

1 IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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3 JOE COMES; RILEY PAINT,)
an Iowa Corporation;)
4 SKEFFINGTON'S FORMAL)
WEAR OF IOWA, INC., an) NO. CL82311
5 Iowa Corporation;)
PATRICIA ANNE LARSEN;)
6 and MIDWEST COMPUTER)
REGISTER CORP., an)
7 Iowa Corporation,)

) TRANSCRIPT OF
8 Plaintiffs,) PROCEEDINGS
)

9 vs.)
)

10 MICROSOFT CORPORATION,)
)

11 Defendant.)

12 -----

13 The above-entitled matter came on for
14 hearing before the Honorable Scott D. Rosenberg,
15 commencing at 9:22 a.m., November 9, 2006, in
16 Room 310 of the Polk County Courthouse, Des Moines,
17 Iowa.

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25 Des Moines, Iowa 50309

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1 PROCEEDINGS

2 (The following record commenced on

3 November 9, 2006, at 9:22 a.m.)

4 THE COURT: First motion I have on the list
5 is plaintiffs' motion to show cause.

6 MS. CONLIN: Yes, Your Honor.

7 May it please the court. I have given to
8 the defendants the additional correspondence between
9 the defendants and the plaintiffs and the additional
10 production that has occurred.

11 THE COURT: Hang on one second. Sorry
12 about that. A little noise back there.

13 MS. CONLIN: Your Honor, Microsoft has
14 failed to comply with the court's order of 1/23,
15 2003, which coordinates discovery between this case
16 and the multidistrict litigation and obligates
17 Microsoft to provide all of the information provided
18 in the MDL.

19 Microsoft is also in violation of your
20 order of 7/22, 2005, in which you ordered the full
21 production of the competitor cases, the Burst,
22 Lindows, Netscape, RealNetworks, including the
23 European case and Sun.

24 And Microsoft is also in violation of the
25 court's orders of 4/10, 2006, and 8/2/2006, the

1 discovery orders relating to Microsoft's obligation
2 to provide various source code to the plaintiffs.

3 Your Honor, we have also put together a
4 time line for the court that we called the "source
5 code saga," and it may help the court to go through
6 this with us because it is a saga, and it is ongoing.

7 THE COURT: Thank you.

8 MS. CONLIN: We begin with the coordinating
9 order and then the order that you granted for us to
10 have the documents in the competitor cases.

11 In December, Your Honor, we served our
12 fifth set of requests for production of documents and
13 113 we asked for source code. Microsoft refused to
14 produce it. We filed our motion to compel on
15 February 16th of 2006.

16 About a month after we filed our motion to
17 compel, Microsoft produced the source code produced
18 in Caldera. The source code produced in Caldera
19 should have been produced at the time we entered into
20 the order in 2003.

21 On 6/02 we had to file expert reports, Your
22 Honor, without any source code.

23 On 6/15, Microsoft produced 46 disks. On
24 6/25, 38 more. We moved to compel the source code
25 for Office XP 2003, Word, Excel, and ID on my

1 birthday 6/30, 2006. You granted our motions to
2 compel, and you told the defendant, in what I thought
3 was very clear language, that we were supposed to
4 have all of the source code that you had ordered
5 produced and that they should have produced, in some
6 cases, three years before by September 1st of 2006.

7 On the 4th, Your Honor, of August, you
8 granted the motion for supplemental protective order.
9 And on 8/27, Your Honor, for the first time
10 Mr. Schulman was able to look at the source code.
11 And when he looked at the source code, he was also
12 able to discern that huge chunks of source code was
13 missing. This is in August of 2006.

14 On September 1st, Microsoft produced to us
15 what they indicated was the full source code for
16 Office XP and Internet Explorer 7. However, that was
17 not correct.

18 On September 15th, I told Mr. Neuhaus that
19 Microsoft had failed to produce the source code for
20 the media player. The media player, according to
21 Microsoft, is a part of the source code. That's a
22 part of the operating-system source code. We didn't
23 have the media player. We didn't have the Office
24 namespace extensions.

25 On 9/27 I got two more disks that included

1 some of the missing material. And when we were last
2 here, Your Honor, the defendant had just filed its
3 brief on October 18th, indicating that, yet again,
4 they had found more source code, 14 disks, as I
5 recall, and that they were going to produce it right
6 away.

7 They then told the court that they would
8 produce all source code by October 31st. And I will
9 tell you, Your Honor, as we sit here today, we do not
10 have all of the source code for any of the products,
11 as far as I know, that you have ordered the
12 production of source code for.

13 I've also provided to the court a list of
14 the defective source code. One of the very troubling
15 things about the production of the source code, as
16 the court will recall, is that we got source code
17 that was produced with active Nimna virus on it,
18 which if it had been, we did not have firewalls all
19 over the place, we would have destroyed our data from
20 top to bottom.

21 We also have learned through Mr. Neuhaus
22 himself in a letter -- I wrote on November 3rd, Your
23 Honor, saying, "Look, I still don't have all of this
24 stuff." This is after the third or fourth or fifth
25 time that Microsoft has represented to the plaintiffs

1 that they have all of the source code.

2 Here is a letter, Your Honor, from
3 Mr. Neuhaus dated November 7th, and attached to that
4 letter is, I think, six pages that list the various
5 source code. And I just wanted to briefly tell the
6 court what I believe this to be.

7 These are Office components of the source
8 code. Office XP, Your Honor, is the product
9 currently on the market. The product that is being
10 shipped today, and Microsoft cannot produce, has not
11 produced the source code for that. As you look down
12 this list, Your Honor, you will see the first entry
13 that does not say produced is exchange server
14 collaboration data object, and that say that source
15 code couldn't be located similar provision produced
16 and there's another entry for that and then there are
17 a number of entries following that where Microsoft
18 produces but does not produce everything.

19 There are places where they simply say they
20 don't have it. They cannot locate the source code
21 for one of their flagship products that they're
22 currently shipping.

23 And, as I indicated to the court, there are
24 six pages of this list, Your Honor. And this list
25 includes many, many, many entries where Microsoft

1 has, in fact, not produced source code for Office,
2 which the court ordered it to produce.

3 I also want to give the court a list of the
4 items from the Windows source code that we believe,
5 as we speak, remain unavailable to the plaintiff.

6 Mr. Schulman, in examining the source code,
7 Your Honor, uses an automated system to compare what
8 title of the files with what is actually there. And
9 in doing so under very difficult circumstances, he
10 has provided to me a list of what he believes we
11 still do not have.

12 Microsoft opposes the motion for sanctions,
13 as one would expect. But among the things and, in
14 fact the only thing, that they say in their own
15 defense is that they're sorry, that none of the
16 errors were intentional and most were resolved well
17 before the motion was brought. That's what they say
18 in their brief, Your Honor. But, really, today these
19 issues are not resolved. And if we were writing on a
20 blank slate, which we are not, then, perhaps, this
21 statement could be accepted at face value.

22 But what we have, Your Honor, and what the
23 court is aware of -- let's start with the litigation
24 with respect to the Department of Justice in which I
25 know the court is very familiar with.

1 The court will recall that in the findings
2 of fact, Judge Jackson sets out what might be called
3 the "saga" of Netscape trying to get materials from
4 the defendant Microsoft.

5 Microsoft would, first of all, promise to
6 produce, but then nothing would come. And then more
7 calls would be made, and they would promise to
8 produce more stuff. But nothing would come. For
9 months and months this went on with Netscape, and
10 they could not build their products as a result of
11 Microsoft's failure to do that.

12 The same pattern of behavior has repeated
13 itself, Your Honor, again and again and again.

14 I think the court has maybe had an
15 opportunity to review some of the documents involving
16 Lotus's attempt to get OCX containers that we talked
17 about, I don't know, some other type that we were
18 here. And Novell's attempt to get namespace
19 extensions for Word Perfect that had been D
20 documented and Novell attempt to get MAPI, which in
21 each instance, the pattern is identical. Yes, first,
22 we gave it to you. You must have lost it or we're
23 going to give it to you any minute. And then, of
24 course, nothing happened and we're facing that
25 identical situation in this case.

1 The court is also aware, I know, that
2 Microsoft was recently sanctioned by another court,
3 by a federal court and fined \$25 million for this
4 kind of conduct. There are several examples in this
5 litigation where as I looked at materials, I would
6 discover some big gap, something that I was missing.
7 And I would write Mr. Neuhaus a letter, and Microsoft
8 would find the missing material and send it along
9 with an insulting letter. But I don't know what else
10 I do not have that I have not discovered.

11 Discovery is supposed to be self-executing.
12 Here it has been like pulling teeth. Almost nothing
13 was discovered. I've lost track of the number of
14 motions to compel that we have had in this lawsuit.
15 Nothing was provided. Almost nothing was provided
16 voluntarily.

17 The first liability documents in this case,
18 Your Honor, were delivered about a year ago. The
19 first of the 25 million pages we've had a year to
20 examine those, and we still do not have all the
21 source code today.

22 Microsoft also says that it was not
23 required to produce the XP source code. I think this
24 is an interesting position for Microsoft to take
25 because what they're saying, Your Honor, is that they

1 voluntarily produced the source code and they
2 produced it exactly as they had produced it to the
3 United States of America in the Department of Justice
4 case in connection with the mediation.

5 Well, did they produce to the Department of
6 Justice source code that was missing all kinds of
7 important components? Either they did not produce to
8 the United States complete source code or they have
9 not produced it here. What they admit is the Windows
10 XP source code they produced was incomplete.

11 This is a stunning admission. The fact
12 that Microsoft cannot produce the source code for the
13 operating system that it is currently marketing is
14 truly remarkable. They say that twice. They say
15 that in their brief. They say that at footnote 2 on
16 page 4 and also on page 19 at footnote 13.

17 They say that the earlier Windows XP source
18 code production in the remedies case, "Did not
19 contain a copy of the source code for Windows Media
20 Players." They go on to say that Microsoft was not
21 required to produce more than what had been
22 previously produced.

23 We did not know -- there was no time when
24 Microsoft has said to us, "Here is the source code,
25 but it is not a complete source code." The only

1 reason we know that it is not the complete source
2 code is because we have a talented expert who can
3 tell that it is not complete source code.

4 There's no question that it's not. That
5 issue has been resolved. What is puzzling and
6 surprising and certainly a source of chagrin is that
7 Microsoft didn't tell us that what it was giving to
8 us was incomplete. It has never told us that.

9 Just recently in November they told us --
10 November 1st -- they said, "Here it is. You've got
11 all that you're supposed to have," and we don't. We
12 don't.

13 The affidavits attached and the opposition
14 appears to be based on Office and IE source code, but
15 it is, in fact, what they also say is that the
16 Windows XP source code is dealt with in the same way.

17 Microsoft has lots of business reasons,
18 lots of technical reasons to have Windows and Office
19 source code available to it. And let me just list a
20 few of them.

21 The need to do quick-fix engineering
22 patches and updates on all of any given version of
23 Windows. Sometimes they need to do that for several
24 years, as long as the products are in existence, they
25 may need to patch them. They need to have in one

1 place all the source code to facilitate hording of
2 that product to another platform. There is also a
3 need to have that to fix bugs because every time you
4 fix bugs, you know, you might create bugs in another
5 place.

6 Perhaps, most important, is they have
7 produced source code to the government, not just in
8 connection with the Department of Justice case, Your
9 Honor, but for security audits, for National Security
10 Audits, for the NSA and the CIA and the Department of
11 Defense, so that the source code can be scanned, as I
12 understand it, to see whether or not there's anything
13 in it that should not be in it. They've been giving
14 the United States government source code that is not
15 complete. Source code for products that are being
16 used in connection with the defense of the country,
17 the running of the country, that doesn't have
18 everything in it, or else they haven't given us
19 everything. There are only two options here.

20 Microsoft has made public statements to the
21 government and to third-party security auditors that
22 they have -- you know, that what they're providing is
23 all of the material. But, apparently, that is not
24 so.

25 Microsoft also tells the court that source

1 code production is unusual. Of course, that is also
2 untrue. It's common in patent cases.

3 Remember, Your Honor, when Microsoft came
4 to the court for the purpose of making the
5 restrictions on Mr. Schulman's assets more onerous,
6 that they cited a number of cases wherein source code
7 had been produced. One wonders, what source code or
8 how much of it? But nonetheless, there are certainly
9 needs for the production of source code. And there's
10 been a lot of patent cases involving Microsoft, and
11 in those cases you have to produce source code. And
12 they don't have their source code. They just don't
13 have it, or they're not producing it here.

14 Microsoft also claims that on page 3 of
15 their brief that source code is, at best, of marginal
16 significance in this case. And they go on to say
17 plaintiffs' rebuttal-expert reports served 11 weeks
18 after the production in June of source code for
19 Windows XP do not rely on it in any way.

20 Of course they don't because we don't have
21 all of it yet. Today we don't have all of it. We
22 have not had all of it. We do not now have all of
23 it.

24 Our rebuttal expert, technical expert,
25 can't provide a rebuttal report, still cannot prepare

1 a supplemental report. And its marginal significance
2 in this case indicates a real lack of understanding
3 on Microsoft's part of what this case is about from
4 our standpoint.

5 We say that Microsoft utilizes undocumented
6 APIs that -- within the source code that are
7 accessible and known only to Microsoft's
8 applications, not to ISVs, despite the fact that
9 Microsoft has promised publicly that ISVs will play
10 on a level-playing field. In order to know whether
11 and to what extent these secret hooks into the
12 operating system exists, we have to have the source
13 code and the documentation of the source code.

14 I also wanted to talk about the failure of
15 Microsoft to produce the Windows Media Player.
16 Microsoft has not produced, as we sit here, Your
17 Honor, source code for Windows Media Player 9. The
18 Windows Media Player is defined as middleware under
19 the judgment of the consent decree of the United
20 States Department of Justice. And as such, Microsoft
21 has an obligation to document all Windows APIs that
22 the Windows Media Player calls.

23 Microsoft claims, as it did unsuccessfully
24 in the DOJ liability case with Internet Explorer,
25 that Windows Media Player is simply part of the

1 operating system. Of course, they did not ship it
2 with the operating system when they shipped us
3 operating-system code. It wasn't there. None of it
4 was there.

5 Nonetheless, our technical expert is
6 testing whether Windows Media Player calls
7 undocumented Windows APIs and whether Windows Media
8 Player is separable from Windows, though we need
9 Windows Media Player 9. And Microsoft says it's part
10 of the operating system. And they have not, and
11 apparently are not going to produce it.

12 Microsoft is now saying that because
13 Windows XP RTM included Windows Media Player 8 and
14 not Windows Media Player 9, we're not entitled to
15 have the source code for Windows Media Player 9. And
16 they argued that we didn't ask for it in time.

17 Microsoft delayed producing materials that
18 it should have given us in some cases, many, many,
19 many years ago. And now argues once we discover that
20 we don't have what we're supposed to have that we
21 can't ask for it because it is too late for us to
22 complain.

23 But Microsoft is using whatever was in
24 Windows XP RTM, and it's not given us everything.
25 Another one that we're missing is something called

1 "Netfx."

2 The .NET framework, which was included in
3 the Windows XP binary that Microsoft produced. .NET,
4 as the court may recall, is Microsoft's answer to
5 Java. If .NET is using undocumented APIs in Windows,
6 that would give it an unfair advantage over Java.
7 But the .NET source code, which would provide to the
8 plaintiffs the answer, is nowhere to be found in the
9 production.

10 I want to take a moment and also respond to
11 one of the affidavits, maybe two of them. The Holt
12 affidavit that was filed, Your Honor, when Microsoft
13 filed its opposition brief explaining that it just
14 couldn't find all of its source code. In Mr. Holt's
15 affidavit, he, first of all, tells us for the first
16 time that there are twelve -- I'm sorry I said 14 --
17 but I looked at this, and I see there were twelve
18 additional disks that were discovered the day before
19 Microsoft filed its brief.

20 That is amazing. He says that Preston,
21 Gates & Ellis which has been doing this work for
22 decades has revised its practices for tracking source
23 code produced in litigation. They've now got it on a
24 spreadsheet. That seems like a very good idea. But
25 it is also countered many of the statements they make

1 in their brief that tracking the source code is
2 difficult or impossible. Now, they tell us if you
3 just needed to put it on a spreadsheet which seems
4 very sensible. He says that the disks that were
5 produced would be highly unlikely, the disks with
6 viruses on them, would be highly unlikely to infect
7 our data. He says, "I understand that it is highly
8 likely that the disks and tape were not infected in
9 the process of copying the source code for
10 production. Rather, the virus apparently existed in
11 the materials as found in the source tree."

12 That is the largest software company in the
13 world allows virus in their source code tree is
14 remarkable. Doesn't Microsoft ever consider scanning
15 their source code tree for viruses. Microsoft is now
16 going into the security business, and they cannot
17 detect or will not detect viruses in their own source
18 code tree.

19 What we're dealing with here -- I tried to
20 think, Your Honor, of some analogy that would be
21 meaningful in terms of our situation. And all I
22 could think of was from my days as a prosecutor and
23 when there was a criminal case which required the
24 recreation of a crime scene in a building and in it
25 needed to be very precise for timing purposes and

1 location purposes and we asked the builder of the
2 building to give us the blueprints and they gave us
3 blueprints that -- which we could not reproduce the
4 crime scene.

5 That's what we've got here. We don't have
6 the blueprints, and we're entitled to them. And
7 you've ordered them no fewer than three times, Your
8 Honor, no fewer than three times. Microsoft has
9 violated not one, not two, but three of this court's
10 orders in connection with its source code.

11 We believe that Rule 1.5172 is the only
12 option left. Microsoft was supposed to produce this
13 material months and months, years ago, but it
14 obviously didn't. And we've been here before.

15 Microsoft has repeatedly delivered to us
16 source code that it represented to be complete, or at
17 least that it did not tell us was incomplete until we
18 discovered it for ourselves. Again and again and
19 again and again. And I gave you the list of what we
20 believe is missing. I gave you the list that
21 Microsoft gave me on November 7th of what they admit
22 is missing or produced in some form, not the form
23 that it used to manufacture the material.

24 Microsoft says that sanctions are
25 unwarranted. And they cite cases that stand for the

1 proposition that a party should not be sanctioned if
2 it complies with the court's order before the court
3 rules on the motion.

4 Microsoft has not complied. And Microsoft
5 also says that we have not suffered any genuine
6 prejudice, I guess as opposed to regular prejudice.

7 This is simply wrong. We're one working
8 day away from the trial in this matter. Much of this
9 material should have been produced years ago or last
10 year or, at the very latest, some of it should have
11 been produced on September 1st. We would have had
12 time then, Your Honor, to have our experts thoroughly
13 examine the source code and make his determinations.
14 But we can't do that.

15 And the issue of the media -- Windows Media
16 Player 9, we feel totally sandbagged on that. We
17 couldn't find it. We said we didn't have it. And
18 now Microsoft makes up this excuse we're not
19 providing it.

