in the ordinary course of business are, in fact, hearsay.

With respect to the DRI handwritten documents, all of a sudden Microsoft says it doesn't matter that they are handwritten, but in their brief at page 2 their very first sentence is: "Certain handwritten documents" -- "handwritten notes cannot satisfy the business records exception." Well, I

just reject that. I think that whether -- and I don't think there's a single case that has ever existed that says that because things are in handwriting, they are less likely to be business records than otherwise.

With respect to 682, whether or not Mr. Barry asked him, Mr. "PercyT," to write this to Go people, he testified to that, Your Honor. Microsoft has designated that testimony, and that goes to the weight. It does not go to the admissibility of this document. At the time he wrote 682, he met all of the requirements.

He may have used DR-DOS before he became an employee. I don't think that's -- I'm not clear on that, but whenever he used DR-DOS, he wrote this business record or this admission at the time he was an employee at the request of his supervisor and the scope of his employment while he was an employee.

761. 761 is the Micrografx letter of Mr. Grayson, and Mr. Chapman says that some of what Mr. Grayson says mirrors the allegation in our fourth amended petition. Imagine that. We cited -- we relied on evidence to bring the lawsuit, and we used some of the language -- which we didn't have anything to do with drafting, I assure you, Your Honor, not

back in 1991 -- that we used the evidence available to us to make these allegations.

Now, Microsoft says that makes this not admissible, and Microsoft, again, says to the Court, "really" -- "These Lotus documents and this Grayson document, we really didn't mean that the reason they couldn't be admitted was because they were" -- "they were relied on."

But on page 11 of their brief, Your Honor, they say, and I quote, Lotus' FTC complaint incorporates the substance of the accusations in these documents: PX 1226, 1261 and 1301," and they go on about that. And they tell the Court that the FTC initiated a regulatory proceeding against Microsoft soon after receiving Lotus' complaint. It wasn't just because of Lotus' complaint. There were lots of folks complaining about Microsoft's conduct.

And they go on to say, "The Special Master ruled that the complaint itself was not admissible." We don't challenge that ruling.

Microsoft then says to the Court: "Those documents on which the complaint was based such as 1226, 1261 and 1301 are likewise inadmissible hearsay." Really, Judge, they told you exactly what I said. These can't be admitted because a complaint

was made based on the facts contained in this complaint. It's just kind of remarkable.

Microsoft also tells the Court that Exhibit 911, Mr. Fade's business records, are not admissible. Microsoft tells you that, "A party admission must have some force of Microsoft behind it." That is not the law. That is not the rule. I read the Court the whole rule from the beginning to the end. It requires three things. They are all present. The end. The documents should be admitted.

That's all I have to say, Your Honor.

THE COURT: Thank you.

Move on to defendant's motion for protective order to quash plaintiffs' Rule 1.705 deposition notice.

MS. NELLIS: That's me, Your Honor. Nice to be back here today.

Let me -- "offered and received," which I think is a comment on my height, so I'm going to reject this, unless you're having trouble.

I will admit at the outset that these have been for me a difficult set of motions to unwind. Once again, I think we're in a situation where motions have moved and more arguments have slipped and slided along the way, so I'm going to go back to

how this all started and see if we can unravel it.

Your Honor will recall, I'm sure, that Microsoft has attempted on multiple occasions to seek evidence to offer to the jury in this case about the views of Iowa consumers. Back in February Microsoft asked the Court's permission to informally contact a limited number of absent class members and to obtain their views regarding Microsoft products. Plaintiffs opposed and the Court agreed Microsoft's motion was denied.

In opposing that motion, plaintiff stated -- in fact, this was to the Iowa Supreme Court -- that any suggestion that class member could provide relevant evidence on the ultimate issue in this case, which is overcharges -- and I quote, "ludicrous." In April 2006 we tried again. We noticed the deposition of four end-user consumers who were located outside of Iowa. So these were not class members. They were people in neighboring states.

And plaintiffs, again, moved for a protective order and they gave two reasons: That it was too much of a burden for them to attend those four depositions in the neighboring states and because, again, consumer testimony is irrelevant.

And again, the Court agreed with plaintiffs and granted plaintiffs the protective order and there was no testimony taken there.

So we came to June. Microsoft is tenacious, if nothing else, and we moved for leave to conduct the deposition of a limited number of absent Iowa class members. And the way we came up with -- what we asked to do was take a deposition of certain class members who had written letters expressing views regarding the DOJ litigation. And this was in response to a Tunney Act -- a request made by the government under the Tunney Act of comments on the settlement of the government case. Again, plaintiffs opposed and here again is what they said in opposition: "Individual consumers lack the necessary foundation to opine on any issue of liability or damages." And again, the Court agreed with the plaintiffs. The motion was denied on June 5th and no discovery was taken.

Now, it was in the context of this third motion, this motion to have a limited number of depositions of absent class members, that I understand now two motions arose. The motion I am arguing now is our motion to quash the Rule 1.705 subpoena, but I'm going to refer briefly to

plaintiffs' motion to have a commission to take a deposition in D.C. because I will respond to that when that motion is argued, but these are intertwined, at least in my view.

So what happened was plaintiffs first said -- and this happened before they moved to take the deposition of Microsoft's corporate designee. They said, "We want to take the deposition of the Association for Competitive Technology" -- I'm going to refer to that as ACT -- "to determine whether" -- and this is important -- "whether Microsoft influenced any of the individuals that may be Microsoft's undisclosed proposed deponents."

So again, I want to be clear on what the articulated relevance is in the first motion because it becomes the articulated -- the "ATC" motion because it becomes the articulated relevance in this motion as well: whether the views of absent class members have been influenced.

Well, how can the views of absent class members, whether those views have been influenced, be relevant if the views themselves are not relevant? Here is how it could be relevant: If Microsoft is going to be allowed to take the discovery of class member views, then, yeah, plaintiffs should be

allowed -- and we conceded this in our argument -- to determine whether Microsoft has done anything to influence those views. They should be allowed to ask that question of any deponent that Microsoft is allowed to take testimony from.

And this -- again, that is exactly what we said in our papers: If you're going to let us take these depositions, then let plaintiffs go ahead and ask the deponents. There is no reason to start bothering third parties like ACT. If something comes up, well, we can go back and visit that later, but there is really no reason. But what happens, the Court again denied that motion. So those depositions disappeared. And I actually e-mailed Ms. Conlin when the Court denied that motion and I asked if they were going to withdraw, and she said, No, they are not going to withdraw because this is bigger -- this request for commission is bigger because it's connected to the Rule 1.705 request for a deposition.

I will admit that at the time I didn't really understand how they were connected, but I think I'm figuring it out and I hope I'm taking Your Honor along with me on this path. I said, okay, that was their choice.

