

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICROSOFT CORPORATION,

Defendant.

CA No. 98-1232 (CKK)  
Washington, DC  
September 25, 2008  
10:33 A.M.

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STATE OF NEW YORK, ET AL,

Plaintiff,

vs.

MICROSOFT CORPORATION,

Defendant.

CA No. 98-1233 (CKK)

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TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY  
UNITED STATES DISTRICT JUDGE

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1 P R O C E E D I N G S

2 THE COURT: Good morning, everyone.

3 COURTROOM DEPUTY: Civil Action 98-1232, the United  
4 States of America versus Microsoft Corporation. Civil Action  
5 98-1233, State of New York, et al., versus Microsoft  
6 Corporation. Both cases are set for status hearing. Counsel,  
7 would you please approach the microphone and introduce  
8 yourselves for the record.

9 MR. SEVERT: Good morning, Your Honor. Adam Severt  
10 for the United States. I'm joined at counsel table by Aaron  
11 Hoag.

12 THE COURT: All right. Good morning.

13 MR. HIMES: Jay Himes for the New York Group with  
14 Ellen Cooper from Maryland.

15 THE COURT: All right. Good morning.

16 MR. HOUCK: Steve Houck, Your Honor, for the  
17 California Group. With me at counsel table is Don Resnikoff  
18 with the D.C. Corporation Counsel or Attorney General's  
19 office.

20 THE COURT: Attorney General's office.

21 MR. HOUCK: Attorney General's office, I realized I  
22 misspoke as I started to speak, so I corrected myself. And  
23 we're missing two of our usual stalworths, Adam Miller from  
24 California and Layne Lindeback from Iowa. And I want to  
25 assure Your Honor there's no diminution of interest in the

1 case, Mr. Miller is stuck in depositions in California and  
2 Mr. Lindeback is attending some meetings in Salt Lake City.

3 THE COURT: Not a problem.

4 MR. RULE: Good morning, Your Honor. Charles Rule  
5 for Microsoft. With me at counsel table from Microsoft  
6 Corporation are Bob Muglia, who will be speaking later, Kevin  
7 Kehoe, Craig Shank and David Snyder, and Jonathan Kanter from  
8 my firm.

9 THE COURT: All right. All right. As has been my  
10 practice throughout this litigation, I'll summarize the  
11 compliance efforts that have been set out in the reports. I  
12 have a few questions at the end. And I'll call on counsel and  
13 Mr. Muglia to tell us where we are. This is a full compliance  
14 status hearing. The one we held in June of this year was an  
15 interim one, we have been doing a combination of these about  
16 every three or four months. The focus of the hearing in June,  
17 and to a large degree the focus today, will be on the projects  
18 undertaken under Section III.E, the Communications Protocol  
19 Licensing Provisions of the Final Judgment, which are set to  
20 expire at this point on November 12th of '09. I also extended  
21 to November 12th of '09, I'll call them the Expiring  
22 Provisions of the New York and California Group Final  
23 Judgments, with the exception of III.B.

24 Microsoft has filed two Supplemental Reports in  
25 July and August, and you also filed a joint report in

1 September. The joint report focuses on recent enforcement  
2 activities, particularly, as I indicated, III.E, and the  
3 middleware-related provisions of the Final Judgment, III.C,  
4 III.D and III.H. As always, when I talk about the TC, I'm  
5 including Craig Hunt, the California's technical expert.

6 So, let me start with III.E. In terms of the  
7 project schedule, as agreed, Microsoft did create a second  
8 template in response to the TC's concerns that a single  
9 template wouldn't sufficiently handle the different types of  
10 system documents that Microsoft planned to create. However,  
11 it looks like in early August the TC determined that  
12 proceeding based on those templates was not going to lead to a  
13 prompt and satisfactory resolution, in their view. And,  
14 therefore, they provided Microsoft with their own two proposed  
15 templates. And Microsoft and the TC are now using the TC's  
16 templates as a starting point for discussions and are  
17 reviewing Microsoft's suggested changes to those TC templates.

18 Both sides, I think, and the TC, acknowledge that  
19 the challenges to creating the type of system documents the TC  
20 envisions are not easy. They also explain, and I think it's  
21 important that the goal is to minimize the miscommunication  
22 over the template's intended meaning, and to resolve any  
23 issues before they are actually finalized. And the TC, as I  
24 understand it, has begun creating examples in order to further  
25 this discussion with Microsoft for specific sections of the

1 templates, and has presented those first examples to Microsoft  
2 last week.

3 I think it appears, and everybody seems to agree,  
4 that finalizing the system document templates is taking longer  
5 than everybody expected, unfortunately. But that the TC is  
6 pursuing the project in order to allow Microsoft to develop  
7 quality system documents. As I understand it, the targeted  
8 completion for this template finalization process should be in  
9 the next month or two. After they're finalized, then  
10 Microsoft will need to develop a new project plan to complete  
11 the system documents, which will include Milestones so we can  
12 keep track of it.

13 I would note that the parties don't provide any  
14 estimate as to when Microsoft may be able to complete the  
15 drafting or finalizing of these system documents. But  
16 Microsoft does state that they're continuing to draft system  
17 documents in accordance with the latest templates, and it will  
18 continue to do so and revise them as necessary. As requested  
19 by the TC, Microsoft did develop a process for including  
20 change information in the new versions of the technical  
21 documentation, and provided the TC with a sample document. We  
22 had talked about that last time. The TC is satisfied with  
23 that, and Microsoft is going to go ahead, if they haven't  
24 already, in implementing the approach, I guess either in this  
25 month or in October, with the release of the technical

1 documentation.

2           The TC's testing evidently recently disclosed a  
3 protocol not included in Project Sydney database, and  
4 evidently Microsoft also uncovered a second one. They now  
5 have been added to the database. And evidently they don't  
6 need additional documentation.

7           Finally, Microsoft has informed the TC that changes  
8 to protocols in Windows 7 will result in a significant number  
9 of new and modified technical documents. These technical  
10 documents will be delivered to the TC later this year, and the  
11 TC is developing a plan for reviewing them. In terms of the  
12 TC's Prototype Implementation Activity, as of August 31st of  
13 this year there are a total of 1,360 outstanding TDIs in the  
14 rewritten documentation, of which 184 are Priority 1 TDIs,  
15 which were submitted by the TC, and 651 were self-identified  
16 by Microsoft. I would note that the numbers seem to be going  
17 up since June.

