1 IN THE IOWA DISTRICT COURT FOR POLK COUNTY
2 ---
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.)
) VOLUME II
10 MICROSOFT CORPORATION,) (April 18, 2006)
)
11 Defendant.)
12 ---
13 The above-entitled matter came on for
14 hearing before the Honorable Scott D. Rosenberg,
15 commencing at 9:00 a.m., April 17, 2006, in
16 Room 404 of the Polk County Courthouse, Des Moines,
17 Iowa.
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25 Des Moines, Iowa 50309

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1 PROCEEDINGS

2 (Court reconvened on April 18, 2006, at

3 9:00 a.m.)

4 THE COURT: Very well. I think Microsoft

5 was done with its arguments contrary to those of

6 Comes in regard to Microsoft's power in relevant

7 market.

8 Did plaintiffs want to comment more on that

9 before going to the next section?

10 MR. JACOBS: Yes, Your Honor.

11 THE COURT: Go ahead.

12 MR. JACOBS: I just have a few comments in

13 response to Mr. Rosenfeld's arguments.

14 First of all, I would like to direct the

15 Court's attention to the Iowa Supreme Court's

16 decision on collateral estoppel at 709 N.W.2d at 121.

17 And Your Honor will recall yesterday Mr. Rosenfeld

18 was arguing that many of these findings for which

19 plaintiffs are seeking preclusive effect here, they

20 were evidentiary, and, therefore, Mr. Rosenfeld

21 argued, they are subsidiary and not subject to

22 preclusion.

23 But the Iowa Supreme Court rejected that

24 standard. The Iowa Supreme Court did not contemplate

25 evidentiary with subsidiary. In fact, the Court says

1 at 121 that "The Second Restatement rejected rote
2 application of the ultimate fact/evidentiary fact
3 analysis because, even if a fact is properly
4 characterized as evidentiary, great effort may have
5 been extended by both parties in seeking to persuade
6 the adjudicator of its existence or nonexistence and
7 it may well have been regarded as the key issue in
8 the dispute."
9 "The Second Restatement" -- the Court
10 continued here -- "replaced its comment discussing
11 the distinction between ultimate and evidentiary
12 facts with a new analysis where the Court must
13 determine, quote, 'whether the issue was actually
14 recognized by the parties as important and by the
15 trier as necessary to the first judgment,'" unquote.
16 That's quoting Restatement Second of Judgment,
17 Section 27, Comment J.
18 The Iowa Supreme Court continued: "This
19 important and necessary analysis protects parties
20 from the dangers of innocuous, subsidiary facts" --
21 "innocuous facts" -- "because it only precludes such
22 facts as were truly disputed in the first
23 proceeding."
24 What we were going through yesterday when
25 we were discussing the issues that were raised and

1 litigated by the parties and that the Federal
2 District Court determined to be the necessary
3 findings that it needed to reach in order to conclude
4 that Microsoft had monopoly power. These were
5 precisely the kinds of issues that we're discussing
6 here. They were issues that were important to the
7 parties. In fact, most of these issues that were
8 raised were raised by Microsoft.
9 Piracy, for example, was raised by
10 Microsoft. Microsoft was saying, "We don't have
11 monopoly power because -- we don't have monopoly
12 power because of piracy. We don't have monopoly
13 power because of the installed base." These were
14 Microsoft's arguments. Microsoft saw these as issues
15 that could be determinative in whether or not
16 Microsoft actually had monopoly power. Clearly they
17 were important. Clearly they were necessary to the
18 judgment as -- excuse me, let me back up.
19 Clearly the trier saw them as necessary to
20 the judgment and that's the standard, were they
21 important to the parties and did the trier see them
22 as necessary to the judgment. And as we walked
23 through yesterday, that's clearly the case. Whether
24 they are evidentiary or not is really irrelevant.
25 That's not the question. The question is: Does it

1 satisfy the standard set forth by the Iowa Supreme
2 Court here which rejected the ultimate evidentiary
3 distinction.
4 THE COURT: Well, even if it's subsidiary,
5 even if we do consider it or the Court considers what
6 Mr. Rosenfeld and Microsoft has designated, or, I
7 guess, shown to the Court or tried to demonstrate a
8 subsidiary in that it only fills in that, for
9 instance, what is covered by Findings of Fact 33 and
10 34, if Microsoft were to attempt then to litigate,
11 let's say, a Finding of Fact in No. 50, wouldn't they
12 be precluded from doing that because even though it's
13 subsidiary, it's part of that fact in 33 and 34, so I
14 would be within -- if there was a motion to exclude
15 that or an objection to what they were doing,
16 couldn't I sustain that on the basis that it's a
17 subsidiary fact within that fact?
18 MR. JACOBS: Well, I believe Your Honor
19 could do that and we would hope you would do that,
20 but here's where I think what we are seeking here on
21 collateral estoppel really will provide a real
22 roadmap for the Court to understand what findings
23 Microsoft is subject from precluding. If we actually
24 have collateral estoppel on these findings, it will
25 be easy enough to say, "Objection, Your Honor, this

1 is precluded by Finding 68." And we will have that
2 as the roadmap that can be used going forward.
3 Now, it doesn't mean all of these findings
4 need to go in front of the jury. What we -- there
5 are two separate issues here. The issue one is what
6 issues can Microsoft not contest going forward in
7 this case. So all of these, you know, so-called
8 "subsidiary" findings, you know, these are important
9 issues.
10 Secondly, the second question then is,
11 "Okay. Well, ultimately what will the jury be told?"
12 And I think that's an issue that Your Honor and the
13 parties will certainly be getting into at some point
14 later in terms of what exactly of the findings will
15 be used for the jury. And there's also another issue
16 too and that is experts -- in terms of expert's
17 reliance on certain findings here.
18 Now plaintiffs' experts will presumably
19 want to rely on certain findings of fact to be able
20 to put them in context and explain what was going on
21 in the government case. And also then -- the
22 corollary of that is plaintiffs will want to be able
23 to point to issues that have been decided to prevent
24 Microsoft's experts or even lay witnesses taking
25 positions contrary to that. So I think in terms of

1 of why we're seeking all of these findings here and
2 not just what, you know, might be considered ultimate
3 findings, it is very important from the standpoint of
4 providing a roadmap going down the road, pulling
5 forward.
6 THE COURT: What do you say, Mr. Rosenfeld,
7 am I right in saying that Microsoft -- and you agree
8 that 33 and 34 covers everything under Roman Numeral
9 III up through 67, then I assume I'm not going to
10 have someone from Microsoft stand up and say, "Judge,
11 that is Finding of Fact 57 and you haven't designated
12 that or collaterally estopped," that would be kind of
13 a disingenuous argument, wouldn't it, if you said it
14 was a subsidiary?
15 MR. ROSENFELD: I think, Your Honor --
16 THE COURT: Do you agree or not?
17 MR. ROSENFELD: I do. Findings 33 and 34
18 certainly subsume those. I want to make one other
19 quick point.
20 The Iowa Supreme Court pointed out that
21 coming up with a list of findings, it's not the
22 purpose to provide a broad landscape upon which -- or
23 to find -- I believe, yeah, find a place to park this
24 case, a broad landscape of facts on which to park
25 this case. You know, the roadmap -- I can't resist

1 following the metaphor. The Iowa Supreme Court
2 certainly had that in mind and said, "No, you don't.
3 You don't get collateral estoppel for a broad
4 landscape of facts on which to park this case."
5 THE COURT: So just to make sure I'm clear
6 on this, let's say one of their experts gets up and
7 says, "I relied on Finding of Fact 57 from the
8 federal case," I would assume that since you think
9 that is part of 33 and 34, you're not going to stand
10 up and object?
11 MR. ROSENFELD: No. The only thing I would
12 reserve, Your Honor, we have pointed out that certain
13 of these findings, there are issues where the
14 findings do, in fact, include conduct that the court
15 of appeals found to be appropriate, and we would, of
16 course, reserve our right and the findings go beyond
17 what the court of appeals found to be.
18 THE COURT: What if the expert just says
19 word-for-word No. 57?
20 MR. ROSENFELD: Well, Your Honor --
21 THE COURT: Word-for-word.
22 MR. ROSENFELD: Well, again, not looking
23 specifically at 57 --
24 THE COURT: Sir, it's a subsidiary fact.
25 What difference does it make?

1 MR. ROSENFELD: Yes. My only point is,
2 Your Honor, that some of the findings -- and I
3 pointed this out to you yesterday and we will see it
4 more today -- refer to conduct that the court of
5 appeals said was proper conduct. As to those
6 findings and those portions of those findings, you
7 should not be. Remember, the court of appeals --
8 Judge Jackson in his finding found conduct to be
9 unlawful that the court of appeals did not. As to
10 those findings, no, we should not be bound.
11 THE COURT: Well, that is another question
12 then for both of you and I haven't seen that, and I
13 think that's an important question. That's why I
14 asked yesterday was when the Circuit Court looked at
15 Jackson's findings, did the Circuit Court
16 specifically find that certain findings either were
17 not shown, proven or not important or threw them out.
18 And are you asking me to use collateral estoppel
19 power on those issues which the federal circuit court
20 either did not rely upon or specifically stated was
21 not proven?
22 MR. JACOBS: No, Your Honor, we are not.
23 What we are -- what --
24 THE COURT: You understand my problem?
25 Let's say, for example, No. 57 is a finding

1 of fact that the federal -- was that the
2 D.C. Circuit?
3 MR. JACOBS: Right.
4 THE COURT: They looked at it and said, you
5 know, 57 goes to nothing. It doesn't prove anything.
6 It doesn't do anything and we find that what Judge
7 Jackson did in that is in error.
8 MR. JACOBS: Right. No, what we --
9 THE COURT: You couldn't present it here,
10 could you?
11 MR. JACOBS: No. On those points what we
12 are -- well, unless -- well, here, let me back up.
13 If a finding was necessary solely to a portion of the
14 judgment that the D.C. Circuit said this judgment
15 does not stand, we are not going to seek -- we're not
16 seeking preclusive effect on those findings.
17 Now, as we will see later, there's some
18 disagreement as to whether or not certain findings
19 were necessary solely to portions of the judgment
20 that don't stand.
21 THE COURT: I understand that.
22 MR. JACOBS: But for those findings that
23 were necessary solely to those portions of judgment,
24 no, we are not seeking preclusive effect on those.
25 THE COURT: Okay. So I can safely assume

1 that every one of these that you're seeking
2 preclusive effect, you're saying that the federal
3 circuit used?
4 MR. JACOBS: Well, there's two questions
5 there. One is did the federal circuit explicitly
6 cite every one of the findings for which we're
7 seeking?
8 THE COURT: I don't care if they were
9 explicitly cited or not. I want to know if they
10 said, "57. Judge Jackson, you're full of whatever
11 and we're not going to even recognize it." And now
12 you want to use it. To me the federal circuit court
13 would be the one that controls, not Judge Jackson's
14 decision.
15 MR. JACOBS: Right. And no findings were
16 so overruled by the Federal Circuit.
17 THE COURT: That's what I want to nail
18 down.
19 MR. JACOBS: Right.
20 THE COURT: I want to make sure when I look
21 at all of these findings of fact that you're asking
22 me to preclude, that I'm not going go get something
23 later saying, "Oh, by the way, Judge. I don't know
24 why you're using that because the Federal Circuit
25 found that that's full of crap."

1 MR. JACOBS: Right.

2 THE COURT: And that was not even a finding

3 that was reversed. If that happens, I'm going to be

4 a little upset.

5 MR. JACOBS: There were only a few findings

6 of fact that Microsoft even challenged at the D.C.

7 Circuit level.

8 THE COURT: Okay.

9 MR. JACOBS: 159 was one of them. We will

10 see -- we will see that later.

11 THE COURT: I don't care if it's challenged

12 or not. What I'm concerned about is that the Federal

13 Circuit Court says this finding of fact has no basis

14 whatsoever, any facts or evidence brought before

15 Judge Jackson and; therefore, you can't even consider

16 it and it should not be considered.

17 MR. JACOBS: Right.

18 THE COURT: My problem is, is someone going

19 to come in and say, "Oh, Judge, we want that finding

20 of fact." And then they are going to get up and say,

21 "But the Federal Circuit said that." If that happens

22 during trial, then we're going to have a bunch of

23 wasted time relitigating this very issue today about

24 preclusion and I'm not going to be happy about that

25 from either side if that happens.

1 MR. JACOBS: I understand.
2 THE COURT: So I want both sides to point
3 out to me in no uncertain terms what findings of
4 fact -- I don't care what it is, subsidiary or
5 whatever -- what findings of fact they believe the
6 federal circuit court said is out, gone, not proven,
7 Jackson was wrong. If you don't show me that, then
8 I'm going to assume everything was affirmed by the
9 Federal Circuit and I'm going to rule accordingly on
10 preclusion. Is that understood?
11 MR. ROSENFELD: Could I address that,
12 please, Your Honor?
13 First of all, yesterday you asked a very
14 good question about the role of the appellate court
15 decision, and I wanted to get back to that. It's
16 directly to what you're asking. On our brief on
17 page 41 we cite a number of cases that make a point
18 that "When a judgment is appealed, collateral
19 estoppel only works as to the issue specifically
20 passed on by the court of appeals. Only the basis
21 that is actually considered on appeal can have any
22 preclusive effect in subsequent litigation." Now --
23 THE COURT: Well, that is not correct.
24 That can't be correct. That means if I appeal one
25 portion of -- 1/10 of 1 percent of a fact in a case

1 to the Iowa Supreme Court and I don't appeal any of
2 the other facts, that those facts, therefore, an
3 issue of issue preclusion, I can't say they are
4 precluded?
5 MR. ROSENFELD: That's correct, Your Honor.
6 But the issue here is when a matter is appealed, and
7 Microsoft didn't appeal the finding. It appealed the
8 judgment in total.
9 THE COURT: There you go.
10 MR. ROSENFELD: Now, it put everything in
11 play. The court of appeals then came out with its
12 determination. It says, "We've looked at Judge
13 Jackson's opinion. We've reversed most of the
14 findings of liability and as to the rest, we've
15 revised them."
16 Now, we didn't go through and say we
17 reverse them because a finding was wrong, because the
18 finding could have been right. It's just the legal
19 theory was wrong. All of those findings did not make
20 out a violation and that's a lot of what happened
21 here, so the findings can still stand.
22 THE COURT: All right.
23 MR. ROSENFELD: Violation is gone.
24 THE COURT: Gotcha.
25 MR. ROSENFELD: More than half of the

1 findings that we're talking about were not even
2 addressed, not even addressed by the court of appeals
3 here. That's why the approach that we've suggested
4 of highlighting those findings where there can be no
5 argument avoids the very problem that you put your
6 finger on, which is down the road for these other
7 findings we're going to have to say, "Well, what part
8 of that survived?" And it's not an easy issue to
9 resolve.
10 THE COURT: Well, all of it survived if
11 they didn't reverse it.
12 MR. ROSENFELD: No. Because if Judge
13 Jackson's refers to A, B and C as conduct, let's say,
14 providing the browser free, the Court said,
15 "Providing a browser free is not unlawful." It
16 didn't say we reverse that finding. It said
17 providing a browser free is not unlawful. That part
18 of that finding was reversed, but the Court didn't
19 say, "We're going through it and we're going to
20 reverse a finding. We're reversing a finding of
21 liability." So when you look at that particular
22 finding, the references to providing the browser or
23 the Internet Access Kit, those facts didn't support a
24 liability finding. Okay? That's the difficulty
25 here.

1 THE COURT: Okay. Go ahead.

2 MR. JACOBS: Well, in response to

3 Mr. Rosenfeld's point, two things: First, plaintiffs

4 have removed those findings from their motion. We've

5 removed the finding that we -- as we've said, that

6 are necessary solely to those portions of the

7 judgment. What remain there are findings, however,

8 that may refer to conduct, as Mr. Rosenfeld says,

9 that was ruled legal, but that doesn't mean that

10 those findings weren't necessary to other issues that

11 were necessary to the ultimate conclusion that

12 Microsoft violated the law. When we get to Java, for

13 example, Microsoft argues that Microsoft's

14 development of an incompatible Java Virtual Machine,

15 that the liability judgment was overturned by the

16 D.C. Circuit; therefore, any of those findings about

17 Microsoft's development of an incompatible Java

18 Virtual Machine are rendered not preclusive here.

19 Well, we disagree with that position.

20 Those findings are still necessary because this other

21 conduct that Microsoft engaged in, deceiving Java

22 developers to write to Microsoft's version of the

23 JVM, Java Virtual Machine, as opposed to Sun's

24 cross-platform Java Virtual Machine. Had Microsoft

25 not developed an incompatible Virtual Machine, there

1 would have been no harm to that. There could have
2 been no anticompetitive harm. Same thing with
3 Microsoft's threats to Intel to get Intel to stop
4 developing a fast Windows cross-platform Java Virtual
5 Machine. Had Microsoft done that but not had an
6 incompatible Java Virtual Machine out there in the
7 market, there would have been no anticompetitive
8 effect. Same thing with getting ISVs, software
9 developers, to write to Microsoft's incompatible Java
10 Virtual Machine. Had Microsoft's Virtual Machine
11 been compatible, perhaps there would have been harm
12 to Sun or to some other developer of a Java Virtual
13 Machine but there wouldn't have been harm to
14 competition, and it's harm to competition that is the
15 hallmark of an antitrust violation.
16 So these findings here, regardless of
17 whether or not liability was ascribed to a particular
18 finding, isn't really the issue. The issue is
19 whether or not looking at the analytical framework
20 that the federal district court and the D.C. Circuit
21 both follow, which when we get to anticompetitive
22 conduct, it is whether the conduct had
23 anticompetitive effects. Whether the defendant
24 Microsoft was able to offer any sort of
25 procompetitive justification for its conduct; and if

1 so, whether the anticompetitive effects of the
2 conduct outweigh the procompetitive benefits. You
3 need a lot of these findings here to be able to
4 ascertain that. Whether or not liability is ascribed
5 to a particular finding is not the issue here.
6 MR. ROSENFELD: One last point.
7 First of all, the standard is necessary and
8 essential to the judgment and one other rule that
9 generally applies in collateral estoppel sort of the
10 tie-goes-to-the-runner rule. We haven't talked about
11 the burden here, but the burden is on the party
12 asserting that there should be preclusion; and if the
13 basis of the prior decision is unclear, if there's
14 ambiguity, then collateral estoppel cannot be
15 applied. That's from Connors v. Tanoma Mining Co.,
16 953 F.2d 682, the D.C Circuit. I'll give you that
17 cite again, 953 F.2d 682. Sort of the
18 tie-goes-to-the-runner, and it makes a lot of sense
19 because if it's not clear that I talked about
20 yesterday morning, they can still put in the evidence
21 if you don't apply preclusion; but if you do apply
22 it, the issue is forever over. The courts say you
23 better be really clear, ambiguity construed against
24 the proponent.
25 THE COURT: Okay. You can continue,

1 Mr. Jacobs. Sorry to interrupt you.
2 MR. JACOBS: Not at all. In fact, I hope
3 my voice holds out. Whether or not you all share
4 that sentiment, I don't know.
5 THE COURT: Take your time.
6 MR. JACOBS: Okay. So we were talking
7 about monopoly power and the power to control price
8 here. Well, one of the other objections that
9 Mr. Rosenfeld had yesterday was that a lot of these
10 findings referred to pricing and what it ultimately
11 comes down to is, yes, those issues that involve
12 pricing are necessary to the judgment. In fact, when
13 the D.C. Circuit -- here's what happened in the
14 federal case.
15 The government put forth a market -- a
16 monopoly power argument based on what was called the
17 "structural approach" that we discussed, you know,
18 the fact you have a market -- you have a high market
19 share in a market protected by barriers to entry. We
20 walked through that yesterday and how the Court
21 established these barriers by finding, you know, that
22 ISVs and OEMs and users and all of that, that there
23 were costs involved in coming up with a new operating
24 system. So here we have those barriers that the D.C.
25 Circuit says -- you know, I'm trying to find the

1 exact quote here -- at 57, 253 F.3d 57, the D.C.
2 circuit says: "The district court correctly applied
3 the structural approach to determine if the company
4 faces competition in the short term." So the D.C.
5 Circuit looked at -- it didn't cite all of the
6 specific findings of fact that Judge Jackson found,
7 but it looked at in terms of market -- sorry --
8 barriers to entry into the market, but it looked at
9 the approach that the D.C. Circuit -- that the
10 federal district court followed and said, "Yes, that
11 approach was right." And, in fact, when the federal
12 district court didn't follow that approach with the
13 Web browser market, it overturned because it didn't
14 make the detailed findings that the D.C. Circuit said
15 were necessary.
16 But then moving on, Microsoft then --
17 Microsoft was the party that asserted, you know, the
18 structural approach in this new "high tech makes no
19 sense." These markets are dynamic. We can't look at
20 the structural proponent. You need direct evidence
21 of market power. Microsoft was saying direct proof
22 is necessary in this instance. Now, the D.C. Circuit
23 rejected that argument ultimately, but Microsoft was
24 the one saying, you know, you need this direct proof.
25 You can't find market power without certain direct

1 proof of this sort. We're going to show all of this
2 evidence, make all these arguments that, you know,
3 our pricing policy isn't consistent with monopoly
4 power. Our behavior isn't consistent with us having
5 monopoly power.
6 So Microsoft is raising these issues that
7 it obviously believes is important of whether or not
8 there is direct proof, so the Court had to resolve
9 them. And whether or not it says Microsoft's
10 position or Microsoft's pricing policy is not
11 inconsistent with market power or -- I don't know how
12 many double negatives I had in there, but -- quite a
13 few, but, you know, that doesn't mean that issue
14 wasn't necessary. This language that Mr. Rosenfeld
15 pointed out, you know, that doesn't -- that is not
16 disqualifying for this particular finding to be
17 necessary.
18 I think that was all I have on relevant
19 market. I want to move ahead then to unless -- okay.
20 I want to move ahead to the later findings now when
21 we're moving on to Finding 68.
22 THE COURT: Middleware threats.
23 MR. JACOBS: Right, the middleware threat.
24 Let's go ahead to the findings here.
25 Okay. Well, what -- no, no. Let's go to

1 Finding 68 here. The federal district court found
2 that middleware technologies have had the potential
3 to weaken the applications barrier to entry. That is
4 the barrier to entry that protected Microsoft's
5 monopoly in the operating systems market. Microsoft
6 was apprehensive about that and really feared that
7 middleware could erode its market power.
8 Now, these findings are 68, and let's go
9 ahead. This is just generally 69. This is talking
10 about how Netscape Navigator had certain middleware
11 attributes that gave it the potential to undermine
12 the applications barrier to entry.
13 Let's move ahead to 70. Adding to
14 Navigator's potential to weaken the applications
15 barrier is the fact that the explosion of the
16 Internet and popularity of the Internet. These are
17 findings that are necessary to the entire case here.
18 Unless middleware could threaten the operating system
19 and Microsoft's operating system monopoly, the whole
20 case falls apart.
21 Okay. Going on to 72, same thing. No,
22 sorry, let me back up. Okay. So these are talking
23 about the threat to the operating systems monopoly.
24 Let's move ahead to 73 -- to 77 then. So what you
25 have is you have Netscape Navigator and you have 73

1 to -- or, I'm sorry, 69 to 72 establishing that
2 Netscape threatened Microsoft's monopoly.
3 Then Findings 73 to 77 you get to Sun
4 Microsystems, and Sun Microsystems/Java Virtual
5 Machine. Again, how is it that the Java Virtual
6 Machine treated Microsoft's monopoly. Here the Court
7 is going through about how a program written in Java
8 relying only on APIs exposed by the Java class
9 libraries were run on any PC containing a JVM, Java
10 Virtual Machine, that had itself been ported to the
11 resident operating system. Therefore, Java
12 developers who develop those to APIs can run their
13 software. This is exactly how Java -- this
14 establishes the threat.
15 THE COURT: 68 is one of the ones you wish?
16 MR. JACOBS: 68, yes.
17 THE COURT: Okay. It's not marked on mine.
18 MS. KNIFFEN: I apologize. That's an error
19 on my part.
20 THE COURT: So 68 is one.
21 MR. JACOBS: 68 is in the notebook that we
22 handed up yesterday with the various findings.
23 THE COURT: It's in the notebook but not in
24 this?
25 MR. JACOBS: Yeah, right, right.