So here we are on the motion for

plaintiffs' request to take deposition of a Microsoft corporate designee, and we move to quash, and I'm going to explain why because -- and I again remind Your Honor that at that point I really did not understand -- I don't think any of us understood that this had to do with this articulated relevance of whether absent class member's views have been influenced, but was very much focused on the breadth of the request as well as what we saw as the attempt to invade work product. And we're going to get there, but it wasn't until -- so we filed a motion to quash and the responsive papers came in. And in the responsive papers, the same exact relevancy theory was articulated.

The reason they filed this motion to take a deposition of our corporate designee -- and you really have to dig your way through the papers to find it -- but here they say exactly one more time they want to determine whether class member views may have been influenced. So the reason on both this motion and the motion we're going to discuss next is precisely this and nothing more: They want discovery to determine whether class member views have been influenced. I think the answer here should be simple.

If class member views of Microsoft products in this case are not going to be considered relevant or admissible, and it's my understanding at this time that it's only the class representatives who are going to be able to testify on that topic, then how can whether views of absent class members of -- whether those views were influenced be admissible? Plaintiffs can't have this both ways. They have said to this Court time and time again absent class member views are not relevant. Whether those views were influenced can only go to the credibility of those views. If the views are not coming into trial, then there's nothing to discredit.

Now, last time I was here, which was not so long ago, both Ms. Conlin and Mr. Hagstrom -- and this was in the context of the motion to postpone the deposition of Mr. Howery -- they kept saying, "Plaintiffs deserve a level playing field." Well, here is a place where they're certainly requesting something that is not a level playing field.

If the plaintiffs are going to be allowed to take discovery of class member views, then I submit, Your Honor, Microsoft must be allowed to do the same. If the Court will allow Microsoft to take discovery of class member views, absent class member

views, then plaintiffs, I will concede, should be allowed to take discovery of whether those views were influenced. But if not, if Microsoft is not going to be allowed to take discovery of absent class member views, then plaintiffs have no reason to test those views. There's no reason that I can discern anyway, other than one, and the one reason I can contemplate for plaintiffs to pursue this discovery after Your Honor's ruling last June is to tie Microsoft up and to impede our ability to get ready for trial. And I don't say this lightly, but I do say it because I do believe it to be true, and it's going to get me back to why I did not initially concede the connection of this motion to what is now the articulated reason of relevancy.

And I'm going to try to do this relatively quickly, but if the Court is not inclined to agree with me that this request for discovery is entirely irrelevant and see some relevance here, then I think it will be plain when we walk through what is being asked here that whatever that relevance is, it is clearly not outweighed by the burden that plaintiffs are attempting to put on Microsoft here and it is a burden that will tie us up and very much slow us down for reasons that, again, I fail to understand.

So here is what plaintiffs have asked for. They've made a request for a corporate designee, a Microsoft corporate designee. Four topics: First topic is all Microsoft's surveys since 1994 that may have involved any person or entity who is now a member of the Iowa class, 12-year period since 1994.

The second thing they ask for is all surveys taken for purposes of this or any other class action, whether or not it is a class member. And I should note that "service" is defined in their notice as "any contact whatsoever."

The third thing they ask for is all communications between Microsoft and any class member since 1994 concerning any issue, quote, raised by the parties in this litigation.

The fourth thing they ask for is all efforts by Microsoft or others to contact federal or state entities or their employees in connection with the government action, the anticipated filing of the government action and/or any state class action. So what they want is for Microsoft to prepare a corporate designee to testify as to all of these contacts since 1994.

I think, as you can see on first blush, this does not seem to go to the issue as to whether

an absent class member in this litigation has had its view -- which is not going to be admissible -- influenced. This is much, much broader. And when I read this -- and I remember well it seemed to me that what the plaintiffs here were trying to do was to take discovery or taint discovery regarding Microsoft's efforts to prepare for this case and the hundreds of other class actions around the country and in the government case. I'm not sure for what purpose: To understand our defense strategies, to share with defense plaintiffs' counsel other ware? I don't know. But plainly that is not proper discovery. And, frankly, I'm glad that I understand now that that is not what they are after. But in any event, this is incredibly broad, unduly burdensome, it reaches far beyond the articulated theory of relevance; which again, I don't think is a sustainable theory given Your Honor's prior rulings.

We will take these one by one. First topic seeks testimony about surveys undertaken by Microsoft on behalf -- or on behalf of Microsoft regardless of whether done for purposes of this litigation or not at any time over the past 12 years of any class member.

Now, of course, we don't know yet who the

class members are, so basically you have to read this of any person in Iowa. And again, "surveys," according to plaintiffs, means "any contact." So what they are asking for here is any contact made by any person at Microsoft or any person working for Microsoft at any time over the past 12 years or any person in the state of Iowa.

Now, Your Honor, Microsoft is a business. It's a business that sells products. It sells its products to consumers. There are today 70,000 people worldwide currently employed at Microsoft, and many more have come and gone over the past 12 years. Over those 12 years, which far exceeds the scope of the class, when this class was certified, of course Microsoft has conducted business surveys. It's conducted all kinds of surveys to determine consumer preferences, to determine what kind of product its customers like, what they don't like about products. It's necessary to a business. That's what businesses do, and I don't think anyone here, not even plaintiff, is saying Microsoft has to shut down its business and stop learning what kind of things best serve its customers.

Microsoft -- I am told Microsoft's corporate marketing department does hundreds of

surveys a year. Other groups worldwide around Microsoft do surveys. Third parties do surveys. They do them nationally. They do them globally. And is it possible that someone picked up the phone in 1998 to do a survey about -- and it doesn't matter under this topic. Anything. Let's say, you know, "We're thinking about developing a new computer game. We want your views." And did somebody who answered the phone or got us a questionnaire, could that person have been in Iowa? Absolutely. Probably likely. How are we going to figure this out? 70,000 employees now, many more going back over the last 12 years, vendors who are doing these surveys, geographic data are not necessarily kept and -- relating to business or marketing surveys. And then, even if we could figure it out, then we're going to educate somebody to testify about all of these? It's an incredible burden. It would take months to complete.

And the question I ask, Your Honor, is why? Why do plaintiffs need this? What happens next.

Let's say we do this deposition and that deposition is conducted and somebody from Microsoft testifies in 1996 there were three surveys about "X" topics that touched Iowa, and we do this through the

years until current. Well, does that establish that the view of any class member was influenced? Of course not.

What could happen next? Well, I suppose we would have to try to figure out who those people in Iowa were and how were they contacted. I'm not sure we can, but maybe plaintiffs think they can, but let's say it can be done. Let's say we come up with 100 people for some way, reason or another were contacted for a survey by Microsoft. Then what? Do plaintiffs get to depose those 100 people to determine whether the survey influenced their views, the views that are not going to be admitted into this trial? I don't understand it.