20 There is no dispute that Microsoft broke
21 its promise by failing to meet the 10/31, 2006
22 production date that it set for itself. And the
23 failure is ongoing.

24 We respectfully suggest that two sanctions
25 against Microsoft are necessary. I'm assuming, Your

1 Honor, that the \$25 million is out of the question.
2 So instead we ask that Microsoft -- that the
3 testimony of Microsoft's expert, John Bennett, be
4 stricken and not permitted to be presented. This
5 sanction is necessary and appropriate because
6 Professor Bennett takes issue with Mr. Schulman's
7 conclusions about the use of undocumented APIs and a
8 similar practice in code sharing.

9 Professor Bennett has had access to
10 Microsoft source code, but he's also had access to
11 Microsoft developers. And Microsoft's repeated
12 delays in producing source code has made it
13 difficult, if not impossible, for Mr. Schulman to
14 address the issues raised by him.

15 And the second sanction that we seek, Your
16 Honor, under Rule 1.517 is that Microsoft be
17 prohibited from challenging the testimony of
18 Mr. Schulman. We believe that sanction is
19 appropriate and necessary because Microsoft should
20 not be allowed to bring in Mr. Bennett -- Dr. Bennett
21 when, in fact, we've not had access to the material
22 needed by Mr. Schulman to complete his work.
23 Striking testimony is a severe sanction, but it is
24 clearly warranted in this situation.

25 The court has explicit and specific

1 authority under 1.517 to do exactly that.

2 Microsoft tells us that it cannot put its
3 own source code or its currently deployed flagship
4 products together for any -- not for the government,
5 not for its own experts, not for all of the other
6 folks to whom it has provided source code for one
7 reason or another over the years, not for the
8 Department of Justice.

9 The prejudice to the plaintiffs is now
10 irreparable. And we ask the court to sanction
11 Microsoft by striking Dr. Bennett's testimony and by
12 not permitting Microsoft to challenge the testimony
13 of Andrew Schulman.

14 Thank you, Your Honor.

15 THE COURT: Thank you.

16 Response.

17 MR. NEUHAUS: Yes, Your Honor. That would
18 be me.

19 What you've just heard is an extraordinary
20 exaggeration and undocumented story of what we freely
21 admit have been problems in producing source code.

22 And I'm going to explain how those problems arose and
23 what they really were. But much of what Ms. Conlin
24 just told you is not true and not documented.

25 There's no affidavit, no nothing to prove much of

1 what she said. I'm not trying to minimize the
2 problems we've had. There have been problems in
3 producing source code. They are nowhere near what
4 she says, and they're nowhere near as severe as she
5 says.

6 We do sincerely regret the errors. There
7 are three different kinds. One is, there have been
8 viruses and corrupt disks produced.

9 Two is that we discovered source code late
10 and produced it, although immediately after finding
11 it. And three is we learned that source code in the
12 company is not kept in a single place but spread out
13 all over the place and has been a monumental task to
14 gather.

15 The core problem is that source code is
16 completely different from other documents that have
17 been produced in litigation. It is stored -- because
18 of its nature, it's got to be stored completely
19 separately. It can't be on any network computers or
20 anything else where all the other documents are
21 stored that are produced in litigation. And it turns
22 out that it is also stored in the company in
23 different ways than other kinds of documents and
24 extremely hard to track down.

25 Before I go through this, I would like, you

1 know, to set the stage with several points. First of
2 all, as I said, source code is different. Maybe I
3 should explain what source code is.

4 Source code is the human, readable text
5 that you use to build a product. It is then this
6 human, readable text is compiled into the zeros and
7 ones that a machine can read.

8 The zeros and ones that our machine can
9 read are called "binary code," and that is what is
10 put on the disk that is sold to -- sold out of the
11 market. Source code is what the software writer
12 writes.

13 Once you have compiled the source code, the
14 compilable source code, you don't need to go back to
15 it, again, for business purposing en masse. You
16 sometimes do need to go back to fix a bug, but,
17 contrary to what Ms. Conlin says, it is not true that
18 you need all of the source code in one place for a
19 business purpose in real life. And you do sometimes
20 need, and Microsoft does, needs to track back a
21 particular piece of problem to the source code. And
22 when it does, it tracks it down. But it doesn't need
23 to, and has not, whatever she may think has to --
24 should be the case, it has not pulled all the source
25 code for its products together into a one, handy,

1 neat place. We thought that they had.

2 There is something called the "source
3 tree," which is -- or the "source depot" where all
4 source code is supposed to be stored for a particular
5 product. But it turns out that what that contains is
6 all the source code that the product group that was
7 working on the product built. And they put it all in
8 this place called a "source tree," a very organized
9 place, along with a lot of other things that go into
10 making the product in addition to source code.

11 When we produced source code to the
12 plaintiffs, we went to the developers and said, "Give
13 us source code for that product."

14 And the developer said, "Here you go. Here
15 is the source tree, the source depot." And we
16 produced that to the plaintiffs. And what we didn't
17 know at the time, and it has only come out later as
18 we understood it, is that there are a lot of
19 components, you know, a relatively small proportion
20 of the total of any of these products -- less than 20
21 percent -- of these products that are contributed by
22 third-party partners, that is, other organizations
23 within Microsoft that give you source code, that
24 build the product, the component, and put it into the
25 product just before it's built or third parties,

1 non-Microsoft companies that -- you know, that are
2 under contract and provide the code for this sum
3 component.

4 And those materials are not all collected
5 in the source tree or the source depot. They are
6 often out there, wherever the person, wherever the
7 builders were, either within Microsoft or the third
8 party. And they will -- they call it dump or drive
9 the binary code into the product at the end. And the
10 bindery code appears in the source tree.

11 But the result is -- and the result is that
12 if you produce a source tree, you're not picking up
13 the source code that is out in the developers at
14 Microsoft or in the third parties.

15 In many cases, Microsoft simply doesn't
16 even have the source code. There isn't a need in
17 general terms to go back and get access to all the
18 source code. The third parties may not, and often do
19 not, give it to Microsoft. They give the binaries.

20 And in other cases, you've got source code
21 that was written way back in 1990s that the component
22 is carried forward into products -- you know, into
23 new generations of the products. And there has been
24 no need to collect that source code and put it in the
25 source tree. And sometimes it simply doesn't exist

1 anymore. That developer has moved on.

2 All I'm trying to illustrate is it's very,
3 very -- it turns out, we didn't understand this. We
4 thought source tree, give us the source tree. It
5 turns out when you say "I need every single last
6 component," they say, you know, "That's incredibly
7 difficult to do." It's very difficult even to find
8 them all. Then when you find them all, you trace
9 them back, you try to find something that was written
10 in the 1990 and it doesn't exist any more or you've
11 got the version of the source code that was one, you
12 know, build they call it before the final so it's not
13 exactly the same and you try to pull it all together.
14 That's what we've been doing. That's why it's been
15 so difficult.

16 So all that is by way of saying source code
17 is quite different both in the way it's dealt with in
18 the company in terms of code, in terms of trying
19 to -- and the way it's relative rare. When it's been
20 produced in litigation it has to be dealt very, very
21 specially. And that has resulted when Microsoft has
22 attempted to produce all the documents produced in a
23 prior litigation. It has overlooked some of the
24 source code, which I will come to.

25 We have to keep in mind that this has been

1 an immense document production, larger by far any of
2 us, I think have ever seen. Twenty-three million
3 pages of documents of all different kinds of
4 documents and videos and many, many other things.
5 And source code presents significant problems of its
6 own, but it is a piece -- only a piece of the total
7 production.

8 I also want to make clear, to emphasize,
9 that much of the production in this case has been
10 production from prior litigation, as you know, and,
11 in fact, the source code that Ms. Conlin says we owed
12 her at the outset was produced in prior litigations
13 with some of the competitors, not very many of them,
14 and relatively rare but still it comes in those case
15 and we were always -- when we were ordered to produce
16 all of the documents from the prior litigation, it
17 was Ms. Conlin said it this was material that was
18 readily available and could be duplicated with a push
19 of the button and with little effort at little cost.

20 We said at the time it wasn't that simple.
21 We were quite right. It isn't simple but the result
22 is we were supposed to produce what was produced in
23 the prior case an simply sort of hands it over just
24 as it was and that is meant is if there corrupt disks
25 for a virus on a disk and in particular corrupt disks

1 we weren't supposed to be checking every single file,
2 we were to be copying it over and that's what we
3 dealt and that has led to problems as well.

4 I also ask, before I go into each of these
5 issues, that the court keep in mind that the
6 discovery in this case has gone pretty much all in
7 one direction from us to plaintiffs. Plaintiffs'
8 production of documents has been two one-hundredths
9 of 1 percent of Microsoft's production to them.

10 Even so plaintiffs have had similar
11 problems. They have overlooked files in producing
12 them to us. Ms. Conlin, when she produced the Howerly
13 documents, forgot to look on her computer for a
14 spreadsheet that he had sent her. She had sent her
15 e-mail wrong so it was automatically deleting e-mail
16 she received. More than 90 percent of the production
17 from the plaintiffs Riley Paint has come weeks and
18 weeks after it was due. All of this is, of course,
19 on a much, much smaller scale than the problems that
20 Microsoft has had. But their whole production has
21 been a much, much smaller scale. But the real point
22 is that document production is complicated and
23 massive document production like this is especially
24 complicated.

25 So let me now go through this and first I'd

1 like to explain what happened, how it is that the
2 errors that really did occur in producing source
3 code. Then I would like to talk about the
4 exaggeration that she made in her presentation today,
5 most of which I will tell you are not in her papers.
6 I've never heard of this before and there's no
7 support, no affidavit that says anything about all
8 the supposed business purposes that she says
9 Microsoft has for having all the source code
10 collected in one place, which it simply doesn't have.

11 All right. Let me go through this, and
12 we'd really regret these errors. We think they're
13 understandable. They've been mistakes, and I would
14 like to explain them in a completely clear way.

15 First, although mentioned only in passing
16 today in her time line and in her papers, she makes a
17 great deal of viruses and corruption on various disk
18 and source code.

19 So I want to examine what really happened
20 there.

21 There were viruses on two disks, and one
22 tape of so-called "digital linear" tape of source
23 code that were produced on January -- on June 15 and
24 16, 2006. Each one of those has one or two files
25 infected. This is out of more than 140 disks and the

1 tape of source code that have been produced in this
2 action. This was the virus. It was a serious lapse,
3 but it was caused by a one-time effort to produce to
4 plaintiffs very quickly a large quantity of source
5 code that had just been located.

6 The source code that had been found had
7 been produced in prior cases and had been stored in a
8 vault at Preston, Gates and Ellis that had been
9 overlooked when the 23 million pages of documents
10 were produced.

11 The 23 million pages of document were
12 produced was completed in December of 2005, and this
13 material was found on June 13, 2006. It was produced
14 to plaintiffs, extremely quickly, on June 15 and 16,
15 2006.

16 In order to produce it that quickly, the
17 materials were divided between Preston Gates and
18 Ellis, its internal tech department, and an outside
19 vendor called "Lighthouse Global Technology."

20 The vendor did not include a virus check
21 when it duplicated the disks and tapes. Preston,
22 Gates and Ellis does, and as a standard practice has
23 always does so or does so now in this case, as far as
24 I'm aware.

25 The vendor's position, unbeknownst to

1 Preston Gates, was that a virus check can make
2 alterations when materials is being duplicated. They
3 call it the "forensic" duplication.

4 Preston, Gates lawyers didn't realize this.
5 The viruses appear on Microsoft's copies of the disk
6 as well. They weren't inserted in the course of
7 production. The minute they were found, they've all
8 been replaced. And, of course, the vendor has been
9 instructed to include a virus scan going forward
10 whenever it duplicated the materials.

11 We told the Plaintiffs this was the cause
12 at the time. Plaintiffs say that there were other
13 virus concerns -- have raised other virus concerns in
14 their papers, but those were, in fact, inert viruses,
15 traces left after a virus scan cleaned the document.

16 Most virus scan software today does not
17 even report that as a hit. They use one version of
18 the virus scan software that says the hit is
19 essentially a false positive. So that's the virus
20 issue. It's a serious issue. We regret it, but it
21 occurred in the way I've just described as a result
22 of trying to get materials out very quickly.

23 In her papers she also mentions corruption,
24 that there were disks produced with corrupt disks.
25 This occurred on the June 15th and 16th production

1 and of one later production. There were a total of
2 six disks that had one or two files that were
3 corrupt. They were corrupt in our versions too. The
4 only way you can catch that is by a file-by-file
5 check, which as, I said to you earlier, exactly what
6 we were not supposed to be doing with respect to
7 production of material from the prior litigation.

8 All of these problems, the viruses and
9 corruptions, were fixed by September 1st.

10 The second set of problems was late
11 production of source code, that is, source code that
12 was overlooked in producing the documents produced in
13 prior litigation. Here I just want to pause.

14 She said it today again, and she said it in
15 here papers: that we had failed to comply going back
16 with the court's January 23, 2003 order, which
17 obligated Microsoft, she says, to produce all of the
18 information produced in the MDL case, and that's just
19 not true in two ways.

20 The source code and the result is that she
21 says that some of the source code is years old
22 because it should have been produced to her in 2003.
23 Two things about that.

24 The January 23, 2003 pretrial order in this
25 case did not require Microsoft to produce to

1 plaintiffs everything that had been produced in the
2 MDL proceeding.

3 What it required was that Microsoft would
4 not object to the plaintiffs in the MDL proceeding,
5 sharing with the plaintiffs in Iowa and other state
6 cases materials that were produced in the MDL
7 proceeding. The whole design was that the individual
8 state plaintiffs would go to the MDL plaintiffs and
9 get the documents that have been produced in the MDL
10 proceeding. That is what these plaintiffs have done
11 in Minnesota.

12 Ms. Conlin and Mr. Hagstrom got the
13 materials from the MDL plaintiffs. They didn't come
14 to Microsoft to get them, and that was precisely what
15 was intended. When there have been specific issues
16 raised, they couldn't find or couldn't get from the
17 MDL plaintiffs something, they would come to
18 Microsoft and Microsoft has produced it. But it's
19 not true that we were required to produce whatever
20 had been produced in the MDL plaintiffs. They were
21 supposed to get it from the MDL plaintiffs.

22 But more importantly, in the MDL
23 proceeding, there was no source code produced from
24 the case that she's describing. The MDL order, the
25 order that required production of all the materials

1 from prior cases, specifically excluded source code,
2 and that's in our materials -- on Exhibit C of our
3 materials has the MDL order in which we were required
4 to turn over to the MDL plaintiffs the materials in
5 prior cases.

6 And paragraph 21 says quite specifically
7 Microsoft is not required by this order to produce
8 source code for its software. So that, in fact, the
9 first order that required us to produce source code
10 to the plaintiffs was the order that required us to
11 turn over from the prior litigation, it was Your
12 Honor's order in July of '05 requiring us to produce
13 all the materials that had been produced in other
14 cases, not the MDL case, but in competitor cases and
15 the like. And that material was all produced -- it
16 took four-and-a-half months. That's the 23 or 17
17 million pages of documents, and that was all produced
18 by December of '06.

19 And then in June of '06, some of the source
20 code that had been produced in those prior
21 litigations was discovered and produced in the
22 two-day period that I've described.

23 The cause of that is, as I've said, that
24 source code is kept in different databases. The 17
25 million pages is kept in a big database or in other

1 sources around the company. But because source code
2 requires such special treatment, it was
3 produced -- it was kept in secure vaults or sent back
4 to Microsoft and secured there. Or in one case, it
5 was kept at outside counsel's office. And the only
6 record that had even been produced was the letter
7 producing it which was found in the correspondence
8 files for that litigation only by a document by
9 document, looking through the correspondence to find
10 this.

11 All of that is by way of saying that the
12 source code produced in litigation is very, very
13 difficult to find. It's very difficult to keep track
14 of, and it is not like other documents, and it was
15 simply overlooked.

16 When it was discovered in June, it was all
17 produced very, very quickly. One set of source code
18 was ultimately found only in October because, as I
19 said, in trying to track down all source code that
20 may have been produced, we were going through
21 correspondence files in the litigations that had been
22 conducted years before and found a reference to it.
23 We traced it back to the lawyer who conducted that
24 litigation, and he said he had it locked in his desk
25 drawer. And we produced it from that source at that

1 time.

2 So that is how it arose that some of the
3 source code was produced not in December when we
4 completed production of the other materials, but in
5 June and in one case in October.

6 The third category of error and the error
7 that she -- that Ms. Conlin has focused on most is
8 that when Your Honor ordered the production of
9 additional source code in August, August 2nd, when we
10 produced it on September 1st, it didn't have all of
11 the components of each product. Several things about
12 that, and then I would like to -- and then I'll try
13 to explain a little bit more on how that occurred,
14 although I think I've already forecasted it.

15 The order to produce the source code on
16 August 2nd, and this is, as I say, the source of
17 her -- the primary source of her complaint at this
18 point -- directed us to produce the source code that
19 had been requested in her motion, which was source
20 code for Office, XP, Office 2003, and a product -- a
21 component called "Internet Explorer 7 Beta." Your
22 Honor did not require us to produce and plaintiffs
23 did not seek to have us produce the operating system
24 source code Office -- sorry, Windows XP.

25 And that's a critical point because she now

1 complains that, well, we've not produced Windows
2 Media Player 9. (A), there is no order that requires
3 us to produce Windows XP. Windows Media Player is a
4 part of Windows XP; and, (B) -- strike that. There's
5 no order that requires us to produce Windows XP.

6 What we were required to do is produce
7 whatever had been produced in the prior litigation.
8 And in the prior litigation, as Ms. Conlin has said,
9 Windows XP, one version, the first one released to
10 market in October in 1991 was produced to the DOJ in
11 the context of mediation. And it appears at that
12 time, this was in 2001, that Microsoft produced the
13 source tree for Windows XP. Again, in the context of
14 mediation, there's nothing out there that says
15 produce every last bit of source code. Microsoft
16 produced a source tree for Windows XP. And when
17 plaintiffs sought the production of additional source
18 code, they didn't seek an order that required us
19 to produce Windows XP.

20 Nevertheless, when these problems arose,
21 when plaintiffs said we haven't found a certain
22 component of Windows XP and we haven't found a
23 certain component of Office XP, we went and looked
24 and learned about this whole source tree problem.
25 And we since tried to -- and we've, therefore, gone

1 to get the complete source code for the Windows XP
2 product that was produced to the government in 2001
3 and for the Office products that were ordered to be
4 produced in this case.