18           Microsoft notes, again, which they did the last  
19 time, that the total number of TDIs spans the entire range of  
20 rewritten MCPP documentation as well as the overview materials  
21 and system documents, and that the numbers of TDIs should be  
22 considered in the context of more than 20,000 pages of MCPP  
23 technical documentation. We can talk about that a little  
24 later.

25           Testing and Validation. Microsoft and the TC met



1 in July to review the results of Microsoft's Cluster 6  
2 testing. Microsoft is continuing to test Cluster 7, which is  
3 expected to be out by the end of -- or completed by the end of  
4 this month. In terms of Interoperability Lab Plug-Fest  
5 Events. Microsoft completed an interoperability lab with one  
6 implementer in July, got very positive feedback. Another one  
7 has been scheduled at the end of this month. Microsoft is  
8 also planning a Media Streaming Plug-Fest for October, an  
9 Active Directory Plug-Fest for January of '09, and the they'll  
10 also hold a File Systems Plug-Fest in September, which has  
11 some interesting people that will be attending.

12 In terms of the MCPP Status. Microsoft reports  
13 there are a total of 50 companies licensing patents for  
14 Communications Protocols under III.E, 40 of which had  
15 royalty-bearing licenses, that's up slowly, it's been  
16 increasing, but it's up since June. Lucent Technologies,  
17 DayTek, Storwize have signed patent licenses. Microsoft is  
18 aware of 14 patent licensees shipping products under the MCPP,  
19 and also reports 28 licensees signed up to receive free  
20 Technical Account Manager Support, and seven have signed up  
21 for the Windows source code access. As of September 18th,  
22 documents describing the protocols that are available on the  
23 Internet have been downloaded over 209,000 times. That's also  
24 a number that has increased since June.

25 Are there any remaining issues regarding the

1 protocol elements deleted from the revised technical  
2 documentation, which was an issue last June? Regarding  
3 finalizing the templates for the overview system documents,  
4 I'm assuming that we're not on track for drafts in March of  
5 '09 and finalizing it in June of '09, but I'd like to hear  
6 about that. Do we have any sense from the parties and  
7 Microsoft as to when that is likely to be finalized? And are  
8 Plaintiffs satisfied with the progress.

9 I'm concerned because, although I'm happy on the  
10 one hand that you're cooperating and that this is moving, I'm  
11 also troubled, however, about the overall delay. Hopefully  
12 we're not going to have a substantial delay as we've had in  
13 the past on III.E. They're set to expire November 12th of  
14 '09, which is less than 14 months away. And I guess one  
15 question: Is it expected that you would still be finding  
16 protocols that have been excluded from Project Sydney database  
17 or is that sort of a natural thing that happens, or is this  
18 something that should have been picked up?

19 In terms of moving to III.C, the competing  
20 middleware, this really relates more to New York and  
21 California Plaintiffs. They're monitoring the developments  
22 regarding Windows XP and Vista to assure compliance with the  
23 Final Judgments. They have been reviewing early builds of  
24 Windows 7. As those builds of Windows 7 progress, the TC is  
25 going to conduct middleware-related tests in order to ensure

1 that the middleware-related bugs fixed in Vista don't show up  
2 again in the next operating system. The TC is also testing  
3 the version of Windows XP that Microsoft developed for the XO  
4 laptop computer, which is being offered by the One Laptop Per  
5 Child Foundation.

6 Plaintiffs also report that the TC has completed  
7 its testing of the new desktop search features introduced as a  
8 result of the Google complaint, and reports that the new  
9 features are working as agreed, and promote user and OEM  
10 choice for desktop search and Vista. So, that seems to be an  
11 issue that hopefully has been put to rest. The TC has  
12 continued to work on the operating system code scan that's  
13 aimed at determining whether there's a commonality in the  
14 Windows code accounts for browser overrides. The TC is also  
15 continuing its investigation of certain default browser  
16 overrides and has reported issues in this vein to Microsoft,  
17 which is still looking into it.

18 The TC has completed its testing of Microsoft's  
19 publicly released version of IE 8 beta 1, and is now testing  
20 the recent release beta 2. Based on the testing of beta 1,  
21 the TC discussed with Microsoft the behavior of placing its  
22 icon in the Start menu under certain middleware  
23 default-setting scenarios, and Microsoft has changed that  
24 behavior in beta 2. Microsoft also made changes in beta 2  
25 based on the TC's discussion of certain aspects of Windows'

1 Internet Options interface. Plaintiffs indicate that these  
2 changes make the interface more browser independent. I'm  
3 pleased to hear that and pleased to hear the progress.

4 The TC has made certain changes to its simulator  
5 tool, which it had transitioned to Microsoft. Once it  
6 completes that it will pass that on to Microsoft. Any initial  
7 reactions to the TC's testing of Windows 7 or IE 8, or is it  
8 too early to tell anything further that would need to be  
9 added? It looks like that one is moving fairly smoothly.

10 In terms of complaints, we still have the one that  
11 has been left or noted as being investigated by the  
12 Plaintiffs, which does include the United States, including  
13 some discovery. And I assume that that's continuing. There  
14 don't seem to be any additional substantive complaints since  
15 the last report. Are we satisfied with the progress? I don't  
16 know what the complaint is, which is fine, I'm not supposed to  
17 know. But are we satisfied with the progress that's been  
18 occurring with this complaint in terms of how it's moving  
19 forward to get resolved? Anything else to add?

20 Compliance efforts. Microsoft has been actively  
21 engaged in their ongoing training programs, monitoring, making  
22 sure that newly appointed individuals, officers, directors, et  
23 cetera, get the necessary materials. So, we're sort of  
24 narrowed down on what the issues are, although they are  
25 certainly very important issues. And each time we come there

1 is some new little wrinkle to it. So, let me call on everyone  
2 at this point. Let me start with the federal people, Justice  
3 and, then I'll work my way around.

