

1 IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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3 JOE COMES; RILEY PAINT,)

an Iowa Corporation;)

4 SKEFFINGTON'S FORMAL)

WEAR OF IOWA, INC., an) NO. CL82311

5 Iowa Corporation;)

PATRICIA ANNE LARSEN;)

6 and MIDWEST COMPUTER)

REGISTER CORP., an)

7 Iowa Corporation,)

) TRANSCRIPT OF

8 Plaintiffs,) PROCEEDINGS

)

9 vs.)

)

10 MICROSOFT CORPORATION,)

)

11 Defendant.)

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13 The above-entitled matter came on for
14 hearing before the Honorable Scott D. Rosenberg,
15 commencing at 9 a.m., October 12, 2006, in
16 Room 404 of the Polk County Courthouse, Des Moines,
17 Iowa.

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24 Certified Shorthand Reporter

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25 Des Moines, Iowa 50309

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1 PROCEEDINGS

2 (The following record commenced at 9 a.m.
3 on October 12, 2006.)

4 THE COURT: Mr. Hagstrom, you wish to
5 continue?

6 MR. HAGSTROM: Yes, Your Honor. Thank you.

7 Your Honor, when we ended for the day
8 yesterday, I was responding to Microsoft's contention
9 that volume licensees should be eliminated from this
10 case. And I showed Your Honor that this issue has
11 been raised before to Judge Reis and to the Iowa
12 Supreme Court. And I also showed Your Honor the
13 section of the Microsoft appeal brief where volume
14 licensees was discussed. And we handed up two
15 affidavits from Microsoft employees, English and
16 Zoroza, that Microsoft submitted three years ago on
17 this issue, which went on for several pages
18 discussing the volume licensing programs, individual
19 negotiations among LARs and their customers and other
20 matters which Microsoft contended made volume
21 licensees different.

22 And I showed you the ruling by the Iowa
23 Supreme Court in which the court said and I quote,
24 "In conclusion on the adequacy of the class
25 representation, we find that both Comes and Riley

1 Paint are representative members of the class and
2 that they have established sufficient financial
3 resources to be certified to represent the class."

4 Now, Microsoft is probably going to say
5 that we didn't fully address the volume licensing
6 issue or offer some other reason why they should get
7 another bite at the apple. But the fact is they did
8 raise the issue, and it was submitted with what they
9 considered proof of differences between volume and
10 nonvolume, and the Iowa Supreme Court rejected that.
11 If there's really any question about that, the last
12 paragraph in the Iowa Supreme Court's decision under
13 "Conclusion": "We have reviewed the remaining issues
14 raised by Microsoft and find them to be without
15 merit. We conclude that the district court did not
16 abuse its discretion in certifying the two plaintiff
17 classes."

18 So our view is that the Supreme Court's
19 ruling is the law of the case. Microsoft knows this.
20 So what do they do? They attempt to create the
21 appearances of, quote, unquote, new evidence to
22 overcome the certification of Comes and Riley Paint
23 as adequate to represent volume and nonvolume
24 purchasers.

25 As I mentioned yesterday, Microsoft relies

1 upon three types of so-called "new evidence,"
2 affidavits from the four LAR resellers that we handed
3 up, statements of plaintiffs' experts and the
4 affidavit of Microsoft expert, Dr. Paul.

5 Now, the LAR affidavits that we saw talked
6 about stiff competition between LARs and actually
7 across channels, across distribution channels. So
8 this competitive atmosphere is one of the main
9 characteristics that link volume and nonvolume
10 purchasers, along with the fact that they all
11 purchased the same products, the products at issue in
12 the two certified classes. So it makes their claims,
13 if not identical, extremely similar for purposes of
14 proving impact and damages.

15 So more importantly for today, these
16 characteristics help show that their claims are, like
17 I say, if not identical, extremely similar.

18 But the so-called "new evidence" with
19 regard to these four LARs affidavits, as we saw
20 yesterday, is not new. The LARs affidavits are all
21 from 2002. They were submitted by Microsoft in the
22 case that became -- called Deiter in the Fourth
23 Circuit, which is part of the MDL. And they were
24 submitted eight months before class certification was
25 briefed back in this case in 2003 -- I mean,

1 submitted in the MDL. So the LAR affidavits are
2 largely repetitive of what Your Honor saw with regard
3 to the English and Zoroza affidavits that were
4 submitted in this case by Microsoft with the class
5 certification briefing.

6 So the arguments were really the same:
7 Negotiation, bundling -- all those things that
8 Mr. Casper raised yesterday as supposedly new, they,
9 in fact, are old.

10 So this is where we left off yesterday, and
11 I want to move to the second type of evidence
12 Microsoft relies upon for purposes of its new
13 evidence that it claims warrants removal of the
14 volume licensees.

15 As you can see here in page 37 of the reply
16 brief, which, of course, we didn't respond to, so
17 this is my first opportunity to respond to their
18 reply brief:

19 Microsoft asserts that the new evidence
20 includes, actually, statements by plaintiffs' own
21 experts. So they are suggesting that there is
22 something new in the expert reports filed
23 June 2, 2006, that they never knew about before.

24 So Microsoft says in it's reply brief that
25 Professor Mackie-Mason "separately analyzed the

1 volume licensing channel" in his analysis. This is
2 true, but the analysis at issue was about liability,
3 not impact or damages. And it is evidence that would
4 be relied upon by all class members. It's not unique
5 to any particular class member or type of class
6 member.

7 In opining on the question of liability,
8 Professor MacKie-Mason found it significant that one
9 type of anticompetitive conduct that Microsoft had
10 engaged in was to discriminate on price among
11 licensees, particularly volume licensees. This
12 evidence, which is relevant to proving liability, in
13 other words, the fact that Microsoft can discriminate
14 on price, as Professor MacKie-Mason will testify when
15 he comes into court here, that fact, that ability to
16 discriminate on price is evidence of monopoly power
17 and the exercise of monopoly power. And that, of
18 course, is a liability issue.

19 Perhaps, more importantly, for purposes of
20 today, a portion of Professor MacKie-Mason's
21 June 2nd report that Microsoft cites as new evidence
22 is really not new at all. And we've handed up to
23 Your Honor pages from Professor MacKie-Mason's report
24 that Microsoft cites in its reply and a parallel
25 portion from the joint report of Professor

1 Mackie-Mason and Dr. Netz that was filed in
2 Minnesota, which was filed three years earlier and,
3 of course, before class certification in this case.

4 And I always thought it was sort of a
5 coincidence that our expert reports were due in this
6 case June 2, 2006, and it happened to be that our
7 expert reports in Minnesota were due June 2, 2003, so
8 it was three years to the day earlier.

9 So the point of this is that Microsoft and
10 its counsel -- same counsel in Minnesota as here --
11 were aware of that issue, this analysis of price
12 discrimination that they claim is new evidence. That
13 was known to Microsoft and its counsel before class
14 certification briefing done in this case.

15 So if you look at the handout, you'll see
16 that the language they have cited in their reply
17 brief is in footnote 122 of the Comes report there on
18 page 40. And that's in the first handout. Let's
19 see, the Comes caption is on the front. And when you
20 compare that to footnote 111 in the second handout,
21 you see that the language is identical.

22 And then also comparing the Comes report,
23 generally, subsection d, which is pages 43 to 45,
24 which also talks about this issue, that is comparable
25 to the same section or subsection d in the Gordon

1 report. So the wording of those two sections dealing
2 with this issue are virtually word-for-word
3 identical. It might be because it was a joint report
4 in Minnesota; you might see "we" rather than "I," but
5 that's really not a substantive difference.

6 So then at page 38 of their reply brief,
7 Microsoft also includes among the so-called "new
8 evidence," a statement from Dr. Netz in her expert
9 report which they say affirms the need to treat
10 volume licensees different.

11 And here is the statement that Microsoft
12 specifically quotes, and this is from footnote 205 of
13 Dr. Netz June 2, 2006, Comes report: "Semantics
14 aside, I do consider the volume licensing channel
15 separately from sales via retailers."

16 Again, Microsoft takes this statement out
17 of context. The only reason Dr. Netz considered
18 volume purchasers separately was to determine whether
19 they need to be treated differently. In other words,
20 as an economist you want to look at potential
21 variations.

22 So what she did and what she was saying
23 here is that she investigated. She was investigating
24 to see whether or not there was any substantive
25 differences that would require her to treat the

1 volume-licensee segment of the finished goods channel
2 differently than, for instance, the retail channel or
3 the OEM channel.

4 So once she made that examination, she
5 concluded that market conditions and other conditions
6 rendered treating the two separately was not
7 necessary because there is cross competition between
8 the channels, and a number of other factors led her
9 to the conclusion that volume licensees must be
10 treated the same as everybody else.

11 So with that statement in the June 2, 2006
12 report, although Microsoft characterizes this as "new
13 evidence" and a substantive basis for Your Honor to
14 now exclude volume licensees, even though this is
15 just her investigation, it's part of her analysis.

16 It's not a conclusion that volume licensees are
17 different. Microsoft says this is evidence from
18 plaintiffs' own expert that requires volume licensees
19 to be treated differently.

20 So let's take a look at what was said in
21 the joint report in Minnesota. "Semantics aside, we
22 do consider the volume licensee's channel separately
23 from sales via retailers." It's identical except for
24 the pronoun "we," because, again it was a joint
25 report of Dr. Netz and MacKie-Mason.

1 So we've got this statement, which
2 Microsoft says is new. Microsoft counsel knew --
3 k-n-e-w, "knew" -- it was not, in fact, new.
4 Microsoft and their counsel were aware and had in
5 their possession the joint report from Minnesota
6 before class certification in this case.

7 But this was not the first time that
8 Microsoft and its counsel had seen this issue. We go
9 back to 2002. The expert report of Professor
10 Mackie-Mason, footnote 398, it's the same wording.
11 Now we're back to "I" because it wasn't a joint
12 report. Dr. Netz was assisting Professor
13 Mackie-Mason with that report, but he was the expert
14 being presented in the -- testifying expert being
15 presented in the California case.