5 In doing that we learned what I've
6 described about how source code is stored at
7 Microsoft, that 80-plus percent is stored in the
8 source depot. But if you have to get every last
9 piece of source code for a product, you've got to do
10 this massive effort. And it has been massive to try
11 to find all the source code. It has required
12 Microsoft in the last six weeks or so to contact more
13 than 500 developers around the company. More than
14 4,000 e-mails have been exchanged between the lawyers
15 at Preston and us, and these 500 developers in order
16 to track down all of the source code that -- these
17 last bits of source code that are spread all around
18 the company. We've done that. We've accomplished
19 that. And we did so by, I think, except for one
20 component, as of October 31st, and that component was
21 sent on November 1st.

22 Ms. Conlin then wrote us and said, "You
23 haven't produced all the source code." I answered
24 her on the letter of November 7th that she gave you
25 and pointed out that the components that she had said

1 we haven't produced, we had, in fact, produced.

2 And, in fact, her expert who produced --
3 presumably handed up -- who generated this list of
4 source code they say is still missing, admits that
5 while Neuhaus's November 7th letter is indeed
6 correct, that MSN metal source code, one of the ones
7 she complained about, was provided on October 20th,
8 along with MSN Explorer and MSN Messenger, both of
9 which she said they didn't have.

10 They do appear to be missing MSN metal
11 source code files, and he provides EG a list of
12 files. None of this have I seen before. She's
13 never -- I've asked her ever since September, "Let me
14 know if you're looking for anything in particular."
15 And all I can say is there no affidavit, nothing that
16 says -- that supports this claim, and they've been
17 wrong before.

18 The other thing she complains about that
19 she says aren't there that I have had a chance to
20 respond to when I go look for it, it's not the
21 product -- these components that aren't in the
22 products we were getting source code for.

23 We were ordered to get source code from
24 very specific products: Office 2003, Office XP, and
25 we undertook to get source code for Windows XP, the

1 version that went to market. And we've done that,
2 and now she says, "Well, get me something else or get
3 me something else or get me something else." And we
4 have done what we were ordered to do and what we
5 undertook to do. It's been an immense effort.

6 Really, monumental effort over the last six weeks.

7 And if there are other things missing from
8 the product that we were supposed to get, we will go
9 get it and find it, but I don't think there are. I
10 think we've got them all.

11 Our people have done a huge amount of work.

12 It was hundreds of files, dozens and dozens of
13 components that people have had to track down
14 individually to get this.

15 The problem is, as I said at the outset,
16 that there isn't any reason to have source code at
17 the company for the product in one place. The
18 company has, in fact, sought, ever since about 2001,
19 there's documentary evidence out there that shows
20 that people are saying we really should pull this
21 altogether because it makes -- bug fixing would be so
22 much easier if we had it all in one place -- that was
23 with Windows XP. Those projects have not been
24 successful. They've not gathered all the source code
25 in one place, as we learned in this exercise. And to

1 say that, "Well, you have business purposes to go
2 back to source code that you needed for quick-fix
3 engineering, that's bug fixing." Yes, absolutely.
4 But the way it's done in real life is you trace back
5 each individual piece until you find it. And
6 sometimes you don't find the source code. And then
7 you just work around it. That is the way it works in
8 real life.

9 In document production, we can't be ordered
10 to produce something that doesn't exist. If it
11 exists, we have produced it. But the fact that
12 Microsoft doesn't work the way Ms. Conlin's experts
13 think it should, "Oh, well they must have it all in
14 one place." That's what we thought too, and it just
15 ain't so. It's not something you can sanction
16 somebody for that they don't have a document that she
17 thinks you should have.

18 Ms. Conlin says that we should produce this
19 Windows Media Player 9.0. As I say, that is not a
20 product. That is not a component of the Windows XP
21 version that we undertook to produce. This one that
22 was produced in 2001. It's a much later version.
23 When she requested -- it's a component of an update
24 to Windows XP that was released much later. When she
25 originally requested source code, she asked for

1 source code for major releases only in -- in the
2 motion that required us to produce all of this
3 material that she explicitly said major releases
4 only. We have produced the source code for the major
5 release Windows XP RGM, the one that is called -- the
6 one shipped to market. Windows Media Player 9.0 is a
7 feature of much later updates and was not ever asked
8 for just as she never asked for all the updates of
9 other products.

10 If we were to have to go get that it would
11 be weeks and weeks of more work because of the same
12 problem of tracking this all down and tracking down
13 the precise version of the source code that was
14 shipped with a particular product.

15 The same with netfx.NET. That's never been
16 raised, but as far as I know it is -- we produced all
17 the components of that that were part of the Windows
18 -- Windows XP major release. And if there are files
19 that we didn't get, we will get them, but I don't
20 think there are.

21 On The significance of source code, we
22 haven't seen -- they had source code for months. She
23 says we haven't had it all, but there's never been
24 any suggestion, never any explanation, no affidavit,
25 no nothing in her papers, for why it is that you need

1 it all to look at what you're looking for, which is
2 whether components culled into Windows -- into
3 Windows. You need the particular components. No
4 one has ever used source code for the purpose that
5 she says that they're going to use it for. Her
6 experts have said repeatedly that you don't need
7 source code to do that. You reverse engineer using
8 the binary code that is out there. That's how it's
9 been done in all the other litigations, even though
10 source code has been produced.

11 The reason some of these problems have only
12 come to light now is because even though source code
13 has been produced, as far as we can tell, no one has
14 ever actually used it. And they still haven't used
15 it to -- the concept that you would strike the -- the
16 testimony of our witness based on a -- these issues,
17 when there's been no indication of any use on their
18 side or of ours of the source code is to me just
19 extraordinary and disproportionate.

20 And the concept that we couldn't challenge
21 the testimony of Mr. Schulman who has to date offered
22 no testimony with respect to source code, although
23 they have had it for months, is also extraordinary.

24 The errors that I've described were
25 mistakes. They were not intentional. Microsoft has

1 made immense efforts to rectify them. The proportion
2 of source code that was missing as of September 1st
3 is a relatively small proportion of the total. There
4 have been no showing that it's critical components.
5 There's been no showing at all of the importance of
6 this stuff. We've never seen anything of them
7 actually using source code for any purpose
8 whatsoever.

9 I should also add the two sanctions that
10 she mentioned today are nowhere mentioned in her
11 papers. They're extremely serious sanctions. They
12 would cripple, I believe, Microsoft in its defense.
13 If those are even remotely being contemplated, we
14 would request some opportunity to address them in
15 more detail because this is the first I've ever heard
16 of them. And they're based on a request that, as I
17 must say, are simply handed up for the first time in
18 court with no evidentiary support and no opportunity
19 to respond, that is, to these claims that additional
20 source code is missing.

21 Your Honor, Microsoft has worked very hard
22 to produce the source code in the first place and to
23 fix the errors. It regrets the errors. It doesn't
24 try to minimize them. They exist. They're nowhere
25 near what Ms. Conlin has said, but they're -- they

1 were errors and they shouldn't have happened. I
2 believe they are understandable. They're the kinds
3 of problems that arise in huge document production
4 and are due in large part to the very special nature
5 of source code.

6 But, in light of the completely
7 unintentional nature of the errors, the immense
8 efforts we've taken to rectify them and the totally
9 disproportionate nature of the request for sanctions,
10 we ask that Your Honor deny the motion.

11 THE COURT: I'm trying to understand
12 something here. Are you suggesting that the
13 plaintiffs have to show that the source code order by
14 the court's order has to be shown to be significant
15 in order to prove a failure to abide by the court's
16 order?

17 MR. NEUHAUS: No, Your Honor. No, Your
18 Honor, not at all, Your Honor. We agree that we
19 should have produced all the source code by
20 September 1st. And we did not know that we had not
21 produced all the source code by September 1st. We
22 thought we had. And I'm not suggesting that at all.

23 That goes to the disproportionate nature of
24 the sanctions.

25 THE COURT: Source code you say is not that

1 important anyhow?

2 MR. NEUHAUS: What I'm saying, Your Honor,
3 is we have not seen any evidence of their use of
4 source code in this case or in any other case.

5 THE COURT: I want to know if it's
6 important to the defendant.

7 MR. NEUHAUS: Sorry.

8 THE COURT: Is source code important to the
9 defendant?

10 MR. NEUHAUS: To the defendant. As a
11 commercial matter it's very important because it
12 is -- it can be used to recreate the product. It's a
13 trade secret.

14 THE COURT: And it requires special
15 treatment as you stated?

16 MR. NEUHAUS: It does.

17 THE COURT: So if it's so special, how come
18 you don't know where it's at?

19 MR. NEUHAUS: Your Honor, it's so special
20 because once it's created -- when it's written, then
21 it is compiled into this final product. But it is
22 secure. There's been no indication anywhere of a
23 leak. But to trace it back for every piece of --
24 these are products that are tens of millions of lines
25 of code long, and, as I say, 80 percent of it is kept

1 in this one place. But it is extremely vital trade
2 secret material, and it is kept within the company at
3 every place it's kept in a secure way. It's just a
4 problem of trying to gather every piece of it for
5 these huge products.

6 So the answer is -- it's that every single
7 little component, the individual developer has kept
8 it secure. It's, after all, at Microsoft. But to
9 trace back to this component, which was written in
10 1992 for Windows XP, that developer has it there.
11 I've got to find the precise source code that went
12 into building that particular component. It's just a
13 huge task.

14 THE COURT: Has Mr. Bennett looked at this
15 source code?

16 MR. NEUHAUS: I don't believe
17 Mr. Bennett -- he's received everything the
18 plaintiffs have received. It's not referred to in
19 his report. He's not used the source code. He
20 receives what the plaintiffs have received. If they
21 advance some claim or some argument out of the source
22 code, he will look at it and tell us what the story
23 is or give us -- tell us what -- analyze what they
24 do, but he's not advanced any affirmative proof based
25 on source code.

1 THE COURT: You're proposing him as an
2 expert to rebut Mr. Schulman's testimony?

3 MR. NEUHAUS: He's a technical expert on a
4 wide range of problems, a wide range.

5 THE COURT: Is he going to be used to rebut
6 Schulman's testimony?

7 MR. NEUHAUS: He would be used to rebut
8 Schulman's testimony on -- he'll be used to rebut
9 Schulman's testimony on a wide range of issues.

10 THE COURT: How about source code issues?
11 Will he be used to rebut Schulman's testimony on
12 source code?

13 MR. NEUHAUS: Yes, he would be. He's not
14 had any occasion to deal with source code yet.

15 THE COURT: I'm not going to be surprised
16 at trial, though, if he starts talking about source
17 code that he looked at that Mr. Schulman didn't look
18 at, am I?

19 MR. NEUHAUS: No. He will respond to what
20 Schulman does with source code if Schulman does
21 anything.

22 THE COURT: Anything else, sir?

23 MR. NEUHAUS: No. Thank you, sir.

24 THE COURT: We will take a short break.
25 Fifteen minutes.

1 (A short recess was taken.)

2 THE COURT: Rebuttal.

3 MS. CONLIN: Yes, Your Honor.

4 Let me begin by trying to make clear why
5 all source code for Windows XP is necessary before we
6 can make the determination of a critical issue.

7 Here is the question we're testing. This
8 is one of the questions we're testing. Does, as an
9 example, Windows, Excel call a secret hook in XP?
10 Does it use that secret hook that nobody else knows
11 about to make Excel work better, faster than a
12 competing product could work because they don't know
13 about this secret hook in Windows XP?

14 In order to find out whether or not Windows
15 XP has a secret hook, we would have to have all of
16 the Windows source code because unless we had all of
17 it, the secret hook might be in some part that was
18 missing.

19 Does that make sense?

20 THE COURT: Yeah.

21 MS. CONLIN: That's the problem. That is
22 our problem.

23 THE COURT: Do you want me to swear myself
24 in?

25 MS. CONLIN: No, Your Honor.

1 MR. NEUHAUS: Do you want me to talk

2 because I don't think it makes sense at all.

3 THE COURT: I'm just trying not to look too

4 stupid.

5 MR. NEUHAUS: You can see that the reason

6 this is done without source code is because you're

7 looking at how one program talks to another program,

8 which is done in the open air, so to speak.

9 MS. CONLIN: Not really. That's just not

10 correct.

11 THE COURT: Go ahead.

12 MS. CONLIN: We need the source code for

13 the products that are talking to each other. And we

14 need to know if they're talking a language that

15 nobody else understands. That's the basic thing.

16 And we can't know that without everything.

17 In order to review the source code, we have to have

18 all of it. It is interlocking. It is

19 interdependent. Using back to my blueprint analogy,

20 Your Honor. If I had to rebuild a building identical

21 to another building and I had all of the blueprints

22 except for, you know, one corner, I wouldn't be able

23 to put that building up. And that is what we are

24 faced with in this case.

25 Let me say that with respect to what we

1 have produced, Microsoft makes much of the fact that
2 we haven't produced very much, but they haven't asked
3 for very much and we produced what they asked for.
4 We don't have that much. We don't have 25 million
5 pages of documents. These are ordinary Iowa citizens
6 who are endeavoring to represent the class.

7 They say that Riley Paint, that most of
8 Riley Paint's materials, that counting up the pages,
9 that we didn't produce it initially. Well, that is
10 because we were a little bit surprised to learn that
11 what they wanted were the manuals for a kind of
12 proprietary industry-specific software called
13 "batchmaster" in which Riley Paint mixes colors. And
14 so we gave them these manuals, and they're pretty big
15 and that's where they get that particular statistic
16 that they have cited to the court.

17 It was to hear Mr. Neuhaus to say that they
18 have just now learned that the source code is not
19 kept in one place is surprising given the fact that
20 Microsoft has been involved in decades of litigation
21 involving this source code. And Sullivan & Cromwell
22 and Preston and Gates has represented Microsoft since
23 the beginning, virtually the very beginning of
24 litigation. So how is it that today for the first
25 time or in the course of this litigation for the

1 first time they're learning that they don't seem to
2 have all of their own source code for their flagship
3 products?

4 Several times they have been required to
5 produce source code. In Caldera they were required
6 to produce operating-system source code. In Burst
7 they were required to produce source code for Windows
8 Media Player 9. I'm thinking because Windows Media
9 Player 9, as I look back on it, was the Windows Media
10 Player which Burst, among those that Burst said
11 infringed on its patents. And so I don't understand
12 why Windows Media Corona, which was its code name,
13 would not have been produced in Burst.

14 Microsoft says to you, Your Honor, that it
15 isn't going to give it to us, whether they produced
16 it in Burst or not. It is a part of the source code.
17 They have said that over and over and over again. In
18 pleadings, in testimony, again and again. It's one
19 of the five middleware products that Microsoft is
20 required by its consent decree with the United States
21 Department of Justice to assure there are no
22 undocumented APIs in that particular source code.

23 Microsoft tells you that they do not need
24 to go back to the source code for any business
25 related materials. Mr. Jim Allchin, one of the very

1 top officers of Microsoft, has said that they need it
2 in public statements, that Microsoft has made public
3 statements for years, that desperately stored source
4 code for its Windows product was a serious problem
5 but that it has been addressed and resolved.

6 It's also true that using its own
7 technology Microsoft could have automated the search
8 for components whose source code was missing from the
9 Windows and Office's source code -- source tree
10 depository.

11 Microsoft has made statements, public
12 statements, reported statements that governments and
13 third-parties security auditors have conducted
14 thorough and exhaustive reviews of its Windows source
15 code. That, of course, can't be true if, in fact,
16 they don't seem to have all of their Windows source
17 code.

18 And, particularly, following the United
19 States v. Microsoft consent decree, Microsoft has
20 made public statements that it monitors or polices
21 the use of undocumented Windows APIs by all of its
22 software, both efforts included in the Windows
23 package and software shipped separately from Windows.

24 Microsoft complains that we were unable to
25 do an affidavit for the court. Please look, Your

1 Honor, at the date on the letter that Mr. Neuhaus
2 sent to me. It's November 7th. This is
3 November 9th. I can produce -- if the court wants to
4 have this material that I provided to you from
5 Mr. Schulman sworn, we can certainly do that. But
6 the court doesn't even need this in order to make its
7 judgment about what Microsoft has done here. It can
8 rely on Mr. Neuhaus's letter of November 7th in which
9 he admits that he has not produced all of the source
10 code that this court ordered him to produce. It's
11 not been produced.

12 I have to tell you, Your Honor, I cannot
13 believe that Microsoft does not have all of the
14 source code for its currently shipping flagship
15 products. It doesn't seem possible.

16 Microsoft insisted on onerous requirements
17 that have been very hard for us to meet with respect
18 to Mr. Schulman's examination of the source code. He
19 has to drive hours. It's been a very difficult thing
20 for him. Now we learn that they have left it lying
21 about in lawyer's offices. He says that the minute
22 that the viruses were found, that they replaced the
23 source code.

24 Well, that was such a serious situation.
25 If we had loaded those disks unknowingly without all

1 of the protections that we have, our data would have
2 been destroyed. The Nimna virus is one of the most
3 dangerous viruses ever created. It destroyed
4 billions and billions of dollars of data. And I know
5 that from Microsoft's own documents. That's how I
6 knew the name of the virus and what it was capable of
7 doing. That is in Microsoft's source code tree. It
8 is just very difficult also to accept. And they say
9 they sent us the Luru virus, but we shouldn't have
10 been so worried about that because it was, quote,
11 inert. We couldn't run the disk until that so-called
12 inert virus was removed.

13 And it only came on whatever they said,
14 twelve -- whatever I've got on my list, 12 or so
15 disks. That one disk, one spot of that virus could
16 have destroyed all our data in my office. It would
17 have been gone. It would have been corrupted. It
18 would have been irretrievably corrupted.

19 Mr. Neuhaus complains that some of the
20 things that I've said today are not in my papers.
21 It's because I just got some of this material.

22 Microsoft produced -- let's talk a moment
23 about the Caldera source code, which was produced to
24 us as the operating-systems source code for the older
25 operating systems.

1 When that was produced, you know, the
2 letters say -- and you've got the letters, Your
3 Honor. Here is the source code for Windows 95. It
4 doesn't say, "Here is part of the source code or here
5 is it as much as we could find or here is the source
6 code tree but no components."

7 The same thing is said, Your Honor, when
8 they produced the Windows XP source code. It says,
9 "Here is the Windows XP source code."

10 If we had known -- if we had suspected for
11 a moment that we didn't have everything, it would
12 have been a part of our motion to compel before this
13 court. We got a letter. We got a bunch of disks.
14 It says, "Here is the Windows XP source code." It
15 doesn't say, "Here is the Windows XP source code that
16 we could find or that comes from the source code tree
17 or that is missing all kinds of components."

18 We had every right to rely on what we were
19 told, and what we were told is, "Here is the Windows
20 XP source code." If we hadn't had the ability to
21 examine the source code and ascertain that it was
22 missing all kinds of stuff, then like apparently
23 everyone else who has got the source code from
24 Microsoft, we, too, would not have known that
25 Microsoft does not produce all of the source code for

1 its flagship products. But we do know because we do
2 have the -- not me personally, Your Honor, but one of
3 the experts, Mr. Schulman, can figure that out.