1 THE COURT: Thank you.

2 MR. JACOBS: Okay. Then 74 through 77,

3 move -- okay. Sun Microsystems. Let's move on

4 to 75.

5 This is when -- Microsoft itself understood

6 the threat that Java posed. This was -- you know,

7 these were findings that established this threat.

8 76. Now, again Sun's strategy, its cost

9 platform strategy, where the Java Virtual Machine

10 would be available to run on different platforms and

11 developers who wrote to those Java APIs on their

12 applications on various operating system. Sun

13 Strategy could only succeed if a Java runtime

14 environment that complied with Sun's standards found

15 its way onto PC systems running Windows. And then --

16 Oh, sorry, back, if you would.

17 Netscape and Sun. In May of 1995, Netscape

18 agreed that it would include a copy of Sun's Java

19 Virtual Machine with the Netscape Navigator browser.

20 It was the Netscape and Sun combination that really

21 posed this one-two threat to Microsoft, and then

22 again, establishing the combined efforts of Microsoft

23 and Java.

24 Now, the D.C. Circuit -- all of these

25 findings here, the D.C. Circuit goes into a

1 discussion about, you know, how is it -- this is at
2 253 F.3d at 60 -- how is it that browser user
3 share -- why does it even matter? Why do we care
4 about it? You know, this is a browser. Why do we
5 care? We're talking operating systems here. Why do
6 we care? 253 F.3d 60, the Court talks about how a
7 browser usage share is important because a browser
8 must have a critical mass of users to attract
9 software developers to write applications to the APIs
10 that are -- that it exposes, and the entire
11 foundation of this case rests on the middleware
12 threat, how is it, what are the attributes of
13 middleware that threaten Microsoft's monopoly?
14 So let's move on here. Oh, I'm sorry. Do
15 you want --
16 MR. ROSENFELD: I would like to respond to
17 these if I could.
18 THE COURT: Are you done with your
19 middleware?
20 MR. JACOBS: Yeah. I think when we move
21 into this Section 79 through 132 is sort of a
22 separate -- there's a separate subsection here, so,
23 yes.
24 THE COURT: Okay. In regard to Sun?
25 MR. JACOBS: Right.

1 THE COURT: Very well.
2 MR. ROSENFELD: Several points I would like
3 to make, Your Honor, and the first one is -- and I
4 think we talked about this yesterday, but when we're
5 talking about preclusion here and we're talking about
6 the findings, we're talking about this within a
7 particular time period, the time period of the
8 Department of Justice case, which was '95 to '98.
9 And so there are going to be inevitably issues about
10 what happened after 1998, whether Judge Jackson, in
11 fact, got it right in a lot of these predicted
12 findings. And so I want to be clear that this fight
13 over these findings and their preclusive effect can
14 only be within the time period that was at stake in
15 the Department of Justice action.
16 Now, the second -- yesterday, I guess, I
17 jumped a little bit ahead and discussed some of these
18 findings because all of these findings relate to the
19 issue of Microsoft's monopoly power and in the
20 defined market. And as I said yesterday, these
21 findings about Sun, about Netscape, there were
22 findings about cloning; there were findings about
23 IBM; all of these are evidentiary findings that bear
24 on the existence of the barrier to entry in the
25 marketplace, this applications barrier to entry, and

1 whether anybody was able to surrender. And so these
2 findings that have been broken out as the middleware
3 threats, they are just another category of possible
4 threats to Microsoft's market power that the Court
5 found could not surmount the barrier to entry. So
6 they are no different than the other findings we
7 talked about yesterday. And that is why I go back to
8 33 and 34, which are the findings that Microsoft has
9 agreed to, to deal with the monopoly power issue.
10 Those are the same findings that the Iowa Supreme
11 Court referenced in its opinion and Judge Peterson
12 referenced in his opinion.
13 And those findings talk about a high
14 barrier to entry, particularly Finding 34. It says:
15 Second, Microsoft's dominant market share is
16 protected by a high barrier to entry.
17 Third, and largely as a result of that
18 barrier, Microsoft's customers lack a commercially
19 viable alternative to Windows. All of the rest of
20 this myriad of findings Mr. Jacobs has talked about
21 are examples of efforts to surmount that barrier to
22 entry that did not work, or so Judge Jackson found.
23 They were the basis for his conclusion that there was
24 a viable barrier to entry for the marketplace.
25 The middleware threats are no different

1 than the other operating systems or other kinds of
2 threats. They were all efforts to impede Microsoft's
3 market power. And the judge said they didn't work
4 so I don't see any difference between these
5 particular findings and the one yesterday. And, yes,
6 they are subsidiary findings. They do provide the
7 evidence, the support for the conclusion that Judge
8 Jackson reached that there was a barrier and that it
9 wasn't surmountable. Okay.
10 Now, two other quick cleanup points and I
11 will sit down. Mr. Jacobs went back to some of the
12 earlier findings; and in particular, those pricing
13 findings in the '60s that I talked about yesterday.
14 He said, "You don't have to pay any attention to the
15 language that Judge Jackson used because they are
16 still necessary and essential." And I would just
17 refer Your Honor in particular to Finding 64. It's
18 one or two or three of that universe. It says -- it
19 starts by saying: "An aspect of Microsoft's pricing
20 behavior that, while not attending to prove monopoly
21 power, is consistent with it." Now, that under any
22 definition of "necessary and essential" cannot pass
23 that on, and those are Judge Jackson's own words.
24 Last point. We've heard a lot both in
25 plaintiffs' brief and before you this morning about

1 the Web browser market and the fact that the court of
2 appeals reversed Judge Jackson on the Web browser
3 market and that tells you how much more he had to do
4 to define the market for operating systems.
5 There's a lot in the court of appeals
6 opinion, but the fundamental point is the failure was
7 not Judge Jackson's. The failure was the
8 plaintiffs', the government. And the Court says --
9 if I have the right page here, just a second -- the
10 key point is that the Court chastises the plaintiffs
11 for not having a theory of liability and for not
12 presenting evidence in the Web browser market, and I
13 will find that for you. Yes, I will just read it to
14 you.
15 It's on 84. That's 253 F.3d, page 84,
16 talking about barriers of entries in the Web browser
17 market and they say: "Any doubt that we may have
18 regarding remand versus outright reversal, that is
19 whether we should remand rather than reverse it, was
20 dispelled by plaintiffs' arguments on attempted
21 monopolization before this Court. Not only did
22 plaintiffs fail to articulate a Web site barrier to
23 entry theory in either their brief or at oral
24 argument, they failed to point the Court to any
25 evidence in the record that would support a finding

1 that Microsoft would likely erect significant
2 barriers to entry upon accusation of a dominant
3 market share."
4 This is in the Web browser market. Then
5 the Court went on to say: "Plaintiffs did not devote
6 the same resources to the attempted monopolization
7 claim that they did to the monopoly maintenance
8 claim." This wasn't a failure of Judge Jackson to
9 make findings. It was a failure of the plaintiffs to
10 prove their case. It was a failure of the plaintiffs
11 to provide a theory and to provide any evidence. So
12 I think that this effort to rely on the Web -- the
13 attempted monopolization claim in the Web browsing
14 market is incorrect and misleading. The fault was
15 the government's, not Judge Jackson, not because he
16 didn't enter the necessary findings. It's because
17 there wasn't the necessary evidence.
18 Summarize: 33 and 34 agreed-upon findings
19 cover this entire area. The middleware threats are
20 no different. This is "supportive material," not
21 "necessary and essential" to the judgment.
22 Thank you, Your Honor.
23 THE COURT: Thank you, sir.
24 MR. JACOBS: I think I will try to move --
25 MR. ROSENFELD: 79, is that --

1 MR. JACOBS: 79, Finding of Fact 79
2 through -- well, actually, you know, let's go back to
3 65 for just one moment. If the Court will just bear
4 with me.
5 I'm sorry 64. Yes.
6 MR. ROSENFELD: 65 is not in there.
7 MR. JACOBS: I really should have all these
8 memorized by now. Okay. Here is the language. Here
9 is the entire finding. Let's understand what is
10 going on here. This is a finding aspect of
11 Microsoft's pricing behavior, while not tending to
12 prove monopoly power, is consistent because the fact
13 that the Microsoft charges different OEMs different
14 prices. Among the five largest OEMs, Gateway and
15 IBM, which in various ways have resisted Microsoft's
16 efforts to preserve the applications barrier to
17 entry, pay higher prices than Compaq, Dell and HP,
18 Hewlett Packard. Microsoft is messing with IBM.
19 That is what this is about here. That's what this
20 finding is here. And it's not -- this is what the
21 Court looked at to say, "Yes, this is the sort of
22 conduct that I'm seeing as consistent with monopoly
23 power." And the question is, Was it important to the
24 parties and did the Court see it as necessary to the
25 judgment?

1 So I will leave that behind now.

2 Okay, 79 here, 79 through 132, 79 through

3 89. These findings -- we will break these up into a

4 couple of sections here, 79 through 89 first.

5 79 through 89 deal with these findings,

6 establish what Microsoft did when Netscape -- let me

7 back up.

8 Microsoft realizes Netscape is a threat to

9 Microsoft's operating system monopoly. The first

10 thing Microsoft does in response to that threat is it

11 tries to enlist Netscape in a scheme to divide up the

12 market. Basically, Microsoft would develop Web

13 browsers for Windows 95 going forward, which everyone

14 knew at that point Windows 95 was going to be the

15 dominant operating system out there, and Netscape

16 could have everything else. And these -- you know,

17 there was a series of findings here that relate to

18 that conduct and to that attempted market allocation.

19 So let's go through 79, establishing

20 misconduct. 80 -- I'm sorry -- 79 and then 88 is the

21 next one; and again, this is -- Your Honor, this is

22 what Microsoft did. This was Microsoft's first

23 response.

24 Now, Microsoft has argued, well, these were

25 necessary -- these are those findings that are

1 necessary only to the attempted monopolization claim,
2 monopolization of the Web browser market and that was
3 thrown out.
4 So, therefore, these findings, they are not
5 subject to preclusion.
6 But let's go back, and at Finding 67 where
7 Judge Jackson knows that Microsoft's monopoly power
8 is evidence that over the course of several years it
9 took actions that could only have been advantageous
10 if they reinforced monopoly power. So the Court
11 looked at that as direct proof of Microsoft's
12 monopoly power; but moreover, what the Court also did
13 was it looked at these findings. These findings were
14 necessary to the Court's determination that
15 Microsoft's other conduct with respect to Navigator
16 was illegal. What the D.C. Circuit said was that
17 when you look at a monopolization claim, you analyze
18 it with the three steps that we've discussed before,
19 anticompetitive effects, procompetitive justification
20 and whether or not there is -- if there are
21 procompetitive justifications, what is the balance?
22 The Court then went on to say: "While
23 proof of intent isn't necessary to this," what you
24 can do is you can look at intent to predict the
25 anticompetitive effect of conduct. You look at

1 what -- what was the party thinking, and you can use
2 that. You can look at the purpose of this conduct to
3 predict, well, if it seems -- if it seems to have
4 been anticompetitive and it seems to have
5 anticompetitive effect, you can use that to conclude
6 that, in fact, it was anticompetitive. Well, that's
7 precisely what the Court did here.
8 If you look at Judge Jackson's conclusions
9 of law -- and this is at 87 F.Supp.2d at 39 -- and
10 Judge Jackson wrote in the conclusions of law that
11 Microsoft's proposal to Netscape -- and here is a
12 quote -- "illuminates the context in which
13 Microsoft's subsequent behavior must be viewed."
14 So these were hotly contested issues.
15 Microsoft vehemently denied that it engaged in any
16 sort of browser allocation effort with Netscape. The
17 courts -- the parties hotly contested that issue.
18 Was it important to them? Certainly. And did the
19 trier view it as necessary? Yes, the trier viewed
20 this as necessary in illuminating the context. In
21 other words, it understood them as necessary to the
22 anti -- concluding that Microsoft's conduct, indeed,
23 was anticompetitive. And when I say Microsoft's
24 conduct, I mean Microsoft's conduct towards Netscape
25 that was found to be illegal. The monopolization

1 conduct, Microsoft's efforts to cut Netscape out of
2 OEM channel, out of the IEP channel and all of the
3 other conduct that was litigated in this case. This
4 was necessary -- viewed as necessary by the trier and
5 therefore meets the standards set forth by the Iowa
6 Supreme Court.
7 THE COURT: I'm sorry. Are you referring
8 to the first paragraph there under "Combating the
9 Browser Threat"?
10 MR. JACOBS: In the conclusions of law.
11 THE COURT: Yeah, page 39. I want to make
12 sure I got the right spot.
13 87 F.Supp.2d at 39. Let me get there
14 myself. Yeah, the same ambition that inspired
15 Microsoft's efforts to induce Intel, Apple,
16 RealNetworks and IBM.
17 THE COURT: Sorry. I wanted to make sure I
18 was in the right place.
19 MR. JACOBS: And that is precisely what
20 these other findings deal with later. Then what
21 happened after Microsoft -- Netscape declined
22 Microsoft's invitation to allocate the markets the
23 way Microsoft proposed, basically, Netscape knew that
24 it made no sense for them to survive. They perhaps
25 couldn't even survive as an ongoing business if they

1 agreed to Microsoft's proposal.

2 Well, what Microsoft then did was --

3 Findings 90 through 92 -- Microsoft then withheld

4 certain critical information from Netscape, critical

5 technical information about Windows applications

6 programming interfaces that Netscape -- that

7 Microsoft was using with its Internet Explorer

8 browser and that Netscape wanted to use for its

9 browser. And so the findings here, 90 through 92,

10 establish, you know, this is what Microsoft did.

11 They withheld this critical information from

12 Netscape, in retaliation for their refusal to go

13 along with Microsoft's browser allocation suggestion.

14 Now, again, Microsoft is going to dispute that -- you

15 know, well, the D.C. Circuit didn't ascribe liability

16 for them, but that is not the point. The point is

17 was this viewed as necessary by the trier to the

18 ultimate judgment. And Judge Jackson, again, that

19 these punitive measures that Microsoft inflicted on

20 Netscape, and this at the same place here on

21 87 F.Supp.2d at 39.

22 This proposal -- talking about the market

23 definition proposal, together with the punitive

24 measures that Microsoft inflicted on Netscape when it

25 rebuked the overture, illuminate the context in which

1 Microsoft's subsequent behavior towards PC
2 manufacturer Internet Access Providers and other
3 firms must be viewed.
4 So again, we can walk through quickly the
5 Intel, Apple, RealNetworks and IBM stories here.
6 These findings are Findings 93 to 132 on the finding
7 of fact outline. It's roman numeral V, sub C.
8 MR. ROSENFELD: Would it make sense for me
9 to respond to these two categories first?
10 MR. JACOBS: Let me finish up here because
11 this -- again, these findings here, we've tried to
12 condense them down as much as possible and remove as
13 many subsidiary -- arguably subsidiary facts or
14 details as we could from those. So Findings 93 to
15 132, again cited by Judge Jackson in -- on
16 87 F.Supp.2d 37, talking about the same ambition that
17 inspired Microsoft's efforts to induce Intel, Apple,
18 RealNetworks and IBM to desist from certain
19 technological innovations and business initiatives;
20 namely, the desire to preserve the applications
21 barrier to entry motivated the firm's June 1995
22 proposal to Netscape, abstains from releasing
23 platform-level browsing software for 32 versions of
24 Windows. So basically -- again, all of this stuff,
25 the Court is looking at it regardless of whether or

1 not it is ascribing liability to this conduct. The
2 Court is looking to that as necessary to conclude
3 Microsoft understood the middleware threat and
4 Microsoft sought to undermine the threat, and,
5 indeed, the conduct that it subsequently engaged into
6 OEMs and IAPs, in fact, had anticompetitive effects.
7 Now I will let Mr. Rosenfeld respond.
8 MR. ROSENFELD: Thank you.
9 Your Honor, I want to start, if I might, by
10 going to the very language in the conclusions of law
11 that Mr. Jacobs cites in dealing with both Finding 79
12 and 88 and I believe it's 90, 92. I don't think
13 under any stretch of the English language, language
14 like "it illuminates the context" can be equated with
15 "necessary and essential" to the judgment. Just does
16 not compute. This is context. And if there's
17 anything at all, the decisions on collateral estoppel
18 agree on is context, background and the like, does
19 not constitute "necessary and essential" findings.
20 No liability was ascribed by Judge Jackson or by the
21 court of appeals to this conduct. No liability.
22 Indeed, this is one of the instances of
23 conduct that was never addressed by the court of
24 appeals. The agreement never happened. It was never
25 addressed by the court of appeals and the best Judge

1 Jackson can do is say it illuminates the context. I
2 really think that is all there is to say about those
3 particular findings.
4 Now, when you get to 92 -- 90 to 92, I
5 think the argument, if it's possible for it to become
6 stronger, becomes compelling because those particular
7 findings, 90 and 92, not only were they never
8 referenced by the court of appeals, they weren't
9 referenced by Judge Jackson in his own conclusions.
10 How in the world can you find those findings, which
11 neither Court even ordained to discuss in the context
12 of its analysis to be necessary and essential to the
13 judgment. It just doesn't work.
14 If there were any doubt about that, you can
15 go to Judge Kollar-Kotelly, the 224 F.Supp.2d in 143,
16 and she talks about the fact -- let me find it here.
17 But the point, Your Honor, is: I think it's -- I'm
18 sorry, it's 163, 163.
19 THE COURT: What's the F.Supp?
20 MR. ROSENFELD: 224 F.Supp.2d, and it's the
21 footnote, and she says in that footnote and she's
22 distinguishing the categories of conduct where there
23 was a finding of liability. She says: The Findings
24 of Fact 115 to 32 -- which are the findings relating
25 to the other OEMs that Mr. Jacobs began to talk

1 about -- "do not provide a clear basis for
2 liability." "Do not provide a clear basis for
3 liability." So she distinguishes Apple and Intel and
4 we provided the agreed-upon findings about Apple and
5 Intel. She says: "Otherwise, the findings relating
6 to OEMs do not provide a clear basis for liability."
7 Now, I think that deals with 77, 79 -- I
8 think it deals with 88 and 90 to 92. I think it also
9 deals with this other category, and I don't know if
10 Mr. Jacobs intends to go through 92 through 132 in
11 more detail.
12 MR. JACOBS: No, I don't.
13 MR. ROSENFELD: Okay. Those are all
14 findings that relate to other OEMs. Intel, IBM, et
15 cetera. And I think in relating to Apple's
16 QuickTime, which is its media player which is
17 distinct from the finding related to Apple that were
18 found to provide for liability, all of those findings
19 are again these kind of examples that illuminate the
20 context for Judge Jackson. They were not even
21 discussed by the court of appeals.
22 It falls in the category of withholding
23 technical information, pressuring Intel, responding
24 to Apple's media player, responding to RealNetwork's
25 media player, responding to IBM's SmartSuite. None

1 of those discussions were discussed. Those are the
2 subjects Kollar-Kotelly said did not provide a clear
3 basis for liability. They cannot possibly be
4 necessary and essential to this judgment.
5 THE COURT: So the Court should be looking
6 at Kollar-Kotelly's also?
7 MR. ROSENFELD: Yes, because what
8 Kollar-Kotelly is doing -- first of all, you have to
9 think of Kollar-Kotelly, and I was thinking last
10 night how to describe this -- she's sort of Jackson 2
11 because it's the same court that rendered the initial
12 ruling and he got booted. She got put in his place.
13 She's looking at what happened before as the judge on
14 remand as saying, "Oh, my goodness, what happened, if
15 you will, to my decision?"
16 And she's going back and looking at those
17 findings and looking at the court of appeals decision
18 and saying, "Now, that won't survive as a basis for
19 liability because it's only that that survived as a
20 basis for liability that can give rise to remedy."
21 And that's what the court of appeals told Judge
22 Kollar-Kotelly to do, so her interpretation is very
23 important.
24 Thank you, Your Honor.
25 THE COURT: Mr. Jacobs.