16 So to portray this testimony as something
17 "new" is just demonstratively false.

18 Now, the only other piece of so-called
19 "evidence" that Microsoft contends is new as to the
20 volume-licensing issue is the affidavits of
21 Professor Paul that are submitted with Microsoft's
22 motion for decertification. But as we saw yesterday
23 with the portion from the opening affidavit that we
24 handed up, Professor Paul is, in fact, relying upon
25 information that in fact is old. In other words, the

1 2002, 2003 material -- in fact, you'll see in those
2 pages from Appendix C that we submitted, she's also
3 relying upon material going back to 2000, 2001 on
4 similar issues. That's not to say that she hasn't
5 looked at testimony in this case and so forth.

6 But that brings me back to another issue or
7 related issue as kind of an aside here on the Deiter
8 case because, in fact, those large account reseller
9 affidavits were submitted in the MDL litigation.

10 And Mr. Casper talked to you about three
11 cases kind of together on this typicality issue. And
12 as Your Honor is aware, typicality is not a
13 requirement in the Iowa rule. The word does not
14 appear there. It does, however, appear in the
15 federal rule.

16 And I spoke to you yesterday about the
17 Hammer case and quoted how the Iowa Supreme Court in
18 Hammer identified a standing issue because the
19 association involved there had not suffered any
20 injury as a class member. So, therefore, it was not
21 a proper class representative. Individuals were,
22 however, appropriate and adequate class
23 representatives. So because there wasn't any injury
24 to the association itself, they had no standing.

25 Mr. Casper also cited to you the decision

1 of Judge Pille in Merrifield v. Ameritrust. And
2 again, it was a standing issue. Just factually,
3 there were -- there was an issue about having two
4 subclasses because there was -- after the original
5 class was certified -- some changes in the law that
6 came about and so there was an issue to create two
7 subclasses. And I will call them subclass A and
8 subclass B. This had to do with some loans and so
9 forth and fees associated with some loans. So rather
10 than using their kind of unusual descriptions for two
11 subclasses, I will just refer to subclass A and
12 subclass B.

13 And the defendants challenged the adequacy
14 of two particular plaintiffs to represent both
15 subclasses. And Judge Pille found that while these
16 two plaintiffs had been involved in paying the fees,
17 and we will call it subclass A, they hadn't been
18 involved in paying separate fees in subclass B.

19 So, accordingly, then, Judge Pille found
20 that they did not have standing. In fact, he said,
21 quoting him, they say he said, "Defendant contends
22 that the representative parties -- the Sterns and
23 Merrifields -- lack standing to represent members
24 potentially injured by," and it goes on to describe
25 the two types of fees.

1 And he quoted the Hammer case, stating that
2 the two plaintiffs lacked standing to be class reps
3 for the subclass B because "standing requires that a
4 class representative," must be -- or, excuse me,
5 continuing with the quote -- "must be a member of the
6 class sought to be represented." And although he
7 quoted the Hammer court for that and then he went on
8 and quoted the Newberg quote that was quoted in
9 Hammer, which was talking about standing, but the
10 word "typicality" was in this long quote.

11 So Microsoft attempts to bootstrap from the
12 word "typicality" being in that quote to now impose a
13 typicality requirement in Iowa. And that's just not
14 the case.

15 Here we've got two classes of indirect
16 purchasers of Microsoft software: operating systems
17 software and applications software. There's no
18 dispute that the named-class representatives have
19 purchased both types of software. So, therefore,
20 they have standing.

21 And, therefore, as I read to you a few
22 minutes ago, the Iowa Supreme Court found that these
23 class reps were fully adequate to represent all
24 members of the class. And as the court wrote, I
25 mean, it understood that the issue was whether or not

1 these class representatives could represent all
2 members of the class because it wrote that these
3 plaintiffs, quote, initiated this action on behalf of
4 all lowa end purchasers of Microsoft operating
5 systems and applications software. "All" certainly
6 includes volume licensees, and that quote is from
7 696 N.W.2d at 320.

8 So we saw from the conclusion, then, that
9 despite Microsoft arguing that volume licensees are
10 not members of the class, the Iowa Supreme Court
11 rejected that argument.

12 So along this typicality argument of
13 Microsoft, the one case, then, that they rely upon
14 where there is a typicality requirement under
15 Rule 23 of the Federal Rules, they cite to Deiter,
16 but Deiter is simply not applicable for a number of
17 reasons.

18 First, we have to remember that Deiter was
19 rendered by the Fourth Circuit. Quite frankly, the
20 Fourth Circuit is really the most unfriendly consumer
21 circuit in the country. And given the concerns of
22 the Iowa Supreme Court expressed in Comes I, Comes
23 II, and other decisions, that the real victims are
24 the indirect purchasers. The antitrust laws are
25 designed to protect the real victims, and that in its

1 class certification decision it recognized it as
2 providing a procedural device for protecting these
3 real victims.

4 And, additionally, it particularly stated
5 that our class procedure rules are remedial in nature
6 and are to be liberally construed.

7 The Fourth Circuit in Deiter is taking a
8 very restrictive view of class certification, which,
9 as a policy matter, is contrary to what the Iowa
10 Supreme Court says.

11 And, second, we have to keep in mind the
12 context of what was going on in the MDL. The counsel
13 there that were pursuing these claims had tried to
14 bring a nationwide class, basically, for indirect
15 purchasers, but tried to get around Illinois Brick by
16 calling them direct. Judge Motz said, "No. Even
17 though there is this supposedly direct licensing
18 arrangement, it's no direct purchase." So he
19 dismissed that.

20 So then these counsel refiled and said,
21 "Well, okay. We will bring a direct purchaser
22 class." So there was some people throughout the
23 country that purchased from -- I think it is a Web
24 site. I forget. It's like "Shop.Microsoft.com" or
25 something like that. But they also wanted to include

1 Enterprise volume licenses because Enterprise volume
2 licenses are, in fact, direct purchasers. And, of
3 course, direct purchasers are not part of this class.
4 We only have indirect purchasers.

5 And then as I mentioned yesterday, the
6 evidence that Microsoft submitted in Deiter was
7 also -- the equivalent of it was submitted here
8 because we had the four LAR affidavits in Deiter. We
9 had the other two affidavits from Microsoft employees
10 saying basically the same thing here. So we've got
11 the federal courts ruling one way. We've got the
12 Iowa Supreme Court ruling the other.

13 Then, finally, all states that even have
14 typicality requirements in their rules: Arizona,
15 California, Florida, Kansas, Minnesota, New York,
16 South Dakota, New Mexico, Wisconsin, certified the
17 classes with volume licensees. In fact, the New York
18 case was actually certified after Judge Motz's
19 decision separating the volume licensees.

20 And, of course, in North Dakota -- which
21 has an identical class certification to Iowa --
22 certified and included the volume licensees.

23 So in short, Deiter simply has no
24 application here.

25 Now, getting back to Professor Paul, she

1 relies upon these LAR affidavits to conclude that,
2 you know, "Gee, negotiation is something new here.
3 It's something unique. There's new evidence about
4 negotiation or bundling by volume licensees."

5 Well, that's just -- as we've established,
6 that's not new evidence. So to say that
7 Professor Paul is now presenting new evidence on this
8 issue is not new evidence at all. She's just simply
9 regurgitating what Microsoft has argued before,
10 successfully, apparently, to the Fourth Circuit, but
11 unsuccessfully and, more importantly, to the Iowa
12 Supreme Court.

13 So she possesses no new facts, and in her
14 deposition she even admitted that she has no idea how
15 many licenses were purchased by each of the volume
16 licensees she identifies. That's at page 179 of her
17 deposition. She admits that as few as five licenses
18 could qualify as volume purchases, and she makes a
19 number of other admissions on page 168 of her
20 deposition:

21 "Question: I guess, first of all,
22 do these declarations actually say that
23 the volume customer experience is very
24 different from the purchasing experiences
25 of single-license purchasers; in other

1 words, volume compared to non-volume?

2 "Answer: No, I don't think any of

3 them specifically say that."

4 So she doesn't have any information that

5 there's anything different about them.

6 You heard about the example of Maytag

7 yesterday.

8 "Question: Do you have" --

9 I'm sorry. This is at page 177 of her

10 deposition:

11 "Question: Do you have any

12 specific evidence that Maytag negotiated

13 specific terms with respect to their

14 purchase of licenses?

15 "Answer: I don't have specific

16 information about these purchases, no."

17 And there's some other things in her

18 deposition about volume, but suffice it to say that

19 she didn't do any of her own investigation. All she

20 was doing was receiving what was said by these

21 affidavits from several years ago.

22 And I think the Paul deposition transcript

23 is Exhibit S to our submittal.

24 Now, she had to admit in her deposition

25 that her only evidence was that any kind of volume

1 licenses possibly could be negotiated. This is from
2 page 181 of her deposition. And she didn't know.

3 But let's take a look at what this means in
4 terms of the issues here.

5 I want to take a look at what is in In re
6 Cutlery Antitrust Litigation. It's a case that we
7 cited. And this was a class case, and, you know,
8 it's very -- it's very common for a defendant to say,
9 "Well, we can't have class certification because,
10 gee, these customers are treated differently, you
11 know, these types of intermediaries are different.
12 You know, you've got all of these different issues,
13 judge, all of these different facts and it's too
14 complicated. You just cannot certify the class."

15 Well, number one, we've seen that the other
16 courts in the Microsoft cases have certified the
17 classes. This court, the Iowa Supreme Court,
18 approved certification here.

19 Here we've got, quote, thus, even if bid
20 customers, master distributors and repackers, as well
21 as other types of purchasers who receive rebates and
22 discounts paid less than the floor price agreed to by
23 the conspirators, information that the uniform price
24 lists were a factor in negotiating these purchases
25 would provide adequate proof of impact."

1 So despite all of the distractions about,
2 well, there's bundling going on, you know, it's very
3 vigorous competition between LARs and so forth, all
4 that really means is margins are thinner. And,
5 actually, the more competition there is and the
6 thinner the margins, actually forces the
7 intermediaries to pass through an overcharge, to pass
8 through costs.

9 So in a sense, Microsoft's argument is
10 actually contradictory in the sense that
11 competition -- the more competition there is, the
12 greater the likelihood of pass-through.

13 In fact, one of the things that Professor
14 Housman said back in the original class
15 certification, he identified when you have a
16 distribution chain, even a monopolist, you're likely
17 going to have 50 percent pass-through. But the
18 greater the number of competitors in that
19 distribution channel, the increased likelihood of
20 pass-through.