Someone testifies, they say, "Yes" -- best case scenario for plaintiffs, "Yes, I was contacted by Microsoft. I was contacted by Microsoft in 2000. They wanted to do a survey about Windows. They asked me lots of questions about their operating system, and at the end of that survey I felt it was a better product than before I had that conversation." Then what? Do plaintiffs get to put that into evidence that the person was contacted to participate in a survey about Microsoft product and that the view was influenced? But you can't know what those views are.

There's no relevance here, Your Honor.

Certainly there's no relevance here of anything that goes to the ultimate issue in this case which is overcharge and the burden -- and this is just on Topic 1 -- cannot be justified.

So let's move to Topic 2. Here they ask for all surveys taken for the purpose of this or any other class action, whether or not a class member. So where Topic 1 is asking for someone to testify about every single survey ever done in the past 12 years on any topic whatsoever as long as it may have touched somebody in Iowa, Topic 2 is asking for any survey ever taken for purposes of a class action, whether or not it has anything to do with Iowa or this case.

Well, what does this mean? I guess I'm trying to figure it out. It means, for example, if Microsoft surveyed people in Illinois where there was never a class action pending, let's say, for purposes of developing defense themes in New Hampshire where there was a class action pending at one time, well, plaintiffs want to know about that.

What does that have to do with this case? First, it's plainly work product. Second, of course it's not wrong. It's certainly okay to do that. I

can go to a state where there's no class action pending and talk to people to help me understand what I need to do to get ready to try a case somewhere else.

But, most importantly, in my view, again, what possible relevance does this have to this case in Des Moines? What could plaintiffs say to the jury about this? What does this have to do with whether persons in Iowa are overcharged for Microsoft products? How can this burden be justified? How can plaintiffs justify the burden of asking us to attempt to figure out every single contact with every single person about a class action? We've been litigating these class actions since 1999. This is, I really do believe, nothing more than an attempt to invade Microsoft's counsels' thought process. It certainly has nothing to do with whether a class member's view in this case may have been influenced.

Okay. Let's bring us to Topic 3. I will try to go a little faster. We start to overlap here. Again, here they are asking for all communications between any class member and Microsoft on any issue raised by any party. Okay. So remember, the class here was certified in 2003, but what they are asking us to do is figure out and educate somebody to

testify about every single time any single person in Microsoft since 1994 spoke to someone in Iowa and then figure out if it relates in some way to any issue that has been raised by any party in this case. I'm not sure what that means.

There's a 95-page petition out there. We've had tens of thousands of documents that have been identified that are in issue. We've got lots and lots of motions. But again, burden versus relevance. How could Microsoft possibly do this? How would you figure it out? Do you send a notice to everybody in the company and everybody who ever worked in the company and do you say, "Did you ever talk to anyone in Iowa?" "Did you ever pick up a call from a customer, let's say, back in 1996 who was saying, 'I'm afraid I have a security flaw in my software.' 'I have a question about how my operating system works.' 'Can you talk to me about how much Excel costs?' 'What do I do if I have a virus?' All things that are certainly in issue in this case.

And then what? We educate somebody to tell them every time there was such a contact? And then what? We try to figure out who that contact was with? And then what? Do they go and depose those people to find out if that affected their views, but

we can't ask what the views were? To what end, Your Honor? What relevance does this have to this case?

All right. Topic 4, one of the harder ones, is efforts to contact federal and state entities or employees in the government action about -- efforts to contact federal and state entities or employees with respect to the government action, the filing of the government action, or any state class action.

So basically what plaintiffs want to know here is a list of every time Microsoft contacted a federal or state entity in connection with the government action; not this action, government action. They want to know about our contacts prefiling the government action, which I guess is a request to find out about our settlement negotiations? I'm not sure. And they want to know about every time we contacted a federal or state entity in any other state class action.

Well, those are other cases. What does that have to do with this action? If Microsoft lobbied the government prior to the filing of the government action or engaged, as it obviously did, and has been publicly reported in efforts to resolve that case before it was filed, what does that have to

do with this case? Why do those contacts need to be figured out, spelled out and described in the deposition of the plaintiffs' lawyers here or any other state class action?

Let me give you an example of how unbelievably broad this request is. Here is an example. Minnesota: I was involved in the Minnesota case along with Ms. Conlin and Mr. Hagstrom, who is not here today, and I will tell you I have made and continue to make efforts to contact the Minnesota Department of Education. So does Mr. Hagstrom. We've been working with the Department of Education in Minnesota ever since Ms. Conlin and Mr. Hagstrom settled that case with us. Part of the settlement is the Department of Education receives funds through a cy pres distribution. Well -- and this is just one small part of the very minor part of just my life. Every single one of those contacts would have to be identified, figured out, and we would have to educate a deponent about them to testify to plaintiffs in this request. It doesn't have anything to do with this case and it certainly doesn't go to whether or not a class member views in this case were influenced. It is like the others: Overly broad, incredibly vague, unduly burdensome; and as I stated

in the beginning, given the positions that plaintiffs have taken and that Your Honor has sustained, entirely irrelevant.

In short, the Court has ruled that Microsoft may not seek discovery regarding the views of absent class members. For that reason alone, the Court should deny plaintiffs' attempts to take discovery on whether those views were influenced. If one is not relevant, the other cannot be relevant. But not long ago Ms. Conlin referred to the Iowa "goose and gander" rule. And if the Court disagrees with me, I'm going to respectfully request that the Court apply the Iowa "goose and gander" rule. If the Court believes there is an independent relevance here, it must go both ways. If plaintiffs are going to be allowed to determine whether class member views were influenced somehow by Microsoft or persons working for Microsoft, then it can only be fair that Microsoft be allowed to discover whether class member views were influenced by plaintiffs. There have been many, many newspaper articles quoting Ms. Conlin saying many, many nasty things about Microsoft. If we're going to open this up, let's open it up all around; but again, I don't see to what end.

Thank you, Your Honor.

THE COURT: I assume you want to apply the "goose and gander" rule so that no one will cry "fowl"?

MS. NELLIS: Indeed.

MS. CONLIN: Can we quote you on that, Your Honor?

THE COURT: We will take a 15-minute break and then we will let you respond.

(A short recess was taken.)

THE COURT: Response.

MR. CASHMAN: Good afternoon, Your Honor.

We will start with the basics. It's clear that the evidence exists, and it's also clear that in spite of the pleas we've heard today from Ms. Nellis, that, (a), the vast majority of those arguments were not set forth in the brief and therefore eliminated potential meet and confer on some of those issues; and furthermore, as demonstrated by reading what was in the brief, none of those claims, allegations and arguments are supported by any proof in the record with respect to proof -- with respect to burden or breadth or any of those issues. And we've cited case law in our brief that affidavit testimony would be required to make the bare minimum showing of the kind of allegations and claims that were made by

Ms. Nellis.