4 And Mr. Neuhaus tells the court, "If there
5 are other things missing, we will get them."

6 Well, Judge, you told them to produce this
7 material. They have said, I think, now on three or
8 four occasions, "Here it is. You've got it now."

9 Well, now, as of November 7th, Mr. Neuhaus
10 admits, "We do not have it now." "We do not have
11 Windows." "We do not have Office." "We don't have
12 any complete source code." And so what have is not
13 very useful because of the nature of what we need to
14 do with it. And that's whether or not the source
15 code, whether or not Office calls on undocumented
16 APIs and the Windows XP source code if we don't have
17 it all.

18 With respect to the Windows Media Player
19 9.0, they say they didn't have to produce that
20 because all they had to produce was major releases.
21 This is a word game. We did not want them to have to
22 produce betas. We were trying to work out something
23 that would get us what we needed without getting more
24 than we needed or putting them through any undue
25 difficulty. We certainly did not expect for them not

1 to rely on our attempts to cooperate, to deny us --
2 which they're doing -- a piece of source code for
3 something that is critically at issue in this case,
4 and that's the Windows Media Player 9.

5 Mr. Neuhaus says that no one has ever used
6 the source code. It's easy to see why. No one has
7 ever had the source code, and we don't have the
8 source code. Microsoft admits we don't have the
9 source code.

10 You can just rely on their admissions, Your
11 Honor: What they admit they have not produced and
12 what they will admit they will not produce.

13 And Mr. Neuhaus complains that I never
14 mentioned the two sanctions. I mentioned -- that is
15 correct.

16 When we filed this, we relied -- we said
17 the court should figure out a sanction, and, of
18 course, the court, if it grants this motion, will in
19 its sound discretion do so. But it occurred to me
20 that it might be useful to suggest what an
21 appropriate sanction would be. The court is free,
22 obviously, to accept it or not what we suggest. But
23 we're in a pickle here. And we are in a pickle not
24 of our own making. And we're in a pickle here that
25 Microsoft has made. And we are not able to examine

1 the source code and the way we need to for the
2 purpose we need to because Microsoft hasn't produced
3 it. It's by this court's several orders on the
4 topic.

5 THE COURT: Thank you.

6 MR. NEUHAUS: Your Honor, may I quickly --
7 a couple of points.

8 Mr. Schulman wrote a book on undocumented
9 APIs without any access to source code. He has been
10 making a career without any access to source code.
11 This whole concept actually need asked is just not
12 true. That's the book he's written.

13 THE COURT: That misses the point, does it
14 not? The point of this hearing is, did you produce
15 what you were ordered to produce or not?

16 MR. NEUHAUS: I understand.

17 THE COURT: That really is not relevant,
18 what Mr. Schulman has done with it or without it.

19 MR. NEUHAUS: It's relevant to how
20 significant this is to the case.

21 The second thing, Your Honor, the
22 development the source code is distributed around the
23 company for business reasons that make sense. They
24 develop the source code in different places in what
25 are called different environments with different

1 tools and that compile it so that it only can be
2 compiled in that one place and then put into the
3 product.

4 So the reason it's distributed around the
5 company is for a business purpose. And just finally,
6 Your Honor, just -- I don't want to minimize what is
7 going on here, but the concept that these viruses
8 would have infected everything she ever had, she is
9 not supposed to load source code onto computers that
10 is connected to anything else. That's part of the
11 order, that is part of the protections that are in
12 place and have been in place.

13 So, you know, again, I'm not trying
14 minimize things, I really am not. But there's been a
15 lot of exaggeration.

16 Thank you, Your Honor.

17 THE COURT: You will admit, though, that
18 your letter of November 7th and the attachment is
19 accurate?

20 MR. NEUHAUS: It is accurate. And we've
21 looked and looked and looked and if the source code
22 doesn't exist in the company, there's nothing we can
23 do about it. A document production -- you know
24 doesn't require you to make it up. You look -- you
25 get what exists and produce it. If source code

1 doesn't exist because the material was produced and
2 generated in 1991 and has been relied on in binary
3 form ever since or the product has continued to
4 develop so we have source code from much later
5 versions of that component but not the one that she
6 was looking for when she asked for this material, you
7 know, there's nothing we can do about that. I mean,
8 the concept that if I can't find a source code for a
9 component and it doesn't exist in the company or it
10 was existed -- it's kept as a third party completely
11 unrelated to Microsoft and their contract requires
12 them just to produce the binary, and that's all there
13 is to it, well, we don't have the source code. Any
14 order to us and any document request which requires
15 us to produce documents in Microsoft's possession has
16 to with control, not stuff that doesn't exist.

17 THE COURT: Anything else?

18 MR. NEUHAUS: No, thank you.

19 MS. CONLIN: Your Honor, with respect to
20 Mr. Schulman's books on undocumented APIs, they -- he
21 did that without access to the source code, that's
22 correct. And so what we need to know is are there
23 undocumented APIs that cannot be discovered without
24 access to the source code.

25 And, Your Honor, with respect to what I

1 gave you, would you like for me to make this into an
2 affidavit?

3 THE COURT: That's up to you.

4 MS. CONLIN: All right.

5 THE COURT: Anything further?

6 MR. NEUHAUS: No, thank you.

7 THE COURT: Next motion to enforce court
8 order re expert by Microsoft.

9 MS. CONLIN: Your Honor, we've switched the
10 order of that, if we may.

11 MR. CHAPMAN: Ms. Conlin wanted to argue
12 several of motions together, and that's fine with us.

13 THE COURT: Which one do you want next?

14 MR. CHAPMAN: This would be the motion
15 concerning agreement with witnesses to come and
16 testify. I think it's No. 4 or 5 on your list.

17 MR. GREEN: No. 3.

18 MR. CHAPMAN: Sorry. 3.

19 THE COURT: Witness agreements. Okay.

20 MR. CHAPMAN: Thank you, Your Honor.

21 Jeff Chapman from Microsoft. This motion
22 to compel had its origins when we were in Your
23 Honor's courtroom on August 1, 2006, and we were
24 arguing about another motion. This was plaintiffs'
25 motion to lift the protective order to allow the

1 plaintiffs to show highly confidential information to
2 witnesses to prepare them for trial.

3 That was a motion that Your Honor granted
4 in part. In opposing this very broad relief that
5 plaintiffs had thought, my colleague Mr. Green,
6 expressed concern that we would be showing or
7 plaintiffs would be showing highly confidential
8 sensitive business information to people who were not
9 identified or who were identified as witnesses but
10 who might not ever show up. So we would have no way
11 of finding out what they saw or whether they saw
12 anything.

13 And in response to that, Ms. Conlin, in an
14 attempt to have the court grant her the relief that
15 she wanted said the following:

16 "They said they had not overdesignated
17 witnesses who won't show up. They said, 'Your Honor,
18 the only people on our witness list are people who
19 have agreed in writing to attend the trial.'"

20 As soon as we found out about that, we
21 wrote Ms. Conlin a letter saying, "Could we please
22 have what you have represented in open court exists?"

23 It's responsive to the very first document production
24 request we served in this case."

25 And this was not just sort of make work for

1 the plaintiffs. These documents are very important,
2 Your Honor, they may very well show a witness's
3 bias. They may show I'll only come if I receive
4 something in return. They may express that they are
5 happy to come because they really don't like
6 Microsoft and are really looking forward to
7 testifying and willing to say anything that would
8 hurt Microsoft.

9 I don't know what's in these documents
10 because I've never seen them.

11 But in response to this request, which we
12 did not think was particularly controversial because
13 the documents had been referred to in open court and
14 Ms. Conlin said absolutely not. Your request is
15 outrageous and it's beyond the pale. So we are here
16 today, again, on a motion to compel.

17 This motion to compel should be granted for
18 three reasons.

19 First, the correspondence that Ms. Conlin
20 referred to is responsive to the very first set of
21 document requests we ever served in this case. That
22 request for calls for all documents that evidence
23 refer or relate to communications between you and any
24 other person or entity regarding Microsoft, this case
25 or the subject matter of this case.

1 Clearly, correspondence with a witness by
2 the plaintiffs from their agent, plaintiffs' counsel,
3 to a witness saying, "Will you come and testify in
4 this case? What are you going to testify about?" It
5 concerns this case. It concerns Microsoft, and it is
6 a communication. It is clearly within the scope of
7 that document.

8 Plaintiffs acknowledge that they have these
9 documents in their brief. They said they've had the
10 standard and customary correspondence with witnesses
11 that is normally carried out as part of the
12 preparation of any lawsuits.

13 They have made two arguments to try to
14 resist producing these documents that concern the
15 scope of our request.

16 First, they've said we asked for formal
17 written agreements. Apparently, I didn't know this.
18 There is a Bender's legal form witness agreement and
19 apparently the plaintiffs think that's what we're
20 asking for. That's not what we're asking for.

21 Let me be as clear as I possibly can be.
22 Ms. Conlin said the only people on our witness list
23 are people who have agreed in writing to attend the
24 trial. That's what I want. That and nothing else.
25 I don't need a fancy agreement. I just want what she

1 represented to you and to me existed.

2 They've also said that they don't have to
3 produce these documents because the document requests
4 said any correspondence that you have had with other
5 people. And they said "you" means the plaintiffs and
6 only the plaintiffs, not plaintiffs' counsel.

7 That simply is not the law, Your Honor. If
8 a document is in possession of the attorney, it is
9 constructively in possession of the client. Clearly,
10 also just as a matter of basic agency law, the
11 counsel is the agent for the plaintiffs. They're not
12 doing this for their personal reasons. They're doing
13 it related to this case on behalf of Mr. Comes, Ms.
14 Larsen and the other class representatives.

15 This is about as responsive as you can get
16 to this request. Plaintiffs know -- plaintiffs have
17 these documents. I should say they have some of
18 these documents because they acknowledge that some of
19 them they discarded.

20 The second reason that the plaintiffs give
21 for resisting this is they say that it's
22 attorney-work product. And they say that these
23 documents are loaded with trial strategy and the
24 nature of a witness's testimony and things of that
25 nature. I don't know whether that's true or not.

1 Your Honor, I haven't even seen them. I haven't even
2 gotten a privilege log, so I can't even test whether
3 that's true. But let me make this as easy as I can
4 possibly make it, given where we are.

5 Presumably, if counsel's representation is
6 accurate, there is a line in that e-mail or letter or
7 whatever the nature of the correspondence is that
8 says, "I will come to testify in this case," or
9 "happy to see you in Des Moines to testify in
10 December," or something similar. That's what I want.

11 If plaintiffs' counsel insist that the
12 entire rest of the document is privileged or work
13 product, which I don't know, redact it. Give me that
14 one line. Put it on a privilege log. Let me look at
15 it. I may actually agree that it's privileged, and I
16 may not seek it, then, again, I may not. I don't
17 know. I just don't have anything to test their
18 representation and see whether it is accurate.

19 That is what I should be entitled to, Your
20 Honor. No one, not even the plaintiffs with some
21 very, very different definitions of what work product
22 and privilege are depending on whether it's something
23 they want or something they don't want to give have
24 contended that that one sentence, "I will come to
25 testify in this case" is protected by any applicable

1 privilege. Clearly, it is not. That is all I want.

2 And that is what I am entitled to under the law.

3 The final point, Your Honor, that I would
4 want to make as to why our motion should be granted
5 is basic fairness. You cannot and should not be able
6 to represent to the court and to Microsoft that
7 certain documents exist and talk about the nature of
8 those documents, where they say the witness will come
9 testify to try to persuade Your Honor to grant them
10 some relief that they want, and then when we ask to
11 take a look at those documents, pull them away.

12 Ms. Conlin made a representation to this
13 court that certain documents exist and about the
14 nature of those documents, what is in them. And that
15 is all that I want in this motion at this time.

16 Thank you, Your Honor.

17 THE COURT: Response.

18 MS. CONLIN: Thank you, Your Honor.

19 Defendants seek to compel the production of
20 documents created in the course of my representation
21 of the class. As is their tendency, the defendants
22 have taken a remark out of context. Distorted it
23 beyond recognition, relied on cases that don't
24 support it and seeks production of communication with
25 witnesses, which is, without question, work product

1 and not discoverable. It is one working day until
2 trial. The defendants have not and cannot support
3 their motion, in fact or in law.

4 In their request, Your Honor, in their
5 standard request No. 10, they ask for communication
6 between you and any other person or entity about
7 Microsoft, about the case or about the subject matter
8 of the case.

9 Now, if they meant to include lawyers in
10 that, that would be my entire file. That would be
11 everything. If you look at -- if you look at that
12 request, it is -- defendants read it. We read it.
13 Except defendants read it -- except as of this
14 motion, but never before that -- as asking my clients
15 if they had talked about the case to family or
16 friends or posted something on the Internet or on a
17 bulletin board or something of that sort. They want
18 to know what the clients have said about the case,
19 not what I've said about the case because my whole
20 file is about the case. It has to do with Microsoft.
21 Every single thing. Every piece of paper has to do
22 with Microsoft.

23 The RPDs above and below the one that is
24 the focus of our attention today will help the court
25 to understand that this is directed not to lawyers

1 but to clients. And, Your Honor, in terms of the
2 rule that a document in possession of the lawyer is
3 deemed to be in possession of the client is for the
4 prevention of a client from giving lawyers documents
5 so that they won't be discoverable. It doesn't -- it
6 isn't directed to what the lawyer creates in
7 representing the client.

8 The RPD was directed to the class reps to
9 find out what they have posted on bulletin boards or
10 written to family or friends. But now the defendants
11 wants to change its meaning to cover something it was
12 never meant to cover even by them.

13 Until the defendant decided to test
14 counsel's veracity yet again that was the
15 interpretation given to it by both parties. And,
16 Your Honor, they have actually contacted the people
17 on my initial witness list, which was the one that I
18 was talking about.

19 The materials are not discoverable for two
20 reasons. They don't fall within any fair reading of
21 the request for production of documents and, two,
22 they're protected, not as defendant suggests in its
23 brief as clearly not attorney-client privilege, but
24 by the work-product privilege.

25 Communication with witnesses on matters

1 pertaining to their willingness to substantially
2 inconvenience themselves by voluntarily coming to
3 court from all over the country and the world
4 requires some persuasion. And now all they want --
5 in the beginning they wanted more, but now all they
6 want is the one sentence. What use is that? What
7 relevance is whether or not there is a sentence in an
8 e-mail that says, "Yes, I'm coming."

9 The fact is Microsoft has an extensive
10 witness list, and it's possible that no one on that
11 list is coming. It's really not relevant to any
12 issue in the case.

13 And there is a third -- there is a third
14 reason. Some of these witnesses on plaintiffs'
15 initial list agreed literally years ago to come.
16 There was no reason for me to retain it, and I
17 suspect I did not. I have not attempted to search at
18 this point through the dozens and dozens and dozens
19 and dozens of correspondence and witness files, given
20 the fact that I'm trying to get ready for a trial.

21 None of the few cases that defendants cites
22 comes close to ordering the production of e-mails in
23 which a witness agrees to come to trial.

24 There is no rationale for requiring the
25 production of such materials, except an improper one.

1 And certainly if the plaintiffs' counsel is required
2 to produce her work product, defendants must
3 reciprocate and prove that all of its witnesses are,
4 in fact, coming as well as providing all the other
5 work product that answer any interrogatory or
6 requests that we have propounded that happens to be
7 their work product.

8 Finally, the defendant, once again, attacks
9 credibility. When I made this statement to the court
10 it was absolutely true, absolutely true except for
11 McNeal who was a mistake. Mr. Jim McNeal was on the
12 initial witness list as a result of a clerical error.
13 Every other person on the initial list has agreed to
14 come to court.

15 When it came time to file the final list,
16 Your Honor, which was sometime after I made the
17 statement, there was some we couldn't find. There
18 was some that wouldn't make up their minds as to
19 whether or not they would agree to come. But I
20 thought I might be able to persuade them to come
21 before the end of the trial.

22 And, of course, Your Honor, if we didn't
23 put them on that final list, we couldn't have called
24 them, even if they did agree at some point to come.
25 That's why the final list that has people on it that,

1 as I said, we couldn't find or that haven't made up
2 their minds.

3 Now, Microsoft demands that we do something
4 that they have not done, and that is to tell them
5 exactly who is coming before we start voir dire.

6 Microsoft is famous for putting lots of
7 people on their witness list who do not come and not
8 just one or two, but most of the witness lists. We
9 believe Microsoft's motion is without merit, filed
10 for an improper purpose, designed to waste counsel's
11 time immediately before trial and unprecedented and
12 without support. And we ask that the court deny the
13 defendant's motion.

14 THE COURT: When did you make the request?

15 MR. CHAPMAN: I believe the letter -- the
16 document request or the letter to Ms. Conlin saying?

17 THE COURT: Request for document.

18 MR. CHAPMAN: The request for documents was
19 made in 2003.

20 THE COURT: The specific requests for
21 witness agreements?

22 MR. CHAPMAN: No. It's a broader request
23 that asks for communications by the plaintiffs with
24 other people about this case or about Microsoft.

25 MS. CONLIN: If I may add one other thing,

1 Your Honor, discovery was closed as of July 2nd.

2 THE COURT: When did you narrow the request
3 down to witness agreements?

4 MR. CHAPMAN: The first -- I believe within
5 two days after I learned that these agreements exist
6 when Ms. Conlin made that statement in open court.

7 THE COURT: You don't have a date for it?
8 You don't know when you made the written
9 request for it?

10 MR. CHAPMAN: September 5, 2006, Your
11 Honor.

12 THE COURT: Wasn't discovery closed at that
13 time?

14 MR. CHAPMAN: Yes, it was, Your Honor, but
15 I didn't know the existence of these documents and
16 they were responsive to a prior request.

17 THE COURT: Did you specifically ask in any
18 of your previous requests for witness agreements
19 prior to September 5th?

20 MR. CHAPMAN: No, we did not. We made a
21 broader request that we believe those documents are
22 within the scope of.

23 THE COURT: Give me the exact request that
24 was made in 2003 verbatim.

25 MR. CHAPMAN: "All documents that evidence,

1 refer or relate to any communications between you and
2 any other person or entity regarding Microsoft, this
3 case or the subject matter of this case."

4 THE COURT: That is just about everything?

5 MR. CHAPMAN: That's correct, Your Honor.

6 But we're not asking for everything today.

7 THE COURT: You were then?

8 MR. CHAPMAN: That's correct.

9 THE COURT: Did you want their file then,
10 their attorney file?

11 MR. CHAPMAN: No, I did not.

12 THE COURT: Why not? It says "you."

13 MR. CHAPMAN: Yes. But we want to take a
14 realistic approach. The plaintiffs made the
15 representation that no documents existed. We took
16 them at their word. When we learned on September 1st
17 the documents did exist, we followed up.