21 Well, in these channels we've got literally
22 hundreds of intermediaries. There's substantial
23 competition, I think, as Professor Paul recognizes.
24 So that, in fact, requires pass-through.

25 Now, Professor Paul simply repeats her -- I

1 guess I don't know if the word "speculation" is
2 appropriate, but "lacking in foundation" remarks in
3 her reply affidavit about negotiation. She doesn't
4 have any firsthand experience with it, but, of
5 course, an expert doesn't have to have that. They
6 can rely upon other evidence. But all she does is
7 really repeat what's already been said in these
8 affidavits that were submitted back in 2002. So
9 simply put, there's nothing new there.

10 And then, in fact, she suggests that
11 Professor Netz makes some concession that volume
12 licensees are subject to a different formula or
13 analysis, than nonvolume. And I think Professor Paul
14 goes so far as to suggest that impact damages have to
15 be calculated differently. But as Professor Netz
16 explained in her affidavit in response to the remarks
17 of Professor Paul, quote, it is not individual class
18 member characteristics that are relevant to the
19 determination of prices in the market, but market
20 characteristics. Class members that hold volume
21 licenses and that hold nonvolume licenses face the
22 same market characteristics: Software markets
23 monopolized by Microsoft and distribution markets
24 that are highly competitive. And we've seen that in
25 these affidavits. Thus, common issues predominate

1 and common formulaic methods can be used to calculate
2 the damages.

3 So Microsoft overstates the differences
4 between volume purchasers and those who are not
5 volume purchasers.

6 Microsoft concedes, I believe, in its reply
7 that a single person or entity may be both a volume
8 and nonvolume. Originally in their decertification,
9 they wanted to exclude all volume licensees, which
10 could pull with it the nonvolume purchases of those
11 volume licensees. They clarify that in the reply.

12 But the fact that there is some confusion
13 there demonstrates that, in fact, when you've got a
14 corporation or a small business that is both a volume
15 and nonvolume and the purchasing patterns are the
16 same, they are facing the same market
17 characteristics, there's just no sufficient
18 differential to justify exclusion of volume
19 licensees.

20 You know, volume purchasers and nonvolume
21 purchasers comparison shop or they don't, you know,
22 as Dr. Netz says. They negotiate prices or they
23 don't. Nonvolume can negotiate prices as well. They
24 each buy in bundles or they don't. And they buy
25 support for their products or they don't. So

1 there's just not sufficient differentiation. They
2 face the same market conditions.
3 So as Professor Netz further explains in
4 her affidavit, "Regardless of the individual
5 characteristics of the class members, whether volume
6 or non-volume, each buy software in a highly
7 competitive distribution market, and they each have
8 available to them software produced in markets that
9 are monopolized by Microsoft. They face common
10 issues, and common methods are available and have
11 been used to calculate damages for both types of
12 class members. And that's precisely what Dr. Netz
13 did.

14 Here's over 40 studies, over
15 40-consequence, multiple regression pass-through
16 studies that have been performed. You see that each
17 and every one of them has a pass-through greater than
18 100 percent. And you find that with the corporate
19 segment, which is the volume, the percentages are
20 very similar to the finished goods channel and the
21 OEM channel.

22 And I may have said this before at one
23 time, Your Honor, but I also want to just remind you
24 that with the weighted average of pass-through rate
25 being approximately 114 percent, the way that

1 Dr. Netz does the damages calculation is that she can
2 take the conservative number.

3 In other words, it's kind of like taking
4 the lowest common denominator. The lowest common
5 denominator here is 100 percent, so overcharge -- per
6 overcharge. You don't increase it. You take 100
7 percent of the overcharge. So at 100 percent, that's
8 actually lower than the pass-through rates of all of
9 these studies. So if you've got a \$60 overcharge on
10 a particular license -- we're claiming its
11 pass-through is \$60, when, in fact, going through the
12 distribution channel, just for easy numbers, if it
13 was 110 percent pass-through, it actually increases
14 to \$66. So that's a conservative method of dealing
15 with damages issue.

16 Now, Microsoft's last point on volume
17 licensees is that these folks don't want to be part
18 of this class, and this is just speculation. There
19 is no evidence of that. I mean, we don't see any
20 evidence whatsoever.

21 The fact of the matter is the inference
22 that we draw -- and I think Microsoft's sole basis
23 for that is that there's not a volume licensee as a
24 named-class representative. Well, in our view that's
25 unnecessary.

1 In Minnesota, for instance, not one volume
2 licensee opted out or objected. And, in fact,
3 80 percent of the claims, 87 percent of the claims --
4 I take it back, 87 percent of the claimed value was
5 by volume licensees.

6 So to suggest that they don't want to be
7 part of the class is simply ridiculous, and there's a
8 practical aspect to this as well. With the class
9 action devices, you know, you've got a number of
10 small claims, and it's absolutely impossible for an
11 individual to bring a lawsuit against Microsoft. You
12 can just imagine the cost of fees and so forth
13 involved in this case. No individual can do that.

14 And, in fact, I submit even Maytag, which
15 would have a large claim, could not afford to bring
16 this type of action. It simply wouldn't do that
17 because the cost in comparison to what its claim is,
18 there's a great disparity. And so for that reason we
19 had a huge percentage of volume licensees in
20 Minnesota making claims and accepting the benefits of
21 the settlement in that case.

22 So we're to the conclusion.

23 There is nothing new to warrant
24 decertification. We talked about the law. The law
25 has not changed. Rule 1.261, 1.262 and 1.263 are the

1 same. As I pointed out, the Iowa Supreme Court has
2 said common issues on liability alone are sufficient
3 to -- are sufficient for class certification, and
4 that's even if there were individualized questions on
5 damages, which we submit the evidence will
6 demonstrate that they are, in fact, common issues.

7 The class definition hasn't changed. So
8 despite what Mr. Casper said yesterday, we have the
9 same products at issue for which we are seeking
10 damages. We still have indirect purchasers of
11 licenses for these products and only indirect
12 purchasers, not direct purchasers like the Enterprise
13 volume licensees and dealer.

14 Volume licensees are still and have always
15 been in the class. And just last month at
16 Microsoft's insistence we gave first-class mailed
17 notice to every identifiable volume licensee in the
18 state of Iowa. So they've all received notice, and
19 the whole notice plan, as Your Honor is aware, cost
20 over \$200,000.

21 Now, if Your Honor were to do what
22 Microsoft suggests and decertify volume licensees or
23 remove them from the class, now notice would
24 presumably have to go out again to them to say, "Oh,
25 by the way, you no longer have a claim." And

1 certainly that would create much confusion.

2 The time frame for the class is unchanged.

3 Mr. Casper seemed to argue that because volume
4 licensees now make up 60 percent of sales in Iowa on
5 applications software, that that's some sort of
6 change. But back when the class was certified, there
7 was a huge argument, huge dispute as to what would be
8 the end date for that class period. Microsoft wanted
9 it December 15, 2001. We said, "No." The conduct is
10 continuing. Why should class members that are
11 continuing to be harmed be cut off from a remedy?

12 Judge Reis agreed. The Iowa Supreme Court
13 agreed. So the fact that you have an extended class
14 period, you, of course, recognize there are going to
15 be continuing purchases. So, in essence,
16 Mr. Casper's argument is really the reargument that
17 the class period should have ended back in December
18 of 2001. It shouldn't have. It's law of the case.

19 THE COURT: What about the class time
20 period beginning? Does that change?

21 MR. HAGSTROM: No. It's always been
22 May 18, 1994, which under the tolling provisions that
23 we talked about with regard to Microsoft's statute
24 of limitations argument, that date is chosen because
25 that is four years prior to the filing of the

1 government action. So May 18, 1994, has been the
2 date throughout.

3 So in short, the class is the same, and we
4 want to keep it the same. And you confirm that by
5 denying in full without modification this motion for
6 decertification.

7 Now, the claims and the defenses, as they
8 pertain to the elements of the class-action rules,
9 have also not changed. Nor has the evidence.

10 Microsoft characterizes our claims on
11 innovation and security as new, but as Your Honor
12 saw, we had those in the third amended petition. And
13 these, again, as I mentioned yesterday, are claims
14 for damages.

15 And we saw the Dickerson case where you've
16 got your cause of action, but you may have varying
17 forms of damage. For instance, in a personal injury
18 suit, you may have loss of consortium, past medical,
19 future medical, pain and suffering.

20 Well, that doesn't change the essence of
21 the claims. And I think Microsoft concedes that
22 these are the various forms of damages that make up
23 the consumer welfare overarching claim for damages,
24 which is the sum and substance of what the purpose of
25 the antitrust laws is intended to address.

1 So this is not a summary judgment motion,
2 as I explained yesterday. This is a decertification
3 motion, and I cited to Your Honor the Williams v.
4 Brown, and Bogosian v. Gulf Oil cases where
5 defendants came in and tried to engage in battle of
6 the experts. And the courts there said, "Wait a
7 minute. What you're doing is you're attacking
8 plaintiffs' experts." You know, that's either a
9 Daubert issue, that's a summary judgment issue.

10 Decertification deals with the elements of
11 the rule, and there is no new evidence that changes
12 any of the elements of the rule here.

13 And Microsoft certainly has not brought a
14 motion in limine to exclude the testimony of Dr. Netz
15 or Professor MacKie-Mason. Why? Because they know
16 it would be unsuccessful. I mean, this motion is
17 really an attempt to exclude their testimony. But in
18 looking at it from a summary judgment fashion,
19 Dr. Netz says one thing, Dr. Paul says another. They
20 both are well credentialed. It will be up to the
21 jury to decide who is correct.

22 Our experts rely upon the same
23 methodologies that were identified for Judge Reis.
24 The same types of evidence to demonstrate liability,
25 impact and damages as they proposed three years ago,

1 which were confirmed by Judge Reis and the Iowa
2 Supreme Court. And the price premium method, one of
3 those methodologies we mentioned, and as I mentioned
4 yesterday, does not even employ the pass-through
5 issues. So, therefore, even if they were correct
6 with Dr. Netz's methodologies on rate of return and
7 profit margin, the argument doesn't apply to price
8 premium.

9 And as the Comes court said, the key is
10 common complaints, not common injury. All of these
11 class members have common complaints. These common
12 complaints are for the anticompetitive conduct of
13 Microsoft.