4 MR. SEVERT: Thank you, Your Honor. I think I'll  
5 start by updating you on recent developments since the filing  
6 of the status report, because I think they'll address most of  
7 the questions related to III.E.

8 THE COURT: All right.

9 MR. SEVERT: I'm pleased to report that the TC and  
10 Microsoft have reached agreement on at least the first  
11 template for the system documents.

12 THE COURT: Okay.

13 MR. SEVERT: And this has been a result of the TC,  
14 Craig Hunt, and Microsoft working really around the clock for  
15 the last few weeks to get resolution on the open matters. So,  
16 the agreement so far is on the protocol family system  
17 document, which is the first of the two types of templates.  
18 And most of the system documents actually fall into this  
19 category. The defined task, which is the second type of  
20 system document, work is still ongoing to reach resolution of  
21 those, however, most of the discussions relating to the first  
22 type of system documents also relate to the second type of  
23 system documents. So, at this time we don't anticipate any  
24 major obstacles in reaching an agreement on the second type of  
25 system document. And we also have a little bit of time to

1 reach agreement, as none of the system documents which  
2 Microsoft has already drafted or is currently writing are of  
3 the second type, they are all the first type.

4 THE COURT: Okay. So, where does that put us on  
5 the timetable?

6 MR. SEVERT: I think we are -- now that we have  
7 reached agreement on the template, Microsoft is now working on  
8 putting together what a schedule might look like. I think  
9 that is certainly the next step.

10 THE COURT: That's very gratifying to hear. I was  
11 concerned we were back to more delays.

12 MR. SEVERT: Absolutely. And let me just take a  
13 moment to talk a little bit more generally about the system  
14 documents.

15 THE COURT: Okay.

16 MR. SEVERT: We continue to believe that they are  
17 critical to interoperability, and just as an example of that,  
18 the TC has really dropped everything the last few weeks to  
19 work with Microsoft to develop these concrete examples to move  
20 the discussions on the template along. And in their portion  
21 of the status report, Microsoft notes that the system  
22 documents may be the first of their kind, and that may  
23 technically be true, but from our perspective that's not  
24 really a complete answer.

25 The template was adapted from industry standards

1 and from academic texts, so what perhaps is unique about this  
2 undertaking is Microsoft is attempting to document its  
3 interoperability information for a highly complex system that  
4 was neither designed or intended for interoperability. So, I  
5 don't think anyone will tell you this is not very, very  
6 difficult. But by the same token, it's also very important.  
7 In fact, there is already information in the systems documents  
8 that is not in the technical documents that is essential to  
9 interoperability.

10 THE COURT: All right.

11 MR. SEVERT: Now, your other couple questions.  
12 Well, first, anything else on the templates or system  
13 documents?

14 THE COURT: No. Certainly, the progress that has  
15 been made -- and I do appreciate the TC, they obviously have a  
16 vision of how this should be done and they've presented it,  
17 and I'm gratified to hear that Microsoft has worked  
18 cooperatively to make this work. I'm always thankful that I  
19 decided to adopt the idea of using the TC and Craig Hunt  
20 because they have turned out to be invaluable --

21 MR. SEVERT: As are we, Your Honor.

22 THE COURT: -- in terms of having this actually  
23 work. So, I'm pleased in terms of -- it made sense in the  
24 discussion that a systems document -- the concept made sense  
25 in terms of the discussions, and I'm glad to see that it's

1 picking up on things that will aid not only in the technical  
2 documentation, but obviously in our ultimate goal, which is  
3 interoperability.

4 MR. SEVERT: Sure. Sure. So, as far as the other  
5 questions you had, the deleted protocol elements, that has  
6 been resolved and Microsoft is doing additional training to  
7 make sure this doesn't happen again. And, of course, we  
8 certainly expect that it will not. And your last question  
9 relating to the protocols that were excluded and --

10 THE COURT: Right. I don't know whether that's  
11 something that just happens and it's to be expected, or  
12 whether that's something that shouldn't happen.

13 MR. SEVERT: I think from our perspective that it's  
14 not wholly unexpected. And I think that the nature of, so  
15 far, the protocols that have been found recently is they are  
16 not particularly common or necessarily the most useful.

17 THE COURT: Okay. All right. Thank you.

18 MR. SEVERT: Thank you.

19 THE COURT: Mr. Himes.

20 MR. HIMES: Good morning, Your Honor. I want to  
21 reiterate what Mr. Severt said that the system documents, as  
22 we have said consistently, are essential and integral to the  
23 rewrite project and having technical documentation that is  
24 usable by licensees. You know, these past few status  
25 conferences we go through this ritual of our saying that, and



1 Microsoft comes back and says, well, they are not really  
2 required, we're acting as a volunteer. All the while, of  
3 course, you heard Mr. Muglia say that these documents -- these  
4 system documents definitely aid interoperability. They're  
5 very useful documents, there is no question about that.

6           And I must say, Microsoft also has e-mails from  
7 people out in the world who are now using the documents that  
8 are online, which are saying what we have said. I saw a copy  
9 of one recently from a couple of weeks ago. No where is there  
10 a good protocol overview showing the actions and impacts from  
11 the top down. Could you please provide an overview? And  
12 that's illustrative of what Microsoft, we understand, is  
13 getting from the people out in the public that are able now to  
14 use materials that are online.

15           So, I must say, I have to express my concern with  
16 this attitude that they're behaving as a volunteer, that  
17 position simply doesn't send a good message to the individual  
18 engineers at Microsoft who are doing the work on the system  
19 documents. I don't see how that position can convey to those  
20 engineers the sense of importance in what they're being called  
21 on to do. That they would have, if they understood these  
22 documents, to be part of Microsoft's obligations under the  
23 Final Judgment.

24           So, there is a tension here and it's very  
25 troubling. I think it fosters the sort of grudging commitment

1 to getting the system documents done, and I think that's been  
2 a persistent and a pervasive concern that we've had. Now, you  
3 heard about how we have indeed come to agreement on the first  
4 template, and yes, that's a very good thing. Let me tell you  
5 a little more about that.