1 MR. JACOBS: Let me just real briefly
2 address the importance of Judge Kollar-Kotelly's
3 decision. After the D.C. Circuit decision, the case
4 was sent back and Judge Kollar-Kotelly did preside
5 over the remedies -- the remedies phase of the trial.
6 Now, during that time -- well, prior to the remedies
7 trial, the Department of Justice and about half of
8 the litigating states settled with Microsoft. The
9 other half of the litigating states, including Iowa,
10 did not. They went ahead with the remedies
11 proceeding.
12 Now, what Judge Kollar-Kotelly had to do
13 was to look at the liability that was found in the
14 government case and try to come up with something
15 that redressed the violation.
16 What the states did, when you look at the
17 proposal that the litigating states put forward,
18 there were a lot of remedies, proposed remedies, that
19 were based solely on individual findings of fact.
20 Like I'm going to pick out -- you know, just for
21 purposes of example, Finding 100. Well, in Finding
22 100 Judge Jackson said X. So we want to try to -- we
23 want to base a remedy around X because that was --
24 that conduct was found there. Well, what Judge
25 Kollar-Kotelly is saying is that, "No, you can't just

1 go pick out proposed findings" -- what she said --
2 I'm sorry, not "proposed" findings, "individual
3 findings standing alone cannot serve as the basis for
4 a remedy. You need to find -- look at what the
5 conduct was, the illegal conduct." But that doesn't
6 mean that these findings were somehow rendered
7 unnecessary to the judgment or were totally
8 irrelevant to the judgment.
9 So, I mean, we're really talking about two
10 totally different policy issues here between what
11 Judge Kollar-Kotelly was looking at with remedies and
12 what this Court needs to look at in terms of which
13 findings were seriously contested by the parties in
14 the prior judgment and whether or not those findings
15 were seen as necessary to the judgment.
16 MR. ROSENFELD: Your Honor, just to be
17 clear, there's a profound disagreement here on that
18 issue. Judge Kollar-Kotelly was to look at the
19 findings, the court of appeals' determination, and
20 figure out what gave rise to liability. Those
21 findings were necessary and essential to the judgment
22 and hers weren't.
23 I want to be clear about one other thing.
24 In this area, unlike the findings that we teed up and
25 agreed with regard to market definition of monopoly

1 power, with regard to the proposed agreement with
2 Netscape, with regard to the withholding of technical
3 information, with regard to the conduct regarding the
4 other OEMs, we don't believe there should be any
5 preclusion at all as to those facts because they were
6 not necessary and essential to the judgment period.
7 That is why we haven't proposed any agreed-upon
8 finding in this area. This information was not
9 necessary and essential. These findings were not
10 necessary and essential to the judgment. There
11 should be no preclusion in this area.
12 MR. JACOBS: In the interest of moving
13 forward, we will go on to -- first of all, let me get
14 in the record here. When we're talking about the
15 finding between 93 and 132, that area was dealing
16 with RealNetworks, Intel, Apple and IBM, we're
17 talking 93 to 96, 98, 100 and 106, 110 to 111, 115 to
18 116, 120 to 121, 123 to 125, 130 and 132.
19 MR. ROSENFELD: So we're now --
20 MR. JACOBS: Now moving into Finding 133,
21 "Browser."
22 Your Honor, at this point now we're getting
23 into the real liability findings, conclusions from
24 the district court, and we will start to get into
25 here's what the conduct was, here's what the

1 anticompetitive effects of that conduct were and
2 whether or not there were any procompetitive
3 justification for the conduct and the like. And
4 you'll note, Your Honor, that Judge Jackson and the
5 D.C. Circuit both follow precisely the same
6 analytical framework for looking at this conduct.
7 First of all, when Microsoft says -- you
8 know, the only important issues in the case of
9 Microsoft's brief talks about definition of the
10 "relevant market," "market power" and what was it
11 that Microsoft did that was found to be illegal.
12 Now, then, Microsoft picks out, you know, a
13 handful of findings of fact that sort of, in
14 conclusory form, supposedly talk about what was it
15 that Microsoft did. But as we go through these
16 findings, I think Your Honor will see that what
17 Microsoft really did that gave rise to the liability
18 is much more extensive in terms of -- you know, that
19 is much more extensive than simply what Microsoft
20 tries to encapsulate in one individual finding.
21 There is much more there than Microsoft will admit.
22 And beyond that, the analysis set out by
23 the D.C. Circuit says, "Okay. Once you figured out
24 what was it that Microsoft was doing, you need to
25 examine in detail, you need to examine the effects."

1 In fact, Microsoft in its briefing before the
2 district court and the D.C. Circuit was always
3 emphasizing to the court, "You need to find
4 substantial harm to competition. There must be
5 substantial anticompetitive effect. Just some effect
6 is not enough. It must be substantial harm."
7 And then Microsoft in response oftentimes,
8 although not always, will also raise defenses,
9 procompetitive defenses. "Hey, his conduct was good
10 because of A, B, C, D. This is why you should not
11 find it illegal." And the courts both went through
12 that. You'll see as we go through here Judge
13 Jackson's findings are organized very nicely.
14 Once we get past this -- well, here. Let's
15 look at Roman Numeral (V) -- I'm sorry, go back --
16 Roman Numeral (V), letter "F" "2": "Excluding
17 Navigator from the OEM Channel." And then it talks
18 about Microsoft's binding Internet Explorer. Well,
19 what was it Microsoft did, Microsoft's action. The
20 lack of justification. Judge Jackson's following
21 that framework nicely, and the D.C. Circuit, in its
22 decision, followed the exact same analytical
23 framework. So let's get into the individual findings
24 then.
25 The first two that we have here are 133 and

1 134. Okay. This is sort -- again, this is what is
2 going on. Microsoft understood that Netscape posed a
3 challenge to its platform, to its Window's monopoly
4 platform. So Microsoft decided that Microsoft
5 focused its efforts on ensuring that few developers
6 would write their applications to rely on the APIs
7 that Navigator exposed. Developers would only write
8 to the APIs exposed by Navigator in numbers large
9 enough to threaten the applications barrier to entry
10 if they believed that Navigator would emerge as the
11 standard software employed to browse the Web. "If
12 Microsoft could demonstrate that Navigator would not
13 become the standard, because Microsoft's own browser
14 would attract just as much if not more usage, then
15 developers would continue to focus their efforts on a
16 platform that enjoyed enduring ubiquity; the 32-bit
17 Windows API set. Microsoft thus set out to maximize
18 Internet Explorer's share of browser usage at
19 Navigator's expense. This is a finding that is --
20 this is what Microsoft set out to do. This is the
21 "why." This is what it's all about. Microsoft --
22 this illuminates what ultimately Microsoft wanted to
23 achieve here and what Microsoft was doing.
24 Let's go ahead to 134. Now, here, this
25 one: Microsoft's management believes that no matter

1 what Microsoft did, no matter what the firm did, IE
2 would not capture a large share of browser usage as
3 long as it remained inferior. Is this the full --
4 okay. I just wanted to make certain of that. So,
5 okay. So Microsoft begins to develop its browser in
6 response to the threat from Netscape.
7 But then Bill Gates writes in this famous
8 May 1995 "Internet Tidal Wave" memo: "We need to
9 offer a decent client, but this alone won't get
10 people to switch away from Netscape." In other
11 words, Microsoft knew that simply competing on the
12 merits with Netscape would not be enough to confront
13 the platform threat that Navigator posed to
14 Microsoft. It knew it needed to do more. Well, then
15 we get into what it was that Microsoft did. We're
16 going to move on to -- let's see, Finding 143.
17 Now, Finding 143 -- let me turn to these
18 findings here. This is -- basically, again, this is
19 Microsoft understood that it could not simply develop
20 an attractive browser. It needed to do more. Now,
21 this one actually was cited by the D.C. Circuit and
22 this is at page -- let me get that cite here real
23 quick. This was cited at 253 F.3d at 71. And this
24 was cited for the effects, the anticompetitive
25 effects, in the IAP channel. So the Court was

1 talking about Microsoft's deals with IAPs clearly
2 have a significant effect in preserving its monopoly.
3 They help keep usage of Navigator below the critical
4 level necessary for Navigator -- for any other rival
5 to pose a real threat to Microsoft's monopoly.
6 And then "See example," Finding of Fact
7 143. Microsoft sought to divert enough browser usage
8 from Navigator to neutralize it as a plateform. So
9 this was important to -- seen as necessary to
10 understanding the effects.
11 So, okay, Finding of Fact then 144. This
12 finding established that there are two channels that
13 Microsoft identified as very important to
14 distribution of Web browsers. The Internet Access
15 Provider channel was one, and number two was the OEM
16 channels. OEMs are the computer manufacturers out
17 there. It knew that these channels are able to put
18 browsing software at the immediate disposal of the
19 user without any effort on the part of the user. So
20 basically this established that this is the kind of
21 finding that is necessary for ultimately
22 finding, ultimately concluding, that Microsoft's
23 conduct in these channels, yes, would have
24 significant anticompetitive harm.
25 Let's move on to 145 and 147. Again, these

1 are looking at the other distribution channels, that
2 no other distribution channel does have the same kind
3 of potential for efficient distribution of Web
4 browsers as the IAP and the OEM channel. Now,
5 Microsoft argued, well, Navigator could just do like
6 AOL did back then and "carpet bombing" the world with
7 disks in the mail and CD-ROMs and the like. And the
8 Court found, no, you can't. It can't effectively do
9 that compared to the IAP and OEM channel.
10 Moving on. Okay. Here again, knowing that
11 OEMs and IAPs represented the most efficient
12 distribution channels, Microsoft sought to ensure
13 that, to as great an extent as possible, OEMs and
14 IAPs bundled and promoted Internet Explorer to the
15 exclusion of Navigator. Again, this understanding
16 the anticompetitive effects of Microsoft's conduct in
17 these channels.
18 Just move ahead then real quickly. I will
19 run through the conduct in the -- let's see, the
20 conduct dealing with the technical binding of
21 Internet Explorer to Windows first, and then I will
22 turn it over to Mr. Rosenfeld for his response on
23 that.
24 So we move ahead here and going through the
25 findings in Judge Jackson's Finding 154 now is in a

1 section called, "Excluding Navigator from Important
2 Distribution Channels" and the subpart heading is
3 "Excluding Navigator from the OEM Channel," and then
4 "Binding Internet Explorer to Windows."
5 Now, this is sort of the tail end of some
6 findings dealing with Microsoft's argument that Web
7 browsers -- you know, they are just part of the
8 operating system. Well, Microsoft, when it was going
9 through part of Microsoft's efforts to combat
10 Netscape, was to bind Internet Explorer to Windows,
11 first contractually; and then second,
12 technologically.
13 Now, Microsoft came back and Microsoft
14 said, you know, "Internet Explorer is just a part of
15 Windows. Internet Explorer is browser functionality
16 in Windows." They're just all -- it's all the same.
17 The browser has gone away. It's now all Windows, and
18 Windows 98 Microsoft sought to give the impression
19 that the browser was just integrated into the
20 operating system and that they were one and the same
21 thing.
22 Well, the Court rejected that. The
23 district court said, no, they are not the same
24 product. These are two separate products. They are
25 two separate things. Now, Microsoft argues that, you

1 know, these findings, these are just -- these are
2 findings that only are necessary or only relate to
3 the tying claim, but they are not. All of
4 Microsoft's conduct when Microsoft commingled code
5 between Internet Explorer and Windows, when Microsoft
6 prevented users from deleting -- prevented users from
7 taking out the Internet Explorer from Windows, none
8 of this makes sense if these are separate products.
9 How can you possibly ascribe liability for conduct
10 finding code if it's the same product? You're
11 binding one part of Windows to another part of
12 Windows, is what Microsoft wants you to believe, and
13 that was rejected.
14 So clearly this is a finding that was
15 necessary to the latter conclusions that Microsoft
16 took technological-bound IE and Windows with
17 technological shackles.
18 So moving into -- here's discussing -- the
19 other operating system vendors allowed OEMs, the
20 computer manufacturers, and end users to remove the
21 browser from the operating system. And then
22 Microsoft decided to bind IE to Windows in order to
23 prevent Navigator from weakening the applications
24 barrier to entry rather than for any procompetitive
25 purpose. Again, this is, What did Microsoft do? Was

1 it anticompetitive or were there any procompetitive
2 justifications for this?
3 MR. ROSENFELD: Is this a good place to
4 stop for response?
5 MR. JACOBS: Sure, if you would like to.
6 MR. ROSENFELD: Is this a good place, Your
7 Honor? Okay.
8 I think this is an important and difficult
9 area, and it relates to what we were talking about
10 this morning, where you have interwoven in these
11 findings conduct that was found lawful and conduct
12 that was found unlawful. And I don't think this is
13 the most logical thing to do, but I want to start at
14 the end, if I could for just a second. I want to go
15 to Finding 155.
16 Finding 154 and 155 we just talked about
17 with Mr. Jacobs, and they have to do with this notion
18 of separate products, and this was a hotly contested
19 issue, a tying one. It goes back to probably my
20 inane example yesterday of tires and cars and lug
21 nuts. The issue is, yes, we all know that tires are
22 separate products from cars. On the other hand,
23 nobody says it's a tying violation to sell tires with
24 cars or for that matter shoelaces with shoes. You
25 can go out and buy shoelaces separate from shoes and

1 you go out and buy tires separate from cars, but they
2 are functionally integrated and people and the courts
3 have found those are acceptable products.
4 When you get into the software area, it's
5 even more difficult because we know over the history
6 of operating systems, for example, that originally
7 you didn't have drivers for your printer so if you
8 wanted to print something in your machine, you got it
9 up on the screen, you had to put in a floppy disk,
10 that would trigger your printer and get your printer
11 to print, you took the floppy disk out and off you
12 went. Now we integrate into the operating system
13 device drivers for the printers so you don't have to
14 do that; the same with fonts, the same with media
15 players, and, indeed, the same with the browser. And
16 there was a fight in this case and, indeed, the same
17 with the interface. A lot of people argued that the
18 Window's interface as opposed to the old DOS where we
19 had to use letters and type in all that malarkey,
20 people said that was a separate product. "Microsoft,
21 you should have been able to sell Windows along with
22 the operating system," and I think the plaintiffs in
23 this case are making that allegation.
24 Courts have said, you know, in the context
25 of software, it's a little hard to figure out what

1 the line is between one product and another product.
2 And one of the reasons that the per se "tying"
3 violation here was remanded by the court of appeals
4 was that the court of appeals said, "We're not sure
5 that the traditional analysis of separate products
6 applies in the software market." So instead of
7 saying it's per se unlawful -- that is, you can't put
8 up a defense -- they said, "We better go back and
9 look in detail at how this operates," and that's why
10 the tying violation here was remanded and then the
11 government conceded, Mr. Hagstrom says, for political
12 reasons. I think more because the antitrust law
13 wouldn't support it.
14 But in any event, when Judge Kollar-Kotelly
15 says about Finding 155 should end the discussion.
16 She says at 224 F.Supp. 258 -- and here is a case
17 where she's addressing the finding specifically --
18 she says, "Paragraph 155 in Judge Jackson's finding
19 of fact was identified by the appellate court as one
20 of the key district court findings in conjunction
21 with its imposition of liability on Microsoft for
22 illegal tying in violation of Section 1 of the
23 Sherman Act. The appellate court was unable to
24 affirm Judge Jackson's findings of liability for
25 tying. Because the tying was not pursued on remand,

1 there exists no finding that Microsoft illegally tied
2 any product to Windows."
3 Now, that would seem, (A), to dispose of
4 the fact that this finding is "necessary and
5 essential," a finding relating to the definition of
6 separate products.
7 And it is in one of those findings, Your
8 Honor, that you asked about this morning, are there
9 any where the Court has clearly said no? This is one
10 where they clearly said no, because the issue of
11 tying is one they sent back on remand.
12 Now, I submit the problem gets even worse
13 with the earlier findings, 133 and so on, because it
14 is very important in the context of this case to
15 understand what the D.C. Circuit said was lawful and
16 what they said was unlawful. They did not say that
17 integrating the browser with the operating system was
18 unlawful. They did not say that. They sent it back
19 for determination. So you can sell the tires with
20 the car.
21 What they did say and what we have teed up
22 findings on is that there are certain ways that you
23 are linking the two that we do find unlawful. And
24 the logic, as I understand it, was it's all right to
25 integrate them because there may well be benefits of

1 people getting them all at once but some people might
2 say, "Microsoft, I don't want your browser. I want
3 Navigator's browser," and they ought to be able to
4 take your browser off or at least hide access to it
5 and use Navigator's browser, just like they ought to
6 be able to put Michelin Tires on if they don't like
7 the Goodyear ones.
8 And you, Microsoft, or you, Ford, or
9 whomever, won't allow that. That's the violation.
10 That's -- the fancy word for that here was
11 "commingling code." The argument was that when
12 Microsoft wrote this code -- and we're rambling into
13 an area where I'm really beyond my knowledge, but
14 they would write the code for some of the operating
15 system functions and some of that code would also be
16 used for the browser. So if you were going to take
17 the code out that related to the browser, the
18 argument was it would also screw up the way the
19 operating system worked because they were kind of
20 linked together. The Court said that made it
21 difficult for OEMs and others to offer a competing
22 browser.
23 The remedy was not that you had to
24 disentangle the code, it was that you got to allow
25 the icon that identifies the browser. You got to

1 allow that icon to be disguised or removed or
2 whatever so that somebody, an OEM, could put an icon
3 for Navigator on. That was wrongful conduct.
4 Similarly, not allowing Internet Explorer
5 to be removed, that is, access to it on the operating
6 system by using the add and remove utility, that was
7 coding the lug nuts. The Court said that was wrong.
8 And, similarly, three and four, which are other
9 technical kinds of violations.
10 Now, we have suggested that there are key
11 findings of fact that identify what was wrong with
12 Microsoft's conduct. What plaintiffs are trying to
13 do is to suggest something far more nepharious. They
14 want to suggest, as Mr. Jacobs just did, that the
15 integration itself was anticompetitive. That's not
16 true. Judge Kollar-Kotelly makes that clear.
17 They also want to suggest that Microsoft's
18 developing its own browser was anticompetitive. They
19 want to suggest that Microsoft's paying other folks
20 bounties to use its browser was anticompetitive.
21 They want to suggest that Microsoft's providing its
22 Internet Access Kit, which is the instructions to the
23 OEMs as to how you put the browser in, doing that,
24 giving that away was anticompetitive. Every bit of
25 that conduct was found to be lawful, and I would

1 refer you to 253 F.3d at 68, which is where the court
2 of appeals discusses and describes that conduct.
3 A monopolist does not violate the Sherman
4 Act simply by developing an attractive product, and
5 then at various points on that page it discusses
6 giving away the browser, paying people to use it and
7 so on, that those findings did not make out an
8 antitrust violation.
9 Moreover, Your Honor, even Judge Jackson,
10 no great friend of Microsoft, in Finding 408, which
11 is on page 110 of the district court opinion -- it's
12 84 F.Supp.2d 110 in Finding 408. And 408 is one
13 plaintiffs did not identify as critical and
14 necessary. In 408 Judge Jackson says: "The debut of
15 Internet Explorer and its rapid improvement gave
16 Netscape an incentive to improve Navigator's quality
17 at a competitive rate. The inclusion of Internet
18 Explorer with Windows at no separate charge
19 increased general familiarity with the Internet and
20 reduced the cost to the public of gaining access to
21 it, at least in part because it compelled Navigator
22 to stop charging" -- excuse me -- "Netscape to stop
23 charging for Navigator." This was competition.
24 "These actions thus contributed to improving the
25 quality of Web browsing software, lowering its cost

1 and increasing its availability; thereby benefitting
2 consumers."
3 Now, I've rambled on a good bit, and I want
4 to draw to a close. My point is that these findings
5 that they are trying to get you to say were
6 "necessary and essential," were not "necessary and
7 essential" to a finding of liability. Quite the
8 contrary. These findings relate to Microsoft's
9 development of a competing browser to its thinking
10 about how it was going to compete, to its concerns
11 about whether simply providing a competitive browser
12 with attractive features was going to be enough, to
13 thinking about whether integrating it with the
14 operating system would be the best competitive
15 strategy. All of those things were not found to be
16 unlawful, and the Court did not find that these were
17 separate products that were subject to the per se
18 rule of tying. It remanded that.
19 So none of these findings as "necessary and
20 essential" to the liability findings, there should be
21 no preclusion with regard to these subjects, and the
22 findings that we have -- we, Microsoft, and Judge
23 Peterson and so on have understood as related to what
24 was wrong here about Microsoft's conduct -- and we
25 really haven't gotten to that yet -- those are

1 Findings 161, 164, 170, 213, 213, 213 and 213. I
2 guess there is another chart, but I think these are
3 the key ones; and we can go through those, but the
4 subject of these particular findings is not conduct
5 that was unlawful.
6 THE COURT: Okay. We're going to take a
7 break right now. Fifteen minutes. Thank you.
8 (A short recess was taken.)
9 THE COURT: Mr. Jacobs, we're back to you,
10 aren't we?
11 MR. JACOBS: Yes, Your Honor.
12 THE COURT: Okay.
13 MR. JACOBS: While Mr. Rosenfeld jumped
14 ahead a little bit here and started going through
15 various findings, various liability determinations
16 from the government case with respect to the OEM
17 channel, and he seemed to indicate that the
18 plaintiffs are trying to create the effect -- or
19 create the impression that Microsoft's offering of
20 this Internet Explorer Access Kit, "IEAK," where its
21 offering of bounties or things of that nature were
22 illegal. We're not seeking preclusion on any of
23 that. As we walk through these findings, you'll see
24 the findings for which we're seeking preclusive
25 effect were all necessary to the liability

1 determinations with respect to Microsoft's conduct in
2 the OEM channel here.
3 And I'm going to take you through a swath
4 of findings here, from 156 through 229 here, and
5 we're going to go through and you'll see that -- I
6 will refer the Court to the D.C. Circuit's discussion
7 on the integration of IE and Windows on 253 F.3rd.
8 It's beginning at page 64 and continuing through
9 page 67. And you will see that the findings here for
10 which we're seeking preclusive effect all were
11 necessary to the conclusion that Microsoft's
12 commingling of code in Windows and Internet
13 Explorer -- well, first, what did Microsoft do? What
14 were the effects that Microsoft's conduct had,
15 whether there were any procompetitive justifications
16 for that conduct; and at the very end, only at the
17 very end could a court conclude that this conduct was
18 illegal.
19 Let's start with 156 here. Okay. I'm
20 sorry, 156 and 157 here. Now, this is dealing with
21 Microsoft -- again, perceiving the threat that
22 Navigator posed, and originally Microsoft did not
23 intend to include a browser with its operating
24 system, but then Microsoft decided to develop its
25 browser.