14 So all 13 factors of Rule 1.263 still
15 support class certification. And as Judge Peterson
16 pointed out in Gordon, the class action is the only
17 fair and efficient -- only means for a fair and
18 efficient adjudication of this controversy.

19 If Your Honor were to decertify, it really
20 is the functional equivalent of a dismissal of this
21 lawsuit. And that \$450 million before trebling is
22 kept by Microsoft.

23 So the class representatives will fairly
24 and adequately protect the interest of the class.
25 Class members, as the Iowa Supreme Court says, do not

1 have to have identical claims. The Iowa Supreme
2 Court ruled that these class representatives are
3 adequate and will fairly represent the interests of
4 all indirect purchasers of these products at issue.
5 Microsoft has submitted not one piece of evidence to
6 show that those class representatives will not do so.
7 They, in fact, will do so.

8 So all they do is present a straw man of
9 supposedly new evidence concerning volume licensees,
10 but we've shown that that is just that: a straw man.
11 There is no new evidence.

12 Microsoft has the burden on
13 decertification, and it has not shown that any of
14 elements for certification has changed. It simply
15 regurgitates old arguments.

16 So in short, the prerequisites for class
17 certification continue to exist in this case. And as
18 the Supreme Court said, our class action rules are
19 remedial and should be liberally construed in favor
20 of the maintenance of class actions.

21 And as the Iowa Supreme Court has further
22 made clear, the burden on a proponent of
23 certification is a light one. So that would also
24 show that on decertification Microsoft has a heavy
25 burden. And it has not done anything to show the

1 nonexistence of the elements of class certification.

2 I appreciate your patience, Your Honor.

3 This has actually taken longer than I thought it

4 would, but I would like to ask if you have any

5 questions about anything I have covered?

6 THE COURT: No.

7 MR. HAGSTROM: Thank you, Your Honor.

8 THE COURT: Mr. Casper, rebuttal.

9 MR. CASPER: Thank you, Your Honor.

10 Nothing that Mr. Hagstrom has said either
11 yesterday morning, yesterday afternoon or this
12 morning changes in anyway the presentation that I
13 made yesterday, which demonstrates that the
14 volume-licensing issue and the applicability of the
15 suitability of it to be determined in a case brought
16 by four individual purchasers, that issue has never
17 before been presented and never before been decided
18 by any court except the District of Maryland in the
19 Fourth Circuit. I will demonstrate why that is so.
20 The idea that that has been presented to the Iowa
21 Court and was adjudicated is completely untrue.

22 Secondly, on the question of the new claims
23 for security, the vulnerability, the security and
24 damages on account of security breaches, those are
25 new claims. Those claims for damages were added to

1 the fourth amended petition. I will demonstrate
2 that. They have never before been presented for
3 certification to any court, including a court in
4 Iowa. This court is being asked, in effect, to rule
5 on those for the first time. That very much is a new
6 issue.

7 And, finally, on the question of the
8 pass-through issue, there is no question that there
9 is now evidence which was not in the record before
10 about what resellers actually do. The last time
11 around, this was decided on the basis of an
12 affidavit, a single affidavit submitted by Professor
13 MacKie-Mason, which had no data in it whatsoever. It
14 simply described the methods he proposed to use once
15 he got the data.

16 The data is now in. The data from
17 resellers both analyzed using multiple-regression
18 analysis, as Professor Paul did, and also looking at
19 what the resellers themselves said, they do show that
20 they do not do what Professor MacKie-Mason and
21 Mr. Hagstrom said they must do, which is uniformly
22 pass through all cost changes. They do not do that.

23 And as a consequence of that, that
24 undermines the basis for the certification that was
25 given, which we're not contending that the

1 certification was wrong at the time it was given, but
2 the facts have changed, as I will show briefly, I
3 think, this morning.

4 Your Honor, let me begin by relating to a
5 timing point that Mr. Hagstrom raised yesterday. He
6 pointed out that an order amending a certification
7 order is appealable. And he said that the whole idea
8 of bringing this decertification motion must be some
9 sort of evil scheme by Microsoft in order to delay
10 the trial. Nothing could be further from the truth.

11 We brought this motion for decertification
12 as soon as we could. We could not possibly bring it
13 before the plaintiffs' experts' reports were filed
14 because until then, in June, we didn't know what
15 evidence the plaintiffs were going to rely on. So
16 once we got their expert reports, then we filed our
17 decertification motion as soon as we could. We filed
18 it 60 days later on August 2nd, and the reason we're
19 here today in October is because the plaintiffs
20 wanted more time to respond to it.

21 Now, that's why we're here today. We
22 couldn't have been here any earlier. The question of
23 an appeal delaying this is simply a red herring. If
24 the court modifies the class certification order, it
25 is not Microsoft who would appeal, it is the

1 plaintiffs. Microsoft would have no power to use the
2 appeal right as a way to delay the trial. That is
3 simply not what is going on here at all. If there's
4 to be any delay, it would be the plaintiffs, not
5 Microsoft, and I'm sure they wouldn't do that.

6 Let me turn now to the volume-licensing
7 claim. The claim that we made, which is amply
8 supported by everything in the record, is that the
9 position of volume licensees who buys tens of
10 thousands of licenses at a time is very different
11 from the position of a named plaintiff like the ones
12 I spoke of yesterday who walk into Sam's Club and
13 pick up something on the shelf.

14 The facts demonstrate that they don't buy
15 things the same way at all. And those facts have
16 consequences because you can't assume that if
17 Microsoft overcharged Sam's Club and Sam's Club
18 passed it on, that the same thing happened in a case
19 of somebody who buys a bundle of 50,000 licenses from
20 a reseller who was selling large numbers of licenses
21 and also software and also hardware in the same
22 package.

23 That reseller, for whatever reason it
24 wants, could have chosen to absorb the alleged
25 overcharge, if it really happens, in order to make

1 money in other areas on its more profitable services,
2 on its more profitable sales of peripheral devices,
3 things like that.

4 That is why you have to look at them
5 separately. And the evidence, the facts of how those
6 channels work, establish that.

7 Let me respond to what is really the main
8 argument. Mr. Hagstrom has done everything he could
9 to encourage the court not to look into this issue,
10 and he's done that by asserting incorrectly that this
11 issue has already been raised and already been
12 decided. And that is simply not true.

13 The only time Microsoft has ever litigated
14 the question of whether volume licensees should be
15 inside or outside the class before the U.S. District
16 Court for the District of Maryland is because it
17 arose there because, as Mr. Hagstrom pointed out,
18 there was a motion to add Enterprise customers to a
19 class certification motion. And so the issue was
20 joined there.

21 The district court ruled on April 14, 2003
22 in Microsoft's favor, finding that it was not proper
23 to have individual class representatives who
24 purchased one at a time representing these volume
25 customers who purchased thousands or tens of

1 thousands of licenses at a time. But, of course,
2 that ruling was appealed, and the appeal wasn't
3 resolved until 2006. That's the only time that it's
4 been raised.

5 Now, Mr. Hagstrom said repeatedly that
6 Microsoft presented that argument to the Iowa Supreme
7 Court, and that it was rejected. That simply is not
8 true.

9 If I may approach the bench, Your Honor, I
10 will give the court copies of Microsoft's briefs.

11 THE COURT: Thank you.

12 MR. CASPER: Thank you, Your Honor.

13 If it were correct that Microsoft had
14 presented this argument, one would expect to see a
15 reference to it in the Comes opinion. One does not.

16 Mr. Hagstrom claims that the reason for
17 that is because at the end of the argument in the
18 opinion which says, "We reject everything else,"
19 covers it. It doesn't cover it because the argument
20 was never raised.

21 Your Honor, I tabbed on page 7 the only
22 mention of volume licensing in this entire brief.
23 Down at the bottom, as a way of presenting all of the
24 channels that Microsoft software has distributed,
25 Microsoft wrote three sentences about volume

1 licensing. Just like we wrote sentences about the
2 full package product, just like we wrote sentences
3 about the OEMs, we were describing for the Iowa
4 Supreme Court the ways, all of the ways, that the
5 Microsoft software reaches end users.

6 Nowhere in this brief do we say that the
7 plaintiffs -- that the individual plaintiffs aren't
8 adequate representatives of volume licensees.
9 Nowhere in this brief does Microsoft say that the
10 characteristics of volume licensees are sufficiently
11 different so that they should not be included in this
12 class. Nowhere does that argument appear. Microsoft
13 has never before made that argument except in the
14 U.S. District Court for the District of Maryland and
15 the appeal.

16 Now, could Microsoft have made the argument
17 earlier? Only on an inadequate factual record. The
18 underlying affidavits from the resellers, the volume
19 resellers, the LARs -- Mr. Grass and Mr. Stubbs and
20 Mr. Morris and Mr. Malashock -- were prepared in July
21 of 2002 in the MDL caption. And I advised the court
22 to refer to those because those have the facts.
23 Those were presented to the district court for the
24 district of Maryland. They were not presented in
25 Iowa. They were not part of this record.

1 Now, could Microsoft have come and made the
2 claim at the time? I suppose in theory we could have
3 done that. But if we had, after Judge Motz ruled in
4 April of 2003, I suppose that would have squeaked
5 under the wire for the class-certification briefing
6 here.

7 But had we done that, we would have been
8 confronted by the argument, "Well, this is a ruling
9 of the federal district judge, and it's on appeal.
10 It's not final yet. We don't know how it's going to
11 turn out in the end." So we didn't do that. We
12 chose not to do that.

13 Secondly, and most importantly, Your Honor,
14 we had no facts at the time on how significant this
15 was for Iowa. It was not until 2006 that the parties
16 had completed the discovery and calculations and
17 ultimately the stipulation that was necessary to
18 determine how many licensees there are in Iowa. It's
19 a very difficult process because of Microsoft's lack
20 of information about where its products wind up to
21 know how many licenses are in a given state. And,
22 for example, the OEMs, the computer manufacturers
23 like Dell tell Microsoft practically nothing about
24 where their computers are sold. And so Microsoft and
25 nobody else really knows how many licenses are in a

1 particular state until a tremendous amount of work is
2 done to try to figure that out. That wasn't done
3 until 2006.

