

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.

STATE OF NEW YORK, ET AL,

Plaintiff,

vs.

MICROSOFT CORPORATION,

Defendant.

CA No. 98-1233 (CKK)

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

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Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription

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

Lisa M. Hand, RPR