THE COURT: I'm going to close this door. Sorry.

MS. CONLIN: We thought maybe you were really getting sick of it.

THE COURT: I thought about leaving, but -- go ahead.

MR. CASHMAN: So what you have is really nothing more than unsupported attorney argument, and we submit that's insufficient under the rule to establish good cause of undue burden or overbreadth.

That being the case, I'm still going to touch on some of the arguments. It appears from what Ms. Nellis is now claiming that the real "beef," to use that word that Microsoft has, is relevance. And their relevance argument is based on a mischaracterization of what this motion is about.

Ms. Nellis incorrectly assumes or concludes that this is about what consumers thought based on their contact with Microsoft or its surrogates. That is incorrect. This evidence is about Microsoft conduct, not about what the consumers think. And it is relevant, and again here I will underscore the fact that the relevance connection does not have to be nearly as strong as Ms. Nellis suggests it has to

be.

Under the circumstances, we're entitled to this discovery because it's relevant to show -- improper conduct or potentially improper conduct by Microsoft in contacting absent class members would be one potential use and about its conduct in attempting to influence the views of class members. That's also relevant to this lawsuit. That relevance certainly entitles the plaintiffs to take the corporate designee deposition of Microsoft on the four topics that have been enumerated.

What Ms. Nellis failed to inform you is that there was quite a bit of "meet and confer" that occurred on this motion, and there was quite a bit of discussion about how to narrow or at least make it clear that the plaintiffs weren't seeking surveys of every possible product that Microsoft ever issued or advertising campaigns but, rather, the specific kind of surveys concerning issues in this case. And it wasn't very difficult for the parties to reach an understanding about how to narrow it in that fashion; that the discovery was not going to go beyond what is clearly the intent of the four topics that are listed in the notice.

What this boils down to is that Microsoft

has the evidence. They know it can be easily collected. They know that they have people who can be produced and educated easily to testify on these topics. The topics are easily understood, and to the extent there is any doubt, that's already been negotiated out. The only issue is -- what it really boils down to is Microsoft is stonewalling on providing this evidence because they don't want their conduct -- and we believe the evidence is going to show -- improper conduct to be exposed.

So we think that -- we submit that this motion is entirely appropriate. Particularly under Rule 1.501, Microsoft has failed to show good cause why this protective order should be granted. They have failed to show annoyance, embarrassment, overbreadth, undue burden by evidence. And even the arguments of undue burden are not supported by the facts even when you're looking at the arguments that Ms. Nellis made in light of the "meet and confer" discussions that have taken place.

So we think this is a pretty simple matter and that our motion -- that the motion for protective order should be denied.

Thank you.

THE COURT: Thank you.

MS. NELLIS: Quickly, Your Honor, if I may.

THE COURT: Sure.

MS. NELLIS: I'm not quite sure what was said but I'm going to do my best.

I think Mr. Cashman said our motion should be denied first because we did not meet and confer with them, and -- but then later said we had extensive "meet and confer" and reached an agreement. Neither is true. I will go back through that.

And, second, he is complaining, I think, that we didn't put an affidavit explaining the burden that we would go through and that thus my argument is not sufficient. It is unsupported attorney argument and; therefore, for those reasons they should be allowed to take this massive amount of discovery which they claim with unsupported attorney argument they know can be easily collected and they know the topics can be easily understood and they know have already been negotiated out and they know we engaged in improper conduct.

Well, these are the same people who came in here, Your Honor, without an affidavit and said it was too burdensome to drive to the neighboring state to take the depositions of the class members. I don't think, Your Honor, that's -- let's go back to

the merits.

Plaintiffs say here that this is not about whether or not class member views were influenced. Well, I submit, Your Honor, that is exactly what is says in all of their motion papers. They now say it's about Microsoft conduct. You will not see that in their papers, but let's go back to what -- what conduct have they identified with no affidavit that could possibly be at issue here? The only conduct that they've ever identified that they have complained about -- well, they haven't even complained about which is why they can't call it improper in their papers -- is that Microsoft engaged in lobbying efforts in the government case. Microsoft is allowed to do that under the First Amendment. That's not improper conduct. And if that -- and how that could possibly have influenced the views of class members in this lawsuit, I am entirely at a loss.

Now, as to the "meet and confer," plaintiffs made a very big stink in their opening papers, their responsive papers on this motion, that we did not participate in a "meet and confer." It's not true. We did. Mr. Hagstrom and I did it after he was dissatisfied with his "meet and confer" with

Mr. Green. We came to a conclusion that we were not going to be able to resolve it. That was before I got their resistance. That was their resistance, and when I called them on it, the resistance that said we didn't meet and confer, they filed the revised resistance.

Then I called Ms. Conlin and I said, "Now that I understand what your issues are, should we try to work this out?" And Ms. Conlin said, "Yes, we should try to work this out." And I was referred to Mr. Jacobs, who is not here today, and I attempted on several occasions to work it out with Mr. Jacobs. In fact, I thought Mr. Jacobs and I possibly had an agreement, and Mr. Jacobs called me after I put it into writing and he said, "I was told that we're not making agreements with you."

May I bring this up to Your Honor?

THE COURT: You may. Thank you.

MS. NELLIS: Time and time again, Your Honor, we have come into this courtroom to discuss an issue where we've had negotiations along the way but have not reached resolution. Your Honor has either -- has potentially granted a motion on whoever's requests for discovery it may be -- usually plaintiffs -- and all the internal negotiations are

lost along the way. And plaintiffs come back and say, "Those were just negotiating positions. Those were argument positions. The motion stands as written."

The deposition request, as written, is not something that possibly relates to anything relevant in this litigation. It is not understandable. It is plainly overbroad. It is plainly unduly burdensome. And the fact that I attempted to work out with Mr. Jacobs some kind of resolution that would be reasonable to Microsoft -- and you'll note I did say at number five because I firmly believe it, "by entering into this agreement, Microsoft does not agree that any testimony or document obtained is relevant or admissible in the Comes action and plaintiffs acknowledge the same. All issues of relevance and admissibility are reserved."

Reserving that was willing to enter into an agreement in order to move this along and not be burdened and put this behind us so we can get ready for what really is at stake here, and it was out and out rejected. There is no agreement. There is no understanding. It's overbroad. It's incredibly burdensome and it's not relevant. The motion for protective order should be granted.

Thank you.

THE COURT: Thank you.

Let's move to the motion for District of Columbia Superior Court submission or deposition to "ACT."

MR. CASHMAN: Yes, Your Honor.

This is obviously a related motion. Plaintiffs seek to depose ACT, "Americans for Competitive Technology," in the District of Columbia, and the local rules there require a commission from this Court.

And again, we believe this is a very simple and straightforward matter and that there's no legitimate basis for Microsoft to oppose this kind of basic discovery since it certainly could easily, as we've discussed before, lead to the discovery of admissible evidence.