4 Now, the parties entered into a stipulation
5 in 2006, and then a number appeared in the
6 plaintiffs' expert report in June of 2006. And,
7 ultimately, Microsoft is using those numbers.

8 So in order to have presented this earlier,
9 we would have had to have done so without being able
10 to tell the court what the significance was in Iowa.
11 The MDL case was a national case, a national class,
12 and it didn't matter how many licenses there were in
13 Iowa or Minnesota or anywhere else.

14 Here, of course, it's only significant if
15 the volume-licensing issue affects a significant
16 number of Iowans, and those facts were not developed
17 at the time.

18 So this all shows, I think, quite clearly,
19 that this has never before been presented. One can
20 look in vein for any resolution in the Iowa court
21 about this issue.

22 Now, Mr. Hagstrom, of course, casts
23 aspersions on the Fourth Circuit, claiming that the
24 Fourth Circuit doesn't adequately protect the rights
25 of class members. He had no basis for that at all.

1 He cited the court to nothing other than his own view
2 of the Fourth Circuit.

3 The fact is that the two courts that have
4 litigated this have found that for obvious, good
5 reasons that the two channels are very, very
6 different. We didn't hear too much about substance.
7 Most of what we heard from Mr. Hagstrom was why the
8 court really shouldn't look into this because this
9 was all established long ago.

10 It's also true that Professors Netz and
11 MacKie-Mason mentioned the term "volume licensing" in
12 reports that were submitted in other states years
13 ago. But that doesn't matter. The plaintiffs chose
14 not to submit those reports here, and they can't come
15 in now and rely on a report that was submitted in
16 California in 2002 and say that was part of the
17 record here.

18 There's nothing new here. They chose to
19 submit an affidavit of Professor MacKie-Mason, which
20 did not include any of these details. It included
21 only the bare facts. That's what they relied on.
22 That was the record here.

23 So setting aside this issue of whether the
24 Iowa Supreme Court has already decided this, which it
25 clearly has not, let's look briefly at the substance.

1 Professor Paul says, in paragraph 18 of her
2 reply affidavit, an important difference between
3 volume customers and the named plaintiffs is the
4 extent and form of bargaining power. Volume
5 customers generally have bargaining power to
6 negotiate prices with resellers, not only for
7 Microsoft software, but also for bundles of products
8 and services including, for example, hardware,
9 software, networking and communication services and
10 technical support that vary based on their specific
11 needs. Large volume customers can even engage in
12 negotiations with Microsoft to lower the price to the
13 reseller that the volume customer may buy from.

14 Mr. Hagstrom says there's really no
15 difference. Anybody can negotiate anything they
16 want. Well, Your Honor, I don't know if the court
17 has had any experience in going into Best Buy or
18 Sam's Club and trying to negotiate the price of a box
19 of software on the shelf, but that won't be too
20 successful. Clearly, there is a huge difference in
21 how these transactions are done.

22 Professor Paul goes on to point out because
23 resellers bundle together different items for
24 different volume customers in their negotiated deals,
25 the prices paid for Microsoft software vary depending

1 on the circumstances of each contract. That
2 certainly is not true when you buy from Sam's Club.
3 When you buy from Sam's Club, you pay whatever is on
4 the shelf. When you buy from a volume reseller, it
5 completely depends upon the circumstances.

6 Again, if there was an overcharge, let's
7 assume for the moment that the plaintiffs prove that
8 there is an overcharge, the question will be: Did
9 the volume reseller decide to absorb that overcharge
10 in this transaction negotiated at these prices for
11 this time?

12 And, of course, that's an entirely
13 different question. It requires different proof,
14 requires looking into what volume, large-account
15 resellers do, how that business is conducted, none of
16 which has to be done for a named plaintiff who walks
17 in to buy something from Sam's Club.

18 And the real issue here is that, as I said
19 yesterday, the rule for class certification is that
20 it must be that as goes the claim of the plaintiff,
21 so goes the claim of the class.

22 If the named plaintiffs can prove their
23 case, if that also proves all the class members, then
24 there's a proper class certification.

25 But here, the proof that Sam's Club

1 overcharged for a box of software will not prove
2 anything about whether there was an overcharge to
3 somebody who bought 50,000 copies, along with who
4 knows how many computers and services, for a
5 three-year term and all of that.

6 The evidence that is in those declarations
7 that I pointed out to the court -- from Mr. Grass and
8 Mr. Malashock and the others -- of how volume
9 licensing works is undisputed. The plaintiffs cannot
10 dispute those facts and have not tried and how
11 different that is than individual customers.

12 Professor Paul also pointed out in her
13 affidavit at paragraph 12.1, "Determining or
14 unbundling the licenses actually paid for individual
15 Microsoft software purchased under such a contract
16 can only be done by itemizing the pieces in the
17 contract. This requires a level of detail about
18 prices paid by volume customers for software issues
19 that cannot be determined using the data produced in
20 this case. It requires different information to know
21 how it is that the contract was even constructed,
22 much different than going into Sam's Club where you
23 pay the price that is on the box and you have a
24 receipt that says how much it was. Different proof
25 is required, and that's the point here that the

1 plaintiffs really can't contest.

2 And, finally, on this point, it is true
3 that even the plaintiffs' experts have conceded that
4 volume licensing must be treated separately.

5 Now, Mr. Hagstrom conceded that in his
6 presentation, citing to the places in the reports
7 where they acknowledge that it hasn't been treated
8 separately.

9 Then he went on to say, "Well, they decided
10 there wasn't really any difference." Well, of
11 course, there are factual differences which can't be
12 disputed and they haven't really even tried to
13 dispute that are in the declarations that were filed.

14 But here is what Dr. Netz said when she was
15 asked in her deposition about this. She was asked
16 why the terms of a volume license matter for
17 comparing prices across products, and she said,
18 "Because to compare the price of two products, the
19 products need to be roughly the same product. If,
20 for example, the term of one license gives you the
21 right to use the product for one year and the term of
22 another license gives you the right to have the
23 product forever, those would not be similar products.
24 One would be a lifetime ownership, and one would be
25 one year's worth of ownership or rental, if you

1 would." This is quoted at paragraph 15.1 of
2 Professor Paul's affidavit.

3 She's referring, of course, to the fact
4 that volume licenses are for terms. They are for a
5 term of two years or three terms, entirely different
6 than buying a product on the shelf.

7 And then, finally, she was asked another
8 question about is there a difference between volume
9 and nonvolume licensing that affect the price and the
10 cost of the at-issue products?

11 Dr. Netz replied, "Well, what you get in
12 the volume segment is not completely the same as what
13 you get in the retail segment, and because you're
14 getting a different package of goods, the prices will
15 differ as well as the cost. For example, in the
16 corporate segment, often you're getting more than
17 just the software itself. You may be getting help
18 loading it on your machine, making sure it's
19 compatible with the software you have; whereas, if
20 you go to Best Buy, you give them money, they give
21 you a shrink-wrapped box. You're on your own." This
22 is out of the mouth of Dr. Netz, plaintiffs own
23 expert, who, in effect, concedes that volume
24 transactions are different than individual
25 transactions. There can't be any real dispute about

1 that given the declarations from the four volume
2 resellers that are in the record.

3 The plaintiffs last argument on this point,
4 Your Honor, is to try to convince the court that
5 there is simply no requirement in Iowa that the named
6 plaintiffs hold claims that are similar to those of
7 the class members. They say Iowa doesn't have a
8 typicality requirement; therefore, Your Honor, you
9 should just ignore all of this. It's perfectly find
10 for someone who bought one copy of Windows to say --
11 to represent somebody who bought 10,000 copies.
12 Plaintiffs are simply wrong on this.

13 As I pointed out yesterday, Iowa rules
14 require that the court find that it would be fair and
15 efficient to adjudicate the case as a class action.
16 That's a requirement that every class action in Iowa
17 must meet.

18 The court also has to find that the
19 representative parties fairly and adequately will
20 protect their interests of the class.

21 And, finally, there are issues of
22 commonality, which are in the Iowa rules, including
23 the predominance of common issues.

24 As I pointed out yesterday, and there was
25 really no effective response coming from

1 Mr. Hagstrom, the U.S. Supreme Court has pointed out
2 that these requirements of adequacy, commonality and
3 typicality all tend to merge in deciding whether the
4 claims of the named plaintiff are enough like the
5 claims of the class members to warrant going ahead
6 and allowing this to be done. In other words,
7 whether it's true that the claims of the named
8 plaintiff as goes his or her claims so goes the
9 claims of the class. No dispute about that.

10 But, as I also pointed out yesterday, we're
11 lucky because in Iowa the issue really has been
12 resolved. And I cite the court, again, to Hammer v.
13 Branstad and Vignaroli v. Blue Cross. In those cases
14 the court had to deal with the issue of whether the
15 individual plaintiff there was enough situated like
16 the class members, the proposed class members, so
17 that he could represent them. The court sometimes
18 speaks of it in terms of standing. The court
19 sometimes speaks of it in terms of typicality. Those
20 concepts are very closely related, which is why, of
21 course, the Iowa Supreme Court in deciding these
22 questions quoted the language, the typicality
23 language that I quoted yesterday.

24 As the Court said in Hammer v. Branstad,
25 "The claims of the plaintiff must be typical of the

1 claims of the class," and that's quoting the Newberg
2 treatise on this very point.

3 Now, Mr. Hagstrom only told the court about
4 part of what was really at issue in Hammer v.
5 Branstad. That was a case involving state employees,
6 and the question was whether or not they had a claim
7 for -- to avoid salary reduction because of
8 reductions in grade. And they sued together -- these
9 were nurses. They sued the governor claiming their
10 salary couldn't be reduced.

11 He pointed out that one of the issues is
12 whether the Nurse's Association could represent them.
13 That's true. But there was another issue, and the
14 other issue was whether certain of the members of the
15 class, the proposed members of the class, could be
16 adequate class representatives, that is, had standing
17 to stand in for the other members of the class. And
18 the dispute was over whether they had the similar
19 kind of injury as the other nurses, and the reason
20 was because they were at the very -- maybe, there was
21 a dispute in the facts, about whether these
22 particular nurses were at the lower end of the pay
23 grade. And the governor had accepted, in his order
24 reducing the pay grades, people who were at the very
25 bottom end.

