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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

VIRNETX \* Civil Docket No.  
\* 6:07-CV-80  
VS. \* Tyler, Texas  
\*  
\* March 9, 2010  
MICROSOFT CORPORATION \* 9:00 A.M.

TRANSCRIPT OF JURY TRIAL  
BEFORE THE HONORABLE JUDGE LEONARD DAVIS  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Proceedings recorded by mechanical stenography,  
transcript produced on CAT system.)

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\* \* \* \* \*

P R O C E E D I N G S

(Jury out.)  
COURT SECURITY OFFICER: Please rise.  
THE COURT: Please be seated.  
All right. I understand the parties have

1 a matter or two before we bring the jury in.

2 MR. SAYLES: Yes, Your Honor. If it  
3 please the Court, Dick Sayles for Microsoft.

4 Your Honor, this afternoon a witness to  
5 be called is Mr. Brett Reed, who is the Plaintiff's  
6 damages expert. I'll be cross-examining him.

7 And one of the issues related to his  
8 testimony is some approximately 80 exhibits to which  
9 Microsoft cannot agree to admissibility.

10 And, Your Honor, in keeping with the --  
11 the spirit of how matters such as this are handled in  
12 this district, we have agreed in every respect where we  
13 can agree.

14 We're not asking that they establish a  
15 business records predicate or any sort of a thing like  
16 that. These objections to these particular exhibits go  
17 to the -- the heart of their damage model.

18 And the nature of the exhibits is the  
19 same objections that I brought forward in the motion to  
20 strike Mr. Reed and -- and that was denied at pretrial,  
21 and -- and the motion in limine and the motion  
22 concerning the entire market value, and those were all  
23 denied.

24 And having the experience of -- of been  
25 around for a while, I know that a pretrial ruling of

1 that nature doesn't preserve anything. Microsoft is  
2 very intent on preserving its position and its  
3 objections with regard to these particular damages that  
4 it believes are irrelevant financial data not tied to  
5 the demand for the technology at issue.

6           The -- the problem is that there are some  
7 80 of these. And if they were handled one by one and  
8 tendered by the Plaintiff and objected to on a  
9 one-by-one basis, it would obviously take a long time to  
10 do that.

11           I have spoken with Jason Cassady for the  
12 Plaintiff at some length. We have prepared lists of the  
13 exhibits that they intend to tender in evidence. And  
14 when they do, we have written out what our objections to  
15 those exhibits are. And we in no way wish to diminish  
16 the importance of those objections.

17           We do not wish to waive those objections,  
18 but we do want to suggest to the Court or discuss with  
19 the Court a convenient and realistic manner in which to  
20 handle those important objections to these exhibits.

21           And similarly, the Plaintiffs have  
22 properly disclosed to us last night demonstratives that  
23 they intend to use with Mr. Reed. And as you might  
24 imagine, those demonstrative aids are based upon the  
25 underlying documents to which we object, and, therefore,

1 we have the same objection to those demonstratives.  
2 And we have prepared numbered sets of those. And I  
3 don't think this morning is necessarily the time to go  
4 into this in great detail, although if that were the  
5 Court's wish, we're prepared to.

6 But I wanted to speak with the Court this  
7 morning to offer as a possible solution that the  
8 Plaintiff has agreed that they will tender their  
9 exhibits in a written list to which we have our written  
10 objections, which we can provide to the Court in advance  
11 of this afternoon and obtain a ruling.

12 There are only two exhibits which we have  
13 separated out of that that have unique, special  
14 objections to them. And those would not take long.

15 But I wanted to bring that up with the  
16 Court, because I expect we want to move this case along.  
17 And when we get to Mr. Reed this afternoon, I know that  
18 Your Honor will want to keep things moving. And so  
19 that's the issue.

20 And if -- if the Court would indulge us  
21 and permit us to handle it in a manner that I have  
22 suggested, we'll work together to do that.

23 THE COURT: And you're basically wanting  
24 to make a record on these; is that --

25 MR. SAYLES: I definitely want to make a

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