18 THE COURT: What do you want these
19 documents for?

20 MR. CHAPMAN: I want to know who is coming
21 to trial and who is not coming to trial because we
22 have a lot of work to do. It's a lot of work to do
23 to prepare for cross-examination.

24 THE COURT: What if the court just orders
25 everybody to produce a witness list?

1 What if the court just orders everybody to
2 produce a witness list of who is coming? Would that
3 satisfy it?

4 MR. CHAPMAN: Well, I think -- Your Honor,
5 I think that might be a little bit artificial. And
6 let me just explain why.

7 THE COURT: Okay.

8 MR. CHAPMAN: I acknowledge that who you
9 might want to call as a witness might change over
10 time, depending on how the case goes. But if you
11 have correspondence from a witness that says, "I
12 agree to come to trial." Or if you have
13 correspondence from a witness that says, "I'm not
14 coming to trial." That gives you an indication
15 either way.

16 I think granting this motion would give us
17 the flexibility and the parties the flexibility that
18 those people need, would give us an indication of who
19 is coming and who is not coming.

20 But I don't think it would be right to hold
21 either party right now to saying definitively who is
22 coming and who is not coming because those decisions
23 may change over time. But if there is a preexisting
24 written record of that, that is something we would
25 like and we're entitled to.

1 THE COURT: You don't know who you are
2 going to call a witness?

3 MR. CHAPMAN: We have in mind calling the
4 witnesses on our witness list. We don't know who yet
5 and what order, but our case, from what I understand,
6 is months' away.

7 THE COURT: Couldn't it be updated by both
8 sides with such a list?

9 MR. CHAPMAN: That's something I would like
10 to discuss with my client and my co-counsel.

11 THE COURT: Well, Iowa rules really
12 discourage trial by surprise. So the court, I think,
13 does have the power to tell both sides you will
14 produce a witness list and you will keep updating it
15 as needed. Would that satisfy you?

16 MR. CHAPMAN: Well, I think, Your Honor,
17 what we would prefer is to have the motion that we've
18 put before the court granted. But Your Honor does
19 raise a very good concern. And if it's all right
20 with Your Honor, I would like a very brief time to
21 think about it and get back to Your Honor. We will
22 be seeing a lot of each other lately.

23 THE COURT: Okay.
24 Any response by plaintiffs on this?

25 MS. CONLIN: Well, Your Honor, both sides

1 have produced witness lists, both a preliminary list
2 and a final list. And we've followed the standard
3 practice, which is to put on the witness list the
4 people that we have a good-faith belief will be able
5 to attend. As counsel points out, things do change.

6 THE COURT: I agree with that, things
7 change.

8 MS. CONLIN: And what they want to do
9 is -- you have clearly answered their concern. But
10 they don't want to be subject to the rule that you
11 suggest might be appropriate, which is, you know,
12 make a witness list and stick with it. And I think
13 we're fine with that, Your Honor, because if that's
14 what the court wishes to do. But if, I think, you
15 make the list, it would seem to me as though you
16 couldn't then change it. Then it wouldn't meet
17 Mr. Chapman's desire, which is he wants to know who
18 is coming. I have done my best, and in a cooperative
19 manner talking with Sharon Nellis to tell them
20 exactly that. And now -- you know, what they're
21 doing, judge, I think you have exposed and that is
22 they're trying to make me do more work instead of
23 getting my case ready for trial.

24 MR. CHAPMAN: Your Honor, may I respond
25 briefly?

1 THE COURT: Sure.

2 MR. CHAPMAN: In terms of the more work
3 from what I understand from Ms. Conlin, it's probably
4 20 pieces of paper. That is all we're asking for.

5 Thank you.

6 MS. CONLIN: In thousands -- hundreds of
7 thousands of pieces of paper and dozens and dozens of
8 files.

9 THE COURT: Anything else on this issue?

10 MR. CHAPMAN: I have nothing, Your Honor.

11 MS. CONLIN: Nothing further, Your Honor.

12 THE COURT: What is the next one you want
13 to do?

14 MS. CONLIN: Letting the jurors ask
15 questions.

16 That's my motion, Your Honor. And I would
17 like to proceed.

18 THE COURT: Go ahead.

19 MS. CONLIN: The court will be grateful to
20 know, this is a pretty straightforward issue. It's
21 addressed to the sound discretion of the court. And
22 progressive courts all over the country are
23 permitting jurors to ask questions under the
24 carefully controlled scenario that we have outlined.
25 And for two very, very good reasons: So that jurors

1 who do, in fact, have questions, don't have to rely
2 on telepathy to the attorneys to get those questions
3 answered. This is a very complicated case. It's
4 going to last a very long time. Imagine how
5 frustrating it would be to have to sit for six months
6 with a burning issue that is just never addressed.

7 I became a proponent of jurors asking
8 questions as a result of experience and having jurors
9 have questions that they could not communicate to me
10 telepathically. I can give the court an example of
11 that because I remember so well that the questions
12 that jurors had afterwards that I didn't answer that
13 would have been easy and quick to answer. I simply
14 had not thought of it. I had not seen it from the
15 eyes of that particular juror.

16 I know for sure that I cannot devine every
17 possible question that any one of twelve people may
18 have over a period of several months.

19 Your Honor, I just think it's unfair and
20 unwise not to let them ask their own questions if
21 lawyers fail to do so.

22 The second reason for permitting jurors to
23 ask questions is that the studies indicate, Your
24 Honor, that jurors who are told that they can ask the
25 questions that they have are better able to attend to

1 the evidence because they're no longer lumps of
2 stones sitting on a chair. They're active,
3 potentially active participants in the process.

4 We know for sure that permitting or telling
5 jurors that they may ask questions enhance their
6 ability to concentrate.

7 The other side of the coin is why in the
8 world would we prohibit decisionmakers -- these are
9 our decisionmakers. Why would we prohibit them from
10 getting their questions answered? The answer to the
11 question that I have propounded is tradition, fear of
12 the unknown. But there's just not enough to require
13 human beings to be sort of silent receptacles of
14 whatever information we think they need when they
15 think they need other information.

16 I say to the court, I have never been able
17 to persuade a judge in this courthouse to do that. I
18 have been able to persuade judges all over Iowa and,
19 indeed, in the Gordon case to -- in the Gordon case
20 the judge was persuaded that it was necessary to
21 permit the jurors to ask questions. I would say also
22 to the court that in those cases in which the jurors
23 have been permitted to ask questions, very few
24 questions have been asked.

25 In the Gordon case, when we ended, no

1 questions had been asked. I can remember the other,
2 Judge Scieszinski, in that case she permitted -- they
3 had one question in the entire -- it isn't
4 disruptive. It isn't generally what -- one judge,
5 and I just cannot recall who said something like
6 this. We do not expect you to have questions and
7 that was his way of saying, yes, you can ask
8 questions, but you know we don't think you're going
9 to have anyway. So it was -- I'm not sure it was
10 necessary to discourage questioning, but that was his
11 way of saying to the jury you can ask questions, but
12 we don't think you'll many. It's time to leave the
13 past behind where it belongs and move into modern
14 courtroom practice backed by significant social
15 science, backed by the ABA, backed by the American
16 Law Institute. And in Arizona it's the law. There
17 are several other states that are moving towards and
18 recommending that all -- in all cases jurors be
19 permitted to ask questions.

20 In this case, Your Honor, it seems
21 particularly important, given the complexity, given
22 the length of trial, and given the necessity that
23 jurors understand what they're being told.

24 I am absolutely confident that whatever the
25 court does certainly is not going to be error, and in

1 whatever decision you make. So let's let people do
2 the natural thing and ask questions when something
3 puzzles them.

4 That's all I have, Your Honor.

5 THE COURT: Thank you. Response.

6 MR. CHAPMAN: Thank you, Your Honor. That
7 would be me again, Your Honor.

8 Ms. Conlin did acknowledge that this is
9 something that has never happened in this courtroom
10 before. This is a very complex case. It's fraught
11 with many issues. It's been heavily litigated. It's
12 very complex, and it's very important. We do not
13 think for many reasons that this is a good case to be
14 a test case for something new in this courthouse.
15 Counsel and the court and the jurors are not used to
16 doing this. And there is no particular reason to
17 start right now.

18 The Iowa judicial system has worked well
19 for a very, very long time, Mr. Green informs me,
20 without having this practice go forward. Lawyers
21 question witnesses. They do so very thoroughly and
22 they convey the complex and complicated terms in this
23 trial to the jury.

24 I think, Your Honor, I'm not being modest,
25 and this statement applies to the defense bar, and it

1 also applies to the plaintiffs' bar. You have in
2 front of you very qualified counsel who know how to
3 explain things to the jurors. And if they don't
4 explain it well, they do so at their peril and the
5 peril of their case.

6 There are several federal courts who, I
7 think, could still be described as very progressive
8 courts who have said this practice is very risky and
9 should not be engaged in. The authority that we've
10 looked at has in a few cases -- the lower court has
11 permitted jurors to question witnesses and the
12 appellate court has said, "Well, we're not going to
13 find reversible error in that case." That is hardly
14 in our view an endorsement of the practice and
15 encouragement of failure to find reversible error.

16 The Eight Circuit in the U.S. v. George
17 case, 986 F.2d 1176 recognized that there are risks
18 associated with this practice and it is fraught with
19 error.

20 The Eighth Circuit in another case, U.S. v.
21 Welliver, 976 F.2d 1148, recognizes that allowing
22 this practice presents substantial risk of reversal
23 and retrial.

24 This is going to be a hard-fought,
25 hard-contested, long case. There is absolutely no

1 reason to add this to the mix of another number of
2 things that may force us to go through all of this
3 again.

4 And I think the proof is in the pudding,
5 Your Honor, in what happened in Gordon. The judge
6 did allow it, yes, that's correct. But not a single
7 juror asked a question. So if a single juror isn't
8 going to ask a question -- there were seven weeks in
9 Gordon, a lot of evidence. No juror felt the need to
10 ask a question. If there's no perceived need in a
11 very similar case, why should we start now? That is
12 all I have.

13 Thank you, Your Honor.

14 THE COURT: Very well.

15 MS. CONLIN: Your Honor, this is not a new
16 thing. The Supreme Court of Iowa approved it in
17 1980, 26 years ago. And the practice around the
18 country and around the state is becoming more and
19 more common. As more and more judges accept that
20 this is an important way for jurors to be able to
21 concentrate more fully and to feel as though they are
22 participants in this important process.

23 The qualifications of lawyers as advocates
24 is not at issue. It is the mind reading thing that
25 is so very difficult.

1 I'm going to give you just one example,
2 Your Honor. Medical negligence case involving a
3 woman who is seven months pregnant presenting at the
4 emergency room of a hospital in labor. And the issue
5 was whether -- she sat in the emergency room for
6 about an hour and half without being attended to.
7 And when she was finally attended to, they were
8 unable to stop the labor. The baby was born
9 prematurely and had cerebral palsy. In a nutshell,
10 that's the case. I lost the case. I don't like that
11 part of it. But nonetheless, in our discussion with
12 the jurors subsequent to the defense verdict, one of
13 the things they wanted to know was when the pregnant
14 woman came to the admitting desk of the hospital, how
15 high was the desk?

16 Now, I have to say, Judge, it never
17 occurred to me to prove that. It would have been
18 easy to do. But what they were concerned about was
19 that she -- they didn't know she was pregnant. That
20 they couldn't see that she was pregnant. That
21 they -- I just never thought of proving that. And
22 whether or not it would have made a difference, I
23 don't know. But they had that question. It's
24 something they discussed during deliberations, and
25 it's a question I did not answer and that they should

1 have been permitted to propound. I'll give only one
2 example. There are a whole bunch more that come to
3 me in cases that I both won and lost. So I just
4 think that I'm not talking about experimenting with a
5 totally new thing. I'm talking about moving forward
6 to a place where we know it's good to do and the only
7 reason we don't do it is because we haven't done it
8 before. And we should be doing it.

9 I'm absolutely certain, Your Honor, that
10 there is no possibility of reversal or retrial on the
11 basis of whether or not this court grants or denies
12 this motion. And I ask that you grant it for all of
13 the reasons, good and sound reasons that I have
14 provided both orally and in my brief.

15 THE COURT: Very well. Next motion.

16 MS. CONLIN: Your Honor, do you want to
17 talk -- now, we've got more motions, but this is
18 supposed to be the pretrial. But as best I can
19 determine, we've already done all the usual stuff.
20 Were there issues that the court wanted us to cover?

21 THE COURT: I just wanted to do the
22 motions.

23 MS. CONLIN: Pardon me?

24 THE COURT: I just wanted to do the motions
25 you have listed.

1 MS. CONLIN: Your order suggested pretrial.

2 MR. GREEN: That was yesterday.

3 MS. CONLIN: Was I here?

4 MR. GREEN: I can't recall.

5 MS. CONLIN: Did you do a pretrial

6 yesterday without me?

7 MS. CONLIN: He's giving me a bad time.

8 MR. GREEN: No, the order was pretrial

9 according to your order yesterday, Your Honor.

10 THE COURT: What's the next motion?

11 MR. GREEN: I think it's expert testimony.

12 MS. CONLIN: May I be excused, Your Honor?

13 THE COURT: Yes, you may.

14 Thank you, Ms. Conlin.

15 No. 2, enforce the court's order regarding

16 experts.

17 MR. GREEN: It's No. 2 on your list, Your

18 Honor.

19 Your Honor, I'm not sure -- this is Jay

20 Jurata.

21 THE COURT: Spell his last name, please.

22 MR. GREEN: J-u-r-a-t-a.

23 THE COURT: Okay.

24 MR. GREEN: He's admitted pro hac vice, but

25 I think this is the first time he's appeared in front

1 of you. And I can tell you, he's a good fellow.

2 MR. ROSENFELD: Your Honor, he's one of my
3 colleagues from Heller Ehrman, and we're very proud
4 of him.

5 THE COURT: Proceed.

6 MR. JURATA: Thank you, Your Honor.

7 Your Honor, I'm here before you today --
8 Microsoft is here because the plaintiffs have not
9 complied with the court's order dated August 21, 2006
10 to produce materials that were improperly withheld
11 from expert discovery in this case. And, in fact, we
12 are here because the plaintiffs are using the same
13 strain of language, the same strained interpretations
14 of the original agreement between the parties,
15 governing expert discovery. And they're now applying
16 those same interpretations to the court's order to
17 avoid the plain meaning of the court's order.

18 Before I get into the arguments, Your
19 Honor, let me just cover a little bit of background
20 as to what led up to this. In June 2nd of this year,
21 plaintiffs filed their expert reports in this case.
22 The parties had two stipulations which governed
23 expert discovery.

24 One of the stipulations governed the
25 materials that had to be disclosed with the expert

1 reports. The other stipulation governed what types
2 of questions could be asked during the depositions.
3 During the depositions of plaintiffs' experts it
4 became apparent that there were materials that the
5 plaintiffs' experts had looked at, that they had
6 considered, that had not been turned over. And these
7 were materials they had considered in preparing their
8 experts opinion in the case.

9 The motion was argued in front of you on
10 August 4th, and on August 21st you issued an order
11 requiring the plaintiffs to produce materials that
12 were improperly withheld. And Your Honor made it
13 very clear that they were to produce materials that,
14 quote, their experts reviewed, looked at or used in
15 preparing their expert opinions or reports.

16 Your Honor's order also required a second
17 item, and that was that if there were any materials
18 that met that qualification that had been deleted or
19 destroyed, that plaintiffs were required to provide a
20 list, an accounting of what those items were.

21 And that order, Your Honor, was designed to
22 eliminate subjectivity who was designed to eliminate
23 discretion, so as to make the requirements of what
24 had to be produced with expert discovery very clear.
25 And the plaintiffs have failed to comply with your

1 August 21st order.

2 On September 1st, Your Honor, the
3 plaintiffs produced three items to Microsoft. One
4 was some data which was used to make a spreadsheet
5 that was contained in the damages report of Dr. Netz.
6 And the other two items were memorandum from
7 Dr. Netz's staff that she saw. But in the letter
8 that the plaintiffs wrote, the plaintiffs said that
9 these two memorandums they were producing them, but
10 they were not memoranda that Dr. Netz reviewed,
11 looked at or used in preparing her expert report.

12 And that was all that was produced. No
13 additional documents were produced for
14 Professor Netz. No documents at all were produced
15 for Dr. MacKie-Mason, even though Dr. MacKie-Mason's
16 deposition made it very clear that he had exchanged
17 e-mails with another expert in this case, Professor
18 Noll, plaintiffs' primary liability expert about
19 Microsoft, and that these were -- these were
20 communications that were passed back and forth while
21 they were on the clock doing their work. And the
22 plaintiffs did not produce a list of any materials
23 that were deleted or destroyed.

24 Microsoft sent the plaintiffs a letter on
25 September 8. We're here two months later. The

1 letter remains unanswered, and no additional
2 materials have been produced.
3 And the reason -- the reason this
4 deficiency is important, Your Honor, is because the
5 materials that an expert relies upon in doing their
6 report is only half the story. Yes, that's needed in
7 order to prepare for cross-examination at trial. But
8 many times what an expert looks at when doing their
9 analysis, but decides not to use, that can be
10 extremely telling in preparing a cross-examination.
11 In fact, there's an entire line of Daubert federal
12 case law which states that when experts discard
13 inconvenient facts, that that could be a basis to
14 exclude their testimony. And that's why these
15 materials are important for cross-examination at
16 trial.

17 Now, in the plaintiffs' response, Your
18 Honor, they basically respond by recycling the same
19 sort of arguments that they made back when the motion
20 was first heard in front of you in August. As an
21 initial matter, they don't even address their failure
22 to turn over a list of any materials that were
23 deleted or destroyed.

24 As a second matter they use the same sort
25 of strained interpretations. This time they are

1 latching onto the phrase "in preparing the report."

2 The order read documents that were reviewed, looked

3 at or used in preparing the report.

4 And plaintiffs are latching onto that

5 language to basically say that this means materials

6 that the expert relied upon.

7 This means -- in preparing your report

8 means that these must be materials that the experts

9 relied upon.

10 Now, it's a remarkable claim when you think

11 about it, Your Honor. If a testifying expert

12 receives a document about Microsoft that their staff

13 thought was important enough to give to them or

14 another testifying expert in the case thought was

15 important enough to give them, and this was done in

16 the course of their work, how is that not somehow

17 something that they looked at in preparing their

18 expert analysis in the case?

19 The only reason to review any such

20 documents is, obviously, to prepare the opinion. I

21 mean, we're not talking, Your Honor, about casual

22 magazine reading while sitting on a beach somewhere

23 in the Caribbean, drinking a pina colada. We're

24 talking about documents that are coming from staff.

25 Documents that are coming from another expert.

1 E-mails that are coming from staffs and other
2 experts.

3 The argument makes no sense. It goes right
4 back to the relied-upon requirement that this court
5 rejected on August 21st.