6           Your Honor remarked, and it was in the JSR, that in  
7 early August after we had had TC engineers review Microsoft's  
8 own version of the template, and several of them reviewed it  
9 and reviewed it for an extended period of time, and they all  
10 found it to be inadequate. We concluded that the only way we  
11 were going to get a template in a sensible period of time was  
12 not to sit there and argue about Microsoft's but to start with  
13 the TC's own version of a template. And we sent them ours and  
14 we said we will meet with you and work with you on that.

15           So, that resulted in meetings beginning in August,  
16 and those meetings intensified last week where they were going  
17 day-to-day. By my estimate, there were over 150 TC person  
18 hours dedicated simply to the meetings with Microsoft last  
19 week that included a half a dozen TC representatives and at  
20 least one TC member in person, another on the telephone for a  
21 number of those meetings. Meanwhile, the entire TC  
22 implementation group, that's nearly 30 engineers, had been  
23 pulled off of everything else, all the other III.E tasks of  
24 implementation, to support the template effort. And that  
25 activity began even before the day-to-day meetings that took

1 place last week.

2 Now, you know, Your Honor, we created the TC  
3 in 2003, that's when the members were first approved. They  
4 added a couple of administrative people to build the office  
5 from scratch, and you know, over time to help Microsoft  
6 identify bugs in their own documentation. We built up staff.  
7 Those individuals, you know, work mostly below the hood,  
8 they're not visible as industry people, they are uncommonly  
9 dedicated.

10 And what we have today is the TC and its staff  
11 spoon-feeding the world's biggest and most profitable software  
12 company, not only with a template, but with the details that  
13 Microsoft says -- the examples that Microsoft maintains that  
14 they have to have in order to create a template that will  
15 describe the interactions of parts of the technical documents  
16 that Microsoft has written to cover protocols in its own  
17 software.

18 And I suggest to you that something about that just  
19 isn't right. We're well past the time when Microsoft should  
20 just get over it. I mean, they should stop the posturing and  
21 they should send the right message to their engineers and the  
22 others involved with these system documents. And that message  
23 is that this is part of their Final Judgment obligation, and  
24 that's how they have to treat it. And maybe, just maybe, if  
25 they would do that we would get through this process with a

1 little less wear and tear on everybody, maybe even a little  
2 faster. There is still no project schedule. They have told  
3 us now that we have the first template, and that is the most  
4 significant template, we recognize that. They will work on a  
5 schedule. That's good. I don't mean to suggest that these  
6 system documents aren't challenging, they certainly are. But  
7 they're essential and they are part of Microsoft's  
8 obligations, and they really ought to be treated that way, and  
9 I think thus far they haven't been.

10 Now, I would respond briefly on the middleware. I  
11 don't think we have any current issues with Microsoft on  
12 Windows 7, it is still an early version that we're testing,  
13 but we will continue with the subsequent versions. And on the  
14 IE 8 beta 2, I think that's undergoing testing now, but we  
15 have no current ongoing issues. Anything else, Your Honor?

16 THE COURT: No. No.

17 MR. HIMES: Thank you.

18 THE COURT: Mr. Houck.

19 MR. HOUCK: Good morning, Your Honor. Let me start  
20 by agreeing with you, once again, that it is a good thing that  
21 Your Honor established the TC and Mr. Hunt, even though it was  
22 over our objection. But in retrospect it is a good thing.

23 THE COURT: I didn't bring it up.

24 MR. HOUCK: I knew you were thinking about it.

25 THE COURT: In terms of the TC has been -- without

1 it, it certainly would make my job much more difficult in  
2 terms of having this work.

3 MR. HOUCK: Absolutely. Your Honor asked about the  
4 one complaint that we're still investigating, and indeed we  
5 are investigating it, and we hope to wind it up in one fashion  
6 or another before the next status conference. So, we'll be  
7 reporting to Your Honor then, if not before, on that. But I  
8 did want to address most of my comments this morning to the  
9 technical documentation and the system documents where most of  
10 the effort has been concentrated over the last few months, and  
11 where we still do have some concerns.

12 As Mr. Severt said, it is certainly good news that  
13 we got an agreement at last on the templates. But there is  
14 some bad news with that as well. The bad news is that it took  
15 so long. And as Mr. Himes indicated, had this been done  
16 sooner, more effort could have been devoted over the last  
17 several months to actually working on the system documents and  
18 to dealing with the TDIs, which still remain.

19 As Your Honor pointed out in your summary,  
20 Microsoft does say in its submission that the 1300 or so TDIs  
21 ought to be taken in the context of 20,000 pages of documents.  
22 I was curious about the number of TDIs actually over time  
23 since the rewrite, and I asked Mr. Hunt to compute that, and  
24 he came up with a figure of 4,000. So, we're really talking  
25 about 4,000 TDIs, or more actually, since the rewrite. Now,

1 to be sure -- it's our view that those TDIs tend to be less  
2 significant and more easily correctable than the TDIs in the  
3 initial documentation. But, nevertheless, we believe that's a  
4 fairly high and unacceptable number.

5           Now, why did it take so long to get an agreement on  
6 the system documents template. As Mr. Severt pointed out, and  
7 Microsoft believes they're working on uncharted territory, we  
8 think that's probably an exaggeration. I think the other  
9 interesting thing to point out is, by the time we submitted  
10 the written materials to Your Honor for this conference, there  
11 had been no agreement. The agreement was actually achieved in  
12 the last week or so, which again, reflects how so many of  
13 these disagreements have been resolved over the course of time  
14 here. It happens at the very last minute right before we come  
15 to see Your Honor.

16           THE COURT: That's why I set them every three  
17 months.

18           MR. HOUCK: Precisely. And that's why we ask to  
19 have them every three months. It definitely plays a useful  
20 role. We have a second more serious concern, which is a theme  
21 that Mr. Himes alluded to, and I think he actually understated  
22 that a bit, and that's the concern about whether Microsoft  
23 recognizes that these system documents are required as opposed  
24 to voluntary. Mr. Himes said we come into court every time  
25 and say we think they are required. But I wanted to remind

1 Your Honor that at the last status conference on June 24th,  
2 this is what Your Honor said: System documents seem to be  
3 integral to interoperability and usefulness of technical  
4 documents, and therefore, are required. So, I thought that  
5 was put to bed.