1 Now, contrary to what Mr. Rosenfeld said,
2 we're not seeking any sort of determination that
3 Microsoft violated the law by developing the browser;
4 but these findings all establish here in 1995
5 Microsoft was simply planning on including the
6 browser in what was called the separate "frosting"
7 package," this Windows-plus package that would have
8 come with Windows 95 originally. That was the
9 original plan. It was only then after Microsoft
10 recognized the threat to its operating system
11 monopoly that was posed by Netscape that Microsoft's
12 conduct changed. This goes exactly to understanding
13 the purpose and effects of Microsoft's
14 anticompetitive conduct.
15 THE COURT: Even if, let's say, 155, for
16 instance -- even if the Court looked at that and
17 said, you know, what was said or found by the Court
18 in Finding of Fact 155 doesn't amount to any
19 violation -- is that what you said?
20 MR. ROSENFELD: Yes, Your Honor.
21 THE COURT: -- does it have to be negative
22 to be collaterally estopped?
23 MR. ROSENFELD: I'm just reading 155.
24 THE COURT: What I'm saying is a fact is a
25 fact. If it's used by the Court necessary for its

1 judgment, if the judgment is to the negative, not
2 guilty, so what?
3 MR. ROSENFELD: No, because, Your Honor,
4 as --
5 THE COURT: It doesn't have to be negative.
6 MR. ROSENFELD: -- as Mr. Hagstrom said
7 yesterday, we don't get the benefit of binding them
8 to findings that went in our favor. They want to be
9 able to relitigate those, so it's got to be a finding
10 that is necessary and essential to a liability
11 determination.
12 THE COURT: Okay. All right. Thanks.
13 MR. JACOBS: However, I would emphasize,
14 though, that the finding itself need not be the
15 violation to be necessary to that violation.
16 So let's move on to finding -- the next
17 finding here, Finding 158, about -- this is, again,
18 what Microsoft did originally. What Microsoft did
19 was it put Internet Explorer 1 on the first version
20 of Windows 95 in its OEM license, its OEM version in
21 July of 1995. And these OEMs accepted that even
22 though some made clear, you know, they didn't
23 really -- weren't interested in this, but they had
24 really no choice.
25 Now, 159, this is a critical, critical fact

1 that Microsoft is not subject to preclusion under
2 Microsoft's proposal here, 159. Microsoft knew that
3 the inability to remove Internet Explorer made OEMs
4 less disposed to preinstall Navigator onto Windows
5 95. This is what it's all about. This is what all
6 Microsoft's conduct -- its illegal conduct preventing
7 the removal of IE from Windows is all about. It's
8 about exiling Navigator from the OEM channel. The
9 finding goes on: "OEMs bear essentially all of the
10 consumer support costs for the Windows PC systems
11 they sell." These include the cost of handling
12 consumer complaints generated by Microsoft's software
13 and that preinstalling more than one product in a
14 given category, such as word processors or browsers,
15 onto its PC system can significantly increase an
16 OEM's cost. Microsoft knew, in other words, that if
17 it gets its browser on the OEM's machine and does not
18 allow them to remove it, these OEMs are not going to
19 install Navigator.
20 In addition, preinstalling a second product
21 in a given software category can increase product
22 testing costs. Finally, many OEMs see preinstalling
23 a second application in a given software category as
24 a questionable use of the scarce and valuable space
25 on a PC's hard drive.

1 Now, this -- again, it is crucial. And how
2 do we know it is crucial? Microsoft -- in fact, this
3 is one of the few findings of fact that Microsoft
4 challenged as clearly erroneous before the
5 D.C. Circuit. Microsoft said this is one finding of
6 fact that the district court just plain got wrong,
7 and the D.C. Circuit rejected Microsoft's appeal on
8 this issue.
9 So the D.C. Circuit -- Microsoft made the
10 tactical decision to only appeal a handful of
11 findings, but this was one and this is one that
12 unquestionably was necessary to this judgment.
13 So let's move on then from 159. So Finding
14 160, Microsoft executives, they believed that the
15 contractual restriction -- here's sort of the order
16 that this went. Microsoft first placed contractual
17 restrictions on these OEMs. By contract you cannot
18 remove Internet Explorer from your desktop.
19 Well, Microsoft executives knew that that
20 would not be enough, so in late 1995, early 1996 --
21 and Microsoft is always talking, The jurors will need
22 to understand the time we're talking about. Well,
23 these set forth the time. This is what is going on.
24 Microsoft set out to bind the Internet Explorer more
25 tightly to Windows as a technical matter.

1 Now, Mr. Rosenfeld referred to "tying."
2 This isn't -- tying is a legal claim that has to do
3 with a party -- an entity with monopoly power
4 requiring the purchase of another product in order to
5 get the monopoly product.
6 Now, the tying discussion in the
7 D.C. Circuit decision in the federal court decision,
8 I mean, that's all -- that's really subsidiary to all
9 of this conduct that we're talking about here,
10 Microsoft's binding of Internet Explorer more tightly
11 to Windows as a technical matter. What you're going
12 to see as we go through here the findings of fact are
13 all those findings that set out what Mr. Rosenfeld
14 here has on his chart, but they set out, (A), exactly
15 what Microsoft did, not just some toned-down version
16 of what Microsoft did; (B), what was the effect of
17 that conduct; and, (C), you know, what -- were there
18 any procompetitive justifications. In other words,
19 it went through the framework, the analysis, that the
20 D.C. Circuit says is necessary.
21 In fact, the D.C. Circuit, I will point
22 out, cited 159 and 160 in its discussion at
23 253 F.3d 64 in conjunction with the integration of
24 Internet Explorer and Windows. In fact, the Court
25 notes that consequently in late 1995 or early '96,

1 Microsoft set out to bind IE more tightly to Windows
2 as a technical matter just because they understood.
3 Now, this is quoting from Finding of Fact 160.
4 So let's move forward. Now, here we get to
5 161, which is one of the findings that Microsoft
6 concedes. So we will move on. Okay. Well, here,
7 let me spend a second here. Okay. So Microsoft set
8 out to exile Navigator for OEM channel. Okay.
9 Microsoft then went on to bound Internet Explorer to
10 Windows 95.
11 Let's move on to 164 and then starting with
12 Windows 95 OSR 2. It's a service release 2.
13 Microsoft -- this is the commingling of code, putting
14 the browser-specific routine into the same files that
15 support the Windows 32-bit API. Okay. Another
16 finding that Microsoft concedes here.
17 And then 165 --
18 THE COURT: Is that why these are in darker
19 shades in your booklet?
20 MR. JACOBS: Yes. Yes, Your Honor.
21 So 165, you know, Microsoft -- okay. What
22 is the effect of what Microsoft is doing at this
23 point? Well, initially Microsoft started
24 commingling, initially Microsoft started doing this,
25 but users were still able to -- Microsoft provided

1 users with the ability to uninstall Internet
2 Explorer. There's this little "Add/Remove" function
3 on Windows desktop. I believe you click on the
4 "start" menu and you get little control panels or
5 "Add/Remove" programs. You would be able to remove
6 most of Internet Explorer. Well, okay, so initially
7 Microsoft did allow users to do that.
8 Well, let's move on then.
9 It was in late 1996 Microsoft said, "No, we
10 can't allow this to happen. We need" -- James
11 Maritz -- I'm sorry, James Allchin, high-level
12 Microsoft executive writing to Paul Maritz in
13 December of '96, "How are we going to win? How are
14 we going to win the browser war? My conclusion," he
15 writes in the middle of his e-mail, "is that we must
16 leverage Windows more. Treating IE just as an add-on
17 to Windows which is a cross-platform means losing our
18 biggest advantage, Windows' marketshare." So what
19 Microsoft is saying here is we know we need to bind
20 this technically more strongly to Windows. This is
21 the intent which illuminates the anticompetitive
22 impact of Microsoft's conduct. Let's move to the
23 next.
24 Let's move to the next -- okay. So Finding
25 170 then is the next one. This is another one then

1 where Microsoft concedes, "Okay. Microsoft, we've
2 got" -- here is what Microsoft was doing. We had
3 these findings that show that part of Microsoft's
4 overall strategy was to exile Navigator from the OEM
5 channel, and it saw "Add/Remove" as one means of
6 accomplishing that. Well, here is what Microsoft
7 concedes that, you know, Microsoft's -- Microsoft
8 did, in fact. But that doesn't tell you anything
9 about why they did it and what was the effect of that
10 conduct.
11 The findings immediately preceding it and
12 then the findings that come after, those are the
13 findings that tell you exactly what the problem was,
14 why it was illegal. It's not enough to just say
15 Microsoft didn't provide users with the ability to
16 uninstall IE from Windows 98. So what? Under the
17 analysis by the D.C. Circuit, had they found that
18 that is what the D.C. Circuit would have said, so
19 what? You don't tell me anything about why that is
20 bad, why that is anticompetitive.
21 Let's move on. Finding 173, "Microsoft's
22 Actions," and here where it's talking about the
23 actions that we have just discussed, commingling of
24 code and preventing users from removing IE from
25 Windows 98, Microsoft's actions have inflicted harm

1 on consumers who have no interest in using a Web
2 browser at all. So these -- it's harm. This is bad
3 conduct. This is why it's -- this is the
4 anticompetitive effect that you must find in an
5 antitrust case.
6 Finding 174, "Microsoft has harmed even
7 those consumers who desire to use Internet Explorer."
8 Now, the previous finding was it harmed users who had
9 no interest in a Web browser. This is one even
10 though users do want to use Internet Explorer,
11 they've been harmed. Why? To the extent that
12 browser-specific routines have been commingled -- no
13 question here about what we're talking about, the
14 commingling of code -- with operating system routines
15 to a greater degree than is necessary to provide any
16 consumer benefit, Microsoft has unjustifiably
17 jeopardized the stability of the operating system.
18 Specifically, it is increasing likelihood that a
19 browser crash will cause the entire system to crash
20 and made it easier for malicious viruses to penetrate
21 via Internet Explorer to infect nonbrowsing parts of
22 the system. It makes no sense. The conduct makes no
23 sense unless -- as this finding points out, unless
24 Microsoft were trying to achieve something else.
25 It's the anticompetitive effect and it also shows the

1 consumer harm that is required.

2 Now, let's move on. The Court finds

3 Microsoft said, "Yeah, we've got all the technical

4 justifications why we want to do this." This is

5 Microsoft rebutting the assertion by the government

6 that this was illegal. Microsoft is raising all

7 these issues. Microsoft is saying, "Yeah, we've got

8 good technical reasons." Once they raised these,

9 these are the asserted procompetitive justifications.

10 Sorry. I was moving too fast, even I don't know.

11 So Microsoft is saying these are the

12 procompetitive justifications. Once those are

13 asserted, the Court must decide them. Had the Court

14 found that there were procompetitive justifications

15 underlying this conduct, it wouldn't have been

16 illegal, or at least then it would have changed the

17 outcome because the government would have had to come

18 back and try to rebut this. So, I mean, this is the

19 sort of outcome determinative type of finding that

20 must be given collateral estoppel effect. It was

21 important. It was necessary. It meets all the

22 criteria.

23 Now, let's move on. That was dealing

24 with -- 175 was dealing with Internet Explorer 1.0

25 and 2.0. This is dealing with some later versions of

1 3.0 and 4.0. Again, no technical justification, a
2 finding that the Court absolutely must make.
3 Here the Court -- no technical
4 justification for refusal to meet consumer demand for
5 a browserless version. In other words, Microsoft
6 could have made a version -- Microsoft said, "Hey,
7 Windows 98" -- this is Finding 178 -- "Windows 98
8 gave users all this neat stuff. You know, Windows 98
9 was better than Windows 95." Well, what the Court is
10 finding is the Court is rejecting that argument. The
11 Court is finding Microsoft could have given consumers
12 everything that Microsoft says consumers wanted
13 without this binding of Internet Explorer for
14 Windows; again, rejecting the very argument that
15 Microsoft said undermine the illegal nature or the
16 allegations of illegality by the government. This is
17 outcome determinative.
18 Yeah. And then, you know, the
19 D.C. Circuit, again, when it goes through it talks
20 about, you know, the failure of Microsoft to offer
21 anything, any sort of procompetitive justification.
22 I mean, this all fits into the very analysis the D.C.
23 Circuit says you must follow.
24 Okay. Finding 191, I believe, is next.
25 Again, Microsoft could offer consumers all the

1 benefits of the current Windows 98 package by
2 distributing the product's IE and Windows separately
3 and allowing OEMs or consumers themselves to make the
4 decision. This is the sort of finding, again, harm,
5 but also that it's anticompetitive, anticompetitive
6 effects. There's no justification for this conduct.
7 Any benefits could have been achieved through other
8 means.
9 Now, okay, Windows 98 -- this is the
10 argument I alluded to earlier -- Windows 98 offers
11 some benefits. Okay. Windows 98 has some cool stuff
12 that maybe wasn't in Windows 95. But that is not the
13 justification for Microsoft's conduct because, again,
14 it could have done -- it could have given consumers
15 those benefits without forcing them to have Windows
16 98 as well.
17 Here was another finding, 193. Another
18 justification that Microsoft offered was we need
19 to -- for Windows, for IE, not to be removable
20 because we need to protect the integrity of the
21 Windows platform. The Court rejected that
22 conclusion. Had they not rejected it, had the Court
23 not rejected that conclusion or that justification,
24 again, the outcome would have been different.
25 Another argument that Microsoft raised was,

1 "Yay, Internet Explorer, best of breed. We're
2 providing this great stuff. We're providing the best
3 browser to consumers," but what the Court found -- it
4 rejected that, that that wasn't the purpose. Rather,
5 the purpose and effect of Microsoft's conduct was
6 quashing innovation that exhibited the potential to
7 facilitate the emergence of competition in the market
8 for Intel-compatible PC operating systems. It is the
9 anticompetitive effect. It's the hallmark of the
10 antitrust violation.
11 And, in fact -- this all goes back to how
12 Microsoft's conduct in the browser market or alleged
13 browser market reinforces Microsoft's monopoly in the
14 relevant operating system market, which is also the
15 market that is at issue in our case here.
16 Let's move on. Okay. 195 -- 198, yes.
17 THE COURT: Is 195 one of them?
18 MR. JACOBS: No, I'm sorry. 198 is the
19 next one.
20 THE COURT: Okay. Let's make sure 195 is
21 or is not included.
22 MR. JACOBS: Is not.
23 THE COURT: I have it down here it is. On
24 your chart it says 195. It's not in your book now.
25 MR. JACOBS: Yeah, it's not in binder, so I

1 should eliminate that.

2 This is a continuance of 194 about the

3 "best of breed," rejecting the "best of breed"

4 argument.

5 THE COURT: So is it or is it not?

6 MR. JACOBS: I think since we gave Your

7 Honor this book with the Findings 194 and 198, I

8 think -- since 194 encompasses 195 and given

9 Microsoft's representations earlier, I think we can

10 forgo 195.

11 THE COURT: 191 and 194.

12 MR. JACOBS: And then, again, 198 rejecting

13 Microsoft's proper procompetitive justification about

14 the production of search and communication costs and

15 other reported justifications. Again, the kind of

16 finding that was very vigorously litigated in the

17 government case. It's the type of finding that is

18 outcome determinative. It was viewed as necessary by

19 the finder of fact.

20 THE COURT: Is this a good spot for

21 Mr. Rosenfeld to respond or do you want to go on to

22 202?

23 MR. JACOBS: Let's see.

24 THE COURT: I don't care.

25 MR. ROSENFELD: There's just a few more.

1 MR. JACOBS: Yeah, I think we have 202 --
2 THE COURT: I have 202, 203, 205 to 206.
3 MR. JACOBS: Right. Actually, those are
4 dealing with contractual -- let me make sure. Yes, I
5 think those are all dealing with the contractual
6 provisions.
7 THE COURT: You want to split here?
8 MR. ROSENFELD: Yeah, that is fine. A good
9 idea.
10 MR. JACOBS: I will let Mr. Rosenfeld
11 address this.
12 THE COURT: Okay.
13 MR. ROSENFELD: Your Honor, I think, as
14 promised, what these findings make clear is the
15 difficulty of sorting out the conduct that was found
16 unlawful from that that is found lawful. And it's
17 not any surprise that these findings should have that
18 effect. When Judge Jackson wrote them, he was
19 thinking about whether there was going to be a
20 Section 1 claim for exclusive dealing. He was
21 thinking about, more pertinent than that, whether
22 there was going to be a Section 1 claim for tying in
23 addition to the Section 2 claim that is set out.
24 Now, we all know what happened, that he did
25 find a tying violation, and he said -- and I think

1 this is very important in understanding the
2 differences between our two perspectives -- and he
3 said, "The integration of the browser and the
4 operating system was an unlawful tying. It wasn't
5 merely unlawful, it was per se unlawful." We don't
6 even have to look to Judge Jackson at whether it
7 makes any difference in the market. This is so bad
8 that it's per se alarming, and these findings, among
9 others, are the ones he relied upon to reach that
10 conclusion.
11 Now, we also note the court of appeals
12 said, "No, that is not quite right." And I went
13 through this before, and I won't repeat. I'll hit
14 the high points, if I can. They said, "First of all
15 it's plainly not per se. It's rule of reason.
16 You've got to go out and see if there was any
17 anticompetitive effect because we don't think you can
18 say in the software markets that integration in and
19 of itself is anticompetitive. It might help
20 consumers, not hurt them. Again, it's the cars and
21 the tires.
22 So the tying claim went and the issue of
23 whether the integration in and of itself was unlawful
24 was not resolved in the government case. That's an
25 open question, except that the government decided not

1 to pursue the claim on remand.
2 What the Court did find unlawful was
3 certain ways of tying it together, and the reason we
4 got to these particular findings -- and I think this
5 is probably a good place to start, that is to start
6 at the back end, and let's look at the findings that
7 we've suggested first because these findings better
8 than any other isolate the anticompetitive conduct
9 in a way that a lot of the other findings for
10 understandable reasons given when they were written
11 don't. So let's look at 160 -- excuse me, 161.
12 161 doesn't say, as a lot of these other
13 findings do, that Microsoft deprived consumers of the
14 ability to buy the separate product because nowhere
15 was it found that that was unlawful. What it does
16 say is Microsoft bound Internet Explorer to Windows
17 95 by placing code specific to the browsing in this
18 same file that provided operating system functions.
19 Starting with the release of Internet Explorer 3.0
20 and OSR 2.0, Microsoft offered only a version where
21 you had this code sharer. Now, that is conduct that
22 the D.C. Circuit found unlawful, and this finding
23 expresses that and cabins it in a way that it doesn't
24 bring in all of this other conduct that wasn't found
25 to be unlawful, like integration in the first place.

1 So that's 161, and that's the logic behind, Your
2 Honor, how we got to that one.
3 Now, let's go to 164. This one, again,
4 talks about the commingling, and it doesn't just say
5 bad. It explains it. It says, "Microsoft's
6 motivation for this was to ensure that the deletion
7 of any file containing browser-specific routines
8 would also delete vital operating system routines and
9 cripple Windows 95." Sanitized? I don't think so.
10 This is not a sanitized finding. This tells it like
11 it is and it identifies what is wrong with the
12 conduct that the D.C. Circuit found.
13 And then it goes on to explain it and to
14 explain how even if you could untangle, it would be
15 prohibitively expensive and difficult. That is
16 conduct that was clearly found to be unlawful.
17 Let's go to 170. Now, this talks about --
18 you remember there was a reference to Mr. Allchin, a
19 senior Microsoft employee in the Windows group. This
20 finding talks about his suggestion and what was done
21 about it. And it says, "Microsoft's technical
22 personnel implemented Allchin's 'Windows
23 integration'" -- in quotes -- "strategy in two ways."
24 First, they did not provide users with the
25 ability to uninstall Internet Explorer from Windows

1 98. The omission of a browser-remover function was
2 particularly conspicuous given that Windows 98 did
3 give users the ability to uninstall a number of other
4 functions. So it's making pretty clear this conduct
5 was bad, it was different, and what the reason for it
6 was. Microsoft took this action despite specific
7 requests from Gateway, one of its OEMs, to provide a
8 way to uninstall IE 4.0. Sanitized? No. Limited to
9 the conduct that was found unlawful? Absolutely.
10 And absolutely appropriate.
11 Now, I want to skip ahead just to go to one
12 other finding in this area that bears on this conduct
13 because it's very important, and that is 213.
14 213 in some ways, Your Honor, is a summary
15 of all of this conduct. It talks about the five ways
16 in which Microsoft impeded the ability to take those
17 tires off the car. It goes through them in order.
18 First of all, it was to thwart the practice
19 of OEM customization. Microsoft forced OEMs to
20 accept a series of restrictions on their ability to
21 reconfigure Windows 95. There were five such
22 restrictions.
23 Now, these are the contract provisions, so
24 this ties the picture together; formalized the
25 prohibition against removing icons and the like,

1 prohibiting OEMs from modifying the boot sequence,
2 prohibited OEMs from installing programs that were
3 alternatives to Windows interface, prohibited OEMs
4 from having icons that were a different size or shape
5 to those from Microsoft; and precluded OEMs from
6 using the Active desktop, which was a device to
7 display available software and the like -- from using
8 that to display third-party brands.
9 Now, those four -- and I believe that's
10 the -- no, I'm sorry, I want to make sure -- yes. I
11 think those are the only particular findings that are
12 relevant to this area. So what did we try to do in
13 those findings? We tried to isolate the conduct that
14 was at issue, the bad conduct that was found unlawful
15 by the D.C. Circuit, and separated out in a way that
16 the other findings that you just walked through don't
17 do.
18 Now, let me show you how that works, and I
19 think -- let me give you some examples, Your Honor,
20 of what the problem is. Let's look at Finding 173.
21 Now, 173 talks about how Microsoft -- this
22 is what one of Judge Jackson's sort of internal
23 summaries in his findings -- and it talks about how
24 collateral alarm has been inflicted on consumers. If
25 you note, he's talking about consumers who have no

1 interest in using a Web browser at all, and he talks
2 about the fact that you couldn't get Windows without
3 the browser. And he's saying that is a problem, and
4 then he also talks about the vices of commingling and
5 so on, which are unlawful. The clear suggestion in
6 this finding and a number of others was that the
7 threshold integrating Windows and IE was a violation
8 that harmed consumers, and that is just not what the
9 court of appeals found. That issue was remanded.
10 Indeed, Finding 408 talks about the
11 procompetitive benefits of that integration. Now,
12 this is at the heartland of the prejudice, confusion
13 and distortion concerns of the Iowa Supreme Court.
14 Because these are the kind of background facts that
15 the Court mentioned, the kind of facts where you
16 would like to park the case, make it easier to
17 present. But the cost of doing that is that you
18 bring in conduct that was not unlawful; and that is,
19 of course, prejudicial to Microsoft.
20 And I submit, Your Honor, that it is
21 inevitable in this record, given the way these
22 findings were written -- and this is not a criticism
23 of Judge Jackson -- but given that he wrote the
24 findings before he figured out what the liability was
25 and then the court of appeals drastically altered to

1 use their language, it's inevitable that the findings
2 are not going to fit with the conduct that was found
3 to be unlawful. And this job of taking these
4 findings and trying to force them into this box so
5 they work is very difficult because of the sequence
6 of events here. And that's why Judge Peterson in
7 Minnesota adopted the approach he adopted. We've
8 attempted to do it by coming up with findings that
9 are to do a job of identifying the unlawful conduct
10 and not the other conduct.
11 Now, the other issue is -- and this is a
12 very poor aphorism to describe the problem here, but
13 an awful lot of what's going on in these findings is
14 akin to the old joke about when you ask somebody what
15 time it is and they tell you how the watch works.
16 The necessary and essential findings here are these:
17 The commingling, the removing Internet Explorer, the
18 prohibiting OEMs from removing Internet icons and so
19 on, those are the essential findings. Then there's a
20 lot of supportive material that talks about how we
21 got there; but, in fact, an awful lot of that
22 material -- first of all, it's supportive and
23 shouldn't be provided with collateral estoppel
24 conclusive effects; but second, it brings with it the
25 very same problem of mixing the bitter and the sweet.