6 There's also a new argument in the
7 plaintiffs' response, which is a little bit
8 different, Your Honor. This time this argument is
9 that Microsoft is only entitled to such documents if
10 the expert expressly mouthed the phrase "in preparing
11 my report" during the deposition. In other words,
12 unless the expert said in his deposition that, you
13 know, this was a document I reviewed in preparing my
14 report and mouthed this sort of magic phrase that
15 somehow if that hasn't been said, the documents
16 aren't responsive.

17 And that really is reading back in the same
18 subjectivity. But even if we accepted that argument,
19 it's meaningless. And the reason its meaningless is
20 because the plaintiffs' experts still to this day do
21 not understand what that phrase means. And the
22 reason we know this, Your Honor, is from a deposition
23 that Mr. Reece defended just last week of
24 Dr. Netz. And we just received the transcript for
25 Dr. Netz, Your Honor. So it's not included in our

1 papers. Mr. Reece defended the deposition. If I can
2 approach, I have a copy of the deposition for you.

3 THE COURT: Thank you.

4 MR. JURATA: I also have a copy for
5 Mr. Reece here.

6 During this deposition -- just as some
7 context, Your Honor, Dr. Netz was the expert who had
8 the definition of reviewed, her definition, she was
9 the one who said, "Well, I didn't review a document
10 unless I looked at it twice". She was the "looked-at
11 twice" expert. That was her definition.

12 Now, there were two memoranda that were
13 produced to plaintiffs, and during Dr. Netz's
14 rebuttal deposition, she was questioned on these
15 memoranda. And it's a memoranda from -- the one in
16 question is a memoranda that she received from a
17 professor at the University of Michigan by the name
18 of Professor Lundholm.

19 And in her deposition she testified that
20 she approached this Professor Lundholm to give her
21 advice as to how to treat employee stock options.

22 Dr. Netz -- one of Dr. Netz's damages
23 methods is based on Microsoft's profitability. And
24 she had a question as to whether to include or
25 exclude employee stock options in determining a

1 company's profitability.

2 And on page 85 of her deposition, Your
3 Honor, she testified that she basically approached
4 Professor Lundholm and this is on 85, line 12, and
5 the question is, so the purpose of making this
6 request to Mr. Lundholm was to investigate the
7 reasons for or against including employee stock
8 option expenses in the Microsoft margin calculations.

9 THE COURT: Who is Lundholm again?

10 MR. JURATA: He's a professor at the
11 University of Michigan that Dr. Netz used as staff in
12 this case.

13 And her answer was it was part of such
14 investigation, yes. And if you turn back two pages
15 earlier in the deposition, Your Honor, to page 83,
16 Dr. Netz clearly testifies on lines 22 and 23:

17 "Okay. And you read the memo?"

18 And Dr. Netz's answer was: "Yes."

19 So this was a memorandum.

20 THE COURT: What memo?

21 MR. JURATA: The memorandum that was
22 produced by Professor Lundholm, Your Honor. On page
23 85 of the deposition she asked him for a memorandum
24 only how to treat stock options. On page 83 she
25 makes clear that she read the memorandum. And then,

1 Your Honor, if you skip ahead to 102.

2 THE COURT: She recognizes the memo on 85,
3 but two pages earlier she said that she read the memo
4 she didn't recognize two pages later?

5 MR. JURATA: The quote on 85, Your Honor,
6 is a clarification. It was a clarification question.
7 The way the deposition reads, and I apologize if I
8 presented it in a confusing way.

9 On 83 she says:

10 "Yes, this is a memo I read."

11 And on 85 she's asked:

12 "What was the purpose of seeking the
13 memo?"

14 And she states:

15 "The purpose of receiving the memo
16 was to determine how to treat stock
17 options."

18 THE COURT: All right.

19 MR. JURATA: And then on page 102 of the
20 deposition, on line 11 she's asked the question:

21 "And these were documents that you
22 looked at in connection with your work
23 preparing the expert reports?"

24 And Dr. Netz's answer is:

25 "No, they were not. They were

1 documents I looked at, they were not
2 documents I looked at in preparing
3 my expert report."

4 So we have clear testimony from Dr. Netz,
5 Your Honor, that she has a damages method which is
6 based on Microsoft's profitability. She had to make
7 a decision how to treat employee stock options. She
8 reached out to a professor at the University of
9 Michigan for advice on this. He gives her advice.
10 She reads the advice, and then doesn't turn over the
11 document because it wasn't something that she looked
12 at in the context of preparing her expert reports.

13 Now, the plaintiffs did produce this
14 document in response to the August 21st order. I
15 want to make that very clear. They did produce this
16 document, and that is why the document was used at
17 the deposition last week.

18 But Dr. Netz's testimony just begs the
19 question, Your Honor, how many other documents are
20 out there that she or other experts looked at? It
21 clearly dealt with their analysis in their report.

22 THE COURT: Did you ask her in the
23 deposition?

24 MR. JURATA: It was attempted to be asked
25 in the deposition, Your Honor.

1 THE COURT: If you asked her and she said
2 no to other ones, what are they supposed to do?

3 If you asked her the question and she
4 pointed out exactly what she looked at in whether she
5 used it to prepare the report or not, what is the
6 plaintiff supposed to do? It's sworn testimony,
7 isn't it?

8 MR. JURATA: Except, Your Honor --

9 THE COURT: She has to call her own witness
10 a liar and say, "Hey, you didn't produce all the
11 stuff?"

12 MR. JURATA: On page 1 of the resistance
13 that the plaintiffs filed for this motion, they make
14 a claim to the court, Your Honor. And on page 1 of
15 that resistance it states, "Nonetheless, after this
16 order, plaintiffs produced to Microsoft two
17 additional documents that plaintiffs' expert,
18 Dr. Janet Netz, had seen, but which were not
19 otherwise responsive to that August 21st order."

20 The testimony of Dr. Netz made it clear
21 that this was a document that was, in fact,
22 responsive to the order. And if we were on a clean
23 slate -- or earlier this morning, Your Honor,
24 Ms. Conlin said, "You know, if we were on a clean
25 slate, Your Honor, perhaps we could do -- we could do

1 the benefit of the doubt here." But, you know, there
2 was a long history here of interpreting words in a
3 way to avoid the plain meaning of those words.

4 THE COURT: Well, I guess the problem I
5 have is -- I don't have any problem with enforcing my
6 order. I'm just trying to figure out -- here you had
7 the opportunity to find out exactly everything that
8 she looked at, whether she relied on it or not.

9 MR. JURATA: Only if it was given to us,
10 Your Honor.

11 THE COURT: No. Not if it's given to you.
12 You could have asked her in the deposition, "List
13 everything you looked at whether you relied on it or
14 not."

15 Did you ask that question?

16 MR. JURATA: That question was asked, Your
17 Honor.

18 THE COURT: And did she tell you?

19 MR. JURATA: Her answer was that everything
20 had been produced. But given her testimony that this
21 document still was something that wasn't something
22 that she reviewed in the context of preparing the
23 report, all of the answers -- all the questions were
24 answered with the caveat in the context of preparing
25 my expert reports.

1 THE COURT: Okay. So then the follow-up
2 question would be then: What did you look at that
3 you did not use in the context of preparing your
4 report?

5 MR. JURATA: In answers like that, Your
6 Honor --

7 THE COURT: Did ask you that question?

8 MR. JURATA: Yes, Your Honor. Questions
9 like that were asked and in many cases the witness
10 was actually instructed not to answer. The witness
11 was instructed that the witness could answer
12 questions concerning documents that were reviewed,
13 looked at or used in preparing the expert report
14 because that is what the court's order said.

15 THE COURT: Did she obey those instructions
16 that were given to her?

17 MR. JURATA: Yes. She obeyed every single
18 instruction from counsel not to answer, Your Honor.

19 THE COURT: All right.

20 MR. JURATA: Now, one last point about the
21 plaintiffs' resistance, Your Honor.

22 In an effort to sort of deflect the conduct
23 of their experts, plaintiffs' resistance points
24 fingers at the conduct of Microsoft's experts
25 concerning the production which accompanied their

1 expert reports. And there's just two things I want
2 to say about that, Your Honor.

3 First, the conduct of Microsoft's experts
4 is not at issue here. We're here because -- because
5 there was a motion to -- there was a motion to compel
6 expert discovery concerning the plaintiffs' experts,
7 and the court issued an order and that order wasn't
8 followed.

9 But that's a technicality, Your Honor. The
10 second thing is that plaintiffs have clearly
11 mischaracterized the behavior of Microsoft's experts.
12 I mean, some of the examples in their resistance are
13 just wrong.

14 For example, one of the examples that they
15 use is regarding Mr. Laurence, Mr. Charlie Laurence,
16 who is one of Microsoft's experts. And he's an
17 expert who discusses accounting policies and the
18 proper ways to calculate profitability based on
19 accounting allegations.

20 And in plaintiffs' resistance it states
21 that Mr. Laurence looked at something called
22 "Microsoft Accounting Policies," basically manuals
23 that Microsoft says are the accounting rules that you
24 follow. And plaintiffs' resistance says that Mr.
25 Laurence looked at these materials, but that they

1 weren't produced. What plaintiffs' resistance fails
2 to state is that all of Microsoft's accounting
3 policies were, in fact, produced in this case. The
4 plaintiffs have all of them.

5 And Mr. Laurence said, "Yes. He looked at
6 them." And so it's basically a nonissue. And the
7 other examples that are in plaintiffs' resistance are
8 similarly distorted. If Your Honor wants to go
9 through them, I would be happy to do so, but I don't
10 want to waste Your Honor's time. And the key point
11 is that instead of discussing the conduct of their
12 experts, they just want to throw mud to cover up
13 plaintiffs' failure to comply with the court's order.

14 So in summary, Your Honor, your order of
15 August 21st said to produce materials reviewed,
16 looked at or used in preparing their expert opinions
17 or reports. And it also required a list of destroyed
18 materials. But we have a recurring problem of this
19 language interpretation to avoid the plain meaning of
20 that order.

21 Plaintiffs' experts are now using the
22 phrase in preparing their expert opinions or reports
23 to essentially mean relied upon, which was the very
24 original fight that led to this order, requiring --
25 you know, the argument that the experts had to mouth

1 that particular phrase in their depositions in order
2 for -- in order for documents that met that criteria
3 to be produced just makes no sense. I mean, we are
4 just reading back in the same subjectivity, the same
5 discretion that the August 21st order was designed to
6 clear up.

7 So the request that Microsoft has, Your
8 Honor, is that the plaintiffs be ordered to produce
9 any other materials that are being improperly
10 withheld. I mean, any materials that their experts
11 looked at while essentially on the clock, while
12 working on this case, while doing the work that led
13 up to their expert reports.

14 Microsoft requests the list of materials
15 that had to be deleted or destroyed still has not
16 received any such lists. And because Dr. Netz's
17 testimony makes clear, Your Honor, that plaintiffs'
18 experts just don't understand what the court's order
19 was designed to cover, Microsoft would request that
20 the plaintiffs certify to the court that counsel has
21 looked at the materials that their experts looked at
22 and determined whether or not these are materials
23 that were looked at in the context for preparing this
24 report and turn any of those materials over to
25 Microsoft.

1 THE COURT: How would the lawyer know?

2 MR. JURATA: Well, the lawyer would know,
3 Your Honor, by talking with the expert and explaining
4 to the expert what the court's order means. I mean,
5 a document that someone clearly asked for that
6 addresses an issue that they had to decide for their
7 report, that the expert looked at but still months
8 after your court's order claims it's not something
9 that was done in preparing my expert analysis,
10 indicates for just this one expert, just this one of
11 their 12 experts that their experts don't understand
12 the requirements of the court's order.

13 And with Dr. Netz, Microsoft was fortunate
14 enough to have a rebuttal deposition in order to
15 probe into some of these materials. It did not have
16 that opportunity for the other experts in which there
17 wasn't even a rebuttal expert report.

18 So given Dr. Netz's interpretation, once
19 again, Your Honor, I mean, "looked at" is pretty
20 clear. Working on the clock. I mean, that's pretty
21 clear, Your Honor.

22 And so Microsoft would request that
23 plaintiffs be required to certify that they have
24 produced all of these materials for their experts and
25 they have -- they have explained to their experts

1 exactly what needs to be covered under this. And
2 that is what Microsoft is asking.

3 I appreciate your time, Your Honor.

4 THE COURT: Thank you. Response.

5 MR. REECE: Yes, Your Honor. I'm Jim Reece
6 responding for the plaintiffs.

7 Your Honor, after this court --

8 THE COURT: Was my order unclear?

9 MR. REECE: No, Your Honor. No.

10 THE COURT: Did you understand it to mean
11 rely?

12 MR. REECE: No, Your Honor. I understood
13 it to mean --

14 THE COURT: Where are the documents?

15 MR. REECE: The documents that.

16 THE COURT: That the experts looked at?
17 Where are they?

18 MR. REECE: We've been very clear from day
19 one and it's clear in the Microsoft depositions, it's
20 clear in ours, that the experts in the entire course
21 of their retention looked at more documents than they
22 literally produced and --

23 THE COURT: Where are they?

24 MR. REECE: Each of the experts, including
25 Microsoft, have boxes and boxes of documents that

1 they've looked at that they did not believe fit the
2 court's order of documents they reviewed, looked at,
3 or used in preparing their expert opinions or
4 reports.

5 If the order read the experts should
6 produce every document that they've looked at since
7 their retention, then we are in to, probably, maybe
8 hundreds of boxes from both sides because the
9 Microsoft experts have said they have boxes and boxes
10 and boxes of documents they haven't produced because
11 they don't believe it fits this language.

12 And I can explain to the court exactly with
13 respect to Professor Netz, what she was referring to
14 in the documents that are at issue here.

15 After this court issued its order,
16 Professor Netz produced, again, a spreadsheet from
17 the accounting firm. She had done some analysis, and
18 she did the analysis based upon some other document.
19 It turned out that there was a spreadsheet she had
20 never seen that supported the document that she
21 relied upon. So she had not reviewed or relied upon
22 that. She was looking at and reviewing something
23 further down the line.

24 After this court's order because -- we went
25 ahead and produced that even though she had not seen

1 it. We also, after the court's order which said,
2 again, looked at, reviewed or used in preparing
3 opinions and reports, went back, and there were these
4 two memos that we produced according to the court
5 order.

6 And the memos were memos that
7 Professor Netz said in her recent deposition last
8 week -- she said, "I didn't rely on those memos.
9 Here is what I used them for. Because those memos
10 identified some source materials, I didn't pay
11 attention to the memos. I didn't rely on those. I
12 went to the actual source materials."

13 So these two memos which we have produced
14 simply had source materials. She did not rely on
15 those memos. She went to the actual source
16 materials. She based her opinion on the source
17 materials. And she produced the source materials for
18 her opinion and said in her opinion and in her
19 report, "I'm basing my opinion on the source
20 materials."

21 She was asked in her deposition:

22 "Are there any other memos like
23 this?"

24 So once she described as, "Hey, I
25 picked up source materials from the

1 memo. I went and read the source
2 material. That is what I was focusing
3 on. I produced the source materials. In
4 my opinion, in my testimony, I say
5 is based upon the source materials.

6 But, nevertheless, they said:

7 "Are there any other memos like
8 this?

9 And she said: "No, there were not.

10 Now, we had interpreted the court's order
11 to have some disqualification about -- it would have
12 to be something used in preparing the expert opinions
13 or reports.

14 Now, what Microsoft has done and has
15 basically said, even if you looked at any piece of
16 paper since you were hired for this case, then that
17 means it was looked at in preparing your opinions and
18 report.

19 Now, that, of course, takes away the
20 entire qualifying language. Basically what they're
21 saying is ignore any connection with whether you used
22 it to prepare your opinions or report, ignore whether
23 it had anything to do with that. We really want any
24 document you ever looked at since you were first
25 retained.

1 We did identify what Microsoft's experts
2 had to say about the same subject. Not to point
3 fingers, but to show the court that from the get-go
4 and throughout all of Microsoft's depositions, their
5 view was the same as plaintiffs.

6 In other words, their experts saw all sorts
7 of materials that they did not produce because it
8 wasn't something supposedly that they relied upon.

9 For example, their principal economic
10 expert, Kevin Murphy, provided 160-plus page report.
11 He had 19 or so people working with him over the
12 entire course of his retention in preparing this
13 report. They didn't produce a single e-mail, a
14 single memo.

15 They took the position that:

16 "Well, Professor Murphy, like
17 Professor Netz, had prepared a report
18 in Minnesota, so anything anybody
19 provided me from my staff, any of these
20 19 or so people, whatever they gave me,
21 I'm going to consider to be a draft of
22 my report."

23 "And the parties had agreed you
24 didn't have to produce drafts of the
25 report?"

1 Here specifically is what I asked

2 Mr. Murphy at one point:

3 "I'm just looking -- I just want

4 to make sure we've gotten all the written

5 documents identified. I think what -- to

6 be fair, I think what you've said is

7 you've looked at other written documents,

8 but they have either been drafts of your

9 report or notes about your report. Is

10 that fair?

11 His answer: "Yes, they pertain to,

12 yes, drafts or notes about this particular

13 report."

14 "About the literal report?

15 "Yes, about what is going to be

16 in that report, yes."

17 And so this is an exhibit to our

18 resistance. It's Kevin Murphy's testimony at

19 page 123. So what Mr. Murphy, their principal

20 economic expert has said, is, "Yes, I had 19 or so

21 people working on this for me." "Yes, there have

22 been notes, drafts of the report and notes." "I

23 haven't produced any of those to you," because,

24 again, he didn't think that was something that was

25 covered.

1 With Professor Paul, their pass-through
2 expert, and again, this is right out of our brief, I
3 asked her:

4 "Any discussions -- have you taken
5 any notes whatsoever since you started
6 this assignment?

7 "Answer: I sometimes keep notes
8 when I'm reading things. Usually I don't
9 keep them.

10 "Question: In this case you worked
11 on this case since April 2006, correct?

12 "Answer: Yes.

13 "Question: And you've identified
14 Appendix C, volumes of depositions and
15 pleadings and articles, correct?

16 "Answer: Yes.

17 "Question: Do you have any notes
18 whatsoever that you have taken in
19 connection with this assignment?

20 "Answer: Not that I can think of.
21 I have notes on some documents that I
22 write on the documents when I'm reading
23 them.

24 "Question: What are you referring
25 to there?

1 "Well, like on the depositions of
2 the expert reports, I will often make
3 notes on there to remind me.

4 "Question: You have kept copies of
5 the reports?

6 "Answer: I have, yes. I have
7 copies of the reports.

8 "Question: So if I understand, and
9 correct me if I'm wrong, I'm just trying
10 to understand this. Since April of 2006
11 you've never written a single note on
12 a piece of paper other than on one of
13 the documents you have reviewed
14 in connection with this assignment?
15 Is that your testimony?