1 And so if, in fact, it turned out to be
2 true that these particular nurses were at the lowest
3 grade already, then they wouldn't be affected in the
4 same way as other class members and, therefore, might
5 not have standing, might not be members of the class
6 or might not be typical, and the court so ruled in
7 the second part of Hammer v. Branstad that
8 Mr. Hagstrom didn't tell you about.

9 But the critical point here is that this
10 requirement of standing or typicality or being a
11 member of the class that one represents, none of that
12 is explicit in the Iowa rules. But as the Iowa
13 Supreme Court held in Vignaroli v. Blue Cross, and,
14 again, in Hammer v. Branstad, even if those words
15 aren't used in the rule, it still is part of the Iowa
16 rule, still very much part of the Iowa rule.

17 And when Mr. Hagstrom quoted to you
18 Judge Pille's decision in Merrifield v. Ameriquest
19 Mortgage on this very point, he read you the words in
20 which Judge Pille said, "Standing requires that a
21 class representative must be a member of the class
22 sought to be represented," quoting Hammer v.
23 Branstad. But he didn't read you the next sentence
24 because in the next sentence Judge Pille -- following
25 Hammer and following Vignaroli -- said, "In other

1 words, the claims of the plaintiff must be typical of
2 the claims of the class and the plaintiff must fairly
3 and adequately protect the interest of class
4 members." The designated class representative did
5 not suffer the same type of injury that they assert
6 other class members potentially sustained. And,
7 therefore, he excluded them from the class because
8 they were not typical. That is Iowa law, Your Honor,
9 and there is excellent support for doing that.

10 And as I also pointed out yesterday morning
11 and as Mr. Hagstrom had no response to, if it were
12 true that there were no typicality requirement, if
13 these named plaintiffs didn't have to be typical of
14 the class members that they seek to represent, why in
15 the world would the plaintiffs have alleged in the
16 fourth amended petition at paragraph 23: "The named
17 plaintiffs' claims are typical of the claims of
18 absent class members"?

19 I think that's all I need to say, Your
20 Honor, about volume licensing.

21 The next issue that I spoke of yesterday
22 was the question about whether or not these claims
23 for new claims and new markets and particularly the
24 claims for security have been and properly could be
25 certified or whether they should be excluded from the

1 class, assuming that the whole class is not
2 decertified.

3 Now, the plaintiffs claim that these
4 assertions, these allegations, these claims were in
5 the third amended petition, and there's just nothing
6 new under the sun here. Well, if that's true, one
7 wonders a bit about why the plaintiffs went ahead and
8 filed a fourth amended petition. But I think we can
9 set this to rest by looking very quickly at the
10 plaintiffs' fourth amended petition.

11 First of all, with respect to new markets,
12 paragraph 206 of the fourth amended petition, this is
13 new language that was not in the third: "Microsoft
14 threatens to control, and render Microsoft-specific,
15 the market for Dynamic Web Services and other
16 server-based computing." A new market.

17 In paragraph 217, the plaintiffs then add
18 this language to the fourth amended petition with a
19 new heading: "Microsoft's Predatory Conduct in the
20 Workgroup Server Market," and they have paragraphs
21 217 and 218 go on. At the end of paragraph 217, the
22 plaintiffs allege that Microsoft developed a strategy
23 to monopolize the workgroup server markets. Clearly,
24 those are new allegations that were not there before.

25 Now, Mr. Hagstrom said yesterday that the

1 class notice that was mailed out to the class earlier
2 didn't even mention these new markets. They
3 obviously weren't new. They weren't even mentioned
4 in the class notice. Your Honor, that is not
5 correct.

6 May I approach?

7 This is the class notice that was given
8 out. I highlighted the language in it, Your Honor,
9 that refers to what I just spoke of, that is:
10 "Plaintiffs also allege that Microsoft engaged in
11 anticompetitive conduct in new and specialized
12 purported software markets for server-operating
13 systems." Those are the new claims. Clearly,
14 plaintiffs have made a change.

15 Now, the place where this is most
16 significant is in the security issue because those
17 are the claims that they press. You'll recall, as I
18 said yesterday, of the three claims they made for
19 abandonment or for lack of choice and lack of
20 innovation and security, they abandoned one of those
21 in their resistance. The other one Professor Noll
22 testified in language that I quoted yesterday from
23 his deposition that he had no idea how you would
24 calculate damages. That was for innovation. They
25 give up on choice. Professor Noll said he didn't

1 know you calculate damages for lack of innovation.

2 That leaves the claims for security. Those are the

3 once they press.

4 Now, are those claims new? Yes, they are

5 new. Were they certified before? No, they were not.

6 Again, one can look in vein through the

7 Iowa Supreme Court's opinion in Comes for any mention

8 of security claims or whether or not the plaintiffs'

9 method for proving those claims is appropriate or not

10 appropriate in Iowa. And the reason, of course, is

11 because they had no method, they had no claims

12 because they are now new.

13 We didn't know until we got the plaintiffs'

14 expert reports on June 2nd how they were going to

15 propose to certify and prove these claims for

16 security innovation with a lack of security. We had

17 no idea how you could possibly do this on a classwide

18 basis, and it wasn't until we received the expert

19 reports of Mr. Smith and the economist, Professor

20 Gowrisankaran, that we had any idea how they were

21 going to approach this.

22 But to the issue of whether or not this is

23 new, paragraph 5 of the fourth amended petition adds

24 language which says, "Class members are entitled to

25 recover damages." That was there before, "entitled

1 to recover damages." And the language they added was
2 as follows: "and for their injury from the lack of
3 free choice and the denial of benefits of software
4 innovation and for damages for breaches of security
5 by reason of Microsoft's illegal conduct." That is
6 new language in paragraph 5 of the fourth amended
7 petition. Never before was there a claim for damages
8 on those grounds. As I said, the security issue is
9 the one that counts here.

10 Similarly, if you look at the plaintiffs'
11 prayer for relief, in the third amended petition
12 there was no prayer for relief for damages on account
13 of security breaches.

14 If you look, however, at page -- rather, at
15 the prayer for relief -- it, of course, doesn't have
16 a number because it starts with "Wherefore," --
17 letter (b) says that plaintiffs, and the members of
18 the class, ask for the following kinds of damages:

19 "(2)" -- this is new language, "Damages
20 for the lack of free choice among competing
21 products and the denials of benefits of
22 software innovation."

23 Those are the new claims for free choice
24 and software innovation. But as I said, free choice
25 has been abandoned. And software innovation,

1 Professor Noll acknowledged that he didn't know how
2 to calculate that.

3 "(3) Damages for security breaches
4 caused in whole or in part by Microsoft's
5 illegal conduct."

6 Those are new claims. They have never been
7 certified, and they shouldn't be certified.

8 Now, getting to the substance of those -- I
9 don't think I need to say too much here, Your Honor,
10 about the substance of those claims.

11 Plaintiffs, in their supplemental expert
12 report of Professor Gowrisankaran, which was served
13 on June 19th of this year, at page 39 claimed \$49
14 million in damages for the security vulnerabilities.
15 And the way they are calculated is based upon the
16 report of Mr. Smith. And Mr. Smith is the person who
17 counted up all of the Microsoft security patches and
18 figured out how long it would take an average person
19 to install an average patch. And then you multiple
20 that times the average wage rate in Iowa and you add
21 it all up, and it comes out to \$49 million. And the
22 plaintiffs claim that those are damages that
23 Microsoft is liable for.

24 Now, the plaintiffs never presented
25 anything like this to Judge Reis. They never

1 presented anything like this to the Iowa Supreme
2 Court. Your Honor had the good fortune of being the
3 very first judge, that I know of, ever to have the
4 opportunity to rule on this issue.

5 But the question is whether these claims
6 are ones that could be adjudicated in a class action
7 meeting the Iowa rule, which requires that a class
8 action can be permitted only for the fair and
9 efficient adjudication of the controversy. How could
10 you fairly and efficiently adjudicate this on a
11 classwide basis? One only has to look at the facts
12 to know that. And these facts have not been disputed
13 in any meaningful way.

14 The facts can be found in Professor
15 Savage's affidavit, which I referred to yesterday.
16 Professor Savage's affidavit demonstrates that these
17 security vulnerabilities would affect Iowans very
18 differently.

19 For example, Mr. Hagstrom said yesterday
20 that all 113 of the patches that they are looking for
21 compensation related to Internet Explorer.

22 Internet Explorer is the Internet part of
23 Windows. So, obviously, that's the security breach
24 that they are thinking about, is the Internet
25 security breach.

1 Fact: 1998, 190,000 Iowa households had
2 computers but no Internet access.

3 Fact: 2003, 93,000 Iowa households had
4 computers but no Internet access.

5 Those facts are both in paragraph 21 of
6 Professor Savage's declaration. No dispute.

7 Fact: Patches don't affect all users the
8 same.

9 For example, I said yesterday that some
10 users didn't have Microsoft Outlook or Microsoft
11 Outlook Express. Mr. Hagstrom said, "Well, I don't
12 know why Mr. Casper is talking about those. These
13 are all patches for Internet Explorer."

14 The reason I spoke about those is because
15 some of these patches are specific to other kinds of
16 software.

17 For example, patch No. MS01-012. Microsoft
18 recommended that that be installed only for users who
19 had Outlook or Outlook Express. Savage declaration,
20 paragraph 24.

21 Did a particular class member have it? Did
22 a class member not have it? It wouldn't make any
23 sense to compensate a class member who didn't even
24 have or use Outlook or Outlook Express for the cost
25 of downloading a patch that was only useful for those

1 products. Again, can't be done on a classwide basis,
2 wouldn't be fair and efficient adjudication.

3 The other issue I raised, which there was
4 really no response to from Mr. Hagstrom, was the
5 question of the compensation that one would get even
6 if you assumed that there was liability here that
7 could be proved on a classwide basis. How would you
8 determine whether somebody had been hurt? And how
9 would you determine whether to compensate them?

10 Well, the only way you would know if they
11 were hurt is to find out if, in fact, they got hurt
12 by a virus or some other vulnerability that actually
13 turned into something harmful. A vulnerability does
14 you no harm unless it actually causes you some harm.
15 If it's sitting there as a so-called "potential
16 theoretical vulnerability," it does you no harm and
17 under Iowa law, which requires proof of actual
18 damages, you're not entitled to compensation.