Microsoft has not cited a viable reason under Rule 1.501 showing good cause why this motion should not be granted. They make basically three arguments.

First of all, they argue that ACT has no knowledge and, again, that begs the question how would Microsoft know what ACT knows? And by way of background, the plaintiffs -- one of the reasons they

wish to take the deposition of ACT is that it's a Microsoft surrogate, as explained in our papers, which has engaged in a massive letter writing campaign to Iowans and others trying to influence their views and, perhaps, including improper contact with members of the Iowa class.

And as we've explained in the brief, this kind of conduct is sometimes described as "Astroturf" by Microsoft or surrogate efforts to influence class members. And so we believe we're entitled to take this type of testimony to follow up and explore these issues, and we believe it's not meritorious for Microsoft to allege that the subpoena or commission should be granted on its claim that ACT has no knowledge.

Next, Microsoft claims that we can ask certain deponents about whether they've been contacted by ACT, but the plaintiffs are certainly entitled to broader discovery on this key issue than just asking the deponents where the plaintiffs cannot be so artificially limited. That's why -- one of the reasons why we believe we're entitled to explore that issue further by taking the testimony of ACT.

And then, third, Microsoft claims that we shouldn't be allowed to get the commission to take

this testimony because there's no proof that Microsoft violated the rule prohibiting discovery from absent class members, Rule 1.269, and that's a red herring. That's not even an issue in this motion. It's a simple straightforward issue of whether the plaintiffs should be entitled to take that deposition of ACT and whether Microsoft has satisfied its burden under Rule 1.501 seeking to preclude it, and I submit that Microsoft has failed to meet that burden and that the commission should be granted.

Thank you.

THE COURT: Response.

MS. NELLIS: Yes, Your Honor.

Respectfully to Mr. Cashman, I'm wondering if he's been paying attention to what has been going on in this matter.

Your Honor, Mr. Cashman just argued to you that while they acknowledge that Microsoft agrees they can go ahead and take the -- get this testimony from deponents, from the absent class member deponents in this case, they shouldn't be that limited and they should also be able to talk to ACT about whether they talked to the deponents. Your Honor, there are no deponents. You denied our motion

to take those depositions. It's gone.

Let me try to unwind, again, what is going on here. They keep referring to efforts -- Mr. Cashman keeps referring to efforts to influence Iowa absent class members by referencing activities in the government action. Let's walk -- let's go backwards and see -- it's very hard for me to unravel; so if it's confusing, please ask me and I will go backwards, but this is how I understand what is going on here.

They want to depose the Association for Competitive Technology, "ACT," which is not a party to this litigation. The reason they want to depose ACT is because it was a founding member of the American for Technology Leadership, "ATL," also not a party. "ATL," not "ACT," was reported in a newspaper article to have been involved in a "letter writing campaign," this "Astroturf" campaign that Mr. Cashman is referring to, during the remedies phase of the government action.

After the remedies phase of the government action was concluded, Microsoft and the U.S. Government entered into a settlement agreement. The U.S. Government made a public request for public comment under the Tunney Act. Thousands upon

thousands of people and entities wrote to the government expressing their views, favorable and unfavorable. And Mr. Green can attest, because it's all in his office that I have ten boxes' worth, five double-page big boxes' worth of those letters, which is how -- which is what we did.

We, Microsoft, went through the Tunney Act letters, which they could certainly do too if they had wanted to, and these are not the letters that ATL was involved in, the "Astroturf" campaign. These are -- that was with the remedies phase. This is post-remedies phase. This is the "Tunney Act" campaign. People -- they have no evidence anybody was involved in that, but in a totally different case people wrote letters to the government. Microsoft went through those letters, never finished it, but we thought there may be some people in here who could be helpful to our case. We don't know what Iowans think, but here is a set of Iowans that we can start to pull from this group and start to get a sense. And we came to Your Honor and said, "May we take their depositions?" And Your Honor said, "No."

So what they want to do is take the deposition of ACT to determine whether ACT knows whether ATL was involved in the "Astroturf" campaign

in the remedies phase because somehow that impacts the Tunney Act letters, which were after the settlement, which somehow -- and this is the connection that I keep losing -- shows that Microsoft engaged in improper conduct and influenced class members in this case.

I submit, Your Honor, if plaintiffs believe Microsoft has done something wrong, something improper in this case, in contacting absent class members, they should come to this Court with specific evidence and they should do it very carefully as we did with respect to the Howery materials and as they have done in submitting a motion for sanctions with respect to resellers, which is something you're going to hear later.

This is a game. This is a game to somehow take evidence or actions that were not done by Microsoft, not even done by ACT, who they want to depose, but by ATL, and take it from remedies, post-settlement, Tunney Act, letters I went through, others went through, requests for deposition, to depose people who Your Honor said no and turn that into a fishing expedition to find out if we did something wrong. It's circular, it's nonsensical, and it's anything but simple.

I would ask Your Honor that this motion -- the request be denied and that request be -- I think at this stage, when we are virtually two months away from starting this trial it appears, that the parties should be focused on actions relating to the merits of this case. And if we're going to not be focused on the merits of this case and we're going to think about what people -- the lawyers in this case have done, let's think about what all the lawyers in this case are doing in this case, to go back to the remedies proceeding before -- it's beyond control.

Thank you.

THE COURT: Mr. Cashman.

MR. CASHMAN: Your Honor, Ms. Nellis has the facts and the issues incorrect as we've explained in our brief. We've laid out the reasons why we want this discovery, why we think we're entitled to this discovery. It's the efforts to influence the Iowa Attorney General, efforts to influence class members in Iowa. Those letters have more significance potentially than Ms. Nellis will obviously admit, and it's the reason to explore what information ACT has and how it -- the conduct it engaged in and tried to influence Mr. Miller and Iowa class members is what we're after. I think it is pretty clearly spelled

out in the papers.

Thank you.

THE COURT: Thank you.

Last motion, plaintiffs' motion to amend.

MS. CONLIN: Thank you, Your Honor.

May it please the Court.

Microsoft complains bitterly that we should not be permitted to seek an amendment to the protective order because we agreed to it, but Microsoft sought an amendment to the protective order and it had agreed to it and the Court granted that amendment. In addition, as Microsoft pointed out to the Court then, the protective order itself provides for amendments, anticipating that either side may reassess its position and realize that there is a need for change.

The basic principles are, of course, always important, as they are here. The basic principles with respect to protective orders are, first of all, they are flat-out disfavored under Iowa law. They interfere with the public's right to know. They interfere with the public's right to have access to its court system and its court proceedings, and it is particularly violative of our very strong open-court principles. Nonetheless, they are permitted, and

they are permitted in very narrow circumstances and they are permitted only when the party who seeks confidentiality makes an appropriate showing.