1 And by that I mean the notion that
2 Microsoft said, "The way we win the browser war is to
3 leverage the operating system; that is, to link the
4 two together." It's good marketing and no court has
5 found it to be anticompetitive, and yet a number of
6 these findings refer to that thinking. It was
7 Microsoft's intent they were going to win this
8 competition with Netscape by taking advantage of
9 Windows. That is not unlawful. And, indeed,
10 although we haven't mentioned it, that issue of tying
11 has gone to the D.C. Circuit not once but twice, and
12 both times the D.C. Circuit has not found a tying
13 violation by virtue of the integration. We will get
14 you that other cite, Your Honor. It arose out of an
15 earlier consent decree.
16 So all of these findings that purport to
17 explain the intent behind all of this and illuminate
18 the context, they explain too much. They explain why
19 Microsoft engaged in the legal as well as what the
20 D.C. Circuit found to be unlawful conduct, and that's
21 the vice here.
22 Now, I don't know if it makes sense, Your
23 Honor, and it's helpful to you for me to go through
24 each one of them, but I think the principal vice
25 is -- and this is an area -- and I want to be very

1 cautious because of Mr. Jacobs' reference to
2 Microsoft's agreement. I said -- when Your Honor
3 asked me a question, I said, "To the extent that the
4 findings mix the legal and illegal, we can't be
5 precluded from introducing and litigating the legal."
6 And I know you're shaking your head, and that's a
7 very important aspect of our view here. These
8 findings incorporate a lot of the legal.
9 Now, I'm prepared to walk through them if
10 that would be useful to Your Honor. I'll leave that
11 to you.
12 THE COURT: Sure, whenever you want to
13 start.
14 MR. ROSENFELD: Okay. I think the first
15 one here was 156. Is that right, Mr. Jacobs?
16 MR. JACOBS: I believe so, yes, in the
17 section.
18 MR. ROSENFELD: Okay. This one talks about
19 how do we blunt the threat, and it talks about the
20 thinking of Microsoft in terms of how we're going to
21 win this browsing war. And it says we've got to
22 increase market share. Duh. I mean, that is classic
23 marketing strategy, classic marketing strategy.
24 There is nothing in this finding that relates to
25 anything but the bundling, the threat that was

1 perceived, and ultimately the response which comes
2 out in subsequent findings is that it was integrated.
3 That was one of the strategies and that is not
4 unlawful.
5 You go to Finding 158, and it's more of
6 exactly the same story about how Microsoft integrated
7 IE and Windows. Legal conduct, inability to remove.
8 Now, this, to the extent that it implicates the
9 commingling and the like and the difficulty with the
10 removal, it's one of the supportive findings for 161,
11 164, 170 and the like.
12 Beyond that, it talks about what is a
13 necessary market dynamic, which is if Microsoft can
14 bind and link Windows and the browser, other folks
15 are going to be put in a position of being the second
16 browser on the block, but there's nothing unlawful
17 about that. That's just competition. And if we have
18 any doubt about it, look at Finding 408 where Judge
19 Jackson says, "Microsoft's conduct" -- and remember,
20 the other side of binding or bundling or linking is
21 we gave it away for free. So Netscape was out there
22 charging -- I believe it was $39 for their browser.
23 Microsoft said, "Get the operating system and you get
24 the browser at no extra charge." Anticompetitive.
25 The court of appeals was quite explicit about that.

1 I believe it's at page 68 where they said, "No, that
2 kind of conduct is beneficial." And even Judge
3 Jackson said, "Microsoft's behavior by linking the
4 browser, giving it away for free, was
5 procompetitive." That's 159.
6 160 talks about how it was bound in a
7 technical fashion. And, Your Honor, that finding is
8 summed up in 161, which is one of the key findings
9 that I already talked about relating to the
10 commingling.
11 164, similarly, is one of the findings we
12 just talked about that relates to the commingling.
13 This is the unlawful conduct.
14 Now --
15 THE COURT: You concede 164; right?
16 MR. ROSENFELD: We did, yes.
17 THE COURT: Go ahead. Sorry.
18 MR. ROSENFELD: 165 and a number of the
19 other subsequent findings, again, are supportive.
20 They tell the story. They tell you how the watch
21 works. The unlawful conduct is summed up in that
22 particular finding, however.
23 Now, 166 and 167, I think, again, posed
24 this issue rather directly. This discusses some
25 biplay between Jim Allchin and Paul Maritz, two very

1 senior Microsoft executives. And Maritz's responses,
2 at least in my copy with all the inserts and
3 deletions, it's a little hard to read. It's
4 background, and it talks about how "Windows
5 integration must be our key strategy." (A), I mean,
6 this is taking advantage of the Windows product and
7 integrating the browser for the purpose of competing.
8 This is not unlawful conduct.
9 Now, 170, as I've already said, relates to
10 those aspects of the Windows integration strategy
11 that the Court found to be anticompetitive and that
12 again is -- at least one aspect is eliminating the
13 "Add/Remove" utility as a way -- excuse me,
14 eliminating IE from the "Add-Remove" utility so that
15 it couldn't be deleted. That is the unlawful
16 conduct, but only the unlawful conduct.
17 173, I think -- and I don't believe I've
18 talked about this. I think this illustrates maybe
19 better than the number the problem of legal and
20 illegal conduct and maybe I did talk about it. I
21 hope I say the same thing this time as I said before.
22 What it says is -- this is Judge Jackson
23 summarizing -- "Microsoft's actions have inflicted
24 collateral harm." Now, what actions is he talking
25 about? Well, we know that one of the things he was

1 concerned about was the integration itself, that
2 people couldn't go out there and buy Windows without
3 IE. So this finding necessarily includes the whole
4 issue of integration that the Court found lawful, and
5 this finding was not even cited by the D.C. Circuit.
6 This is true with a number of the others as
7 well. And a number of these findings, as you might
8 suspect, were cited by the D.C. Circuit in connection
9 with the tying claim because that's also what Judge
10 Jackson was focusing on.
11 174 does the same thing: By implication,
12 at the very least, attacks the integration strategy
13 itself as well as the commingling. The commingling
14 is dealt with in 161 and 164.
15 175, again, a textbook example of the
16 problem here. No technical reason can explain
17 Microsoft's refusal to license Windows 95 without
18 Internet Explorer. My response to that -- and I
19 don't mean to be fickle -- so what? In business you
20 don't have to have a technical justification. There
21 was a marketing justification. Microsoft thought
22 this was a better way to market those problems.
23 Now, the Court found that certain ways in
24 which it technically bound them were unlawful, but
25 the integration itself wasn't. The tying claim is

1 predicated on the fact that you had to have some
2 technical justification. The tying claim was
3 reversed and remanded. This is a finding that would
4 have supported that claim. That claim was reversed
5 and remanded. So it highlights, again, the mixing of
6 the legal and illegal conduct.
7 That is 176. 177, again, you just read the
8 first sentence. It just makes this crystal clear.
9 There is no technical justification for Microsoft's
10 refusal to meet consumer demand for a browserless
11 version of Windows 98. There may, however, have been
12 a good business reason for doing it this way. A good
13 competitive reason. The antitrust laws are designed
14 to foster competition. Judge Jackson in applying 408
15 found, in fact, Microsoft's actions did just that.
16 This finding also was not cited by the D.C. Circuit.
17 191, again, it's precisely the same point,
18 Your Honor. Microsoft could offer consumers all the
19 benefits of the current Windows 98 package by
20 distributing Internet Explorer and Windows separately
21 and allowing OEMs or customers themselves to combine
22 the product if they wish. Yes, but that's not what
23 the law requires. And Microsoft's integration was
24 again not found unlawful. There's probably no
25 technical reason why you can't provide shoes without

1 shoelaces. But there's a very good marketing reason.
2 Even though shoes and shoelaces are sold separately,
3 doesn't make them separate products. Putting shoes
4 in shoelaces selling them together, is tying. There
5 was a very good business reason. This finding
6 necessarily focuses on what was legal about
7 Microsoft's conduct, not what was illegal.
8 And again, 192 does exactly the same thing.
9 It focuses on the fact that, you know, while there
10 are unrelated benefits that a user can obtain without
11 the integrating copy, they could get the bulk up.
12 Microsoft nevertheless has forced people, according
13 to this finding, to make the choice to have Internet
14 Explorer even if they don't want it. Again, not
15 unlawful. Now, I don't know, Mr. Jacobs, where you
16 stopped. Am I about -- "best of breed."
17 MR. JACOBS: We went through the "best of
18 breed," 198.
19 MR. ROSENFELD: And I think, again, 193,
20 194. These are all, again, supportive potentially of
21 the findings, although this relates to "best of
22 breed" and so on, and in Judge Jackson's view that
23 wasn't a good enough reason that you were providing a
24 "best of breed" operating system and browser and
25 integrating it. His view was that wasn't a good

1 enough reason.

2 Now, its interesting, Finding 194, not only

3 was it not cited by the D.C. Circuit, it wasn't even

4 cited by Judge Jackson in his conclusions of law.

5 195, I think, has been eliminated, and I think that's

6 where we stopped.

7 So, quick summary: The finding that

8 Microsoft has agreed to identify the unlawful conduct

9 as found by the D.C. Circuit, these other findings

10 are at best supportive and worse, they mingle and

11 lunge together the legal and the unlawful conduct

12 principally because of the way they were crafted by

13 Judge Jackson, and there simply can't be preclusion

14 in those findings. Essentially Microsoft can't be

15 precluded from presenting evidence about conduct that

16 was found to be lawful by the D.C. Circuit.

17 THE COURT: Mr. Jacobs.

18 MR. JACOBS: Yes, sir.

19 Your Honor, I have to say I was really,

20 really struck by a number of issues that

21 Mr. Rosenfeld raised here, and I think what

22 Mr. Rosenfeld is saying goes exactly to our argument

23 that we need to preclude Microsoft from relitigating

24 the government case, as Mr. Rosenfeld is trying to do

25 here. Mr. Rosenfeld really paints a misleading

1 picture about what was litigated and decided and
2 necessary to the judgment in the government case.
3 He's throwing out the tying claim as some sort of
4 bogey man and just apparently to create some sort of
5 confusion that there was some conduct that was
6 subject -- some of the conduct was challenged under
7 tying. Some of the conduct was challenged under
8 monopolization, but it's different. We have no idea
9 what it is. That is just plain wrong.
10 Microsoft before the D.C. Circuit said the
11 Section 2 claims, the monopolization claims, are
12 premised largely on the same conduct said to violate
13 Section 1. This is the same stuff that they are
14 talking about. The conduct that was at issue in the
15 tying claim, yes, it was Microsoft's integration of
16 Windows and IE, and how did they go about doing that?
17 They went about doing that by commingling code and
18 precluding people and users from removing IE and
19 other -- the other stuff that it took that were
20 precisely the conduct that were found to be illegal
21 under Section 2. How do we know that? The D.C.
22 Circuit states at 253 F.3d at 96: "The two practices
23 the plaintiffs have most ardently claimed as tying
24 violations are, indeed, a basis for liability under
25 plaintiff's Section 2 monopoly maintenance claim."

1 This is the same conduct we are talking
2 about, a set of conduct that Microsoft engaged in
3 that gave rise to claims under various legal
4 theories. The fact that the D.C. Circuit -- and
5 let's make sure we get this one right too -- the D.C.
6 Circuit remanded the tying claim, they didn't say,
7 "Hey, this is perfectly all right. This was legal."
8 The D.C. Circuit remanded to the district court
9 because the district court applied a per se rule
10 analysis rather than the rule of reason analysis and
11 it remanded and said, "Go try it again if you want,
12 Government, if you want to challenge this." But it
13 didn't say, "Hey, okay," and it certainly didn't say
14 that everything that was challenged as tying was okay
15 because that conduct was also challenged under
16 Section 2 under the monopoly maintenance claim and it
17 was found to be illegal.
18 I was struck by Mr. Rosenfeld's comments on
19 a number of these findings. Finding 159, if we could
20 put that up. Now, Mr. Rosenfeld said, you know, this
21 was just procompetitive stuff. This was just good
22 business. 159 was the finding that Microsoft
23 challenged as clearly erroneous before the
24 D.C. Circuit and the D.C. Circuit said, quote, at
25 253 F.3rd 66: "We reject Microsoft's argument that

1 we should vacate Finding of Fact 159." Microsoft --
2 and now Microsoft is saying, "That was all right.
3 That was a good thing." And see, this is exactly the
4 problem that we're talking about with Professor
5 Murphy, for instance, where Microsoft -- that unless
6 it is bound by all the determinations that were
7 necessary to reach these conclusions, that Microsoft
8 violated the law. Unless it is bound by those
9 findings, not just these findings that simply
10 describe in part the conduct, but all of the
11 procompetitive justifications Microsoft asserted in
12 support of this conduct at the government case,
13 Microsoft is going to try to relitigate those issues
14 again, here.
15 And that is precisely what collateral
16 estoppel should prevent and what we are seeking to
17 prevent. That will lead to juror confusion more than
18 anything else.
19 Finding No. 175 was another one that
20 Mr. Rosenfeld said, "Hey, this was good." The only
21 relevance of this finding was to tying. This is just
22 simply looking at the tying claim. The tying claim,
23 as I noted, it's the same conduct as the
24 monopolization claim. Finding 175 is cited --
25 explicitly cited by the D.C. Circuit in finding

1 that -- in finding what Microsoft did had an
2 anticompetitive effect. In its discussion -- and I
3 would also point out that when Mr. Rosenfeld is
4 talking about the integration of IE and Windows, that
5 was solely tying and that was okay.
6 Let's take a look at the title of the
7 D.C. Circuit section here at 253 F.3rd 64. It's
8 "Integration of IE and Windows," and it's how -- what
9 they go through and discuss is how Microsoft
10 technically integrated IE and Windows in such a way
11 to foreclose Netscape from the OEM channel, thereby
12 crushing Netscape and helping Microsoft preserve its
13 monopoly in the Windows operating system market.
14 All of this discussion is in the
15 monopolization section. Finding 174 -- did I say
16 174? 174 and 175 are both instances that
17 Mr. Rosenfeld said, "This is good conduct. This
18 might just be business, but that is what a competitor
19 is supposed to do." That, again, was cited
20 explicitly by the D.C. Circuit.
21 Finding of Fact 192, again, Mr. Rosenfeld
22 saying nothing wrong with that, cited in the
23 D.C. Circuit's discussion of the lack of
24 justification and the anticompetitive harm from
25 Microsoft's integration. It's technical integration

1 of IE and Windows.
2 THE COURT: Is that at --
3 MR. JACOBS: I'm sorry?
4 THE COURT: Was that at 66 also?
5 MR. JACOBS: 65.
6 THE COURT: Sorry.
7 MR. JACOBS: So it's utterly amazing that
8 now Microsoft is going to come back here and it
9 reveals what Microsoft wants to do here. It wants to
10 minimize what was found in the government case so
11 that it can go through and collaterally attack the
12 judgment and that's why we need these underlying
13 facts. These facts that were litigated, they were
14 important, clearly were important to the parties and
15 were seen as necessary by the Court. All of this
16 analysis of these determinations of the harm, it's
17 the harm caused by Microsoft's technical binding of
18 Internet Explorer to Windows. That's the same
19 technical binding that was challenged as tying and as
20 a monopolization -- onto the monopolization claim.
21 Does it make sense to move on?
22 Mr. Rosenfeld dealt with some of the other findings
23 that I hadn't gotten to yet, up to 213. Does it make
24 sense to move into a next section now?
25 THE COURT: Why don't we take a break.

1 MR. ROSENFELD: Your Honor, can I have one
2 minute to respond to this last point and tie it up in
3 a bow?
4 THE COURT: Sure.
5 MR. ROSENFELD: Instead of arguing what the
6 D.C. Circuit said, Your Honor, I would just refer you
7 to 253 F.3rd starting at page 84 and going through
8 page -- I guess it's at least 89. That is the
9 D.C. Circuit's discussion of tying, as opposed to the
10 monopoly maintenance claim. The issue there was
11 whether the integration of Windows could be deemed
12 anticompetitive per se.
13 The Court went through and talked about the
14 procompetitive benefits of integrating products. The
15 tying claim was different than these specific
16 instances of conduct that were found to violate the
17 monopoly maintenance claim. Yes, some of them were
18 relevant to the tying claim, but the tying claim was
19 remanded. These instances of conduct were found
20 unlawful in the monopoly maintenance. They are
21 different.
22 THE COURT: Very well. One-thirty.
23 MR. ROSENFELD: Thank you, Your Honor.
24 MR. HAGSTROM: Your Honor, would it be
25 possible to start at one?

1 THE COURT: Only if my court reporter says
2 it's okay.
3 Okay. One o'clock.
4 (A noon recess was taken.)
5 THE COURT: All right. I believe
6 Mr. Jacobs, right.
7 MR. JACOBS: Thank you, Your Honor. I am
8 going to really, really strive to get through the
9 remainder of these findings in the afternoon here.
10 My wife was very kind when I called last night and
11 said this was going to be continuing on today, and I
12 would really dread it if I had to make a call that
13 like that again.
14 MR. ROSENFELD: I will get you my wife's
15 number.
16 THE COURT: It sounds like you have the
17 last word at home; right? "Yes, dear."
18 MR. JACOBS: Mr. Rosenfeld already alluded
19 to many of the findings that Microsoft says -- or
20 actually, I guess it's one finding that Microsoft
21 says was necessary to the conclusion that Microsoft's
22 contractual restrictions on OEMs violated the
23 antitrust laws. And up here we have on the screen a
24 selection -- conclusion from the D.C. Circuit talking
25 about how Microsoft's OEM license agreements

1 prohibited OEMs from removing desktop icons, folders,
2 "Start" menu items and entries, altering the initial
3 boot sequence and otherwise altering the appearance
4 of Windows desktop and thereby preventing OEMs --
5 this is the analysis that the D.C. Circuit
6 followed -- by preventing OEMs from removing the
7 visible means of user access to IE.
8 The license restrictions, the ones relating
9 to the removal of desktop icons, et cetera, prevented
10 OEMs from preinstalling a rival browser such as
11 Navigator and therefore protected Microsoft's
12 monopoly competition of middleware quite otherwise
13 present. Microsoft's prohibition on the alteration
14 of the boot sequence also had an anticompetitive
15 effect.
16 Finally, Microsoft's prohibition against
17 OEM adding icons or folders in different size or
18 shapes had a similar -- and from using the active
19 desktop future had similar anticompetitive effect.
20 Now, the findings that were necessary to
21 this are not, as Microsoft says, just 213, but the
22 findings are those from 202 to 229. And how do we
23 know this? We look at Judge Jackson's -- please go
24 back to that one, sorry -- Judge Jackson's outline.
25 Microsoft's response to the browser threat, Roman

1 Numeral (V), letter (F), "Excluding Navigator from
2 the important distribution channels," this being the
3 OEM channel, and it's in the section preventing OEMs
4 from removing the ready means of accessing Internet
5 Explorer and from promoting Navigator in the boot
6 sequence. These findings all -- these were the
7 findings that the district court made on the issues
8 that were litigated, raised by the parties and that
9 the district court as affirmed by the D.C. Circuit
10 found to be necessary to the judgment.
11 Actually, here it's within this set of
12 Findings, 202 to 229. Your Honor had asked this
13 morning about whether or not there were findings that
14 were necessary to portions of the claim that the
15 D.C. Circuit overturned, and I believe it's 211 and
16 212 -- or 211 that we omitted from this as well as
17 219 and 20, which are those findings that -- where
18 the D.C. Circuit altered the judgment of the district
19 court. It was as to Microsoft's prohibition on OEMs
20 being able to launch at initial bootup a screen that
21 totally obstructed the Windows desktop. So we've
22 removed the findings of fact that were necessary
23 solely to that portion of this conduct. But the
24 D.C. Circuit, notwithstanding the modification to the
25 liability determination still found that all of the

1 remaining conduct here had exclusionary effect, had
2 anticompetitive effect and it was not justified. So
3 the remaining findings here are those findings on
4 which the surviving portion of this judgment relied.
5 So let's go through these really quickly,
6 hopefully. 202. Okay. This is talking about --
7 this is establishing when Microsoft -- well,
8 basically, the contracts that Microsoft -- these
9 contracts enhanced Microsoft's technical binding of
10 IE to Windows. These were basically Microsoft
11 realized that technically savvy OEMs, you know, they
12 can get around some of these. So what we need to do
13 is write a contract preventing OEMs from getting rid
14 of -- well, from disallowing end users to uninstall
15 IE.
16 203, again, this establishes the
17 anticompetitive purpose and effect of Microsoft's
18 conduct. If OEMs could remove IE, then Navigator,
19 OEMs would be able to install Navigator. Now, if
20 they take that option away, Navigator is excluded
21 from the desktop.
22 Moving on to 204 here -- I'm sorry, 205.
23 Again, this is the conduct. Now, 213 mentions
24 Microsoft -- 213 Microsoft formalized the prohibition
25 against removing icons, folders or "Start" menu

1 entries that Microsoft itself had placed on their
2 desktop. Well, 205, that is Microsoft's conduct --
3 before just purely formalizing, this was the
4 beginning of that illegal conduct. Microsoft was
5 basically bullying Compaq, one of its largest
6 customers, and saying, "We're going to threaten to
7 take away your license to Windows if you remove these
8 icons, notwithstanding the fact you're one of our
9 largest customers."
10 206 and 208, also same -- go to the exact
11 same -- well, this is the conduct. This is what
12 Microsoft learned of Compaq's plans and Microsoft
13 sends Compaq a letter and said, "You better restore
14 these icons."
15 208 then. The Court in its confrontation
16 with Compaq, Microsoft demonstrated that it was
17 prepared to go to the brink of losing all Windows
18 sales through its highest-volume OEM partner in order
19 to enforce its prohibition against removing
20 Microsoft-related icons from the desktop. This is
21 how you identify exclusionary conduct. This is how
22 the Court identified this stuff as exclusionary, and
23 this was an important, important issue.
24 Going on. 209. Again, how Microsoft then
25 went ahead and solidified these contractual

1 restrictions.

2 210, you know, basically Microsoft willing

3 to impose costs on its customers. Again, these are

4 the way that the Court determined that this conduct

5 was exclusionary.