6 But oddly enough, six weeks later, in Microsoft's  
7 July 15th, 2008, Supplemental Status Report, we find this  
8 language, which has been repeated in subsequent reports and  
9 indeed is in the current report for this conference. This is  
10 what Microsoft says: Microsoft firmly believes that the  
11 current protocol documentation available to implementers  
12 enables interoperability with Windows and fully complies with  
13 the Final Judgment.

14 So, it would seem as if they don't think anything  
15 else is necessary. In fact, the next sentence they say: In  
16 response to the Technical Committee's request, Microsoft is  
17 undertaking a new effort to supplement the existing protocol  
18 documentation with additional systems document. So, we share  
19 Mr. Himes' concern that Microsoft, we think erroneously at  
20 this point, regards the systems documents as something  
21 voluntary on their part, not obligatory. And voluntary  
22 commitments are certainly nice, but they usually don't get the  
23 same level of the concern and attention something would get if  
24 it's actually required by the Court.

25 So I wanted to note that that is a significant

1 concern we have. As I said, the agreement on the templates is  
2 good news, but I would say it's tempered good news, because  
3 past experience in this case has taught us that when we think  
4 we have an agreement with Microsoft, it doesn't necessarily  
5 mean that there aren't going to be problems of understanding  
6 down the road. And I'd be interested to hear from Mr. Muglia  
7 if he does in fact believe he fully understands what it is  
8 that the TC expects, and I hope he does.

9           And in addition to that, of course, there is  
10 likely to be problems of implementation and execution. So,  
11 based on past experience, we're certainly pleased that there  
12 is agreement at this point, but we're sort of in a watchful  
13 waiting mode to see what happens. Now, we certainly agree  
14 with Your Honor that we like to bring some closure to this  
15 thing here. But we also want to make sure that the documents  
16 are done right and that Microsoft fulfills its obligations  
17 with respect to interoperability as required under the Final  
18 Judgment. And, as also, we remain ready, willing and able to  
19 work with Microsoft and the other Plaintiffs to make that come  
20 to pass as soon as possible.

21           That's what I wanted to say, if Your Honor has  
22 questions I'm happy to --

23           THE COURT: No, I'm fine.

24           MR. HOUCK: Thank you.

25           THE COURT: Mr. Rule.



1 MR. RULE: Your Honor, good morning.

2 THE COURT: Good morning.

3 MR. RULE: Let me start by reiterating that we take  
4 our -- Microsoft takes its responsibility under the decree  
5 very seriously.

6 THE COURT: Why don't you deal right up front with  
7 the issue in the reports about the systems documents being  
8 voluntary and not requirements. I did make it clear, I  
9 thought, at the last hearing that I did not see them as  
10 something -- sort of icing on the cake. I saw them as  
11 something that was integral to making this work.

12 MR. RULE: Your Honor, we definitely heard Your  
13 Honor last time, and we understand that that is a requirement,  
14 and the company is very committed to getting these documents  
15 done. There's no question about that. You know, one can't  
16 say whether, you know, that what people understood and  
17 expected and foresaw in the Fall of 2001, you know, we may not  
18 have fully contemplated or understood, which doesn't matter, I  
19 will grant you at that point, what was going to be required.

20 If you'll remember, Your Honor, the decree that we  
21 negotiated that Your Honor entered had the notion that the  
22 Communications Protocol documentation would be done in nine  
23 months. I think everybody --

24 THE COURT: That was obviously very unrealistic.

25 MR. RULE: Right.

1           THE COURT: But, at any rate -- certainly it's  
2 something that -- but it is certainly a key feature, and in  
3 terms of the other options that were proposed to the Court, it  
4 certainly is the lesser of the options from, I'm sure,  
5 Microsoft's perspective. You may not look at it that way now,  
6 but I think in '01 you did.

7           MR. RULE: Your Honor, I'm not disputing that at  
8 all. I got up in front of Your Honor and defended various  
9 parts of the decree, and so I don't disagree with that at all.  
10 I'm simply saying -- I'm not saying that -- I mean, I could be  
11 critiqued, as well as others, who were in the process of not  
12 foreseeing that it was a more complex project. The fact is  
13 that we are where we are and Microsoft -- and this I guess is  
14 what I want to start by responding to, Microsoft is completely  
15 committed to getting these documents done. The delays have  
16 not been a result of Microsoft taking a lackadaisical attitude  
17 towards this project or sending a message out, gee, don't  
18 worry about this, get to this when you can.

19           The issue has been -- Microsoft has been writing  
20 these documents since the first quarter of this year. We've  
21 presented pilot documents to the TC and to the Plaintiffs, and  
22 we've gotten feedback. Quite frankly, because of certain  
23 elements that the Plaintiffs and the TC feel are necessary,  
24 we've had an ongoing discussion back and forth to try to  
25 understand exactly what would be desired. And the reason for

1 that is because the templates go to engineers, and engineers  
2 need clear directions on what they have to produce. And so it  
3 is that -- it's that back and forth, which I think we are  
4 reaching the end of, we're expecting something back from the  
5 other side in light of some of those discussions. But just so  
6 Your Honor is absolutely clear, we are not waiting on those  
7 documents to write the documents themselves. The templates  
8 are not -- we're not sitting back waiting until the templates  
9 arrived. When the templates do and everybody has agreed to  
10 them, we'll go back and make sure the other documents that are  
11 in progress conform to those, but we take that responsibility  
12 very seriously.

13           The other point I would say is, I think that the  
14 report on the TDIs is actually very encouraging. No one has  
15 ever said that you can develop documents of this technical  
16 detail that are not going to have issues, and that's why you  
17 test -- we're in the middle of the testing. The testing is  
18 pretty much going to be complete, as Mr. Muglia told Your  
19 Honor last time, by the end of the year, and you would expect  
20 things to -- the TDIs to go down even more quickly, but  
21 actually they are going down. So, I think that's positive.  
22 The company is committed to getting this done.

