

1 IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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JOE COMES; RILEY PAINT, )

3

an Iowa Corporation; )

SKEFFINGTON'S FORMAL )

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

Iowa Corporation; )

5

PATRICIA ANNE LARSEN; )

and MIDWEST COMPUTER )

6

REGISTER CORP., an )

Iowa Corporation, )

7

) TRANSCRIPT OF

Plaintiffs, ) PROCEEDINGS

8

)

vs. )

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)

MICROSOFT CORPORATION, )

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Defendant. )

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

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

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1 PROCEEDINGS

2 (The following record commenced at  
3 10:05 a.m. on September 1, 2006.)

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

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

16 Are you ready to proceed?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 In addition, Your Honor, there were a

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

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

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

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

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

25 And again, just briefly, Your Honor, to

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

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

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

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

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

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

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

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

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

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

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

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

17 THE COURT: Sure. Thank you.

18 MR. TULCHIN: Thank you, Your Honor.

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

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

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

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

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

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

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

1 estoppel, not admissible to the jury at trial.

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

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

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

1 to what these motions have to do with.

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

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

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

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

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

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

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

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

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

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

25 There are just so many objections. The

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

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

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

7 And our last slide, Your Honor, is nothing  
8 controversial. It's a calendar showing dates in  
9 November and December. And, of course, Your Honor, I  
10 don't pretend to know how the Court would handle  
11 holiday recess, but if one assumes a week for  
12 Thanksgiving and two at the end of December, there  
13 are literally 19 possible days of trial, assuming  
14 that the Court sits on every other business day.  
15 From November 13th -- or maybe it's 20. Maybe I  
16 miscounted -- from November 13th until the beginning  
17 of 2007. And we don't think that with the kind of  
18 schedule that we're all facing, with Microsoft's need  
19 to be prepared for trial, with the uncertainty that  
20 lies behind many of these important motions and many  
21 of the evidentiary issues, that it makes sense to  
22 rush to trial by November 13th for the sake of those  
23 19 or 20 days.

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

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

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

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

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

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

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

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

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

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

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

13 Thank you.

14 THE COURT: Response.

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

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

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

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

8 MS. CONLIN: Well, Your Honor --

9 THE COURT: I have other cases too.

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

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

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

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

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

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

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

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

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

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

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

25 Microsoft offers other reasons, of course.

1 We've dealt with them in the brief. I'm going to  
2 just, hopefully, lightly touch on some of them.  
3 First of all, Your Honor, Microsoft insists  
4 on saying that we have new claims. We do not have  
5 any new claims. We have two claims. We've had two  
6 claims since the beginning. We have two claims  
7 today. Two claims for violation of Iowa's law. We  
8 have new evidentiary allegations resulting from new  
9 conduct. We filed the amended petition in  
10 September -- I mean, it was granted in February, but  
11 the Court will recall we took a little sojourn over  
12 to federal court in connection with that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 So it's not as though on November 13th

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

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

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

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

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

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

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

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

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

24 THE COURT: Thank you. Response.

25 MR. TULCHIN: Very briefly, Your Honor.

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

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

1 change considerably.

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

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

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

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

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

1 for the Court -- with all the burdens that are coming  
2 down the road, I think it's sensible for any jury to  
3 start this case in 2007. Yes, the case has been  
4 pending for a long time. One might say that an extra  
5 90 days won't make or break anything, Your Honor.  
6 And here it's just so sensible to start after the  
7 beginning of the year, particularly with the problems  
8 that we will face in picking a jury in any event. To  
9 multiply them by having a holiday period facing the  
10 jury right when the selection process occurs does not  
11 seem to be sensible.

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

19 Thank you again, Your Honor.

20 THE COURT: Very well.

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

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

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

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

16 MR. CHAPMAN: Thank you, Your Honor.

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

20 The parties are here today on Phase I of  
21 VII of the Special Master rulings. The parties  
22 commenced pretrial designations in the winter of  
23 2005. There are six more phases that may generate  
24 additional appeals. Today we will talk about the  
25 first of seven.

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

3 May I approach the Court with that, Your  
4 Honor?

5 THE COURT: Yes. Thank you, sir.

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

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

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

1 plaintiffs will make.