6 212. Microsoft finds out what's going on,

7 and Bill Gates writes to Microsoft's executive by the

8 name of Kempin: "Winning Internet browser share is a

9 very very important goal for us." And then three

10 weeks later Kempin talks to his OEM folks and

11 Microsoft begins -- imposes these restrictions on the

12 boot sequence. This was cited by the D.C. Circuit

13 at -- let's see, 253 F.3d at -- one more page here --

14 at 62. The anticompetitive effect of the license

15 restrictions is that Microsoft itself recognizes that

16 OEMs are not able to promote rival browsers which

17 keeps developers focused on APIs and Windows.

18 Okay. So moving on to 213. This is the

19 one that Microsoft says -- this is the only one that

20 you need to read in order to know -- that the Court

21 needed to reach in order to find that Microsoft's

22 conduct was illegal.

23 But the remaining findings here for which

24 we're seeking preclusive effect, 214, the OEMs -- 90

25 percent of the OEMs were subject to these

1 restrictions. That's how you know these are illegal.
2 Microsoft argues you need to show that these -- that
3 these restrictions have a substantial impact. Well,
4 that is what they argued at the district court level
5 and the D.C. Circuit and, in fact, these are the sort
6 of findings you need to reach that.
7 215. Again, how do you know it's illegal?
8 OEM customers themselves were stridently opposed and
9 Microsoft's conduct damaged the goodwill between it
10 and several of the highest volume OEMs.
11 Let's move on. The fact that Microsoft was
12 willing to sacrifice that goodwill is indicative of
13 the anticompetitive purpose and effect of this
14 conduct.
15 Now, again, Microsoft -- this is dealing
16 with 217. We will skip to my notes here. You know,
17 this is the effects of the conduct, as is 218.
18 Moving on to 221. I just -- really what
19 we're -- I think we're going to hear the same thing
20 over and over and over again, which is why I want to
21 sort of speed through this a little bit more is
22 because really the disagreement is on what -- which
23 of those findings were really necessary. Well,
24 Microsoft says it's this ultimate finding. That is
25 the only thing that was necessary. And what we're

1 saying is, no, that's not. You needed to reach --
2 the Court needed to reach all of these issues. They
3 were litigated. They were important, and in
4 accordance with the standards set out by the Iowa
5 Supreme Court that rejects the distinction between
6 ultimate and evidentiary facts, all of this was
7 important to the parties and necessary for the
8 judgment.
9 Let's move on, 220. Okay. So Microsoft
10 is -- again, these are Microsoft's assertions.
11 221, I'm sorry, Microsoft's assertions on,
12 you know, this doesn't have any effect, but, you
13 know, the Court saying, no, it does. It has
14 anticompetitive effect. Microsoft offers some
15 justification. Well, again, we want to give our
16 consumers the benefit of the features that we want to
17 in 222, the features that we want to provide our
18 customers. Again, the courts found these were not
19 procompetitive justification that justify its
20 conduct.
21 223, same thing. Dealing with a series
22 that Microsoft made obviously important to the party
23 and rejected by the Court.
24 Let's move on to 228 and 229, again,
25 rejecting Microsoft's justification. So 229, let's

1 move on, and that Microsoft's restrictions are
2 considerably more restrictive than those imposed by
3 other operating system vendors. Again, the analysis
4 undertaken in the finding of fact by the federal
5 district court followed the same framework that the
6 D.C. Circuit followed when it analyzed this conduct.
7 And its analysis of Microsoft's conduct was at, let's
8 see, 253 F.3rd at 60 -- I'm sorry, at 59, beginning
9 at 59 and going through 64 where it talks about the
10 license issues to OEMs, the anticompetitive effects
11 of the license restrictions, citing Findings 213,
12 203, 159, 217, 210, you know, Microsoft again
13 challenging Finding of Fact 159 relating to consumer
14 confusion.
15 The Court rejecting that, citing then also
16 Finding 210, Finding 212 and then rejecting
17 Microsoft's justifications for license restriction
18 with the one exception, and that is Microsoft's
19 restrictions on OEMs being able to -- being able to
20 invoke at initial bootup an alternate desktop for
21 which we've removed those findings.
22 MR. ROSENFELD: My turn?
23 MR. JACOBS: Yes.
24 MR. ROSENFELD: Thank you. I do think,
25 Your Honor, in the interest of speed, that I did talk

1 about a number of these, so let me just highlight a
2 couple of themes here. One, if you go back and look
3 at Finding 213 in connection with 161, I believe it
4 was 170 and 174 that the unlawful conduct and only
5 the unlawful conduct is captured -- I'm sorry, its
6 161, 164, 170 and 213, that the unlawful conduct in
7 this area is captured by those findings.
8 Second, we would point out that in addition
9 to this issue of integration -- and I would say to
10 Your Honor Judge Kollar-Kotelly's decision as well as
11 the D.C. Circuit's decision makes it quite clear that
12 the issue of integration, whether Microsoft can
13 design its products to have a browser was not
14 resolved by the Court. And if you look at the
15 abundant literature in the marketplace about this
16 case -- and it's generated a lot of writing -- one
17 issue that everybody most focused on at the beginning
18 was whether the courts were going to dictate to
19 companies like Microsoft what you could include in
20 your operating system and what you couldn't. That
21 was the core issue. It's the issue in the Yew
22 proceedings. It's the issue in the South Korean
23 proceedings; that issue of who is going to control
24 product design. That issue was not resolved in this
25 case.

1 Now, the issue of whether you could limit
2 people's ability to remove those features was
3 resolved in this case, but those are logically and
4 operationally different issues. The issue of what
5 you can sell together is different from whether you
6 need to allow the end user to decide if he doesn't
7 want to take advantage of that future; and that,
8 again, I go back to cars and tires and lug nuts.
9 Now, so that issue, to the extent that it finds its
10 way into any of these findings, is definitely clearly
11 prejudicial.
12 Second, I'm not too good even with the low
13 tech, but let me open this up. There we go. That
14 might help. That's okay. Thank you.
15 But that is not the only issue of lawful
16 and unlawful conduct because you'll remember there
17 were other liability violations that were reversed by
18 the D.C. Circuit. Overriding user's choice of
19 default browser, prohibiting OEMs from causing a
20 nonuser Windows interface to launch automatically,
21 and that figures in a number of these particular
22 findings.
23 I'm trying to think whether any others on
24 this chart. I think those are the main ones, Your
25 Honor.

1 All of these findings are included in 213,
2 160, 164 and 170.
3 In addition, of these findings that
4 Mr. Jacobs says were so necessary and so essential,
5 the following were not even referenced by the
6 D.C. Circuit: 202, 205, 206, 208, 208, 209, 215,
7 216, 218, 221, 222, 223, 228 and 229.
8 Now, we're not saying that because a
9 finding is cited in an opinion that necessarily makes
10 it necessary and essential because we have to look at
11 how it was used and so on. There was a block quote
12 describing what the lower court did, but it does seem
13 to us quite clear that when a finding is not cited,
14 there are serious questions about whether it was
15 really necessary and essential to the liability
16 determination, and there are just lots of those
17 findings here.
18 Now, let me just -- again, I don't want to
19 go through all of them because I think we've done
20 that and Mr. Jacobs and I might have a truce on how
21 many of these we go through, but if you just look at
22 202, it starts out by saying "Since the release of
23 Internet Explorer 1.0 in July 1995, Microsoft has
24 distributed every version of Windows with Internet
25 Explorer included. Refusing to offer OEMs" -- it

1 says a little bit lower -- "a browserless and
2 appropriately discounted version forces OEMs to take
3 and pay for Internet Explorer." Again, that is not
4 unlawful conduct, and it's woven into this particular
5 finding.
6 Similarly 203 -- and I'm not going to read
7 through the whole thing -- but it talks about the
8 prohibition on substantive user interfaces. Not
9 unlawful conduct. And again, what is unlawful is in
10 213 in the other findings.
11 We got to a series of findings relating to
12 Compaq and these findings, again, are supportive of
13 the Court's general conclusion that the contract
14 provisions and some of the technological provisions
15 were unlawful under the antitrust laws. But again,
16 this is an example, one example -- yes, it's a big
17 OEM -- but this is supportive evidence of the
18 "necessary and essential" finding. Clearly, the Iowa
19 Supreme Court, the Fourth Circuit, have set forth
20 clear guidance that the who, what, where and so on of
21 all of this, all of the background facts, all of the
22 context, all of the foundation, that's not all
23 "necessary and essential" to the liability finding.
24 Otherwise, you will have this panoply of facts in
25 which the Iowa Supreme Court invades, that's what

1 you'll have, and that's what their guidance was, you
2 shouldn't have because it's prejudicial.
3 Now, I could go through these findings, but
4 if you look at 207, 208, it's examples. It's
5 subsidiary findings.
6 212 again makes reference to "substitute
7 user interfaces." It quotes a report from Mr. Kempin
8 where he talks about control over the start-up
9 screens. The Court said some of those things were
10 unlawful, some of them weren't unlawful, and that
11 this was a finding that was written before the
12 D.C. Circuit had an opportunity to parse Judge
13 Jackson's findings to decide which were right and
14 which were wrong.
15 Similarly, Your Honor -- and I have trouble
16 reading the interlineated version -- 214 also talks
17 about "substitute user interfaces," among other
18 restrictions.
19 In short -- and I won't go into all of
20 these because the vice is principally the same in all
21 of them: 217, 218, 221 all make reference to the
22 "substitute user interface."
23 223, what we've tried to do is identify
24 findings that isolate the unlawful conduct from the
25 lawful conduct. The remainder of these are not only

1 subsidiary, but they merge all that together and
2 that's what is improper. I will stop.
3 MR. JACOBS: Just really briefly --
4 actually, I think we are making progress here.
5 Mr. Rosenfeld, it's interesting every time
6 he uses the term "supportive," what Microsoft was --
7 what these findings of fact were establishing with
8 respect to Microsoft's conduct towards Compaq, that
9 was the illegal conduct. That wasn't just examples.
10 That was the illegal conduct. How could -- Microsoft
11 says, "Well, we need to preclude Microsoft from
12 only" -- you know, the only important issues were,
13 What was the conduct that was illegal found to be
14 illegal? Well, that was it. It wasn't just this
15 toned-down, you know, one-sentence summary of here is
16 what Microsoft did. It was the who, what, where,
17 when, why; and the Iowa Supreme Court certainly
18 didn't suggest otherwise. It would be inconsistent
19 to suggest that only -- that collateral estoppel only
20 applies to ultimate facts. That's not what the
21 Supreme Court of Iowa said. These issues that were
22 important, that were litigated and clearly
23 Microsoft's conduct towards Compaq was important.
24 Now, Mr. Rosenfeld also makes reference to
25 a couple of references to the alternative desktop

1 invoking that. To the extent that language still
2 made it into these findings can be excised just as
3 easily as Microsoft excised it from the one finding
4 of fact that they say is the only -- which one is
5 that? 212, 213 -- that Microsoft says is the only
6 one that is necessary and essential. That one lists
7 one, two, three and four, and Microsoft just took out
8 the reference to "launching alternate desktop." That
9 is not a big deal.
10 What matters here is that the D.C. Circuit
11 went through and it analyzed these findings and found
12 that notwithstanding our finding that this wasn't
13 illegal, that this alternate desktop wasn't illegal,
14 it still had all of the anticompetitive effects that
15 we need to find that it violated the antitrust laws.
16 I guess maybe we should move on now to 230
17 to 239 here.
18 THE COURT: I have 230.
19 MR. JACOBS: 230 to 238.
20 THE COURT: I show 230 to 233, 235 to 241;
21 am I incorrect?
22 MR. JACOBS: No. That is right, Your
23 Honor. And actually could you put that last slide
24 back up, please.
25 Last two sections I'm going to deal with

1 briefly. Well, 230 to 238, that section in the
2 outline of findings of fact pressuring OEMs to
3 promote Internet Explorer and not preinstall or
4 promote Navigator.
5 Now, this is one of those instances where I
6 think Microsoft and we just have a fundamental
7 disagreement on what the effects of the D.C. Circuit
8 decision was.
9 Microsoft says, "Well, this wasn't" --
10 "This wasn't included within any of the acts what
11 Microsoft says are 12 specific acts the D.C. Circuit
12 found to be illegal." This was a holding of
13 Judge Jackson that the D.C. Circuit did not overturn,
14 and Judge Kollar-Kotelly on remand and Microsoft
15 likes to point to Judge Kollar-Kotelly on remand,
16 Judge Kollar-Kotelly said, "The D.C. Circuit did not
17 overturn one of the conclusions. It's still
18 binding." And this is one of those conclusions.
19 And Findings 230 to 238, we can go through those.
20 These are the findings that discuss -- that establish
21 that Microsoft threatened OEMs that did not toe the
22 Microsoft line in promoting Internet Explorer vs.
23 Navigator.
24 Now, Microsoft says these are just -- this
25 would be inconsistent to talk about this conduct when

1 the D.C. Circuit said, "Oh, Microsoft's offering of
2 incentives to IAPs, for example, to promote Internet
3 Explorer, that was found not to be illegal." But
4 this is entirely different here. What we're talking
5 about is Microsoft using threats against OEMs that
6 did not comply with Microsoft's wishes. That is what
7 the federal district court found to be illegal and
8 that the D.C. Circuit did not overturn on appeal.
9 Let's just go through these quickly. 230,
10 231, Microsoft -- okay. Here is where Microsoft did
11 reward-valuable consideration OEMs that took steps to
12 promote Internet Explorer, but now let's move on.
13 Sorry. 232, but Microsoft went beyond that, and that
14 the companies dealings with Compaq demonstrated that
15 Microsoft was willing to go beyond that.
16 Microsoft -- this was around the time that
17 Microsoft was trying to remove the MSN and Internet
18 Explorer icons that were discussed earlier.
19 Microsoft expressed its displeasure to Compaq and it
20 veiled threats to Compaq to do cooperative ventures
21 with its competitors.
22 Moving on, please. Okay. So that had an
23 effect. Compaq relented.
24 So 240 -- I'm sorry, 234, 235, and then
25 Microsoft's relations in Compaq illustrate the

1 blandishments Microsoft extends and its relations
2 with Gateway and IBM. I mean, this was IBM here that
3 Microsoft is threatening the pressure is willing to
4 apply to OEMs.
5 And then 236, this is Microsoft's conduct
6 towards Gateway.
7 237 and 38, and this is how Microsoft
8 retaliated against IBM when IBM did not toe the line
9 with Microsoft. These are the findings that
10 establish Microsoft's conduct with respect to use of
11 threats and incentives. And interestingly, in front
12 of Judge Reis when we moved for collateral estoppel
13 the first time, we listed the conclusions of law.
14 This was one of the conclusions of law that Judge
15 Reis adopted, that Microsoft -- that Microsoft used
16 threats and incentives. Well, Microsoft didn't --
17 never appealed that. Microsoft appealed Judge Reis's
18 application or the standard that Judge Reis used in
19 determining which findings were necessary.
20 And Microsoft, again, really, in its
21 briefing hasn't shown any reason why this liability
22 determination did not survive.
23 Actually, let me go on briefly then. I
24 will cover 239 -- I'm sorry -- yeah, 239, 240 and
25 241. These last three findings -- these are the

1 effects of Microsoft's conduct. Microsoft's conduct
2 in the OEM channel effectively exiled Navigator from
3 the OEM channel. The effects are crucial to a
4 finding that there was a violation of the antitrust
5 laws, and I will turn it over.
6 MR. ROSENFELD: Okay. Thanks.
7 First of all, Your Honor, I want to be
8 quite clear about these conclusions because if you
9 look at plaintiffs' brief before this Court, their
10 argument about 230 to 233 and 235 to 238 is not that
11 it was essential to a conclusion or one of the 12
12 acts breached by the D.C. Circuit, but rather that it
13 was essential to one of the conclusions reached by
14 Judge Reis. Okay. So it's a very different
15 standard, and we would say not the appropriate one,
16 number one, and they are quite unequivocal about that
17 in their brief.
18 Number two, it is not the case that those
19 conclusions not been challenged. Microsoft
20 challenged before the Supreme Court of Iowa the
21 standards that Judge Reis applied, how she applied
22 the necessary and essential tests. The findings were
23 the best example of how she went astray. The
24 conclusions -- her conclusions are really nothing
25 more than another variant of those findings. We

1 challenged them there and we have challenged them
2 here. In all of these, the Supreme Court reversed
3 and remanded her decision and turned to you to figure
4 out what findings are necessary and essential and
5 which ones are not. It didn't say the conclusions
6 stand, the findings don't. It reversed her decision
7 and remanded it to you.
8 Now, looked at from that vantage point,
9 first of all, it is not an argument that these
10 findings are essential, that they are essential to a
11 conclusion of law or a liability finding that wasn't
12 found by the D.C. Circuit. That's number one, and I
13 would say that's dispositive.
14 Second, these particular findings were not
15 relied upon by the D.C. Circuit. Virtually none of
16 them found its way into the D.C. Circuit's opinion.
17 Plaintiffs don't quarrel with that. They say it is
18 true, it is true that the D.C. Circuit didn't really
19 even address this issue, but that doesn't matter.
20 They try to bootstrap that because of Judge Reis's
21 conclusion, and they also say Judge Kollar-Kotelly
22 said any findings that the D.C. Circuit didn't
23 reverse still stand. Well, that's fine, but it's not
24 the issue we're debating. The issue was whether any
25 of those findings that still stand are necessary and

1 essential to a liability conclusion by the Court.
2 That's the issue.
3 So footnote 31 on page 27 of the brief,
4 it's worth reading, Your Honor, because it gets it
5 exactly wrong. The issue is not whether the findings
6 are left standing. The issue is whether they are
7 necessary and essential to a liability conclusion of
8 the Court, and that Court is not Judge Reis. That
9 Court is the D.C. Circuit. That's point one.
10 Point two, Mr. Jacobs made light of the
11 fact that these are not inconsistent with findings
12 relating to the Internet Access Providers; that is,
13 findings that Microsoft provided -- I think "bounty"
14 is the word that is used in the opinion -- provided
15 inducements. It tried to do what it could to get the
16 Internet Access Providers to favor Internet Explorer,
17 and there are some findings later that show that the
18 Court determined they went over the line in certain
19 instances but not by designing a more attractive
20 product and paying people to use it or offering it
21 for nothing. That wasn't going over the line
22 according to the D.C. Circuit, and they were quite
23 unequivocal about that.
24 Now, let's look at some of these findings.
25 231, and again, putting it aside, the fact

1 that this subject was not even discussed by the
2 D.C. Circuit. First, Microsoft rewarded with
3 valuable consideration those large volume OEMs that
4 took steps to promote Internet Explorer. Microsoft
5 gave reduction in the royalty prices and so on. This
6 is conduct precisely analogous to what happened in
7 the Internet Access IAP channel, and it would be
8 astonishing, I think, to conclude that this conduct
9 never addressed by the D.C. Circuit is unlawful and
10 the analogous conduct that was addressed by the
11 D.C. Circuit, the D.C. Circuit said that conduct is
12 lawful. The argument just doesn't make any sense on
13 its own bio. So no link to the D.C. Circuit, no
14 reference by the D.C. Circuit, conduct analogous to
15 conduct that the D.C. Circuit did find lawful and no
16 liability finding.
17 It seems to me we aren't going through
18 these one-by-one. These are findings that plainly
19 don't qualify as necessary and essential to the
20 judgment.
21 Let me take as a concluding example here
22 because I don't want to walk through each one of
23 them. I want to look at 239 to 240. This is a
24 summary finding where Judge Jackson tries to pull
25 together all the harm that he found from Microsoft's

1 conduct, how it exiled Navigator from the channel.
2 This is written after he's written all of these
3 findings that, as I think we have established, mix
4 lawful conduct with unlawful conduct, and then he
5 forms a conclusion about what the harm from all of
6 that conduct was. And this poses a problem that I'm
7 sure you're familiar with. This is, how do you
8 disaggregate here? If you've got A, B and C, and A
9 and B are legal and C isn't, how do you determine how
10 much of the harm resulted from the illegal conduct C
11 as opposed to the legal conduct, A and B.
12 Now, Judge Jackson didn't have to grapple
13 with that issue because he thought all the conduct
14 was unlawful. So he lumped it together. This is not
15 the only time we're going to see that. He lumped it
16 all together, and he said, "Here is the harm." But
17 the D.C. Circuit said, "Not so fast. Not so fast.
18 Some of that conduct is lawful." And so this finding
19 which plainly mixes it all up is highly prejudicial.
20 It distorts the record and it can't be "necessary and
21 essential" to the liability judgment because the
22 liability judgment found some of this conduct legal
23 and some of the conduct not.
24 Most principally it did not find that
25 offering a version of Windows only with IE as a part

1 of it was an unlawful tying.

2 And finally -- and I think this is just

3 critical and I mentioned it yesterday --

4 Judge Kollar-Kotelly -- and I'm trying to find the

5 exact page -- Judge Kollar-Kotelly reached exactly

6 the opposite conclusion and it's very pertinent to

7 this last finding. She said neither the evidentiary

8 record from the liability phase nor the record in

9 this portion of the proceeding establishes that the

10 success of IE is attributable entirely or even in

11 predominant part to Microsoft's illegal conduct.

12 That to me -- that's Judge Kollar-Kotelly's sort of

13 embodiment of Judge Jackson in this ever changing

14 cast of characters, looking at this record saying,

15 This record doesn't establish that Microsoft's

16 conduct was the predominant reason for IE's success."

17 238 and 239 are diametrically opposed to

18 that. For all of these reasons, Your Honor, this set

19 of findings simply can't serve for the basis of

20 preclusion of anything.

