

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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:

FOR THE PLAINTIFFS: MR. DOUGLAS CAWLEY
MR. BRADLEY CALDWELL
MR. JASON D. CASSADY
MR. LUKE MCLEROY
McKool-Smith
300 Crescent Court
Suite 1500
Dallas, TX 75201

MR. ROBERT M. PARKER
Parker, Bunt & Ainsworth
100 East Ferguson
Suite 1114
Tyler, TX 75702

APPEARANCES CONTINUED ON NEXT PAGE:

COURT REPORTERS: MS. SUSAN SIMMONS, CSR
Ms. Judith Werlinger, CSR
Official Court Reporters
100 East Houston, Suite 125
Marshall, TX 75670
903/935-3868

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES CONTINUED:

FOR THE DEFENDANT: MR. MATTHEW POWERS
MR. JARED BOBROW
MR. PAUL EHRLICH
MR. THOMAS KING
MR. ROBERT GERRITY
Weil Gotshal & Manges
201 Redwood Shores Parkway
5th Floor
Redwood City, CA 94065

MS. ELIZABETH WEISWASSER
MR. TIM DeMASI
Weil Gotshal & Manges
767 Fifth Avenue
New York, NY 10153

MR. DANIEL BOOTH
Weil Gotshal & Manges
700 Louisiana
Suite 1600
Houston, TX 77002

MR. RICHARD SAYLES
MR. MARK STRACHAN
Sayles Werbner
1201 Elm Street
4400 Renaissance Tower
Dallas, TX 75270

MR. ERIC FINDLAY
Findlay Craft
6760 Old Jacksonville Highway
Suite 101
Tyler, TX 75703

* * * * *

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

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.