19 So what the plaintiffs purport to do, of
20 course, is to assume that everybody spent X number of
21 minutes downloading the software at some uniform
22 rates. They get two uniform rates; one for a
23 telephone dial-up rate, and one for a cable or DSL
24 modem. But as Professor Savage points out, many
25 Iowans have access to much faster connections.

1 For example, Iowa has what is called the
2 "Iowa Communications Network," which is available to
3 government employees and also to students at Drake
4 University and faculty. In 1995 that network
5 provided speeds of 45 megabits per second, which is
6 many, many times faster than the speeds that
7 plaintiffs are using. In 2000 it went up to 622
8 megabits per second. And by 2004 it was up to a
9 1,000 megabits per second.

10 So the idea of paying somebody for their
11 time for, you know, three minutes of downloading
12 something at dial-up speed when it might take a few
13 seconds if you're on the university network or on a
14 corporate network, again, it makes no sense. It
15 can't be on a classwide basis.

16 Professor Savage also points out that much
17 of this is done for people and organizations by the
18 organizations themselves. Organizations have a
19 computer department that takes care of downloading
20 these things and then feeds them out to individual
21 machines automatically with no effort whatsoever on
22 the part of the user.

23 And, finally, of course, Professor Savage
24 points out in paragraph 40, 41 and 42 of his
25 declaration that Microsoft itself released what is

1 called "automatic update" in the year 2000, in
2 September of that year.

3 And under automatic update these patches
4 just come to you in the middle of the night with no
5 effort at all on your part. And, in fact, Professor
6 Savage points out that when Microsoft released
7 Windows XP Service Pack 2 in August of 2002, they
8 made it the default behavior that the patches would
9 be automatically received at three o'clock in the
10 morning.

11 How, on a classwide basis, could one fairly
12 and efficiently determine whether anybody had been
13 harmed? And if so, how much? When many people in
14 the class do nothing whatsoever to receive these
15 patches that they supposedly sit at their computer
16 and twiddle their thumbs and do nothing while they
17 download.

18 The plaintiffs simply haven't established
19 that there is any classwide method that could be used
20 to prove that at trial. The facts demonstrate
21 otherwise.

22 And this court, of course, has the
23 discretion and the responsibility to determine what
24 kind of a case meets the class certification
25 requirements.

1 The plaintiffs seem to have the view that
2 as long as they have an expert who is going to come
3 in and say that the class was damaged to the extent
4 of \$40 million, that that ends it, that the jury has
5 to listen to that. But that is not true. It's up to
6 the court to determine whether it would be for the
7 fair and efficient adjudication of the controversy.

8 In a case with these kinds of facts where
9 it's all individual, the plaintiffs simply haven't
10 made the showing here on the question of security.
11 The issues are new, and they are inherently
12 unclass-like. Plaintiffs haven't shown anything to
13 the contrary.

14 And, finally, Your Honor, that takes us to
15 the issue of pass-through. Have things changed since
16 the Iowa Supreme Court decided the Comes opinion in
17 2005, affirming Judge Reis's class-certification
18 order.

19 If things had not changed, we would not be
20 here right now. Mr. Hagstrom said during his remarks
21 that I didn't say anything about the Comes opinion.
22 In fact, I mentioned it many times during my two
23 hours yesterday morning, and I did that because we
24 recognize that the Comes opinion is the law of Iowa.
25 And as well, of course, as the law that this court

1 must follow. But the Comes opinion doesn't foreclose
2 the court from reconsidering whether the issue of
3 pass-through is a proper classwide issue if the facts
4 change.

5 Remember that the only thing the court had
6 before it at the time was Professor MacKie-Mason's
7 affidavit in which he said that all resellers act
8 alike. He believes that they must all pass through
9 all cost increases. And, naturally, on the basis of
10 that testimony and crediting that testimony as it was
11 at the time before any data had been introduced into
12 the record, the Iowa Supreme Court affirmed class
13 certification, finding that if he's right, then there
14 will be a fair and efficient means to adjudicate the
15 dispute.

16 But the court was careful to note that
17 earlier on in the Vos v. Farm Bureau Life case, the
18 court -- the Iowa Supreme Court had, in fact,
19 approved the decertification of the class. And our
20 court in this case said that decertification was a
21 safety valve, recognizing that this certification had
22 been done early, that the facts might change, and
23 that if they did, the court could take advantage of
24 the, quote, safety net, unquote, of decertification
25 and could decertify the class if the facts warrant

1 it.

2 Now, that's completely contrary to what
3 Mr. Hagstrom has been saying for the last day that
4 the Comes opinion simply forecloses this court's
5 ability to do anything on this issue. It's been
6 resolved. That's it. It's open and shut. Well,
7 that's obviously not the case.

8 If it were the case, why in the world would
9 the Comes court have pointed out that the court could
10 decertify in the future as a safety net if things
11 changed?

12 Now, the real issue is: Have things
13 changed? And the answer is, Yes, they very much have
14 changed. And what has changed is we now have
15 evidence, facts in the record, that show that the
16 resellers don't all just march to the same drummer
17 and do everything exactly the same which would make
18 it possible to determine how they pass through things
19 on a classwide basis.

20 The best evidence of this may be from one
21 of the resellers themselves. You recall that eight
22 resellers have testified in this case by declaration,
23 and four of them have now been deposed. And one of
24 them testified over the phone in front of Your Honor.
25 So I thought that would be the best one to use for an

1 illustration. I'm sure you remember the testimony of
2 Duane Davis.

3 Duane Davis lives out in Gowrie. He builds
4 and sells 300 to 400 desktop computers a year. Now,
5 you multiple that times the number of years in the
6 class period, that's a lot of computers that have
7 gone to Iowa citizens.

8 What did he say in his declaration? He
9 said that his components for his system, which he
10 sells for 489, have increased sometimes as much as 10
11 to 15 dollars, and in those cases he did not adjust
12 the selling price. In other words, he absorbed the
13 cost increase that the plaintiffs say he must pass
14 through.

15 He then said, "On a handful of occasions, I
16 observe the costs of the component of the base system
17 increase by about \$30." And in that case, he said,
18 "I made a customer-by-customer decision as to whether
19 to increase the selling price of the base system."
20 "Customer-by-customer decision."

21 Now, he was subjected to cross-examination
22 twice; once on the phone by Ms. Conlin, and again in
23 his deposition, which was taken. And in both cases,
24 he stuck to his guns.

25 First of all, he was asked about the

1 declaration. Now, we heard Mr. Hagstrom say
2 yesterday, "Well, the declaration was drafted by a
3 lawyer from Microsoft." Well, he testified how the
4 declaration came to be. His own lawyer asked him how
5 it came to be, and he said, "Well, just the questions
6 that they asked me, and I gave them an honest
7 answer." And then when he was being cross-examined
8 by Ms. Conlin, she said, "What did you do to prepare
9 the affidavit that was filed in this case?"

10 And his answer was, "What did I do? I just
11 sat her in my office and answered the questions that
12 were asked of me." That's at pages 11 and 12 of the
13 transcript of that morning session.

14 Then she asked him further -- this is at
15 page 14 of the transcript:

16 "Did he" -- meaning the lawyer --
17 "bring the declaration all typed up with
18 him?"

19 "Answer: No.

20 "Question: How did the declaration
21 get prepared.

22 "Answer: Well, after writing down by
23 pen and paper that was taken back to his
24 office and then the declaration was
25 e-mailed to me for any discrepancies

1 or misunderstandings that according to
2 the statements that had been made. I
3 made a couple of corrections and he
4 e-mailed them back to me at which time
5 he corrected those, e-mailed it to me.
6 I printed it out and signed it, and I
7 sent it to him."

8 In other words, he was asked questions.
9 The lawyer took down his answers in long hand, went
10 back to his office, typed them up and sent it back to
11 him. Now, is there anything wrong with that process?
12 Should we suspect Mr. Davis's testimony because of
13 the way that declaration was prepared? Not at all.

14 He was then deposed and this led to some
15 actually entertaining testimony. He was asked about
16 the \$30 because you remember he said, "When my cost
17 go up \$30, sometimes I pass them on and sometimes I
18 don't." And so the lawyer who was taking his
19 deposition reminds him of that testimony and says,
20 "On a handful of occasions, I observe the costs of
21 the components of the base system increase by about
22 \$30." That's quoting from his declaration, and the
23 lawyer says:

24 "Are you referring to hardware?

25 "Answer: Correct.

1 "Question: Okay. And then you
2 say, 'In these instances, I made a customer-
3 by-customer decision as to whether to
4 increase the selling price of the base
5 system.

6 "Answer: That is correct.

7 "Question: Can you give me a little
8 bit more explanation of that? When you
9 say customer-by-customer, what went through
10 your mind?"

11 "Answer: Well, I mean, if you walked
12 in the door, I never seen you before,
13 I'm probably going to charge you that
14 extra \$30. But the farmer that has been
15 out there that buys a brand-new system
16 every year and one for his kid, I'll
17 probably, you know, absorb that cost.
18 Because I know he's going to be coming
19 back on other service issues. So it's
20 a business judgment.

21 "Question: And as part of the
22 reason why you do the business judgment
23 for the farmer who comes through
24 periodically, because you're hoping to
25 obviously service that computer and

1 maintain that relationship over time?

2 "Answer: Well, normally the guy I'm
3 going to pass it on to, I already know
4 what type of customer he's going to be.

5 "Question: Okay.

6 "Answer: You know, if he's the type
7 of customer that is going to call me on
8 Sunday night at ten o'clock because his
9 kid's got a CD stuck in there, why, we're
10 not giving him any breaks."

11 Now, I wonder what formula of Dr. Netz can
12 account for Mr. Davis's decision to pass on cost
13 increases to lawyers who take his deposition and to
14 people who call him on Sunday night to unstick the
15 CD drive and to absorb the cost increase when it's a
16 farmer that he thinks will give him repeat business
17 and buy service and things like that.

18 There is no formula in the world that can
19 account for that kind of difference, and every one of
20 the resellers who was deposed had that kind of story:
21 Instances in which they, for their own competitive
22 reasons, don't pass on cost increases.

23 Now, mind you, the plaintiffs' experts say
24 this is impossible. But the experts' testimony is
25 only as good as the facts on which it is based, and

1 the facts here show that resellers don't all act
2 alike.