21 MR. JACOBS: Just very, very quickly on

22 this. Judge Kollar-Kotelly, the embodiment of Judge

23 Jackson on "remand," I guess, was the term

24 Mr. Rosenfeld used, stated, and we quote -- we have a

25 cite here on page 27, Footnote 31 in our reply brief,

1 that -- well, first of all, the D.C. Circuit -- when
2 the D.C. Circuit -- excuse me, let me start over.
3 "The D.C. Circuit stated that it would not
4 set aside any legal conclusions unless incorrect."
5 That was at 253 F.3d 116. On remand the federal
6 district court, Judge Kollar-Kotelly, rejected
7 Microsoft's argument that the D.C. Circuit implicitly
8 reversed this liability determination based upon the
9 threats and incentives described in these findings."
10 That's United States v. Microsoft, 224 F.Supp.2d at
11 99. So even Judge Kollar-Kotelly recognized that, in
12 fact, this was a surviving conclusion. The
13 D.C. Circuit did not overturn it. It was binding on
14 Microsoft, and it should be binding here.
15 Again, Mr. Rosenfeld raised the tying
16 issue. You know, it is a red herring, tying the
17 same -- the claim was based on the same conduct that
18 was at issue in the monopolization claim. The fact
19 that the D.C. Circuit remanded the tying claim,
20 really it doesn't -- that doesn't impact the effect
21 that we're talking about from this conduct. It's
22 not -- the effects are -- the conclusion as to the
23 effects wasn't based on, well, they exiled IE from
24 this particular channel or they exiled IE from OEMs
25 or it harmed consumer X, Y and Z. That wasn't based

1 on the notion that it was also going to be -- this
2 conduct was going to be illegal under various
3 theories. These were factual findings that were
4 necessary ultimately to making these legal
5 theories -- the findings and conclusions on these
6 legal theories, so this really -- it just doesn't --
7 it doesn't impact the analysis at all.
8 Let's move ahead quickly to the IAP
9 channel, if we could, and I think, again, I'm going
10 to try to move through this relatively quickly.
11 Now --
12 MR. ROSENFELD: 244 and 245.
13 MR. JACOBS: Okay. Microsoft 244 and 245,
14 these are the two that it says was necessary. I
15 would note with the exclusion of IAP -- of Navigator
16 from the IAP channel, between 242 and 309, all of the
17 findings that we're seeking here -- correct me if I'm
18 wrong, Liz, but in the other proceedings Microsoft
19 did not challenge the preclusive effect of any of
20 those findings. Is that correct?
21 I may stand incorrect, and I'm sure
22 Mr. Rosenfeld will correct if I'm wrong, but I
23 believe Microsoft did not challenge the preclusion
24 effect of those findings in Minnesota or in
25 California. Now, I know we have the disagreement

1 about whether or not they actually conceded or not;
2 but notwithstanding that -- I think that simply is a
3 reflection of Microsoft now saying all of these
4 findings that before it understood, dealt with what
5 the conduct was, what the anticompetitive effects of
6 that conduct were and whether or not there were any
7 procompetitive justifications for that conduct, they
8 understood in these other cases that those are the
9 sort of issues that are subject to preclusion.
10 Now, of course, it's saying, well, only two
11 are. But let's go through real quickly these
12 findings in the IAP channel.
13 Okay. 242. This is when Microsoft begins
14 bundling the client software, its Internet Explorer
15 browser with IAP -- I'm sorry, it identified the IAP
16 channel as one of the two most efficient channels.
17 Again, this is all going to affect the importance of
18 IAP channel, it's exclusionary conduct, the
19 exclusionary nature of its conduct in that channel.
20 243, those who planned and implemented
21 Microsoft's campaign believe that IAPs gave new
22 subscribers -- if IAPs gave new subscribers a choice
23 between Internet Explorer and Navigator, most of them
24 would pick Navigator; in other words, Microsoft knew
25 it needed to do something in this channel.

1 Let's move on to the next. 244. Okay.
2 Actually, let me note that 242 was cited by the
3 D.C. Circuit explicitly.
4 244, that is conceded.
5 245, again, these are the very summary
6 findings that would not have been enough to reach any
7 sort of liability determination.
8 So then we get to Findings 253, 254 and
9 255. I mean, this is Microsoft -- well, this
10 describes the conduct -- this describes what
11 Microsoft was doing with these referral server
12 agreements that were found to be illegal and this is
13 the conduct. This isn't just supportive.
14 254, well, you know, these IAPs, why is it
15 that the IAPs signed up for this? Well, you know,
16 there was inducement to the IAPs, but it was then
17 that these IAPs and these illegal agreements --
18 that's how you end up finding the effects: Who were
19 these IAPs? What were they doing? Again, it's the
20 conduct.
21 255, again, this is cited by the
22 D.C. Circuit, and let me get the -- in terms of
23 agreements with Internet Access Providers.
24 At page 253 F.3rd F. 67, okay. Let's move
25 on to 256. Again 256, 257 both cited by the

1 D.C. Circuit in terms of this is what Microsoft was
2 doing, these referral server agreements. There were
3 14 IAPs, Internet Access Providers. These were --
4 10, I'm sorry, these weren't the big Internet Access
5 Providers. These were 10 of the top 15 Internet
6 Access Providers in North America. This is at the
7 bottom of Finding 256. This is clearly necessary to
8 make a determination of what was the effect, what was
9 the foreclosure; was it substantial foreclosure, as
10 Microsoft argued was necessary.
11 257, what were the terms of these
12 agreements? You know, in fact, it's interesting
13 since Microsoft argued at the district court level
14 that, you know, these agreements, they shouldn't even
15 be considered illegal because they couldn't have
16 been. They couldn't have any effect. They were so
17 short in duration or we terminated some of the
18 agreements before the lawsuit was even brought. So
19 these details that Microsoft now says don't matter,
20 obviously, then they saw it did matter. These are
21 the sort of details. This is the who, what, where,
22 when, why. That's what makes this conduct illegal or
23 not.
24 258, also cited by the D.C. Circuit. This
25 talks about what were the restrictions on the IAPs.

1 How was it that it actually excluded Netscape.

2 Next finding, 261, also cited by the

3 D.C. Circuit. Microsoft readily made sacrifices in

4 order to induce important IAPs to take actions that

5 aided Microsoft's effort to exclude Navigator from

6 that channel, the conduct that would only make sense

7 if it were anticompetitive.

8 262, also cited by the D.C. Circuit,

9 talking about the limits that these agreements placed

10 on the distribution of non-Microsoft browsing

11 software. This was the effect. This is how it was

12 necessary to determine the effects of these

13 agreements.

14 263, absent these agreements, IAPs would

15 have no reason to limit the percentage of subscribers

16 to any particular browser, the effects.

17 Moving on to 269. Here, that by September

18 of 1998 all of the agreements had expired of their

19 own terms. I mean, this is when this conduct was

20 occurring. Microsoft says, "We need to know when

21 this is occurring." Well, this is when it is

22 occurring. This is the conduct.

23 On to 271, again, what are the effects in

24 the year and a half that these agreements were in

25 force? The restrictive terms induced major IAPs to

1 customize their client software for Internet
2 Explorer, their promotional and marketing, et cetera.
3 In other words, it exiled Navigator from these
4 important channel effects.
5 272, another one cited by the D.C. Circuit.
6 This is dealing with Microsoft -- their dealings with
7 AOL. Again, AOL, a huge percentage of subscribers.
8 These are the agreements that were at issue. This is
9 the effects of the agreements.
10 277, again, dealing with, well, what was it
11 that -- actually, this is a crucial finding to the
12 anticompetitive purpose underlying these -- this
13 whole agreement with these IAPs and particularly with
14 America On Line. It would make no sense other --
15 this conduct makes no sense other than if Microsoft
16 were trying to exile Navigator and to preserve its
17 monopoly power in the operating systems market.
18 287, again, these -- this is what was going
19 on, What was the agreement between Microsoft and
20 America On Line?
21 Okay. 288, again, what was the agreement.
22 This is the conduct.
23 Now, 289. 289 -- I'm sorry, 288 and 289,
24 both cited by the D.C. Circuit explicitly. And the
25 discussion of all of the agreements with Internet

1 Access Providers is all contained within 253 F.3rd 67
2 through 71.
3 So Finding 290, another one cited by the
4 D.C. Circuit, is at 253 F.3d at 67. Again, what was
5 the agreement with AOL? Oh, and also, what were the
6 effects of this agreement?
7 Let's look in the middle of Finding 290, if
8 we could go back to that. "I find it hard to believe
9 that AOL is using Internet Explorer as its browser.
10 Are there exceptions?" Chase responded -- and this
11 is Brad Chase, a major Microsoft executive -- "Yes,
12 there are some, but they are pretty remote. An AOL
13 customer could choose to use Navigator and it will be
14 available to be downloaded from the AOL site,
15 although not in a prominent way." This all goes to
16 the effects of these agreements.
17 291, no purpose other than maximizing
18 Internet Explorer's usage share at Netscape's
19 expense. No procompetitive justification.
20 293, again, one of Microsoft's defenses
21 that was -- that was rejected.
22 294, that is basically showing that these
23 agreements were illegal; again, Microsoft saying,
24 "Well, AOL, you know, was going to choose Microsoft
25 anyway." Well, no, the Court rejected that.

1 And 294 and the effects.
2 296, again, going through all of the
3 effects, and Microsoft consistently argued, "You need
4 to show the substantial effects." Well, what were
5 the effects that were necessary for the Court to
6 conclude that these agreements were illegal? These
7 are the actual effects, and they are not just
8 subsidiary findings. They are important issues that
9 were necessary to the trier, the adjudicator, in
10 concluding that this conduct had an anticompetitive
11 effect and adversely effected the market.
12 298, 301 -- I will try to go through
13 these -- 304, again, dealing with establishing what
14 was the conduct with respect to AOL and what were the
15 effects of that conduct.
16 305. This was cited by the D.C. Circuit.
17 305 and 306, in fact, talking about other agreements
18 that Microsoft entered into.
19 And 306, none of these other Online
20 Services possessed subscriber bases approaching
21 AOL's. So again, these are the effects here.
22 308 cited by the D.C. Circuit at
23 page 253 F.3rd at 71, talking about the
24 anticompetitive effects of this conduct specifically
25 relied upon by the D.C. Circuit. I'm at the end of

1 that section.

2 MR. ROSENFELD: So, ready? Okay, Your

3 Honor.

4 First of all, I would just like for one

5 second to go back to a point where Mr. Jacobs

6 started. He was responding to my quote from

7 Judge Kollar-Kotelly relating to these particular

8 findings, and I would just draw the Court's attention

9 to page 99, its 224 F.Supp. at 99, and it relates to

10 these findings about the OEMs that Mr. Jacobs was

11 finding or was referring to.

12 In the right-hand margin, right above the

13 footnote, the Court says, "Because plaintiffs

14 denounce any reliance upon Judge Jackson's

15 apportioning of liability for coercing OEMs with

16 incentives and threats, neither will the Court rely

17 upon such a finding of liability in consideration of

18 the appropriate remedy."

19 So this is one that falls in that first

20 category, How important was this, really, to the

21 parties and the trier of fact? The government that

22 Judge Kollar-Kotelly points out -- or I should say,

23 the governments because it was a number of states, I

24 believe, actually including Iowa at this point, who

25 actually just renounced any -- she says "denounced,"

1 but I think she really meant "renounced" any reliance
2 on those particular findings. So if you needed more
3 reason to cast it aside, I think Judge Kollar-Kotelly
4 provides it.
5 Now, these findings -- and I think what I
6 would like to do is start with the two central
7 findings that bear on this conduct, and I think it
8 gets us to a different chart. "Exclusivity or
9 Minimum Commitment Agreements with Internet Access
10 Providers," because that's what Mr. Jacobs has been
11 talking about. And there are two findings there, 244
12 and 245. 244 provides that Microsoft's first tactic
13 was to develop and include with Windows an Internet
14 signup program, and that's a lot of what Mr. Jacobs
15 in all of these detailed findings has been
16 describing. This is again, the liability issue that
17 focuses on the conduct that was found unlawful, not
18 all of the conduct. And maybe you could put, if you
19 would, 244 up there.
20 This talks about the conduct that was found
21 unlawful. It's not a lunging together of a whole
22 range of conduct, but it talks about the conduct that
23 was found unlawful by the D.C. Circuit.
24 245, if you would, please, does the same
25 thing. And it talks about -- it doesn't say there

1 were 14 or 15 Online Providers. It said -- and,
2 again, I think we're dealing with the original
3 version which includes all of the language -- yes.
4 The leading Online Providers, service providers
5 agreed, at Microsoft's insistence, to this particular
6 minimum commitment agreement and the like.
7 Now, these findings are chockablock-full of
8 examples of AOL and this and that. If those are
9 supportive findings, 244 and 245 are the ones that
10 focus in on the unlawful conduct as found by the D.C.
11 Circuit.
12 Now, I want to walk through the remainder
13 of these because I think it highlights the problem
14 with this line of analysis. But before I do, I want
15 to take us back to the Iowa Supreme Court decision
16 because I thought -- and I mentioned this
17 yesterday -- I thought one of the interesting things
18 that the Court said was -- it was almost near the
19 beginning of the opinion -- when I was going through
20 the history of Judge Jackson and the court of appeals
21 and so on, concludes a paragraph on page 116, right
22 at the bottom of 116: "This decision" -- that is,
23 Judge Jackson's conclusions -- "did not refer to a
24 large number of factual findings entered five months
25 earlier." So the Court, I think, was sending a

1 pretty strong signal that when Judge Jackson doesn't
2 even refer to these findings, that tells you
3 something about how important, critical and necessary
4 they can be.
5 Let me just tell you which ones he doesn't
6 refer to. This Judge Jackson doesn't refer to his
7 own findings: 243, 253, 254, 263, 269, 271, 298,
8 301, and 304. And while you're making a list, let me
9 also give you a list of the ones that the
10 D.C. Circuit didn't cite because it's a such a
11 sizeable chunk of these findings that it makes you
12 wonder how critical and necessary they really could
13 be to this liability determination.
14 Let me give them to you: 243 --
15 THE COURT: These are ones he did refer to?
16 MR. ROSENFELD: No, these are the ones the
17 D.C. Circuit did not refer to.
18 THE COURT: Okay.
19 MR. ROSENFELD: 243, 253, 254, 263, 269,
20 271, 277, 287, 291, 293, 294, 296, 297, 298, 301,
21 304, and 309.
22 Now, let me just walk through a few of
23 these because I think there are a couple of
24 categories of objections I would make in addition to
25 the ones we already identified.

1 First of all, I think the bulk of these are
2 supportive of the two findings that we have
3 identified and agreed to. And I want to tell you why
4 I use the word "supportive," because Mr. Jacobs
5 mentioned it in one of his prior comments. As you
6 recall, the Fourth Circuit -- well, first Judge Motz
7 came up with this "supportive" standard. And the
8 "supportive" standard, as the Fourth Circuit said,
9 would include any finding that was relevant or
10 consistent with the liability determination, and the
11 Fourth Circuit said that's too broad. The test is
12 not relevant. The test is not consistency. The test
13 is necessity, essentiality. It has to be vital and
14 it has to be critical, according to the Iowa Supreme
15 Court.
16 So when I say these findings are
17 "supportive," I'm not merely saying they are
18 evidentiary; although, I do think under the Iowa
19 Supreme Court decision that's a "relevant"
20 consideration, whether they are evidentiary or
21 subsidiary findings -- but these are just findings
22 that are relevant in some way or consistent with the
23 determination. So that's why I use that term, and I
24 think a bulk of them fall in that category: 253,
25 certainly 254, and these findings describe how the

1 Online Wizard, Internet Connection Wizard and
2 Referral Server worked. The same with 255.
3 Again, 256, these are all descriptions of
4 folks who entered into these particular agreements
5 supportive. And then when you get to 257, again, we
6 run into our -- the old bugaboo about including legal
7 and illegal conduct in the finding. 257 makes
8 reference to licensing Internet Explorer, for
9 example, to these folks at no charge, which, of
10 course, is perfectly lawful, and I think as well as
11 helping them customize Internet Explorer for their
12 use.
13 There was a great deal of evidence in the
14 government case that it was Microsoft's willingness
15 to customize its browser and componentize it for the
16 AOLs of this world and the like. Navigator wasn't
17 willing to do that and that was a big factor in the
18 success of Internet Explorer vs. Navigator.
19 Now that componentization, that
20 customization, is not a basis for liability here.
21 That's good marketing. That's what you're supposed
22 to do.
23 And then when you look at 258, it provides
24 more detail about what exactly is provided in 244 and
25 245, the two findings that we have set out.

1 Now, 261 is kind of interesting because
2 this is a problem that arises in a number of these
3 findings, and that is that they are not really
4 findings of fact. They are Judge Jackson's
5 speculation, prediction, about what the future will
6 bring and this was not lost on the D.C. Circuit. Let
7 me look at page 83 here.
8 The D.C. Circuit on page 83 talks about the
9 use of the phrase "could have" in some of the
10 findings, and it says -- and I think it's a very
11 important point -- it traces the problems in
12 Judge Jackson's findings, not to Judge Jackson, but
13 to the plaintiffs who were deficient in the proof
14 they provide. But he says as to the first point --
15 and this has to do with barriers to enter -- the
16 district court's use of the phrase "could have"
17 reflects the same uncertainty articulated in the
18 testimony cited in plaintiff's proposed findings.
19 Little more than conclusory.
20 Now, a number of these findings talk about
21 "could have," "would have," "might have," and I
22 submit that is not appropriate for the findings of
23 fact that are going to be preclusive. For one, he
24 may just have been wrong about what the future holds
25 and it would not be proper to preclude Microsoft or

1 the plaintiffs from putting in evidence about what
2 really happened.
3 This Finding 261 -- could you put that up
4 for me, please -- this starts out, "Microsoft could
5 have covered the cost of developing and maintaining
6 the ICW." Further down it says, "Instead, Microsoft
7 bartered away so much of the referral fees it could
8 have otherwise charged." It is that kind of
9 prediction, speculation, about what would turn out in
10 the real world; moreover this issue of bartering away
11 what it otherwise could have charged, those are fancy
12 words for giving it away.
13 And the D.C. Circuit at page 68 of their
14 opinion pointed out, that kind of conduct paying
15 bounties and the like for everybody who signs up,
16 which is what happened, that's not anticompetitive
17 conduct. So this is another one of those examples of
18 how the legal and the illegal get lunged together.
19 262 -- let's look at that one, if we could.
20 Again, we have the same sort of equivocating
21 construction. It could have -- it could not have
22 simply been a desire or a simple desire. It may have
23 been one of the motivations. These are predictions
24 and speculations. They are certainly not findings of
25 fact. Moreover, if you look at the last part of this

1 finding, it talks about Microsoft paying a high price
2 to induce the most popular Internet Access Providers
3 to encourage their customers to use the Internet
4 Explorer and discourage them from using the
5 Navigator. I think -- I don't know if it's on this
6 one or on the next page of this one.
7 MS. KNIFFEN: It's on the bottom.
8 MR. ROSENFELD: Okay. Again, that sweeps
9 in the whole range of anticompetitive conduct that
10 Judge Jackson was troubled by. But as we've gone
11 over now I'm sure ad nauseam that conduct, that broad
12 range of conduct was not found to be unlawful by the
13 D.C. Circuit, and these findings tend to lunge it all
14 together.
15 263, one that Mr. Jacobs talked about.
16 It's also one that was not cited by either the
17 D.C. Circuit or even by Judge Jackson himself.
18 The same is true of 269; and there is, of
19 course, the added problem with 269 because if you
20 compare it with Finding 268, which is not in here,
21 Finding 268 says that this conduct ceased in April
22 1998. This finding talks about the fact that these
23 agreements expired by their own terms in September of
24 1998. This is part of the problem with the temporal
25 nature of some of these findings, but this one

1 plainly creates a misleading impression.

2 268 is, of course, left out. And I think

3 that is it on that one. Well, except for the fact --

4 I'm sorry to go back -- except for the fact that this

5 finding also was cited by neither Judge Jackson nor

6 the D.C. Circuit.

7 THE COURT: Which one? 269?

8 MR. ROSENFELD: Yes. Same is true of 271.

9 271 also has the "mayhem" language, and it

10 discusses -- if we could -- it's up there. Thank

11 you. You're ahead of me. It also -- when it talks

12 about, consequently, few ISPs have responded to

13 Microsoft's contractual dispensations by increasing

14 their distribution and promotion of Navigator, again,

15 it sweeps everything in -- the legal and the

16 illegal -- and that, again, is a vice of a great

17 number of these.

18 The AOL findings are another example. They

19 are supportive findings. They are clearly not

20 "necessary and essential" to the determination here.

21 This is evidence, and evidence of that fact, if you

22 will, is that the great bulk of these were not cited

23 by the D.C. Circuit among other things.

24 I think we're getting close to the end

25 here. I think one other problem with a number of

1 these findings, Your Honor -- and 291 is a good
2 example. When we start talking about the effects of
3 these contractual limits and the so-called harm, I
4 think was an issue that greatly bothered Judge
5 Peterson because he declined to include a lot of
6 these "harm and causation" findings, and that is as
7 we discussed yesterday. There are two markets here.
8 There is the browser market and there's the operating
9 system market. Most of these findings are confined
10 to showing the effects in the browser market; that
11 is, by definition when we talk about IEs, that is
12 Internet Explorer share, or we talk about Navigator
13 share, we're not talking about their share of the
14 operating system market because they are not
15 operating systems. They are browsers. We're talking
16 about the effect in the browser market.
17 First of all, the browser market is not
18 what this case, this Iowa case, is about. It's about
19 the operating system market, to be sure the browser
20 market has some relevance to that, just as it did in
21 the DOJ case. But you'll remember we talked about
22 causation yesterday, and the D.C. Circuit, indeed,
23 even Judge Jackson, did not find that any of this
24 conduct in the browser market necessarily affected
25 Microsoft's ability to maintain its monopoly in the

1 operating system market.

2 Finding 411, and I think that is very

3 important because there's a huge risk of distortion

4 and confusion about causation. These findings, when

5 they talk about the effects, the potential to make

6 anyone who is not terribly familiar with all of this

7 thinks it is talking about effects of the operating

8 system market and that's not what we're talking.

9 That's not what the causation issue was in the DOJ

10 case.

11 I think I'm almost done here. Let's --

12 yeah. Let's go to 296 because this illustrates

13 another problem with this "harm" notion. This is a

14 finding that talks about what happened to AOL's

15 client use of Internet Explorer as their browser

16 versus Navigator. And it says a year earlier the

17 same -- excuse me, by January 92 percent of AOL

18 subscribers were using Internet Explorer, a year

19 earlier only 34 percent were.

20 Now, taking those facts alone, what would

21 you conclude? Well, you could conclude a number of

22 things. You could conclude that something Microsoft

23 did was responsible for that 60 percent increase in

24 market share, and that's plainly what the plaintiffs

25 want you to conclude.