23           The other point that I would make is, as important  
24 and as urgent as the discussion of the technical documentation  
25 is, and as seriously as Microsoft takes it, it should not

1 obscure the fact that they are a means to an end. If we look  
2 at how the decree is working, how the MCPP project is working,  
3 I don't think we should overlook the fact that it is working  
4 very well. If you look at the degree to which the documents  
5 are being used, the number of downloads. You know, Mr. Muglia  
6 maybe can discuss this a little bit more, was telling me this  
7 morning about the software or the System Network Industry  
8 Association meeting recently where SAMBA and Sun and a number  
9 of other participates actually demonstrated implementations of  
10 the MCPP protocols, you know, things that I'm not sure in 2001  
11 even I would have thought that a SAMBA implementation of the  
12 protocols would have occurred, but it's there.

13           So, I don't -- I think that it's important not to  
14 overlook the fact that there are implementations out there.  
15 There's a lot of use and a lot of reviewing of these  
16 documentation that is going on at the same time that Microsoft  
17 is committed to doing the system documents and getting them  
18 accomplished on a reasonable schedule. And, again, we  
19 started, they're underway. We agree with sort of the  
20 complexity and length of the program as the Plaintiffs have  
21 laid out. But, you know, it's underway now. We're trying to  
22 move forward as quickly as we can, as quickly as we're on the  
23 same page, and we understand what the TC thinks should be in  
24 those documents, to get them to our engineers and make sure  
25 that those system documents provide all the information that

1 the TC believes is necessary, and we all agree is necessary.

2 So, I just want to make that absolutely clear.

3 This is not a situation where anybody is saying, gee, it's  
4 voluntary, if you get around to it, just get to it.

5 THE COURT: Why do you still have it in the  
6 reports?

7 MR. RULE: I'm sorry?

8 THE COURT: Why do you still have it in the  
9 reports? Why do you have language that doesn't make it quite  
10 as clear in the reports, I mean, those are easy to --

11 MR. RULE: Your Honor, we will take your comments  
12 on our language to heart in the future reports. And it was  
13 certainly not intended, Your Honor, as any shot at you or any  
14 statement that we take our responsibility anything less than  
15 seriously. I think it's not -- I'm happy to go through how we  
16 perceive the chronology of events, but I don't think that's  
17 particularly productive this morning. I think what is clear  
18 is that we heard Your Honor last -- at the last hearing, we  
19 understand that those system documents need to be done.

20 We are doing everything we can, but this back and  
21 forth to make sure that the template is right and it gives  
22 guidance to engineers and we know what we're supposed to put  
23 in those documents is a process that has taken longer than we  
24 expected. But it has not stopped us from putting the effort  
25 in to writing those documents as we are speaking.

1 THE COURT: All right.

2 MR. RULE: I'm not -- I think, Your Honor, all the  
3 other issues have been addressed. I don't know if you have  
4 any other questions for me?

5 THE COURT: No. The reports are getting shorter,  
6 which means we are having fewer issues. The documentation is  
7 the key one, for the most part. There's still some things  
8 with middleware that are being presented to me, but they seem  
9 to be moving smoothly, as far as I can see. The documentation  
10 is obviously the key part to this.

11 MR. RULE: Your Honor, should I ask Mr. Muglia --

12 THE COURT: If he has something he wishes to add,  
13 sure.

14 MR. MUGLIA: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. MUGLIA: First of all, I would like to state  
17 that -- say that I generally concur with what Mr. Severt said  
18 about the progress that's been made across the board, and  
19 certainly including the systems documents. And I'm very  
20 gratified by the work that the combination of the TC and the  
21 engineering team at Microsoft had made in the past set of  
22 weeks to really reach resolution on the system document  
23 templates.

24 In terms of those documents, I want to just really  
25 emphasize that regardless of anything that may have been

1 written in any reports that I myself and my engineering team  
2 are operating with absolute clarity that they are fully  
3 required. And we are working very, very hard to get them  
4 done. We have assigned a significant number of senior  
5 engineers to this project. And, in fact, while we have been  
6 discussing and working on the final templates structure with  
7 the TC, my teams have been proceeding ahead making progress on  
8 these documents.

9           As Mr. Severt indicated, it is agreed by all of us  
10 that this is a complex project, and that the documents -- the  
11 system documents are something that has a level of complexity  
12 that was not originally anticipated. And given that, we know  
13 that this is a multi-month project. And originally in  
14 conversations with the TC, we've heard that they have an  
15 expectation that the project would take on the order of 18  
16 months. In the context of that, when we became aware of the  
17 need to do the system documents in the first quarter of this  
18 calendar year, we began working on it and have proceeded  
19 completely on that with the engineers working on the documents  
20 as the templates have been finalized.

21           And, in fact, we have now released a total of six  
22 early -- I'll call them early documents that do not fully  
23 conform to the TC template to the TC, three of those are  
24 posted on the Web, and we are continuing a pace on that. Now  
25 that we have reached resolution with the Technical Committee

1 on the first template, we will begin the process of finalizing  
2 our schedule and taking the documents that we've already  
3 written and converting them to the new template, and then of  
4 course, will write future documents according to that  
5 template.

6 THE COURT: Okay. Good. How much -- what do you  
7 see -- I mean, I realize that you have not proposed a  
8 particular milestones or whatever, that you will be in the  
9 near future, hopefully.

10 MR. MUGLIA: Absolutely.

11 THE COURT: But do you have some sense at this  
12 point of how this is going to progress? It sounds like you  
13 now have agreed on the template, you're proceeding with the  
14 documentation. If it turns out that the documentation doesn't  
15 work with the systems, you're going to have to be making  
16 changes, right?

17 MR. MUGLIA: I think the purpose of the documents  
18 is to describe the system, and like anything, we will  
19 undoubtedly have a conversation -- we're planning a  
20 conversation in fact with the TC, we're planning a test  
21 process against those documents. So, the process which will  
22 unfold will be somewhat similar to what we did with the  
23 original blue line process, but it's because these documents  
24 are very detailed and very technical and not quite as many  
25 pages total, I think the schedule will be somewhat different.



1 We have a smaller number of documents, each of which are much  
2 harder to write than the 200, roughly, documents we've already  
3 created.