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

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

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

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

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

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

8 MR. CHAPMAN: Yes, Your Honor.

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

11 MR. CHAPMAN: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

25 The plaintiffs have also said that we

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

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

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

25 The plaintiffs have offered no authority

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25       Finally, Your Honor -- and I appreciate

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

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

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

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

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

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

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

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

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

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

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

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

1 statement.

2 THE COURT: So you want all of it out?

3 MR. CHAPMAN: Pardon?

4 THE COURT: You want all of 1185 out?

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

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

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

24 Thank you.

25 THE COURT: Wouldn't the appropriate ruling

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

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

9 THE COURT: Okay.

10 Response.

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

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

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

1 them each time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 THE COURT: Thank you.

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

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

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

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

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

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

1 try to improperly -- improperly influence trade press  
2 reviewers.

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

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

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

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

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

25           Plaintiffs' Exhibit 747. This is the

1 memorandum that Microsoft objects to because it was  
2 prepared in anticipation of litigation, the  
3 memorandum from Mr. Kaplan. Mr. Chapman cites you to  
4 the Palmer case; however, this is not the law in  
5 Iowa. The law in Iowa is stated by the Wells Dairy  
6 case, which was -- which is cited in our brief.

7 That's an Iowa Supreme Court case from 2004. There  
8 the Iowa Supreme Court pointed out that the standard  
9 is whether something was prepared because of pending  
10 or anticipated litigation. It's clear that the memo  
11 from Mr. Kaplan was not prepared because of pending  
12 or anticipated litigation. Instead, Mr. Kaplan was  
13 evaluating options. The options that Go would have,  
14 including doing nothing or undertaking litigation.

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

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

1 sustained.

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

11 THE COURT: Very well.

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

16 MR. CHAPMAN: Sure, Your Honor.

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

21 (A noon recess was taken.)

22 THE COURT: Mr. Chapman.

23 MR. CHAPMAN: Thank you, Your Honor.

24 Just a few very brief points in reply.

25 Mr. Cashman has said that it is somehow

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

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

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

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

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

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

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

8 I have nothing further. Thank you, Your  
9 Honor.

10 THE COURT: Anything else, Mr. Cashman?

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

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

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

17 THE COURT: Okay. Go ahead.

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

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

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

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

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

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

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

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

1 are having.

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

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

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

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

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

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

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

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

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

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

1 1989, people from Microsoft come to the Go -- the Go  
2 business and they have a full-day meeting. And  
3 during that meeting, what Go wants from Microsoft are  
4 two things: They want Microsoft to develop  
5 applications for this small computer, and they want  
6 to be able to interoperate with Microsoft's operating  
7 system on the desktop. Those are the two things that  
8 Go needs or wants from Microsoft. So Go needs to  
9 cooperate.

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

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

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

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

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

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

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

1 literally everything he did.

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

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

1 inadmissible.

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

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

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

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

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

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

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

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

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

13 761, Your Honor, is a letter from a man  
14 named Paul Grayson, who I believe was a CEO -- yeah,  
15 CEO of Micrografx. Micrografx had a tool that they  
16 developed called "Mirrors" which was supposed to help  
17 make things cross-platform, but in this letter he is  
18 talking to Mr. Gates after they've had a conversation  
19 at the big press -- or the big COMDEX meeting of all  
20 the computer people. Grayson, who might have had a  
21 cause of action but never, ever, ever filed a cause  
22 of action, Microsoft seeks to exclude it because  
23 Mr. Grayson suggests -- and the only sentence in  
24 here, Your Honor, that could possibly be something  
25 that would be connected to litigation is this. He

1 says here:

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

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

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

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

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

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

16           They are using subsection (c) when we're  
17 offering it under subsection (d), and it's  
18 1.508(d)(2)(d), and the three things and the only  
19 three things that we have to show -- there's nothing  
20 in there about authority. Three things: Was  
21 Mr. Fade the parties' employee? Absolutely. Was  
22 Mr. Fade -- were these things in here Microsoft's  
23 plans and negotiations? Were those within the scope  
24 of his employment? They couldn't possibly contest  
25 that. And number three: Were these statements made

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

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

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

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

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

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

10 1261 is a similar type of document excluded  
11 for the same reason. It is the business report of --  
12 this is Lotus, Your Honor. We're switched companies  
13 now. We're now to the application company Lotus. As  
14 I recall -- yes, it's a Lotus document, and these are  
15 all Lotus folks that are the "To" and the "From" and  
16 the "CC" and this is -- this talks about the testing  
17 of a Lotus product with a team of technicians who  
18 test that product with a Microsoft product and these  
19 are the results.