3 Professor Paul relates the significance of
4 this when she says at page -- or at paragraph 19.1 of
5 her reply affidavit -- and she's actually quoting
6 here from a memorandum that was prepared by the
7 plaintiffs' own staff, the plaintiffs' experts own
8 staff -- where they pointed out that "some software
9 resellers make money by charging a high price for
10 accessories while keeping the prices for PCs with
11 Windows software low." "Giving away razors to sell
12 the blades." That's from a memo that Dr. Netz' staff
13 prepared for her.

14 So they recognize that the reason that
15 resellers can and do absorb price increases -- or
16 cost increases, rather -- by not raising their prices
17 is because they can make their money in other ways.
18 They have the ability to do that, and they do it.

19 Yesterday Mr. Hagstrom spent a lot of time
20 asserting that Microsoft was somehow claiming that
21 multiple regression analysis was wrong and that the
22 problem with Dr. Netz's approach was that she used
23 multiple regression analysis.

24 Well, that's not true at all. Multiple
25 regression analysis, if properly used, can, of

1 course, be significant, and it can show you what is
2 happening. Let me illustrate. If I could -- may I
3 use one of my boards from yesterday, Your Honor?

4 THE COURT: Yes.

5 MR. CASPER: You may recall that this
6 reseller experienced changes in price -- or costs,
7 rather. Those are the red lines. And the question
8 for any pass-through analysis is: How does the
9 reseller respond when there is a change?

10 And here you can see the changes. In this
11 case the cost goes down and then the cost goes up.
12 And so the question is: Each time the reseller had a
13 chance to make a decision about the change, what did
14 they do? Do they raise the price or not raise the
15 price.

16 Here you can see that this particular
17 reseller was selling below its cost. It was selling
18 at a loss for months. Remember, Mr. Hagstrom said
19 that wasn't possible. No one can do that. Well,
20 they do. But it didn't change its price, and, of
21 course, when its costs later went up, it didn't
22 change them either.

23 So that's the simple example of what
24 happens and, of course, we had the same thing with a
25 personal computer manufacturer where each one of

1 these represents a change. Notice these are
2 different costs. There was a change. Here the cost
3 went up.

4 "Did the computer make her respond
5 by raising its price?"

6 "Answer: No. It kept its price
7 the same."

8 Here the cost went down, a change. The
9 question of pass-through is: How do customers or
10 resellers in this case respond to changes? Did it
11 respond by changing its price? No, it kept its price
12 the same. There's the basic raw data.

13 Now, what happens when you do a regression
14 analysis? Professor Paul did those regression
15 analyses. That's what this chart is. This chart is
16 the result of her regression analyses.

17 Remember that Professor Paul separated the
18 products, first of all, by groups and then by finer
19 degradation of actual products to see what the
20 resellers were actually doing. The point of a
21 multiple regression analysis is that it is multiple
22 because it takes kind of different factors. And one
23 of the factors that you have to take account of is
24 different products. You have to ask the question:
25 Are the resellers doing the same thing for all the

1 products or are they not or are they doing something
2 different? And the only way to look at that is to
3 look at the data to see what they are doing. Using
4 multiple regression analysis is a way of looking at a
5 lot of data at one time, and that's what these are.

6 Professor Paul ran these multiple
7 regression analyses and showed that for different
8 products, the resellers were behaving differently;
9 that is, that for some product they did not pass
10 through their cost increases at all. For others they
11 did it less than 100 percent. It depends upon the
12 product. It depends upon the time. The regression
13 analysis confirms what the underlying data there
14 shows.

15 No real response to that from the
16 plaintiffs. Remember, also, that I said that
17 according to Professor Paul's affidavit and this,
18 again, hasn't been disputed: There are two serious
19 problems, flaws with Dr. Netz' analysis.

20 The first of those two flaws is that she
21 requires only a single number to be returned for her
22 pass-through estimate for a reseller. She doesn't
23 look to see if the products are, in fact, different.
24 Her regression analysis is set up in a such way as it
25 only produces one number.

1 If you set it up with a flaw like that, you
2 can't expect it to be accurate. It hides all of the
3 data that really exists, that a proper regression
4 analysis shows. The data -- the variation is here.
5 You can see it in the data on the chart. You can see
6 it in the regression. It's only if you improperly
7 allow it to return only one result that you get the
8 numbers like this.

9 And the pass-through charts that
10 Mr. Hagstrom showed where 40 different studies had
11 been done and all of them had rates over 100 percent,
12 every one of them was done exactly like this. And
13 Professor Paul ran proper regression analysis on all
14 the ones she could from which there was enough data
15 to do it. And she found that every single one of
16 them varied. That's the first flaw: Requiring it to
17 return a single result.

18 The second flaw, which there has been no
19 response to, is this one, which, again, is if you
20 have two products which are being sold at different
21 levels, that is, they have different price levels,
22 one is relatively cheap and one is relatively
23 expensive, and you put them into the same regression,
24 you wind up inadvertently drawing a line between them
25 and falsely showing a pass-through rate that is

1 higher than either of the pass-through rates on the
2 underlying products.

3 Both of these flaws demonstrate why it is
4 that Dr. Netz says pass-through is 100 percent.
5 Every reseller that she's ever looked at pass through
6 all of its costs, and it's always more than 100
7 percent.

8 The basis for her conclusion are failing to
9 look at the facts that resellers in Iowa testified to
10 and for constructing an analysis that has these
11 flaws, which make it impossible to see what is really
12 happening on a product-by-product basis.

13 And these issues are serious ones. For
14 example, on the below-cost sales that Mr. Hagstrom
15 says resellers just don't sell below their cost,
16 Professor Paul found 34,515 licensees sold below cost
17 in just 14 reseller data sent. That's her affidavit
18 at paragraph 22.21.

19 These are very serious problems that affect
20 all of what she did and demonstrate that her
21 methodology is really one that doesn't take account
22 of the data. The problem is, it doesn't recognize
23 the facts. The facts as they've been testified to by
24 Iowa resellers themselves who say they don't always
25 pass-through their costs.

1 The consequence is in order to know whether
2 an Iowa reseller does or does not pass through its
3 costs, and, therefore, whether a class member has
4 been injured or not, you have to ask the reseller.
5 Professor Netz -- or Dr. Netz, rather, has simply no
6 way to take account of Mr. Davis who charges the
7 farmer \$30 less by absorbing a cost increase than the
8 "pain in the neck" guy who he passes it on to.

9 Dr. Netz estimated that damages that
10 plaintiffs claim -- you've heard numbers about \$50
11 and so forth. Those are not all the numbers.

12 Dr. Netz claims that Microsoft's overcharge
13 for operating systems in 1994 were \$11.11. She
14 claims that the damages, the alleged overcharge in
15 1995 for operating systems was \$15.37. In 1996 she
16 claims it was \$26.90. For Word-Processing Software,
17 she claims that the damages in 1999 are \$17.91. And
18 in 2000 she claims they were \$6.62. In 2001 she
19 claims they are \$6.63. These are all numbers that
20 the plaintiffs would get if they are right.

21 Microsoft, of course, may convince the jury
22 that there was no overcharge at all; or if there was,
23 it was something even smaller than this. These kinds
24 of potential damage numbers are numbers that all of
25 these resellers have testified that they absorbed

1 rather than pass on sometimes in some situations for
2 some length of time. The consequence of that is
3 there is no common proof that those resellers have
4 been injured.

5 Your Honor, it's lunch time I can see.
6 I've used up much less time than Mr. Hagstrom, but I
7 think I've said enough.

8 I just close by saying that if the case for
9 decertification weren't a strong one, I don't think
10 you would have seen four lawyers on this side of the
11 room spending a day and a half with 115 slides trying
12 to demonstrate why it is that the class should not be
13 decertified.

14 The arguments, I think, are clear and
15 convincing that volume customers are different and
16 that the named plaintiffs cannot stand in for them.
17 These "security breach" claims are new claims like
18 the volume claims that have never before been
19 presented to this court and the plaintiffs haven't
20 proposed them after recertifying them.

21 And, finally, with respect to the
22 pass-through issues, the facts have changed since the
23 Supreme Court ruled.

24 The Supreme Court recognized that this
25 court has discretion. There is little that's more

1 discretionary than a trial judge's decision on class
2 certification or class decertification. And the
3 Supreme Court has made it clear that the trial court
4 has just as much discretion on decertification.

5 Microsoft is asking the court to look at
6 all of the facts and all the circumstances and use
7 the discretion that the Iowa Supreme Court has given.
8 Plaintiffs are asking the court not to do that, but
9 simply to assume that everything has been opened and
10 shut and dealt with before.

11 We appreciate very much, Your Honor, your
12 willingness to hear these arguments and look forward
13 to the court exercising its discretion to take
14 account of this case as it now stands.

15 Thank you.

16 THE COURT: Thank you, Mr. Casper.

17 The matter is hereby submitted.

18 See you tomorrow on the other issues.

19 MR. HAGSTROM: Yes, I think you'll see
20 Roxanne tomorrow.

21 THE COURT: All right.

22 MR. HAGSTROM: I think Mr. Green and one of
23 our attorneys has kind of set out an order for the
24 motions in limine to try and coordinate people's
25 schedules.

1 THE COURT: That's fine.

2 MR. HAGSTROM: I think just Roxanne will be

3 here tomorrow, and then Monday you'll see, I think,

4 different groups of lawyer from both sides.

5 MR. GREEN: Carrie has two list, Your

6 Honor, of our lineup.

7 MR. HAGSTROM: Thank you.

8 THE COURT: Thank you.

9 (Record closed on October 12, 2006, at

10 11:58 a.m.)

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CERTIFICATE TO TRANSCRIPT

The undersigned, Janis A. Lavorato, one of the Official Court Reporters in and for the Fifth Judicial District of Iowa, which embraces the County of Polk, hereby certifies:

That she acted as such reporter in the above-entitled cause in the District Court of Iowa, for Polk County, before the Judge stated in the title page attached to this transcript, and took down in shorthand the proceedings had at said time and place.

That the foregoing pages of typed written matter is a full, true and complete transcript of said shorthand notes so taken by her in said cause, and that said transcript contains all of the proceedings had at the times therein shown.

Dated at Des Moines, Iowa, this 30th day of October, 2006.

JANIS A. LAVORATO

Certified Shorthand Reporter