16 "Answer: No, no. I have written
17 some things. I have made notes at times.
18 I don't think I have any. I may have some
19 in my office at home, but nothing I'm
20 aware of.

21 "Question: So you have taken notes
22 along the way as part of your work but
23 you discarded them. Is that what
24 you're saying?

25 "Answer: Once I use them, I have

1 so much paper, I typically do discard it."

2 Again, I'm not pointing fingers. I'm
3 identifying that with their experts there are things
4 they looked at, things they wrote down, things they
5 discarded that have never been produced. And it
6 was -- so it reflects the fact that this argument
7 today that really what experts have to produce is
8 every document they ever looked at is something
9 Microsoft never believed their experts didn't follow
10 that practice.

11 I list a couple of other examples. There
12 was one example we had listed which counsel had
13 pointed out was incorrect, and I'm not referring to
14 that. They had produced that document in a different
15 part of the litigation. That's just fine.

16 But John Bennett, their technical expert,
17 testified at his deposition that he destroyed notes
18 taken at a day long meeting with at Microsoft that
19 were ultimately used in preparing his report.

20 "Question: Did you take notes at
21 that meeting?

22 "Answer: I took some notes on my
23 computer. As is my practice, you know,
24 as I review information, those notes
25 evolve into the contents of my report."

1 Mr. Bennett also testified that he failed
2 to produce an e-mail in his possession, enumerating
3 the people in attendance at the meeting.

4 Again, we have another example from their
5 computer security person, Stephan Savage, where he
6 supposedly wrote out questions he was going to ask
7 Microsoft people before a meeting with them in
8 connection with his work that was not produced.

9 So my point, again, is to say that
10 throughout these 20 or so expert depositions that
11 both sides took, the experts on both sides have
12 looked at and have freely acknowledged, as has
13 Professor Netz, freely acknowledged that, yes, of
14 course, from the get-go she has said, "I've looked at
15 things other than what I've used in some way for my
16 opinions."

17 Microsoft's experts have done the same
18 thing. If we were to change the order today to what
19 Microsoft is implying, which is, "Let's take out the
20 language about looked at, reviewed or used in
21 preparing my opinions or reports," then all experts,
22 all 20-plus experts are going to have lots and lots
23 of documents to hand over to each other because that
24 isn't the way that either side handled their
25 depositions.

1 And we had that stipulation,
2 specifically -- of course, the court's order came
3 after the depositions. The stipulation the parties
4 were operating under at the time of the depositions.
5 Obviously, the court order governs, but it came after
6 the depositions.

7 And I'm just pointing out that in these 20
8 or some depositions, the agreement of the parties is
9 that you could discard. You didn't even have to keep
10 materials unless it was something you relied or
11 relied upon in preparing your report. So for all 20
12 some depositions, going into those, we had an
13 agreement as of March 2006, that they didn't even
14 have to keep those kinds of documents. They only had
15 to keep these kind of documents if they were reviewed
16 or relied upon by the expert in preparing the report.

17 So now to say let's take away from --
18 obviously, the court's order is what governs. While
19 the testimony was going on before the court order,
20 everyone understood they could even discard things
21 that weren't reviewed or relied upon.

22 If we now say, "No, we're going to change
23 this to let's produce everything every single expert
24 in this sought from the moment of retention," then
25 we're into an enormous examination of each of the

1 20-plus experts.

2 We did, after this court's order, go back
3 and that is why Professor Netz produced these
4 additional memos. They're not memos she's going to
5 reply upon. They're not memos she used. She
6 identified the source materials. When she testifies,
7 her opinion is going to be based on the actual source
8 materials.

9 Every expert in this case has identified
10 and produced the documents and the support that
11 they're going to be offering in support of their
12 opinions.

13 So there's no expert in this case who is
14 going to my knowledge -- is going to say, "Oh, gee,
15 I'm really basing my opinions on some other things
16 that have not been produced to you in a timely
17 fashion."

18 So every expert, when they get on the
19 stand, the other side will have had, by now, all the
20 documents that they have used to prepare their
21 opinions.

22 We believe, again, when the court order
23 came out, we talked about that language. We believe
24 we have complied with the court's order.

25 Professor Netz produced those two additional memos.

1 She said in her deposition of last week on pages 106
2 to 107 when specifically asked, "I don't have any
3 other memos similar to that."

4 Again, the other thing is there's been this
5 suggestion that somehow we are conditioning
6 production on whether an expert mouthed certain words
7 at the deposition. I have no idea where that came
8 from. That's never been the case. If there's some
9 words in our brief that have led counsel to believe
10 that, I don't know what those would be.

11 We've always in the depositions followed
12 what we thought was the understanding and the
13 agreement of the parties. And we believe we followed
14 the court's order.

15 Thank you.

16 THE COURT: Thank you.

17 Rebuttal.

18 MR. JURATA: Just a few points, Your Honor.

19 I believe that what Mr. Reece just told you
20 shows the continued confusion regarding the plain
21 meaning of the interpretation of the court's order.

22 Mr. Reece stated several times that the
23 court's order covers documents that an expert relies
24 on, that an expert is basing their opinion upon, a
25 document that the expert can basically put up and

1 say, "This supports my opinion."

2 The court's order, Your Honor, calls for
3 documents looked at, relied upon or used. I think I
4 got that right. "Reviewed, looked at or used."
5 That.

6 Doesn't encompass "relied upon." But
7 that's only part of the court's order. The court's
8 order is broader than that to include documents that
9 the expert looked at going to the subject matter of
10 the report, but that do not support the expert's
11 opinion. And that, I think, is the central
12 confusion, sitting here today, still regarding the
13 interpretation of the court's order.

14 THE COURT: You don't want things like a
15 letter from someone's aunt or uncle saying, "By the
16 way, how is your report is going? You're not getting
17 that ridiculous with me, are you?"

18 MR. JURATA: No, Your Honor. We're not
19 looking for every document that the expert ever
20 looked at.

21 I want to make very clear that Microsoft is
22 not seeking draft reports. Microsoft is not seeking
23 an expert's notes regarding drafts reports, or any
24 other people's notes regarding draft reports. I
25 think plaintiffs' counsel and Microsoft are in

1 complete agreement that the stipulation does not
2 prevent discovery into those materials. And I want
3 to make it very clear Microsoft is not interested in
4 draft reports here.

5 What Microsoft is interested in are
6 materials other than drafts, memos that are received,
7 e-mails that are received from staff, not from
8 relatives, from their staff or from other testifying
9 experts or even from counsel that go to the opinions
10 in their reports that they looked at. And it's
11 basically that clear, Your Honor.

12 And I want to make it very clear that that
13 is the standard that Microsoft's experts used when
14 producing materials with their reports.

15 The materials that were listed with
16 Microsoft's expert reports and the materials that
17 were produced were not just the materials that
18 supported what the expert was saying. It was all
19 materials the expert had actually looked at,
20 regardless of whether or not those materials
21 supported the experts' actual opinion.

22 And I just want to briefly touch upon some
23 of the examples that Mr. Reece mentioned about
24 Microsoft's experts because I do think it is a
25 mischaracterization.

1 First of all, the quotes that you were read
2 from Professor Murphy were discussing drafts. They
3 were discussing notes regarding drafts, the very
4 things that were precluded by the stipulation.

5 Professor Murphy testified that he works
6 orally with his staff, that he does not do lots of
7 writings with his staff. That he sits down in a
8 room. He talks with his staff about the opinions.
9 And counsel was allowed to depose Professor Murphy
10 regarding those conversations.

11 In contrast to that, plaintiffs' experts
12 testified -- and I can hand them up to you, if you
13 want, Your Honor, but there are exhibits to the
14 briefing that you were given.

15 Professor MacKie-Mason testified that he
16 received e-mails from his staff and other experts
17 concerning Microsoft.

18 Professor Noll testified that he received
19 e-mails from his staff regarding Microsoft.

20 Professor Netz testified that she received
21 e-mails from her staff she looked at once regarding
22 Microsoft, but she didn't produce any of them because
23 she didn't look at them twice.

24 So it's those interpretations which led to
25 the court's order, Your Honor. All Microsoft is

1 asking is that there is a level-playing field and
2 that both sides be subject to the same expert
3 disclosure requirements.

4 Microsoft has turned over all documents
5 that its experts have looked at with one exception,
6 Your Honor. I do want to talk about Professor Paul's
7 point because that is an area where the expert did
8 inadvertently throw out some notes that she had. She
9 was instructed not to. She made a mistake. This
10 mistake -- she talked about the mistake at the
11 deposition. Plaintiffs' counsel was allowed to
12 inquire fully into what these were. There were no
13 instructions not to answer.

14 But with that one exception, Your Honor,
15 Microsoft turned over everything with the exception
16 of drafts or notes thereto that their experts looked
17 at regardless of whether it supported their opinions.
18 And all Microsoft asks is that plaintiffs do the same
19 for Dr. Netz and all of their other experts.

20 MR. REECE: May I make one just brief
21 remark?

22 They say they've turned over everything.
23 They've turned over nothing. What they've done is
24 they've interpreted -- the moment I'm retained I'm
25 working on my draft report. So we've actually

1 produced e-mails and memos.

2 Professor Murphy, we don't have a single
3 e-mail or memo from any of the 19 people working on
4 this for the entire retention, a single e-mail or
5 memo from him because they carefully say, "Oh, but we
6 aren't going to turn over drafts or notes about
7 drafts."

8 They interpret their retention as being,
9 okay, from the time we get going, any notes you make
10 is a note about a draft so now we don't have to turn
11 over anything. So that is the game that is being
12 played here.

13 We've actually turned over e-mails and
14 notes. They aren't because they say, "Well, no, it's
15 a note about a draft. So we interpret the thing
16 their way. The moment these experts are retained,
17 they're working on their draft. So any notes about
18 their draft, any notes they ever get, any e-mails
19 that Dr. Murphy gets from his 19 people, are notes
20 about my draft and therefore not discoverable.

21 That's the problem. We're actually turning
22 over some things. They aren't turning over anything
23 because they're all notes about drafts.

24 THE COURT: Have you requested these
25 documents?

1 MR. REECE: Yes. They've refused. They've
2 said it's drafts. They even refused inquiry into
3 them. I have a specific --

4 THE COURT: Is there a motion to compel on
5 this?

6 MR. REECE: No. Because we interpreted
7 according to the agreement that both parties were
8 interpreting that, yes, there's all sorts of things
9 experts on both sides are looking at that they say do
10 not fit this language. And so we said, "Fine. Our
11 experts are testifying under oath to this language.
12 If your people say, hey, they're complying, we
13 weren't going to make an issue about it."

14 But I raise the point because it shows we
15 were operating under this agreement where all experts
16 had all sorts of things they've looked at.

17 Thank you.

18 MR. JURATA: Your Honor. May I say one
19 thing because I think there's something I want to
20 clear up.

21 Microsoft's experts did turn over a large
22 amount of e-mails and other materials that they did
23 look at.

24 During the earlier oral argument, I
25 believe, but I'm not sure, that there is a chart that

1 was handed up to the court which discussed some of
2 the documents which had been produced and it was a
3 table on it and it listed for each of the different
4 experts, e-mails, memos and other things, other
5 things that were produced.

6 And I'm working from memory here, but I can
7 tell you that Professor Savage, who is Microsoft's
8 expert on security issues, turned over 12 pages of
9 handwritten notes that he had on the case from a
10 meeting at Microsoft. He turned over e-mails that he
11 had between him and people at Microsoft with
12 questions that he had asked regarding Microsoft's
13 products.

14 Professor Hubbard turned over numerous
15 memos that he had received from staff. He received
16 something like a dozen memos from staff analyzing
17 various things in the case.

18 Professor Wright turned over materials from
19 staff. Professor Dean Calkins turned over materials
20 that he had received from Microsoft's attorneys. And
21 the list goes on.

22 Professor Murphy is unique in that the way
23 Professor Murphy works, he does a large part of his
24 own work.

25 Professor Murphy is a distinguished

1 economist at the University of Chicago. He was the
2 winner of the John Bates Clark award in economics,
3 Your Honor.

4 And what that is, is an award --

5 THE COURT: What do you mean he does his
6 own work?

7 MR. JURATA: He does his own work, Your
8 Honor.

9 THE COURT: He still looks at them.

10 MR. JURATA: That's correct, Your Honor.

11 THE COURT: If he still looks at a book on
12 economics, that is something he relied on. Did he
13 turn it over?

14 MR. JURATA: If he looked at that, it was
15 turned over, Your Honor.

16 THE COURT: So it doesn't make any
17 difference if he does his own work or not? What he
18 looks at? Who cares if he does his own work or not.

19 MR. JURATA: That's correct, Your Honor.
20 What I was not very well articulating was that
21 Mr. Reece was talking about the fact that there are
22 not any e-mails or memorandums from Professor
23 Murphy's staff that were turned over with Professor
24 Murphy's report. And that's because he did not ask
25 for any such e-mails or memos from his staff. He did

1 his own work. When he dealt with his staff, he dealt
2 with them orally. And every document that he looked
3 at was produced with his expert.

4 THE COURT: I see what you're saying.

5 Okay.

6 Anything else.

7 MR. JURATA: No, Your Honor.

8 THE COURT: Very well. Take a recess until
9 1:45.

10 (A short recess was taken.)

11 MR. REECE: Your Honor, Chris and I have
12 talked about what is No. 5, plaintiffs' motion to
13 strike opt-out member designation. And what we're
14 going to do is try to work on this over the weekend.
15 We've talked a little bit about a way to kind of
16 resolve the issues. And if there's any little piece
17 we can't resolve, we will bring that to the court's
18 attention for Monday.

19 MR. GREEN: We've got everything resolved,
20 I think, but one issue. And we're just wasting your
21 time with that if we can figure it out.

22 THE COURT: So you're going to take Chris
23 away from duck hunting?

24 MR. GREEN: I'm going to get him in the
25 blind with me.

1 THE COURT: I hope you're a better shot
2 than Chaney.

3 MR. ROSENFELD: Maybe not.

4 THE COURT: Plaintiffs' motion, which one
5 -- I guess the next two are really the same thing.

6 MR. REECE: They really are. I think we
7 can argue the two at the same time.

8 THE COURT: I would prefer that if you
9 don't mind.

10 Who wants to go first you?

11 MR. REECE: I would be happy to, Your
12 Honor.

13 This motion involves one of our expert-
14 rebuttal witness, Professor Stiglitz. And the issue
15 is that he's provided his rebuttal report on time,
16 September 29th. And as I'll describe, he has an
17 incredible schedule that doesn't allow his rebuttal
18 deposition to be taken by November 1 and not until
19 mid-January. And with that kind of lead in, that's
20 what the motion is about.

21 We move to simply request an extension of
22 the date for his rebuttal deposition. Microsoft has
23 moved to strike his testimony because he cannot be
24 available for a deposition before when we identified.

25 Professor Stiglitz, to give a little bit of

1 background to the court, is a renowned professor who
2 teaches at Columbia University. It's the university
3 where one of Microsoft economic experts hails from.

4 He's a very distinguished economist and is
5 very familiar with Microsoft. For example, he
6 submitted a report on behalf of plaintiffs in the
7 Microsoft MDL proceedings. He is a Nobel Prize
8 recipient in economics.

9 THE COURT: So he and I have something in
10 common?

11 MR. REECE: And there may be some more
12 things in common here.

13 He was the chief economist at the World
14 Bank. He was a member of President Clinton's
15 cabinet. He served in many high-level positions.
16 Earned many other honors.

17 As a teacher, and this is what is important
18 about his role in this case, he is uniquely able to
19 explain complicated economic theories in really
20 simple, easy-to-understand language.

21 We provided his rebuttal report on the date
22 that it was due, September 29th. It was when
23 checking on his availability for a deposition by
24 November 1st that we learned that because of a book
25 tour for a recent book that he's published and other

1 business engagements, we have to go to mid-January,
2 January 15th to find a full day for his rebuttal
3 deposition. His schedule has him traveling between
4 now and then to more than six foreign countries,
5 including 30 days in India, starting December 9th.

6 So we had a number of discussions amicable
7 with Microsoft in which we explained his travel
8 schedule and asked for an accommodation to have his
9 deposition scheduled on that first available day for
10 a deposition.

11 Microsoft, of course, was willing to extend
12 it for a couple of weeks, but he just isn't
13 available.

14 These are the reasons why we believe our
15 request for an extension is appropriate and will not
16 be prejudicial in any way.

17 Professor Stiglitz provided an expert
18 report in the Microsoft MDL case. And this isn't a
19 very complicated time line, but it's -- as I'll refer
20 to these dates, I'll just put it up here because I
21 think the dates are important.

22 So Professor Stiglitz provided this expert
23 report in the Microsoft MDL case back in 2002.
24 Microsoft's attorneys took a full day deposition of
25 Professor Stiglitz on this report in February of

1 2003.

2 Now, his rebuttal report in this case and
3 his opinions in this case are identical, absolutely
4 identical for the time period up through the date of
5 his MDL deposition.

6 There are no changes and what we've done
7 basically is we've submitted to both the court and to
8 Microsoft a redlined version of his rebuttal report
9 so it can be shown that there aren't any changes up
10 through that point in time.

11 The redline version also shows that there's
12 almost no changes after February 1st up to the
13 present time. There are a couple additional facts
14 that he has. Some additional information that he's
15 learned, but when looking at the redline version of
16 his report, you'll just go page and page and there's
17 no change.

18 The parties in our case, as the Comes case,
19 have previously agreed, that they can depose each
20 other's experts only on any changes to a prior report
21 in a Microsoft case or to change his
22 foreign-additional-time period.

23 So the agreement of the parties would be
24 that as long as Professor Stiglitz hasn't changed his
25 views up to the time of his last deposition by

1 Microsoft, which would be February 1, 2003, that they
2 wouldn't be able to ask him questions about his
3 opinions up through that point in time. That's done,
4 and that's the way the parties have operated. And
5 there's lot of instances of that where I would ask a
6 general question like of Dr. Murphy:

7 "What is a monopolist?"

8 And he was instructed not to answer because
9 we could have asked that of him in his last
10 deposition.

11 So the real issue here is because we're
12 asking him to essentially provide his opinion for the
13 remaining time period, the February 1, 2003, up to
14 the present time, what do we do with the fact that
15 he's unavailable for his rebuttal deposition by
16 November 1?

17 We will offer Professor Stiglitz four
18 depositions for this additional period of time. It's
19 just that his travel schedule prevents that until
20 January 15th.

21 The January 15th date, of course, for a
22 rebuttal expert is still many weeks before any
23 Microsoft experts would be expected to take the
24 stand.

25 January 15th happens to be a federal

1 holiday, and Dr. Stiglitz could be available in
2 New York where he lives and where Sullivan & Cromwell
3 has their principal offices.