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

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

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

12 Microsoft makes exactly the same argument  
13 based on the same reasons for Exhibits 1226, 1301 and  
14 1305. They don't say a thing about litigation. They  
15 did, in fact -- the facts that are included in here  
16 turn up in a legal memorandum later. I'm uncertain  
17 how Microsoft was able to persuade this Special  
18 Master otherwise, but to adopt Microsoft's reasons  
19 for excluding evidence would create a wholly new rule  
20 and we would sure want to go back over all of  
21 Microsoft's briefs to seek to exclude all the  
22 documents they cited or even as to the documents they  
23 seek to introduce because the facts in the documents  
24 were subsequently cited in some legal document.

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

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

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

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

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

3 Microsoft included in the December 1991  
4 Beta what was called the "Christmas Beta" of Windows  
5 3.1. Internal Microsoft documents show that in order  
6 to create problems for DR-DOS and to suggest to  
7 people that DR-DOS was, in fact, incompatible with  
8 Windows, a man named Aaron Reynolds put code into  
9 Windows that would detect -- first they said they  
10 were going to detect DR-DOS, but they changed that  
11 now and now they -- what they wanted to do was test  
12 whether or not MS-DOS was present. And if MS-DOS was  
13 not the operating system running on the machine, that  
14 would pretty much automatically mean it was DR-DOS if  
15 the machine was running. A warning popped up in  
16 front of the eyes of the computer user and said there  
17 was a nonfatal error.

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

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

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

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

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

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

21 THE COURT: Response.

22 MR. CHAPMAN: Thank you, Your Honor.

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

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

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

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

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

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

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

16       With respect to some of the documents about  
17 DR-DOS that Ms. Conlin first discussed: 377, 385 and  
18 436, she says that what this gentleman was doing in  
19 the Far East is he was simply trying to sell his  
20 product. He was not doing that, not by a long shot.  
21 He was trying to drum up support for a lawsuit  
22 against Microsoft. And when you're doing that, you  
23 naturally have an incentive to only gather and only  
24 report those facts which you believe will help that  
25 lawsuit. The documents on their face indicate that

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

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

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

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

25 Plaintiffs' Exhibit 682, Your Honor, seems

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 Thank you, Your Honor.

13 THE COURT: Any further comments?

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

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

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

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

6 With respect to 682, whether or not  
7 Mr. Barry asked him, Mr. "PercyT," to write this to  
8 Go people, he testified to that, Your Honor.  
9 Microsoft has designated that testimony, and that  
10 goes to the weight. It does not go to the  
11 admissibility of this document. At the time he wrote  
12 682, he met all of the requirements.

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

19 761. 761 is the Micrografx letter of  
20 Mr. Grayson, and Mr. Chapman says that some of what  
21 Mr. Grayson says mirrors the allegation in our fourth  
22 amended petition. Imagine that. We cited -- we  
23 relied on evidence to bring the lawsuit, and we used  
24 some of the language -- which we didn't have anything  
25 to do with drafting, I assure you, Your Honor, not

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

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

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

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

21 Microsoft then says to the Court: "Those  
22 documents on which the complaint was based such as  
23 1226, 1261 and 1301 are likewise inadmissible  
24 hearsay." Really, Judge, they told you exactly what  
25 I said. These can't be admitted because a complaint

1 was made based on the facts contained in this  
2 complaint. It's just kind of remarkable.  
3 Microsoft also tells the Court that  
4 Exhibit 911, Mr. Fade's business records, are not  
5 admissible. Microsoft tells you that, "A party  
6 admission must have some force of Microsoft behind  
7 it." That is not the law. That is not the rule. I  
8 read the Court the whole rule from the beginning to  
9 the end. It requires three things. They are all  
10 present. The end. The documents should be admitted.