The burden is on the party that seeks confidentiality to show that each and every document for which it seeks such protection is deserving of it. It must make a particularized showing of good cause. Ninety -- I'm making an estimate here, Your Honor. 99 percent, I'm going to take, maybe 99 and 44/100 percent, of the documents that Microsoft produced in this case carry designations of "confidential" or "highly confidential."

Microsoft has abused the protective order process. We entered into it to save time. You know, reviewing documents is a burden on whichever party has to do it, but we expected some good faith on Microsoft's part and we did not get it. Microsoft wants to turn the whole thing upside down and put the burden on us. Instead, the law puts the burden on Microsoft, and it is a heavy burden to show that documents should be kept confidential.

Among the things that Microsoft included as "highly confidential" or "confidential," we've given the Court some articles in the public media, trade press, Microsoft designated things that you can get

off the Internet as "confidential" Microsoft documents. They designated documents that were publicly released in the Department of Justice case as "confidential" or even "highly confidential" documents.

What plaintiffs seek today is just the right to prepare their witnesses, just as Microsoft can prepare their witnesses. We're coming up on a trial. Almost every single one of Microsoft's witnesses are Microsoft employees or former employees. Almost every document belongs to Microsoft, and they can show those documents to whoever they want and they can show those documents to whoever they want whenever they want. They don't have to tell me what they are showing and they don't have to follow any particular time schedule and they don't have to get any signature on any documents. They just can show all of their witnesses anything that they want to.

Originally the protective order says the plaintiff cannot show "highly confidential" documents at all until the witness is on the stand. Now, that's just so awful that Microsoft decided that it could not support that.

The "highly confidential" documents are, of

course, inevitably the ones that have the most important information for the plaintiffs, and the defendant has given that up and now says, generously, we get three days; in other words, what Microsoft now proposes to the Court is that we can show highly confidential documents to actual witnesses 72 hours before they are on the stand. That just presents all kinds of practical problems.

What we seek, Your Honor, is a very narrow right to show witnesses "highly confidential" documents when the witness is available to review them. The plaintiffs have offered several protections for the defendant's "highly confidential" documents.

First of all, every witness to whom we show "highly confidential" documents will be required to sign an affidavit or declaration that says, "I read the protective order. I know that I am subject to civil or criminal penalties if I breathe a word of what I see in these 'highly confidential' documents."

Second, we seek this extension only for trial witnesses and only to the extent necessary to develop their testimony, whether by direct or cross-examination. We seek the right to show our witnesses the documents so that their testimony will

be full and that they will be fully prepared.

We have agreed that there will be no copies of these documents left with the witness. We won't be mailing them out or remailing them out. We will take the documents when we go to see the witness and bring them back when we come back. We have also offered to keep a privilege log, to keep track of every single "highly confidential" document that we show to any witness. And if a problem arises and some disclosure is made, then there will be a complete record which then Microsoft will be permitted to access.

In terms of the practical problems, Your Honor, three days before the testimony is what they propose. Seventy-two hours. But what if the witness doesn't get on the stand when expected or gets on the stand before expected? I just have to say I've never had a trial in which the witnesses have all gotten on the stand when they were supposed to, not even close to that. All of our witnesses, except the class representatives, are out of town. Some of them are out of the country, and that would mean what defendants propose is that we've got to get everybody here three days before they are supposed to testify, put them up a hotel.

Now, what does that do to the witness? I've got to tell you it might make it less likely that they are willing to come if we're going to haul them across the ocean three days before they testify in order to prepare them. That really restricts our ability to do what we would like to do in terms of preparation.

Of course, the other option is for us to get on the plane in the middle of the trial and go where they are, instead of doing what we would ordinarily do in terms of initial preparation, and that would be, Your Honor, for our office, well in advance of trial. That's how we do it. You know, we make an initial -- we do an initial trial preparation before the trial starts and then we do comprehensive trial preparation closer up to time.

But doing all of it immediately before the testimony, we think that's not a very good practice. It tires the witness. It makes retention less likely and comprehension more difficult.

Microsoft complains that we have never tried to use a provision that is in there. Well, how would we go about that? Here is how we would have to do it, Your Honor. There's kind of an escape clause in there that says we can show a witness "highly

confidential" documents if we go to Microsoft and say that we would like to do that and tell them what we're going to show the witness and then wait for them to decide whether or not they are going to let us do that. Well, we don't think that that is an appropriate way to conduct pretrial and trial preparation.

Microsoft also in its brief seems to suggest that we could only find 11 pages of documents improperly designated. Well, there are probably 11 million, maybe 25 million. We selected a few randomly to give to the Court.

Microsoft has made simply wholesale designations of every single page it has produced as Microsoft "confidential," including documents originally produced by others. Microsoft has acted in manifest bad-faith, and we seek relief from the most onerous of the restrictions so we can begin our trial preparation at our convenience and at the witnesses' convenience without giving Microsoft a very unfair litigation advantage.

I can't imagine Microsoft's reaction if I demanded from them a list of the exhibits that they were planning to use with their witnesses today or several months from now and then try to veto some of

them, and that's the kind of power that this protective order as written gives to Microsoft.

In order to answer Microsoft's objections based on the "highly confidential" documents of third parties, Your Honor, I do want to make a proposal for that because, first of all, there are very few of them that we will want to use that are "highly confidential" and that belong to third parties.

We want to use "highly confidential" documents of Microsoft. But let's assume that there are some very few that we would want to use. Then the 72-hour provision would probably be quite practical just because there aren't very many such documents, if any. There may be none ultimately. We have designated very few as exhibits. So there won't be -- that's not onerous. What is onerous is the application of the 72-hour rule to document what Microsoft has designated as "highly confidential."

There's also a practical problem with the defendant's proposal in terms of rebuttal witnesses. Microsoft says that the only time the 72-hour rule would apply is if we have designated the witness. In rebuttal, we need not designate our witnesses, nor do we need to disclose them to the opposing party at all before they take the stand.

Microsoft proposes that the Court's rules and the Iowa practice be suspended and that plaintiff identify rebuttal witnesses, apparently, in advance of trial, but certainly in advance of their testimony, if that witness needs to see some of Microsoft's millions of pages of documents designated "highly confidential."

Microsoft's proposal for delaying any witness at all until three days before the witness actually takes the stand and only if the witness has been previously designated has simply no rational basis. It's just a naked attempt to impede the plaintiffs' trial preparation.

We've made a reasonable proposal to amend an overrestrictive protective order aggravated by Microsoft's bad faith overdesignation so that we can get ourselves and our witnesses ready to trial, and we ask the Court to grant our motion.

THE COURT: Very well. Thank you.

Response.

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

THE COURT: Yes.