4 We don't believe there's any prejudice to
5 Microsoft because it's had its essentially identical
6 MDL reports for several years, four years or so.
7 It's taken a full day deposition on that report. So
8 in any event, it could only ask questions for this
9 additional period of time. And as reflected in the
10 report that he did provide in this case, and the
11 redline version, there is almost no changes, albeit
12 there are some factual developments that he refers to
13 that he did not have in his earlier report because
14 the facts had not happened yet.

15 In other words, in his report in this case
16 he refers to a few incidents that would have happened
17 since February 1, 2003. And that's why we think it
18 is appropriate that he be deposed for that period.

19 Microsoft says that it would like to have
20 his opinions before trial starts. It has those
21 opinions. They're in his report.

22 And, of course, again, we're only talking
23 about this additional period of time. If we were to,
24 for example, say, "Fine, the court were not to
25 exercise its discretion to grant this extension that

1 we're requesting, we would simply scale back his
2 deposition, his testimony up through February 1,
3 2003, because there isn't a requirement by the
4 parties' agreement for a deposition. That's as far
5 as he's going to go."

6 Now, Microsoft actually says they want to
7 strike his testimony. They don't really distinguish
8 the fact that this testimony, at least up to this
9 date, is something they aren't entitled to take his
10 deposition on anyway. So we provided a rebuttal
11 report. The parties' agreement is they couldn't
12 depose him on that period.

13 So, number one, it would be inappropriate
14 to strike him as a witness. If the court again were
15 not to grant our extension, we would present him, but
16 have to limit his testimony to that period of time.

17 Microsoft suggests that he's perhaps not
18 rebutting all the experts. He's not an appropriate
19 rebuttal witness for all of the experts because
20 essentially we're using his MDL report and two of the
21 four experts for Microsoft didn't testify in the MDL.

22 That doesn't really make sense because
23 Dr. Stiglitz's opinions are really rebutting
24 testimony, not individuals. To use a real facetious
25 example, if Microsoft's experts were to say two plus

1 two equals five and Professor Stiglitz believes that
2 two plus two equals four, his math would be in
3 rebuttal to Microsoft's math regardless of who they
4 put on the stand. Again, it's a facetious example.
5 I'm just using it to illustrate the point.

6 Finally, Microsoft suggests that it's okay
7 to strike Professor Stiglitz. Again, they don't
8 mention this agreement, so I'm not sure they've even
9 focused on that. But because we have another
10 economic rebuttal expert, Dr. Warren-Boulton, that
11 argument doesn't really hold up because Professor
12 Stiglitz and Dr. Warren-Boulton cover different
13 grounds. And we've provided both of their rebuttal
14 reports to the court in a very, very general summary.

15 Dr. Stiglitz developed some overarching
16 economic propositions which counter the economic
17 arguments advanced by Microsoft's experts.

18 Dr. Warren-Boulton, on the other hand, had
19 provided a report in June. Microsoft's four
20 different economic experts attack his report. So his
21 rebuttal report is very different than
22 Dr. Stiglitz's. His rebuttal report is: These four
23 Microsoft economists said these ten things, let me
24 respond to these ten things.

25 So they really do cover very different

1 grounds. And, of course, I think his report makes
2 the point that it isn't appropriate to strike
3 Dr. Stiglitz because we have Warren-Boulton because
4 his report identifies four Microsoft economists are
5 attacking him. So I think it's understood that
6 economists are going to be coming at this from
7 different angles. Each side has a number of
8 economists.

9 Obviously, striking him as a witness
10 entirely would be inappropriate given the parties'
11 agreement, and that would be an extreme remedy. And
12 Microsoft has argued on numerous occasions that
13 striking a witness would be an extreme remedy.

14 Again, we believe that his rebuttal
15 deposition on January 15th would not be prejudicial
16 because it would be still during plaintiffs' case.
17 And, of course, he won't be coming up until after
18 Microsoft's entire case.

19 We think the attempt to exclude him is not
20 so much in reality a concern that they don't know what
21 he's testified about or don't know what he's likely
22 to testify about, but it's a concern that he's an
23 extremely effective witness who can communicate
24 things very simply.

25 He is very important. He has very

1 important testimony on big-picture-economic issues
2 that is directly contrary to a number of the
3 Microsoft experts.

4 Plaintiffs will be prejudiced if he's not
5 allowed to testify. We would respectfully suggest
6 that Microsoft would not be prejudiced given that
7 he's a rebuttal expert, and he's -- they have his MDL
8 report. They've taken his deposition, and his
9 opinions here are essentially very much the same.

10 For those reasons and because we think his
11 testimony, most importantly, will help accomplish
12 what we're all here for, which is to help the jury
13 try to decide this case in the best way that they
14 can.

15 So for those reasons we would respectfully
16 request that his rebuttal deposition be allowed to go
17 forward on January 15th, and definitely that his
18 entire testimony not be stricken. And that at the
19 very least, if the court were not inclined to grant
20 our request for an extension, that he certainly is
21 allowed to be a witness for the time period up
22 through his MDL deposition.

23 Thank you, Your Honor.

24 THE COURT: Thank you.

25 Response.

1 MR. JURATA: Your Honor, Professor Stiglitz
2 is a rebuttal experts. Plaintiffs' motion should be
3 denied because Microsoft is entitled to know what his
4 actual rebuttal opinions are.

5 And the fact that he has submitted a report
6 in a case three years ago does not tell Microsoft
7 what specific arguments Professor Stiglitz is going
8 to have in response to Microsoft's experts in this
9 case.

10 And withholding that information until the
11 middle of plaintiffs' case-in-chief will interfere
12 with Microsoft's trial preparation and will limit the
13 information that Microsoft has in preparing for
14 cross-examining the live witnesses which appear prior
15 to his deposition.

16 Your Honor, if I may, I would like to go up
17 to the chart that Mr. Reece did which is a very
18 helpful chart, I think.

19 THE COURT: Sure.

20 MR. JURATA: Now, Mr. Reece noted that
21 there's no prejudice to Microsoft because Microsoft
22 has these two prior expert reports. And Mr. Reece --
23 and I agree with Mr. Reece. He drew sort of this
24 line that said Microsoft already knows his opinion to
25 this. And that is true.

1 But what has happened since this line,
2 since this cutoff, Your Honor, is Microsoft has
3 submitted expert reports for new experts that were
4 not back here. There's an expert report for
5 Professor Hubbard, which is 86 pages in length, and
6 something like 42 exhibits.

7 There's an expert report for Dr. Wright,
8 which is 26 pages in length and has six exhibits.

9 There is an updated expert report for
10 Professor Murphy, which has something like 36
11 additional pages and 10 new exhibits which weren't in
12 his earlier report. And there's a slightly updated
13 report for Professor Oster. And there's also, as
14 Mr. Reece noted, new facts which have occurred,
15 including the proceedings over in Europe which
16 Mr. Stiglitz has been proffered to cover in his
17 testimony.

18 The problem from Microsoft, Your Honor, is
19 that because the report is the same, Microsoft has no
20 idea how he's going to respond to specific arguments
21 in any of these expert reports.

22 THE COURT: Wasn't there an updated report
23 given by him?

24 MR. JURATA: There is an updated report,
25 but it's the exact same report, Your Honor, as this

1 one, right.

2 THE COURT: Okay. I gotcha.

3 MR. JURATA: In fact, under the first
4 sentence of the updated report says, it responds to
5 these four experts. Professor Hubbard's name is
6 never mentioned in the remainder of the report.
7 Professor Wright's name is never mentioned.
8 Mr. Murphy's name is never mentioned. And Dr. Oster
9 appears in one footnote, I believe it's 42 of his
10 report. And that is the extent that there's any
11 reference to what is something like 250 pages of new
12 experts opinions and analysis that were not out there
13 for his testimony in the MDL.

14 So the only way to learn his rebuttal
15 opinions, and he is a rebuttal expert, is depose him,
16 which shouldn't surprise you, Your Honor. After this
17 morning, it appears the parties, once again, have a
18 different interpretation of a stipulation that has
19 been entered into in this case.

20 And if I may approach, and, Jim, this is
21 the deposition stipulation, Exhibit B to your motion.
22 I would like to hand up, Your Honor, what the
23 agreement is for these expert depositions. And I'm
24 going to do this from memory because, unfortunately,
25 that is my only copy.

1 But that stipulation does not say you are
2 only required -- you're only allowed to ask questions
3 about changes.

4 What that stipulations says, Your Honor, is
5 that what you can't ask about is anything that you
6 could have asked about during the prior deposition.
7 And then it goes on to expand upon that language. To
8 give an example, a change to your report, is
9 something that could not be asked at a prior
10 deposition.

11 Well, another thing that couldn't be asked
12 at a prior deposition, Your Honor, is how Professor
13 Stiglitz would respond to these expert opinions and
14 analyses which did not exist in 2003.

15 It would have been impossible to ask about
16 them, and that is why you need a deposition in this
17 case. The only way for Microsoft to know how
18 Professor Stiglitz is actually going to rebut its
19 experts, is to take his report, take Microsoft's
20 expert report, sit them down at the deposition and
21 ask: "How does your report respond to this opinion
22 by Professor Oster? How does your report respond to
23 this report by Professor Murphy?" That is what
24 rebuttal testimony is. And that is what Microsoft
25 just doesn't know, sitting here today.

1 So Microsoft offered to postpone his
2 deposition by a couple of weeks. I mean, we
3 understood the book tour, but we do not -- we did not
4 expect that it was going to be a three-month delay
5 into the middle of plaintiffs' case, after the
6 opening statements in this case and after live
7 witness have testified.

8 Without knowing Professor Stiglitz's
9 testimony, Microsoft does not know which facts to
10 elicit from live experts that it may want to use
11 during Professor Stiglitz's cross-examination at
12 trial. That is the prejudice, Your Honor. Microsoft
13 cannot finalize its trial strategy because it does
14 not know the opinions that Professor Stiglitz, the
15 specific opinions that he will offer at trial.

16 And this court has broad discretion, Your
17 Honor, as you know, to exclude expert testimony if
18 the expert is not made known in a timely manner.

19 Microsoft -- if we were talking about a
20 couple of weeks, Microsoft would be very happy taking
21 a late deposition. We would not be in front of you
22 now, Your Honor. But if Professor Stiglitz's book
23 tour is more important than your pretrial schedule in
24 this case, which Microsoft tried to postpone and
25 plaintiffs vigorously opposed that and said, "Your

1 Honor, this trial must proceed, this schedule cannot
2 move," if Professor Stiglitz cannot meet that trial
3 schedule, if his book tour is more important than
4 that, well then perhaps he shouldn't be an expert
5 testifying in this case.

6 In conclusion, Your Honor, the rules are
7 the rules. They apply to both parties. Microsoft's
8 experts has fully complied with the court's pretrial
9 schedule. Microsoft was willing to briefly postpone
10 Professor Stiglitz's deposition, but we're talking
11 about the middle of trial and that postponement is
12 just too long. It doesn't let Microsoft finish its
13 trial strategy. It withholds information that
14 Microsoft might need for its opening statement, and
15 it does not give Microsoft a road map as to what
16 facts it needs to elicit on cross-examination of the
17 witnesses who will appear at trial prior to January
18 15th.

19 And for those reasons, Microsoft requests
20 that if Professor Stiglitz cannot comply with a
21 pretrial deposition, then the only appropriate remedy
22 is to exclude his testimony in trial. Exclude his
23 rebuttal testimony at trial because Microsoft does
24 not know what his rebuttal testimony is.

25 Thank you, Your Honor.

1 THE COURT: Thank you.

2 Rebuttal.

3 MR. REECE: Yes. Thank you, Your Honor.

4 Microsoft admitted that they knew his

5 opinions to a detail as of February 1, 2003.

6 If we take that report and put him on the

7 stand and say, "Just say what is in your report,"

8 that is contrary to everyone of Microsoft's

9 economist. That is rebuttal. That is literally --

10 Microsoft says it's two plus two equals five. He

11 says two plus two equals four. His report says two

12 plus two equals four. So they know what he's going

13 to say. It's contrary to what they say, so it is

14 rebuttal.

15 They say, "Well, gee, I want to ask, you

16 know, specific question, what do you think about

17 Professor Murphy?" Well, what he can testify to now

18 is in rebuttal is he could say, "I just understand,

19 you know, whatever he said, here is what I say

20 verbatim from the MDL report." They know exactly

21 what he's going to say. What he's going to say is

22 contrary to what the Microsoft experts are going to

23 say.

24 A rebuttal expert doesn't have to say,

25 "Okay. I've studied every little piece." We can put

1 on a rebuttal expert to say two plus two equals four.

2 He doesn't have to say, "Oh, I knew the other side

3 said two plus two equals five."

4 The lawyers put on the rebuttal witness to

5 rebut testimony that has come in. The rebuttal

6 expert doesn't have to study the experts that he's

7 rebutting.

8 They've acknowledged that they know

9 everything about his opinion up through this date.

10 When we look at his report, and we provided a timely

11 report, it's the same.

12 And I think it's always at a very genuine

13 level, "Gee, we might want to ask him a question.

14 There was something he was involved in the EU."

15 Well, if he was involved in the EU against Microsoft.

16 I mean, Microsoft knows this stuff inside out. They

17 have two reports that are essentially identical.

18 They have an eight-hour deposition of him.

19 They keep the criticisms at this general

20 level because in reality they know exactly what he's

21 going to testify to, which is in this report.

22 Finally, Microsoft is now asking that he be

23 struck entirely -- Oh, let me just back up for a

24 moment on this agreement of the parties.

25 I'll just read a specific example from

1 Professor Murphy's deposition. I asked:

2 "How would you define a monopolist?"

3 Microsoft's attorney said:

4 "You know, I'm going to object

5 and, Mr. Reece, I think I'm going to

6 instruct. These are not questions that

7 relate to work that has been done in

8 Iowa. And you certainly did not give

9 us this kind of latitude in the depositions

10 we've taken. So if you want to ask him

11 about work done in connection with the

12 Iowa report, that's fine. Otherwise,

13 I believe these questions are improper,

14 and I will instruct.

15 "Mr. Reece: Okay. I have about 25

16 more questions just for the record of

17 this sort.

18 "Microsoft's attorney: You can

19 read them, and I'll instruct. And then

20 we can go on, if that's what you want

21 to do.

22 "Mr. Reece: I'll probably cover

23 them at some point. So you're instructing

24 him not to answer?

25 "Microsoft's attorney: Yes. I'm

1 not trying be an obstructionist. I
2 think these are questions that certainly
3 could have been asked before and
4 don't certainly relate to the Iowa
5 work which is the stipulation we've
6 entered into.

7 So the stipulation was if they could have
8 asked the questions before about a report or
9 opinions, you can't go back and ask for those same
10 things. And that's what the stipulation both says,
11 and that's the way the parties interpreted it, is
12 that if portions of an expert report that were not
13 changed and were not a topic of examination, even if
14 they weren't the topic of examination in prior
15 testimony, they can't be the subject of examination
16 in this action.

17 So here, they couldn't, under their own
18 agreement and the way that they instructed their
19 witness, ask anything. Prior to the eight-hour
20 deposition in 2003, we think it is appropriate to
21 offer him because there's a few factual additions
22 that he's making after that point in time.

23 The final point I would make is that
24 Microsoft now says, "Well, you've got to strike this
25 person as a witness." That's an appropriate

1 sanction. And I mentioned throughout their briefs,
2 they say that's an incredibly hard sanction.

3 An example is from their memory item in
4 opposition of plaintiffs' motion to strike
5 Microsoft's disclosure of opt-out consumers
6 witnesses.

7 Microsoft writes, "The preclusion of
8 evidence is considered a harsh sanction to be
9 imposed. As a result, courts in this state, Iowa, do
10 not lightly preclude parties from calling witnesses.
11 And the party requesting such relief must show real
12 and substantial prejudice."

13 Microsoft goes onto cite cases where Iowa
14 courts held that witnesses should be allowed to
15 testify, even where they were not listed at all on a
16 pretrial witness list, where a witness was discovered
17 on the morning trial began, where the name of a
18 potential witness was first revealed at the
19 deposition taken after a pretrial witness lists were
20 filed and many other cases.

21 So it is, in Microsoft's own words, and
22 it's been repeated through their motions, an
23 extremely hard sanction to say he can't testify at
24 all.

25 We're simply asking for an extension of his

1 rebuttal deposition. And we don't believe that the
2 general statement that you would like to ask him what
3 he thinks about this or that witness is anything that
4 rises to a level of prejudice, given the staging of
5 the case.

6 Thank you, Your Honor.

7 THE COURT: Thank you. Very well.

8 MR. JURATA: Your Honor, given the fact
9 that we had two motions going on here, can I just
10 briefly respond?

11 THE COURT: Sure.

12 MR. JURATA: And I only have three brief
13 points, Your Honor.

14 Professor Stiglitz is a rebuttal expert.
15 Microsoft is entitled to learn what his rebuttal
16 opinions are and what those opinions are pretrial.

17 The second point is, if it's as Mr. Reece
18 says, if his opinion is really limited to just what
19 was said in his 2003 MDL expert report, well, then
20 he's not a rebuttal expert. He's not responding to
21 any of Microsoft's experts. He would have been -- it
22 would have been an original expert report, which
23 would have been due back in June. And it's just
24 being snuck in under the eyes of the rebuttal report.
25 And Microsoft's experts have not been given the

1 chance to respond to what essentially is an original
2 expert report.

3 And the third thing, Your Honor, exclusion
4 is appropriate here. Microsoft would not be seeking
5 exclusion were the delay not until after the start of
6 plaintiffs' case.

7 All Microsoft wanted was a pretrial
8 deposition to learn what his rebuttal testimony is
9 going to be.

10 Plaintiffs inform Microsoft that is simply
11 not possible. Given that, the traditional remedy
12 when an expert is not made available to determine
13 what his opinions are, is the exclusion -- is the
14 exclusion of the expert. And trial court has done
15 that in case after case when the expert is not made
16 available pretrial.

17 That's all I have, Your Honor.

18 THE COURT: Very well.

19 Anything further?

20 MR. REECE: No.

21 THE COURT: All right. We will take up the
22 other motions on Monday. I did have an issue I
23 didn't bring up. I had a voice mail from a reporter
24 from the Register, Des Moines Register, who wanted to
25 know about getting a copy of the jury questionnaire.

1 I'll leave it for you guys to think about over the
2 weekend. I'm not going to answer yet, if that's what
3 you want me to do. All right.

4 MR. GREEN: Your Honor, are we starting on
5 1:30 or 1? You had an order that said 1:30 and then
6 we talked about 1.

7 THE COURT: Ten o'clock now.

8 MR. GREEN: That's right. I forgot about
9 that schedule. I was thinking about duck hunting.

10 (Record closed on November 9, 2006, at
11 2:24 p.m.)

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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 17th day of November, 2006.

JANIS A. LAVORATO
Certified Shorthand Reporter