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

12 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 So here we are on the motion for

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 surveys a year. Other groups worldwide around  
2 Microsoft do surveys. Third parties do surveys.  
3 They do them nationally. They do them globally. And  
4 is it possible that someone picked up the phone in  
5 1998 to do a survey about -- and it doesn't matter  
6 under this topic. Anything. Let's say, you know,  
7 "We're thinking about developing a new computer game.  
8 We want your views." And did somebody who answered  
9 the phone or got us a questionnaire, could that  
10 person have been in Iowa? Absolutely. Probably  
11 likely. How are we going to figure this out? 70,000  
12 employees now, many more going back over the last 12  
13 years, vendors who are doing these surveys,  
14 geographic data are not necessarily kept and --  
15 relating to business or marketing surveys. And then,  
16 even if we could figure it out, then we're going to  
17 educate somebody to testify about all of these? It's  
18 an incredible burden. It would take months to  
19 complete.

20 And the question I ask, Your Honor, is why?

21 Why do plaintiffs need this? What happens next.

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

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

4 What could happen next? Well, I suppose we  
5 would have to try to figure out who those people in  
6 Iowa were and how were they contacted. I'm not sure  
7 we can, but maybe plaintiffs think they can, but  
8 let's say it can be done. Let's say we come up with  
9 100 people for some way, reason or another were  
10 contacted for a survey by Microsoft. Then what? Do  
11 plaintiffs get to depose those 100 people to  
12 determine whether the survey influenced their views,  
13 the views that are not going to be admitted into this  
14 trial? I don't understand it.

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

1 There's no relevance here, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 In short, the Court has ruled that  
5 Microsoft may not seek discovery regarding the views  
6 of absent class members. For that reason alone, the  
7 Court should deny plaintiffs' attempts to take  
8 discovery on whether those views were influenced. If  
9 one is not relevant, the other cannot be relevant.

10 But not long ago Ms. Conlin referred to the Iowa  
11 "goose and gander" rule. And if the Court disagrees  
12 with me, I'm going to respectfully request that the  
13 Court apply the Iowa "goose and gander" rule. If the  
14 Court believes there is an independent relevance  
15 here, it must go both ways. If plaintiffs are going  
16 to be allowed to determine whether class member views  
17 were influenced somehow by Microsoft or persons  
18 working for Microsoft, then it can only be fair that  
19 Microsoft be allowed to discover whether class member  
20 views were influenced by plaintiffs. There have been  
21 many, many newspaper articles quoting Ms. Conlin  
22 saying many, many nasty things about Microsoft. If  
23 we're going to open this up, let's open it up all  
24 around; but again, I don't see to what end.

25 Thank you, Your Honor.

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

4 MS. NELLIS: Indeed.

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

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

9 (A short recess was taken.)

10 THE COURT: Response.

11 MR. CASHMAN: Good afternoon, Your Honor.

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

1 Ms. Nellis.

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

3 Sorry.

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

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

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

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

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

1 be.

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

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

25 What this boils down to is that Microsoft

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

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

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

24 Thank you.

25 THE COURT: Thank you.

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

2 THE COURT: Sure.

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

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

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

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

1 the merits.

2 Plaintiffs say here that this is not about  
3 whether or not class member views were influenced.

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

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

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

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

17 May I bring this up to Your Honor?

18 THE COURT: You may. Thank you.

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

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

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

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

1 Thank you.

2 THE COURT: Thank you.

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

6 MR. CASHMAN: Yes, Your Honor.

7 This is obviously a related motion.

8 Plaintiffs seek to depose ACT, "Americans for  
9 Competitive Technology," in the District of Columbia,  
10 and the local rules there require a commission from  
11 this Court.

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

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

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

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

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

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

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

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

12 Thank you.

13 THE COURT: Response.

14 MS. NELLIS: Yes, Your Honor.

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

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

1 to take those depositions. It's gone.