4           It is my anticipation, as I said, that the TC is  
5 approximately correct, although we don't have an actual final  
6 schedule. In engineering terms we call this is a top down  
7 schedule versus a bottoms up schedule. And us managers create  
8 these top down schedules, they're not always accurate in the  
9 end. But that sort of top down schedule that the TC suggested  
10 was approximately an 18 month project.

11           THE COURT: We've only got 14 months for it to  
12 expire.

13           MR. MUGLIA: We started this, though, in Q1. So,  
14 if you work back -- if you worked back, we should be able to  
15 be completing this --

16           THE COURT: I can tell you one thing, I don't want  
17 to have this so you complete the project the day before this  
18 expires and we don't have any sense of how it works. I can  
19 tell you that's not going to happen. So, you just be aware of  
20 that.

21           MR. MUGLIA: I concur with you exactly, Your Honor.  
22 And my goal is to get them done much sooner than that, and in  
23 fact, what we expect is that these things will be coming out  
24 in the format as soon as we're able to begin the conversion  
25 process. But it will be into next year, there's no question

1 that the date will go into next year, and I would guess  
2 roughly somewhere in the middle of next year, when all is said  
3 and done.

4 THE COURT: Okay.

5 MR. MUGLIA: And expect that we will have our  
6 schedule for you -- we'll be able to have our schedule for you  
7 before the next one of these hearings, we'll be able to have a  
8 final schedule.

9 THE COURT: Okay. So, you don't think it will be  
10 one of the interim reports that I'll be hearing about it?

11 MR. MUGLIA: It could be, Your Honor, but we're  
12 still waiting to get agreement on that final template, and  
13 until we have that, I can't really work back on the date.

14 THE COURT: All right.

15 MR. MUGLIA: In terms of some of the other  
16 questions that Your Honor had. In terms of the TDIs, this is  
17 very common for a project of this complexity. If we looked at  
18 any Microsoft engineering project we would see what we -- we  
19 call them bugs, we would see similar numbers for something of  
20 this level of complicity. As I reported to Your Honor in  
21 June, it was my expectation that given the volume of testing  
22 that is being done, as we speak, that the number of TDIs will  
23 actually continue to increase. We are able to keep them  
24 relatively flat and constant, but just the amount of testing  
25 will likely generate a significant number of new TDIs coming

1 in, that will ramp down. Our testing is mostly complete this  
2 calendar year. It is fully complete after the first quarter  
3 of next year. So, we expect that as we move into 2009, the  
4 outstanding TDIs will begin to ramp down, and they should over  
5 time begin to ramp down pretty quickly, because as the  
6 incoming rate goes down, our ability to fix them will more  
7 than catch up. Right now we are balancing the incoming rate  
8 with the fix rate.

9           That was Your Honor's question around the TDIs, is  
10 that clear?

11           THE COURT: Yes.

12           MR. MUGLIA: You asked the question about the  
13 Sydney protocols and why we did not discover two of those. If  
14 Your Honor might recall, when I talked about the process we  
15 used to determine the database of protocols, that was a  
16 process where our engineers looked at everything, we believe  
17 we got -- we believed very strongly we got all the important  
18 ones, and we tried to get every other one we possibly could.  
19 The protocols that were missed, I would describe as either  
20 obscure or obsolete, and as we determined with the TC, they  
21 don't really need to be documented anywhere. So, I feel  
22 pretty okay about what happened there, and it is possible that  
23 we'll find more in that category, but I really do believe  
24 we're not hitting anything that would impact a licensee in any  
25 way, shape or form.

1           And, finally, Your Honor, just commenting on the  
2 plug-fest, I will say the following, which is, it's been --  
3 it's actually very gratifying for me to see the shift that's  
4 happening in the industry, together inside Microsoft, that  
5 this project has done. We, this week at the Storage  
6 Networking Industry Association Plug-Fest that we worked with,  
7 we had quite a number of Microsoft engineers working directly  
8 with SAMBA people and Apple people and Sun people, and we are  
9 really beginning to see some very sophisticated  
10 implementations of interoperable systems coming out of this  
11 effort.

12           And the way the engineers are working together is  
13 quite a bit different than in the past. So, we see them  
14 getting together after the plug-fest and going out to dinner  
15 and working together, and it's quite a different atmosphere  
16 than might have occurred even three or four years ago. So, I  
17 feel very good about that kind progress, both in terms of the  
18 actual products and the quality of the interoperable products  
19 that are being produced as a direct result of this effort, and  
20 the consent decree as well as, frankly, the way the engineers  
21 are working together.

22           THE COURT: All right.

23           MR. MUGLIA: Anything else, Your Honor?

24           THE COURT: No.

25           MR. MUGLIA: Thank you very much.

1 THE COURT: Anything anybody wants to respond to?

2 MR. HIMES: I do have a couple of things, Your  
3 Honor. First of all, I heard Mr. Muglia refer to the system  
4 document project as going back to the first quarter of this  
5 year. The first quarter of this year was the point that  
6 Microsoft renamed the overview documents the system documents.  
7 The system documents, in concept, go back to the beginning of  
8 the rewrite project in the Spring of 2006, and it was a  
9 subject of discussion with the TC and Microsoft at that point  
10 in time. The notion was overview documents, the nomenclature  
11 changed at a given point in time, but not the concept.

12 And, in fact, our reviewing the technical documents  
13 themselves took into account the fact that there were going to  
14 need to be what are now called system documents. We did not  
15 fight a religious war over whether particular items of  
16 information had to be in particular technical documents,  
17 because we had made clear there was going to have to be a  
18 system document or an overview document that would describe  
19 interactions, and therefore, there was no need necessarily to  
20 worry about whether bits of information made it into technical  
21 documents or not, it would be included in the overall rewrite  
22 project. So, it is not accurate to say that the system  
23 document project began in the first quarter of this year, it  
24 did not.

25 Now, one other thing. We made reference to the

1 fact that Windows 7 will result in new documentation that  
2 needs to be done, and we do have subsequent information, and  
3 I'm sorry that we didn't bring it to your attention earlier.  
4 We are now told by Microsoft that at least on the current  
5 version of Windows 7 there will be 26 new documents required  
6 and another 68 will need to be modified. So, that's going to  
7 be an additional part of the overall III.E project as it  
8 currently exists, I'm sure that number could change, but that  
9 is our current information and I wanted to bring it to your  
10 attention.