MR. GREEN: First of all, just so it's clear, this doesn't -- at least their reason for wanting to amend this order doesn't have anything to

do with the documents that are marked "confidential." They can show those to the witness if so. For her to say -- for Roxanne to say, "Well, we've designated everything," the fact is there's a much more limited designation of "highly confidential" documents and that's what we're talking about here. So the "confidential" stuff isn't even in play because they can show those to witnesses period, and so that's sort of a red herring.

And, second of all, they talk about us trying to seek a change of the protective order. That had to do with the Schulman matter and that source code issue, Your Honor. It really wasn't a change to the protective order. That was an interpretation. And it had to do -- it had to do with location of source code and how that was dealt with. And that was so limited that it hardly can be thrown up in our faces. It is an objection to this request, which is a sweeping change, a total change to the stipulated protective order.

You know, Roxanne is just -- I've practiced law as long or longer than Roxanne in this state. She's just flat wrong about whether courts in Iowa favor or disfavor protective orders. If the parties agree to the protective order, that leads to

resolving discovery issues on an informal basis. Courts love that. The Iowa Supreme Court has said that on numerous occasions. Now, that's what we did in this case.

Long negotiations back in 2003 came up with this stipulated protective order which was then signed by Judge Reis and then became the law of the case. There's a provision in there that it can be amended by application to the Court, but it clearly is their burden, not our burden.

Now, if we were coming into court and saying, "We want a protective order without any agreement with it," yeah, it would be our burden. I agree with Roxanne on that. That is not what is happening here. They are coming into court to try to renege on an agreement that they signed and which was not only signed but ordered by the Court. And it was done for very material reasons, which I will go through, but it's not what -- it's not the situation that Roxanne likes to paint.

We're talking about an informal discovery agreement that was reached between the parties, which is highly encouraged by the Iowa Supreme Court, which they are trying to upset at the eve of trial after Microsoft and all these third parties relied on that

protective order and involved millions of documents, to disclose millions of documents to the plaintiffs, which they did upon reliance that the protective order would be in force, which is another reason it's their burden.

So, anyway, those are just by way of response. And I will try to be brief, Your Honor, because a lot of the things I was going to cover I just did, but sometimes I get caught up and I have to respond to the statements which give me a little pause in the opening argument.

Now, the problem with what they want to do, Your Honor, is they want to -- on the "highly confidential" designations, they want to disclose to anyone they would put on a witness list whether they would be called or not. Now, they have made an initial disclosure which lists 16 people as witnesses in this case. I mean, they talk about dozens and dozens of witnesses in their brief in this matter. They got 16 people disclosed to testify. Now, that was called the "initial disclosure," and September 8th, I think it is, they have to make their final disclosure.

Now, I don't know what they are going to disclose, but Roxanne knows, you know and I know that

what you do is you totally overdisclose on your witness list so as not to be caught where you can't call someone because you didn't disclose them pursuant to the pretrial order.

They want to then, as soon as they make that disclosure, which their amendment would allow them any time after they make that disclosure, which is next week, to give them -- give those witnesses "highly confidential" information.

There's no limit on the time when that disclosure is made. There's no limit on the breadth of it. There's no limit at all, and there's nothing that requires them to call that witness once they give it to them and there's nothing that prohibits that witness except they say they will sign a confidentiality agreement which is attached -- and they will keep a privilege log, but there's nothing to say that they wouldn't be giving these to competitors of Microsoft who never get called as witnesses. That's why we propose a 72-hour rule. It wasn't to make life any more miserable.

And, by the way, you don't have to -- we're talking about documents. Roxanne talks about, you know, when we have to go there or they have to come here. You know, documents are transmitted in a

matter of seconds through e-mails anymore. That's just another red herring, where you have to travel somewhere. I mean, wouldn't they want -- they can prep their witness about all sorts of things before the document is discovered. Then they've got another small part, right, which would be if they are going to disclose "highly confidential," if they have to follow up on it.

At first they were arguing -- it seems to me at some point they were arguing, well, this gives them -- tells us about their work product. You know, it's all going to come out at trial anyway. It doesn't make any difference. That's all a red herring for, there again, like they've done so often in this case, agreeing to something, taking advantage of the agreement, getting to the point where we are ready for trial, having not done anything that they should have done -- i.e., come to us and request -- as the mechanism that is in the protective order for them to disclose this information -- waiting until the eve of trial and saying, "You know, we don't like the rules that were in the first three quarters. Now that we're in the fourth quarter, we want to change the rules because we need to have a better advantage." You know, it's just the equivalent of a

"check and raise," a game. You don't allow a "check and raise," and they've done it a lot of times and they are doing it again.

Again, Your Honor, I will make it clear. The protective order allows them to disclose information to their outside experts and consultants. So that's not at issue here. And, you know, they've come into court several times and said, "You don't need real witnesses in this case because the expert" -- they haven't got any evidence from their named plaintiffs in their overcharge because they say it's all experts. The main witnesses they say are most important to their case are not all prohibited by the protective order and they have whatever they want.

Now, they said -- and I know I'm jumping around a little bit, Your Honor. They said in their reply brief after we offered to do the 72 hours, which they say is okay for some of the witnesses but not for others, is, "Well, let's just nullify the protective order." That was their response and their reply. That would make a lot of sense, wouldn't it? They are coming into court saying we will go to trial on November 13th, but what they want to do is then have millions of documents be brought before you for

you to determine what you would have to do as to whether they should be protected or not under the Iowa standards. I mean, you talk about lack of good faith. That is the epitome of it.

There's a mechanism that is in place. We relied on the mechanism. They have the burden to show that it should be changed. We have offered a reasonable compromise. They have rejected and said, "No, let's nullify it." I think that shows what they are truly trying to do here is to change the rules at the very end of the game so they can see if they can win.

They cite ad nauseam in their reply brief, in their opening brief, the Farnum case. Now, that was a case, Your Honor, which Mark Humphrey had against Searle on birth control products. He made a motion for a -- Searle made a motion for a protective order. Mark wanted to get all the documents that they filed with the patent office on the drug involved. There's a particular name for it. I can't remember what it was now. "New drug application" is what it's called, and Judge Bergeson denied Searle's request for a protective order and Searle appealed to the Supreme Court. It's a 1983 decision. They say that that sets the standard in Iowa for this.

In that case in an opinion written by Mark McCormick, they said, "Okay." He said -- he went through Judge Bergeson's opinion. He said, "I can't say that he abused his discretion." It was an abuse of discretion case by not granting the protective order. In fact, he even said, you know, "You can apply for a protective order, Searle." But what he did say -- but that doesn't have anything to do with this case because there was no stipulated protective order in place. That's where Searle just said, "We want a protective order." There was no agreement between the parties like there is here.

What then Justice McCormick said in that case after he said that there's no abuse of discretion, he says, "We add two final points, however." This is at 339 N.W.2d at 391, Your Honor. "One is that we commend the parties' efforts to cooperate in discovery on an informal basis. Efforts of this kind assist greatly in saving judicial time and in minimizing the expense to litigants that is otherwise inevitable in complex litigation. We encourage these parties and others in similar situations to strive to work out their differences informally when possible."