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

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

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

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

7 We, Microsoft, went through the Tunney Act  
8 letters, which they could certainly do too if they  
9 had wanted to, and these are not the letters that ATL  
10 was involved in, the "Astroturf" campaign. These are  
11 -- that was with the remedies phase. This is  
12 post-remedies phase. This is the "Tunney Act"  
13 campaign. People -- they have no evidence anybody  
14 was involved in that, but in a totally different case  
15 people wrote letters to the government. Microsoft  
16 went through those letters, never finished it, but we  
17 thought there may be some people in here who could be  
18 helpful to our case. We don't know what lowans  
19 think, but here is a set of lowans that we can start  
20 to pull from this group and start to get a sense.

21 And we came to Your Honor and said, "May we take  
22 their depositions?" And Your Honor said, "No."

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

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

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

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

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

12 Thank you.

13 THE COURT: Mr. Cashman.

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

1 out in the papers.

2 Thank you.

3 THE COURT: Thank you.

4 Last motion, plaintiffs' motion to amend.

5 MS. CONLIN: Thank you, Your Honor.

6 May it please the Court.

7 Microsoft complains bitterly that we should

8 not be permitted to seek an amendment to the

9 protective order because we agreed to it, but

10 Microsoft sought an amendment to the protective order

11 and it had agreed to it and the Court granted that

12 amendment. In addition, as Microsoft pointed out to

13 the Court then, the protective order itself provides

14 for amendments, anticipating that either side may

15 reassess its position and realize that there is a

16 need for change.

17 The basic principles are, of course, always

18 important, as they are here. The basic principles

19 with respect to protective orders are, first of all,

20 they are flat-out disfavored under Iowa law. They

21 interfere with the public's right to know. They

22 interfere with the public's right to have access to

23 its court system and its court proceedings, and it is

24 particularly violative of our very strong open-court

25 principles. Nonetheless, they are permitted, and

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

4         The burden is on the party that seeks  
5 confidentiality to show that each and every document  
6 for which it seeks such protection is deserving of  
7 it. It must make a particularized showing of good  
8 cause. Ninety -- I'm making an estimate here, Your  
9 Honor. 99 percent, I'm going to take, maybe 99 and  
10 44/100 percent, of the documents that Microsoft  
11 produced in this case carry designations of  
12 "confidential" or "highly confidential."

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

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

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

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

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

25 The "highly confidential" documents are, of

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

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

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

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

1 be full and that they will be fully prepared.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 THE COURT: Very well. Thank you.  
20 Response.

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

22 THE COURT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 Again, Your Honor, I will make it clear.

5 The protective order allows them to disclose  
6 information to their outside experts and consultants.

7 So that's not at issue here. And, you know, they've  
8 come into court several times and said, "You don't  
9 need real witnesses in this case because the  
10 expert" -- they haven't got any evidence from their  
11 named plaintiffs in their overcharge because they say  
12 it's all experts. The main witnesses they say are  
13 most important to their case are not all prohibited  
14 by the protective order and they have whatever they  
15 want.

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

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

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

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

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

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

25 That's exactly what we did when we entered

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

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

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

1 THE COURT: Ms. Conlin.

2 MS. CONLIN: Briefly, Your Honor.

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

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

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

25 We told the Court about the "confidential"

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

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

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

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

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

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

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

1 don't want to do that now.

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

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

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

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

6 THE COURT: Has he been deposed?

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

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

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

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

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

9 THE COURT: Very well.

10 Any other motions?

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

12 THE COURT: The motions are submitted.

13 MR. GREEN: Nothing here, Your Honor.

14 Thank you, Your Honor.

15 THE COURT: Have a great holiday weekend.

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

19 THE COURT: Which motion is that?

20 I did set a hearing for the 10th?

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

23 MR. GREEN: September 22nd. October  
24 10th -- there are two motions set for October 10th.

25 THE COURT: Are there other motions we have

1 not set dates on?

2 MS. CONLIN: I think there are two or three

3 and the September -- are we off the record?

4 THE COURT: Off the record.

5 (Record closed at 3:52 p.m. on

6 September 1, 2006.)

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CERTIFICATE TO TRANSCRIPT

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

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

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

Dated at Des Moines, Iowa, this 8th day of September, 2006.

\_\_\_\_\_  
JANIS A. LAVORATO  
Certified Shorthand Reporter