11 THE COURT: All right. Thank you. All right.  
12 There's obviously the positive side. There's progress on all  
13 fronts. Certainly, other than the documentation, I think  
14 other areas are moving smoothly, the middleware area, you  
15 know, there's monitoring and that seems to be moving the way  
16 it should or the way I had contemplated it. I mean, the  
17 documentation is still the issue.

18 Obviously, there's two views when you come into  
19 court, since I'm not at the meetings, I'm not with the TC in  
20 terms of how they're working here, but I am concerned that  
21 despite the cooperation, and there certainly has been, that  
22 there seems to be a sharp divergence in view of -- between,  
23 say, the non-federal Plaintiffs and Microsoft as to the  
24 attitudes and approaches that have been taken.

25 I'm not in a particular way to totally resolve it,

1 but the fact that it's there tells me that this isn't all  
2 working as smoothly as it might. I don't expect -- you  
3 obviously have differing points of view, and I don't expect  
4 Mr. Himes and Mr. Houck would raise an issue if they didn't  
5 have concerns. And I have to say, the TC was -- and I'm so  
6 pleased that I adopted this, but it was expected to review, to  
7 be the technical group that would come in, that would make  
8 sure that all of it was done the way it was supposed to. They  
9 moved into doing testing, which I assume we would have  
10 expected. But, frankly, they're doing a lot of work in the  
11 firsthand, which has happened before. We've had this happen  
12 at various points where the TC has picked up work that I think  
13 would have been expected to have been done by Microsoft.

14           And I will just throw this out, I don't have a full  
15 understanding. I understand -- I do appreciate the fact that  
16 these are not simple, that these are complex. But I think  
17 it's interesting that it appears that the TC is able to do  
18 what is necessary and brings Microsoft along, not the other  
19 way around. And I'm pleased that we have the TC and they're  
20 able to do this so we can get this done. I do want to make  
21 sure -- I realize that Microsoft has indicated, and I'm not in  
22 any way indicating that you have not sent them the message,  
23 hopefully you'll change it from the written materials, but  
24 have not sent the right message.

25           On the other hand, there must be something in the

1 contacts between the technical people that's raising this  
2 issue for them to go back and talk to the Plaintiffs, because  
3 Mr. Himes is not sitting at the table there. And the  
4 Technical Committee generally has not complained in this vein.  
5 So, I am a little concerned about hearing this because my  
6 assumption is, even though they are working together, that  
7 there is some frustration here about how this is -- we  
8 certainly have had a lot of changes around this.

9 I'm hopeful that what we're doing with the systems  
10 documents, et cetera, that this will finally come to fruition  
11 in terms of having the interoperability that we need. So,  
12 somewhere the message needs to be filtered down lower or  
13 something, but I think you need to at least take it seriously.  
14 I made my comment last time and I'm reiterating it. The  
15 systems documents, as far as I'm concerned, are required. I  
16 mean, interoperability is really the key part to this whole  
17 thing. And, frankly, Microsoft, I'm sure at some point wants  
18 this consent judgment to terminate, as do I, sometime in the  
19 near future. But that's not going to happen unless these  
20 things get done and there is enough time, frankly, to see that  
21 they are actually going to work. And it's 14 months away that  
22 the next deadline comes up. And I'm certainly not going to  
23 let it be that it's shortly before that we get this all  
24 together with no opportunity to see how it works. So, it  
25 behooves everybody to take a look at this.



1           This may not be how Microsoft usually does things  
2 or whatever, but I want to make sure that all the way down  
3 completely, whoever is working on this, that it be done all  
4 along, not just killing yourself and the TC just before you're  
5 coming to court. I realize that's why judges set hearings,  
6 frankly, in all of their cases, it's the best way of making  
7 sure there is progress, because nobody wants to come in and  
8 say, we haven't got things done. So, I mean, this isn't just  
9 you, this is everybody. Otherwise, we probably wouldn't have  
10 as many court hearings.

11           I want this to be -- as I said, I'm not suggesting  
12 that you're not doing what you're supposed to, but I am  
13 concerned there's something going on here and you all need to  
14 look at it. Because we don't usually get this -- you know,  
15 there have been complaints and differing views about progress.  
16 This is a different one. And this is one that I think you  
17 need to take seriously, and it's just not the spoken word  
18 that, yes, you understand it's required and you're making sure  
19 everybody does it. Something's missing here, and I'll leave  
20 it up to you to figure out where it is, to plug it in and make  
21 sure this moves forward the way it should. I hope not to hear  
22 the same thing next time.

23           So, let's pick a timeframe for the next -- I would  
24 like to do it in the beginning of new year, I have a whole  
25 series of trials through the rest of this Fall. So, it would

1 work better for me to try and do it some time in the January  
2 timeframe, near the end because I do have a trial the first  
3 two weeks in January. So, if we did it -- is it better to do  
4 it in the middle of week?

5 MR. HOUCK: Yes.

6 THE COURT: How about January 28th? That's the  
7 week after the election and all the other stuff. So, the 28th  
8 is a Wednesday. Does that work for people? I'll be finished  
9 with -- in terms of traveling, et cetera, it should make it  
10 easier for you to get here. My trial should be done. Or pick  
11 another day.

12 MR. HOUCK: That's fine with the California Group,  
13 Your Honor.

14 THE COURT: Federal, Mr. Himes, everybody else?

15 MR. RULE: Yes.

16 MR. SEVERT: Yes.

17 THE COURT: All right. Then why don't we set it --  
18 we've been setting this I think at 10:30, which is fine, so  
19 those of you who can get in in the morning can do so. And so  
20 we would expect the report -- if you can get the report in on  
21 the 21st. Anything else from anybody?

22 (No response).

23 THE COURT: I won't be seeing you until the new  
24 year. Have a good Fall. Take care.

25 END OF PROCEEDINGS AT 11:36 A.M.

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C E R T I F I C A T E

I, Lisa M. Hand, RPR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

/s/ Lisa M. Hand

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Lisa M. Hand, RPR