That's exactly what we did when we entered

into the protective order, and yet for the plaintiffs, once they make the agreement and like they did when they wanted to extend their expert deadlines and limit discovery, they make an agreement and then come to court -- just like they do a lot with the Special Master -- make an agreement, come to court and say, "We don't like the agreement we made. Let us off the hook." Well, you shouldn't let them do that, Your Honor.

On page 10 of our brief in opposition, we have laid out changes in the protective order which we think are reasonable and would accommodate the problems the plaintiffs claim they had, at least initially, i.e., about the Morton's Fork of having to choose between disclosing work product and not preparing their witness. We think it gives them ample opportunity to do that, and we ask the Court -- you know, maybe we should be asking the Court just to reject their motion altogether at this point since they said they wanted to rescind in their reply, but that was the way they responded to our fair proposal.

But anyway, if Your Honor is inclined to give them some relief, we ask it only be to the extent that we've put in our opposition memorandum. I think it's at page 10.

THE COURT: Ms. Conlin.

MS. CONLIN: Briefly, Your Honor.

What I'm truly trying to do here is a responsible job to get ready for witnesses to testify in this trial, and it probably will not surprise the Court to learn that our take on what has happened with respect to some of the agreements with Microsoft is different than Microsoft's take.

We believe that Microsoft has violated every single agreement that we have entered into and, indeed, Ms. Nellis read to you from a letter -- or an e-mail from Mike Jacobs which came at a time when we felt Microsoft was massively violating an agreement and when we decided we couldn't enter into any more agreements with Microsoft because we couldn't trust even the written word.

The change the Court permitted in connection with Mr. Schulman was, indeed, quite significant and imposed additional burdens, substantial burdens that were not a part of the original protective order. They just weren't there. They were added in, so it's just not correct that it was not a significant change. It was a significant change and we complied with it.

We told the Court about the "confidential"

documents because it's illustrative of Microsoft's abuse of the process, of the ability to designate documents as "confidential."

There were, Your Honor, absolutely no negotiations in connection with this protective order. The protective order that was entered into here was identical to the protective order entered into in other consumer class actions then pending across the country. As I recall, there was -- I recall absolutely no negotiations whatsoever. It was presented on a pretty much "take-it-or-leave-it" basis. You want the documents, you sign this.

The Supreme Court does not favor protective orders. They favor the resolution of discovery disputes, without a question. Where are the cases that say that they do? Microsoft in its brief cites two Iowa cases. Farnum in an attempt to distinguish it and Ashmead v. Harris, and I have to confess to the Court they are supposed to be on page 5, but I don't find them.

But, in any event, the rest of the cases cited are not even from the 8th Circuit. They are federal cases, in some cases lower-court cases not binding on the Court. But, in fact, the rules about protective orders, Your Honor, they are pretty

universal, and the standards are agreed upon: Protective orders are not favored and, in fact, the burden is on the person seeking the protective order to support it by substantial evidence.

Your Honor, the only people on our witness list are people who have agreed in writing to attend the trial. We have not overdesignated. There are no competitors on the list, and I don't know what Mr. Green is talking about. We can't make copies, Your Honor. You think I could be e-mailing out Microsoft "highly confidential" documents? If I can, maybe that changes things, but that would seem to me to make a copy. Perhaps I'm overreading, but it perhaps seems to me that I would not be able to do that.

I think we need to return just a moment to what if there had been no protective order. Microsoft wants you to think that this was a benefit to us. In fact, it was an enormous benefit to Microsoft. What if we had said no? No protective order, come to court, prove every single document that you want to provide protection for, has the right to that protection? That would have been Microsoft's burden, and we did not put them through that, nor did we put the Court through that and we

don't want to do that now.

What we want is a lifting of an onerous burden placed on our ability to properly prepare our people for trial. We think probably most of the "highly confidential" documents don't deserve that protection. Setting that aside, however, we just want to be able to prepare our witnesses to come to court.

There are significant fact witnesses that will come to court, Your Honor, and I will just name -- well, John Constant is on our witness list and has agreed to come in already, and he wrote DR-DOS. He's the guy who wrote DR-DOS. He's the subject of much discussion, and, of course, the whole DRI, all the internal Microsoft documents dealing with DRI are documents that really he needs to know about.

And if I can't show him those documents until 72 hours before trial, if I could get him over from England, which is where he lives, and try to prepare him on these hundreds or more -- I don't know how many documents we've designated, but it's just not possible. It's not fair, and it will not produce a smooth witness examination. It won't produce the kind of examination that will -- that will be humbled

to the jury because we will have to stop all the time because he won't remember what he has looked at if he looks at all of them within the 72 hours before he has to take the stand and probably a little jet lag before.

THE COURT: Has he been deposed?

MS. CONLIN: Yes, he has, Your Honor. Microsoft deposed him in Caldera several years ago.

THE COURT: Were these "highly confidential" documents shown to him at that time?

MS. CONLIN: I don't think so, Your Honor. And the deposition didn't go very smoothly, but Microsoft was taking the deposition, so, of course, they could show him anything they wanted to show him. It was Microsoft's deposition, and they showed him mostly internal Caldera documents. They weren't very interested in showing them what Microsoft had been talking about internal to them. So we're just in a whole upside position from what the deposition looked like. He's not been deposed by us, Your Honor, and he was deposed many, many years ago.

In terms of it being okay for some witnesses, that's not what I said at all, Your Honor. What I said was we could easily comply with a 72-hour rule for the very, very small number of documents

that are third-party documents that are not Microsoft documents. I didn't say that there should be any difference in terms of witnesses. It's the documents that I think deserve different treatment because some of them are not nonparty documents. Microsoft is a party. It's overdesignated its documents. We're about to go to trial, and I really need an opportunity to fully prepare my witnesses.

THE COURT: Very well.

Any other motions?

MS. CONLIN: That's it, Your Honor.

THE COURT: The motions are submitted.

MR. GREEN: Nothing here, Your Honor.

Thank you, Your Honor.

THE COURT: Have a great holiday weekend.

MS. CONLIN: You want to set another time for hearing. We've got a September 10th hearing date.

THE COURT: Which motion is that?

I did set a hearing for the 10th?

MS. CONLIN: No, no, no, I'm wrong about that. It's September 22nd.

MR. GREEN: September 22nd. October 10th -- there are two motions set for October 10th.

THE COURT: Are there other motions we have

not set dates on?

MS. CONLIN: I think there are two or three and the September -- are we off the record?

THE COURT: Off the record.

(Record closed at 3:52 p.m. on September 1, 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 8th day of September, 2006.

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JANIS A. LAVORATO

Certified Shorthand Reporter