1 I submit, Your Honor, it's not at all clear
2 because there was conduct that Microsoft engaged in
3 as I've described, as well as providing bounties and
4 so on to Internet Access Providers that may well
5 explain a great deal, if not all, of this shift. And
6 if you read this finding, it plainly wants you to
7 believe that the situation is quite different. It's
8 quite confusing and I would say prejudicial on the
9 causation issue, and this is where Kollar-Kotelly --
10 again her comment that the evidentiary record does
11 not establish that the success of IE -- and that's
12 what this is talking about -- was attributable
13 entirely or even in predominant part to Microsoft's
14 illegal conduct. This finding is plainly distorting,
15 confusing and prejudice and it mixes the legal and
16 the illegal.
17 297 is chockablock-full of speculation and
18 the like. It wasn't even discussed by the D.C.
19 Circuit.
20 And if you look at 298, I think the last
21 line, it really, really makes the point I was just
22 mentioning. First of all, it wasn't cited by either
23 Judge Jackson or the D.C. Circuit. The last line
24 says "It is thus a reasonable deduction" -- that's
25 Judge Jackson -- "that the restrictive terms

1 Microsoft induced AOL to accept preempted a
2 substantial part of the Internet Access Provider
3 channel for Internet Explorer." A "reasonable
4 deduction." Well, that is a not finding at all, but
5 even if it were, it's a reasonable deduction of Judge
6 Jackson. It stands in the face of the D.C. Circuit's
7 rejection of a number of instances of the conduct as
8 being unlawful and Judge Kollar-Kotelly saying,
9 "Nonsense." You can't deduce from this record that
10 Microsoft's illegal conduct was the predominant cause
11 of any this. Plainly, plainly misleading. And I
12 think I'm going to stop because I think I've been
13 through the bulk of these, and I think, Your Honor,
14 the points at this stage are quite clear with one
15 final exception, and that is 309.
16 And again, 309 again purports to be a
17 summary, not surprisingly, but perhaps it would be
18 surprising to Judge Kollar-Kotelly, but not to Judge
19 Jackson, the inducements that Microsoft gave out.
20 Those, of course, were legal and the restrictions it
21 conditioned them upon have resulted in a substantial
22 increase in Internet Explorer usage here. That is
23 about as prejudicial as they come given the way the
24 facts and the liability determinations in this case
25 played out. That finding should not be conclusive of

1 anything in this case, Your Honor.

2 Unless you have questions, I think that is

3 a quick tour through those findings.

4 THE COURT: Ten-minute recess, please.

5 (A short recess was taken.)

6 THE COURT: Mr. Jacobs.

7 MR. JACOBS: Thank you, Your Honor. Just a

8 few quick points on Mr. Rosenfeld's discussion of the

9 ISP finding related to the -- I'm sorry -- the IAP

10 channel.

11 First of all, Mr. Rosenfeld raised the

12 Fourth Circuit decision and talked about the

13 "supportive" standard that he keeps referring to,

14 these facts are merely "supportive." And the Fourth

15 Circuit said that is not enough or that was not the

16 right standard.

17 Microsoft argued the Fourth Circuit

18 decision said that -- before the Iowa Supreme Court

19 said, the Iowa Supreme Court, "You ought to the

20 follow the Fourth Circuit." The Iowa Supreme Court

21 was following the Second Restatement of Judgment, and

22 that is standard, as we've talked about numerous

23 times, is not -- it doesn't talk about "supportive"

24 standards, "supportive" findings or whether or not a

25 finding is -- excuse me, let me back up. What it

1 talks about is whether or not a finding was important
2 to the parties and whether or not it was seen as
3 necessary by the adjudicator. That is the standard
4 and that's what we're showing here, that these
5 findings were important to the parties and were seen
6 as necessary by the adjudicator.
7 Secondly, it's interesting that
8 Mr. Rosenfeld keeps talking about, well, the D.C.
9 Circuit didn't cite a particular finding here or the
10 district court didn't cite a particular finding, and
11 yet Microsoft, says, "Well, notwithstanding the fact
12 that the D.C. Circuit and the district court cited a
13 slew of findings," those aren't necessarily necessary
14 and don't qualify as being preclusive and that
15 Microsoft should be able to relitigate those issues
16 or at least they shouldn't be binding on Microsoft
17 here. They just cannot have it both ways here.
18 Third, is that the discussion of these
19 individual findings, again, goes -- we emphasize it
20 reiterates the point Microsoft needs to be bound by
21 all of these findings of harm, how Microsoft's
22 conduct harmed the market, how Microsoft's conduct
23 was anticompetitive. Microsoft is going to seek to
24 keep relitigating all of these issues just like it
25 talks about -- just like Mr. Rosenfeld was talking

1 about with the effects of Microsoft's agreements with
2 AOL. I mean, surely Microsoft litigated that
3 intensely before the federal court. Microsoft had
4 its chance in court to argue that. Now it wants a
5 chance to argue that again. That is not -- the
6 doctrine of collateral estoppel prevents that for
7 numerous reasons, one of which is preserving judicial
8 resources. They want that all to be relitigated
9 again. We cannot do that.
10 Secondly, going through these findings
11 again here, Finding 298. Mr. Rosenfeld talks about
12 this "reasonable deduction" language. It's a
13 reasonable deduction that the restrictive terms
14 Microsoft induced AOL to accept preempted a
15 substantial part of the channel. Reasonable
16 deduction is consistent with the standard that the
17 Court -- the standard of burden of proof that the
18 government needed to meet is a preponderance of the
19 evidence. It didn't need to be absolute certainty.
20 It needed to be a preponderance of the evidence.
21 This sort of language doesn't preclude any of that as
22 being necessary.
23 Finding 261. Now, Microsoft talks about
24 the fact that language -- could you put 261 on? This
25 language about "could have," the fact that the

1 findings uses the language "could have." Microsoft
2 "could have" covered the costs of developing. That's
3 not future tense. That is not predictive. That is
4 past tense. It's past perfect or something, but it's
5 some sort of past tense. It's not predictive.
6 Finding 262 is another one. This was
7 rejecting Microsoft's excuse. This was Microsoft
8 trying to justify its conduct and the Court saying,
9 "No, I'm not buying that." So, I mean, these aren't
10 predictions.
11 269, Microsoft talks about the confusion
12 because the finding refers to September of 1998 and
13 yet Microsoft, one of its reasons for objecting to
14 including a lot of findings, is supposedly a jury is
15 going to be confused by not knowing the dates. I'm
16 not sure which way they want this to go.
17 Finding 271. Mr. Rosenfeld said you can't
18 figure out what this one is referring to, legal
19 conduct or illegal conduct. 271. "By both lifting
20 restrictions in its agreement and ceding control over
21 the IAP sign-up process to OEMs." I mean, this is
22 not a mystery. This is not -- it's not that
23 difficult to figure these out here.
24 The restrictive terms in a referral server
25 agreement, that is what it's talking about, and it's

1 talking about the harm. The D.C. Circuit clearly was
2 able to figure out that these acts harmed the
3 competitive process and thereby harmed competition.
4 Also this discussion that these findings of harm are
5 dealing with harm in a browser market. Harm in a
6 browser market, as the D.C. Circuit itself
7 understood, meant Microsoft could leverage control of
8 Windows into the browser market. It could squash the
9 threat that Netscape and Java posed to the desktop
10 operating system. That's what the case was about. I
11 mean, so harm to that one market is critical here.
12 Let's try to move on here to Finding of
13 Fact 337. Yeah, let's put up the conclusion of law
14 here. Microsoft, in dozens of exclusionary
15 agreements, gave certain independent software
16 vendors, ISPs, preferential support in return for
17 their agreement to use Internet Explorer as the
18 default browsing software. No question this was held
19 to be illegal by the D.C. Circuit.
20 Now, we have four findings, 337 through
21 340, that we are saying are subject to preclusion
22 here. And Microsoft says, well, 339 is the only one.
23 Again, it's the difference between our approach that
24 anything that was important to the parties and
25 necessary to the judgment. 337 discusses --

1 establishes that this conduct was an effort to
2 maximize IE browser share at Navigator's expense, and
3 that Microsoft ISVs directly in getting commitments
4 from them to make Web-centric applications reliant on
5 Internet Explorer technology.
6 Let's move on. 338. Now, this is how
7 Microsoft did it, time to market was important.
8 Microsoft was able to use access to crucial technical
9 information to get these ISVs to agree to Microsoft's
10 terms.
11 Now, 399. This is the -- they have two
12 findings, I believe, they say. These are the "First
13 Wave" agreements that Microsoft entered into that
14 were Microsoft conditioning, a fairly technical
15 disclosure on certain information on ISVs agreement
16 to Microsoft's terms. This was the illegal conduct.
17 340 then is the harm from that conduct.
18 "Microsoft ensured that Web-centric" -- many of the
19 most popular Web-centric applications -- this is in
20 Finding 340 -- "will rely on browsing technologies
21 found only in Windows and has increased the
22 likelihood that millions of consumers using these
23 products will use Internet Explorer rather than
24 Navigator." This is the foreclosure here. This is
25 the anticompetitive effect. Had the Court not found

1 that, it could not have found Microsoft violated the
2 law with respect to this.
3 Why don't I go on to the Apple computer
4 because, again, here the same disagreement between
5 Microsoft and plaintiffs. Microsoft saying one
6 finding or two -- three findings in Microsoft's case
7 that simply described the agreement between Apple
8 Computer and Microsoft, and that is all -- according
9 to Microsoft, that is all that should be subject to
10 preclusion. This agreement that Mr. Hagstrom kind of
11 covered some of this material yesterday, those
12 findings that simply describe the agreement, they
13 don't talk about the anticompetitive effects of it.
14 They don't establish any of that. They don't
15 establish lack of any procompetitive justification.
16 They don't establish what is needed to find a
17 violation of the law.
18 So let's move on to the next finding
19 quickly. Okay. Finding 342. Finding that Apple --
20 the Apple Macintosh, Apple PC systems, that this
21 would be an important means of raising usage share of
22 browsing software. This is crucial to finding there
23 to be any anticompetitive effect.
24 343. Apple was already preinstalled on
25 Navigator on its system. Microsoft comes in and is

1 able to displace Navigator. That is going to be --
2 it's going to have anticompetitive impact. This is
3 the type of finding that establishes that.
4 344. Now, Microsoft -- really, these are
5 the sort of findings that Microsoft never wants to
6 get in front of another because this is talking about
7 Microsoft had specific leverage that it holds over
8 Apple. Finding 344 talks about Apple's business
9 being in a steep decline. This is a time when
10 Apple -- before Steve Jobs had returned or right
11 about the time Steve Jobs returned, the finding notes
12 at the end -- Microsoft announced in the midst of
13 this atmosphere at Apple that it was ceasing to
14 develop new versions of Mac Office. Microsoft's
15 Word, Excel, PowerPoint 4, the Macintosh platform, a
16 great number of ISVs, customers, developers and
17 investors would have interpreted the announcement as
18 Apple's death notice. Microsoft knew that.
19 Microsoft knew it had a club that it could wield over
20 Apple Computer, and, in fact, the D.C. Circuit in its
21 discussion of this conduct actually cites to one of
22 the documents about how -- you know, let's use this
23 as a club against Apple. This is at 253 F.3rd at 77.
24 Citing Finding of Fact -- well, it quotes in its
25 entirety Finding of Fact 344, which Microsoft says

1 isn't essential. Microsoft then recognized the
2 importance to Apple of its continued support of Mac
3 Office, for example, Finding 347, and then also
4 quoting from Bill Gates.
5 Then at Finding 354, I think Apple should
6 be using IE everywhere. And if they don't do it, we
7 use Office as a club. They said all of this that was
8 going around surrounding this agreement was critical
9 for determining. This wasn't just an agreement.
10 Apple and Microsoft didn't just reach an agreement.
11 Microsoft deceived Apple as to the progress Microsoft
12 was making on Mac Office. Microsoft deceived Apple
13 that it was going to cancel Mac Office, which would
14 have killed off Apple. Using that club, Microsoft
15 extracted from Apple an anticompetitive agreement
16 that allowed Microsoft to exile Netscape from the
17 Macintosh platform, which had significant
18 anticompetitive effects. All of that is necessary to
19 this conclusion, not just Apple and Microsoft entered
20 into an agreement, which is all the findings that
21 Microsoft says are necessary to say.
22 So let's go on. I will finish these off
23 quickly. So let's see. Did we go through all the --
24 no, I think we were at -- yeah, 345. This is
25 basically reiterating what I just said here. Finding

1 345. "Microsoft threatened to cancel the product
2 unless Apple compromised on a number of outstanding
3 issues between the companies."
4 349, talking about how should Bill Gates --
5 how should we announce the cancellation of Mac
6 Office.
7 350 is one of those agreed. That just
8 describes the agreement; but there's much more
9 surrounding the agreement, all of which was necessary
10 to the exclusionary effects.
11 351 also agreed.
12 352 agreed. We don't need to deal with
13 that.
14 355. "Apple increased its distribution and
15 promotion of Internet Explorer not because of a
16 conviction that the quality of Microsoft's product
17 was superior to Navigator's, or that consumer demand
18 for it was greater, but rather because of the in
19 terrorem effect of the prospect of the loss of Mac
20 Office." There was no consumer benefit to this deal.
21 It was purely anticompetitive. This agreement --
22 this finding is clearly necessary to establish the
23 violation here.
24 356, also necessary to establish the
25 violation here, and I think -- is that the last one

1 in that? Yeah. 356 is the last one dealing with
2 Apple, so I will turn it over to Mr. Rosenfeld, if
3 you would like to address those two issues.
4 MR. ROSENFELD: Thank you. I apologize,
5 Your Honor. I took one of those candies during the
6 break. They are very long-lasting, so I'm going to
7 juggle that while I'm trying to talk.
8 I will start at the beginning where
9 Mr. Jacobs began, and that is what the Iowa Supreme
10 Court -- the standard in the Iowa Supreme Court is
11 exactly the same as in the Fourth Circuit. The Court
12 says, "Under this analysis, collateral estoppel will
13 only adhere to those factual findings 'necessary and
14 essential' to the prior judgment rather than findings
15 of every minute fact contested by the parties in
16 previous trial."
17 And then it says in its reviewing Findings
18 33 and 34, that these were the kinds of findings that
19 were "necessary and essential" to the underlying
20 judgment. So I don't think there should be any
21 confusion about this standard that has been applied
22 here. It is the one that the Fourth Circuit applied.
23 It is the one the Iowa Supreme Court should apply.
24 Now, I think I'm really going to try to be
25 brief here. If you look at 339, which is the most

1 directly relevant of the stipulated findings, it sets
2 out the details as to these "First Wave" agreements
3 and after all, that's the liability creating the
4 conduct. It talks about the conditions on them. It
5 says there were dozens of them between the fall
6 of '97 and the spring of '98. It says Microsoft
7 promised to give preferential support, other
8 technical information, et cetera, if the ISVs met
9 certain conditions, and one of these was that IE was
10 the default browser, and there is another condition
11 that is specified there as well.
12 I submit that that is the critical finding
13 in this area. The rest of these have two
14 infirmities. One, they already used that terrible
15 word again, "supportive." They are evidentiary
16 findings. And a large number of them were cited
17 neither by Judge Jackson nor by the court of appeals.
18 So putting aside the issue of what the
19 citations mean, Finding 338 decided by neither Judge
20 Jackson or the court of appeals, a point that the
21 Iowa Supreme Court focused on.
22 Finding 342 was cited by neither.
23 Finding 343 was cited by neither.
24 Finding 345 was cited by neither, and I
25 believe Finding 357 was cited by neither as well.

1 Okay. And I believe these are
2 quintessentially supportive findings. When we get to
3 Apple, again, there are two findings that we said
4 encapsulate -- I'm sorry, is that right? 350, 351
5 and 352. I think, Your Honor, that those findings,
6 without all the adornment of evidentiary support and
7 so on, set out pretty clearly what these findings
8 are. I just want to make sure that they are right
9 about which ones, however. Yes. I'm sorry.
10 350, 351 and 352. Now, there was a little
11 editing of this one by the plaintiffs that I think
12 really does change it. It says, "Within a month of
13 Gates'" -- and it changes "call" to "threat." In the
14 finding, Judge Jackson set it out, "Within a month of
15 Gates' call to Amelio, Steve Jobs was once again
16 Apple's CEO and the two companies had settled
17 outstanding issues between them." And it describes
18 the agreement.
19 351 goes into considerable detail about
20 that agreement, and what was the quid pro quo for the
21 support of Mac Office.
22 And 352 does the same. I submit this is
23 the core or these are the core findings regarding the
24 Apple/Microsoft agreement. These are the findings
25 that were critical and necessary to the liability

1 determination; that is, conditioning into new
2 development of Mac Office on Apple's promotion of
3 Internet Explorer. This was one of the 12 acts. The
4 D.C. Circuit found that the Fourth Circuit referred
5 to that, Judge Peterson referred to that, and that
6 Microsoft has suggested appropriate findings
7 following Judge Peterson that memorialized those key
8 critical and necessary findings.
9 355, I think, is particularly interesting
10 because again it highlights one of the problems with
11 these findings. There's a statement in the middle of
12 Findings -- and I've never seen this before,
13 Findings, purportedly a Finding of Fact -- and it
14 begins, "To be blunt, Microsoft threatened to refuse
15 to sell a profitable product to Apple." Then it goes
16 on and on and on. This is a very unusual finding,
17 and I think it's inappropriate and prejudicial. It
18 reflects the fact -- and we haven't mentioned this,
19 but it adds a little color to these proceedings.
20 Judge Jackson was relieved of his responsibility for
21 this case because he talked to the media a lot about
22 the case while it was going on, and one of things he
23 said was he did things this way. That is, he wrote
24 these findings in advance because, I think, as he put
25 it, "It's like the mule trainer who needs to get the

1 attention of the mule." He wrote them in a way that
2 would get people's attention and force them into
3 settlement.
4 I think a lot of people rightly wondered if
5 that's the appropriate use of findings of fact. This
6 language, I think, provides at least some insight
7 into the way Judge Jackson approached writing these
8 particular findings. In any event, that one does not
9 seem appropriate.
10 And I think that as we go through -- I
11 think 356 is the last one, and it implicates the same
12 causation issues that we talked about before. It
13 talks about high usage share and clearly implies, if
14 it doesn't say directly, that the reason it didn't
15 have the high usage share was because of wrongful
16 conduct by Microsoft as opposed to competition,
17 procompetitive conduct, legitimate business
18 decisions.
19 So it argued 350 to 352 are the appropriate
20 "critical and necessary" findings to support this
21 particular wrongful act, and I will stop at that.
22 MR. JACOBS: 355 was absolutely critical to
23 this determination. Microsoft threatened -- as Judge
24 Jackson found, Microsoft threatened to refuse to sell
25 a profitable product to Apple. The product

1 includes -- Apple had invested substantial resources.
2 That is the only -- Microsoft was basically
3 threatening something that made sense only if this
4 conduct would be profitable by protecting Microsoft's
5 operating system monopoly; in other words, it makes
6 no sense, this conduct, other than viewed in this
7 way. It is -- that is how you tell whether or not
8 this conduct is anticompetitive.
9 Now, do we have -- I would like to show
10 Your Honor, Mr. Rosenfeld talked about this -- to be
11 blunt, that this language that is somehow
12 inappropriate. I would like to play a clip from the
13 DOJ deposition of Mr. Gates where he denies precisely
14 doing this, threatening to cancel this product.
15 THE COURT: Was this used at trial?
16 MR. JACOBS: This was used at trial. This
17 was presented at trial. I hope the sound --
18 THE COURT: How do you want the court
19 reporter to report it?
20 MR. JACOBS: That is, actually, a good
21 question. Well, any way, I don't know if we can
22 actually --- we didn't anticipate playing something,
23 so we don't have speakers. So maybe actually it
24 won't work.
25 THE COURT: If you want it for the record,

1 you have to submit a copy of it as an exhibit.

2 MR. JACOBS: Okay. We can -- if you'll

3 allow us to do that, we can submit a copy of the

4 transcript.

5 THE COURT: Unless there's an objection.

6 MR. ROSENFELD: It's not clear what the

7 appropriateness of this is and I would like to see

8 the transcript first.

9 MR. JACOBS: Well, the point is, and we

10 don't need -- we don't need to see the video here.

11 The point is this was a hotly contested issue.

12 Microsoft denied -- Microsoft's chairman and CEO

13 denied they ever did this. He was impeached at trial

14 and his video was played at trial and the government

15 showed documents that convinced the Court otherwise;

16 that, in fact, Microsoft was using Mac Office as a

17 club. Mr. Gates says, "It was profitable. We would

18 never do something like this. This was a profitable

19 product."

20 I mean, this finding is not prejudicial.

21 This finding is a finding of a litigated issue at

22 trial. The only reason Microsoft thinks it's

23 prejudicial is because it's bad for them and it's

24 really bad, but that doesn't make it prejudicial.

25 Okay. Moving on then to Finding 357. I

1 want to just go through these very quickly. These
2 are all findings, 357, 358, 359, 360, 361. In fact,
3 361 was cited for the effect on the maintenance of --
4 Microsoft's maintenance of the applications barrier
5 to entry. 362, 363, 372 and 374, 375, 376, 377,
6 these are findings this is the harm. This is the
7 Court finding the harm from Microsoft's campaign and
8 success in exiling Netscape from the IAPs, OEM
9 channels and the other conduct that Microsoft engaged
10 in. This is all -- these are all the sort of
11 findings that are necessary to the ultimate liability
12 determination that, in fact, Microsoft's conduct had
13 an effect on the competitive process and thereby
14 affected consumers. That is the standard set out by
15 the D.C. Circuit. You must make those showings.
16 These are the showings that were made.
17 I'm going to get into them quickly. Java.
18 MR. ROSENFELD: Can I respond? This is
19 sort of a discrete set, if it's okay to use these.
20 MR. JACOBS: Okay.
21 MR. ROSENFELD: Thanks. Sorry. I will be
22 very quick.
23 The question with regards to all these
24 findings related to usage share is what conduct was
25 responsible for the reduction in usage share by

1 Navigator. Was it the lawful conduct that the
2 D.C. Circuit identified or the unlawful conduct that
3 it identified? We know that Judge Jackson thought it
4 was all unlawful. His conclusions about the usage
5 share reflect his view that all this unlawful conduct
6 resulted in this reduction usage share. This is the
7 desegregation problem. These findings, nor the
8 evidence at that trial, were not directed to the
9 issue of whether just the unlawful conduct resulted
10 in the reduction usage share. They couldn't have
11 been. When Judge Jackson wrote these findings, he
12 thought everything was unlawful. The D.C. Circuit
13 said no. So these findings clearly don't reflect
14 what was decided by the D.C. Circuit. They can't be
15 critical and necessary to the liability determination
16 because they are inconsistent with it. These should
17 not be, (A), preclusive of anything; and, (B), they
18 are highly prejudicial because they lump together the
19 legal and the conduct that was found to be unlawful
20 by the D.C. Circuit.
21 So all these findings fall in the same
22 category and should fall out for the same reason.
23 MR. JACOBS: Well, again, Your Honor, I
24 think Mr. Rosenfeld misstates the standard. You
25 don't need to show that the harm to Navigator was

1 caused solely by Microsoft's conduct. That's not the
2 standard in an antitrust case. That is not the
3 standard the D.C. Circuit insisted on. So this
4 notion that you have to disaggregate all of this and
5 you couldn't possibly do that, if that were the
6 standard the D.C. Circuit having found a few of these
7 acts as not violating Section 2, how could they have
8 possibly come to any conclusion as to the harm to the
9 competitor process? I mean, it's just -- it
10 basically is saying that this is just an unsolvable
11 problem even when the D.C. Circuit was able to look
12 at the record here and conclude that Microsoft's
13 conduct had an effect on the market.
14 Moving on to Java. Okay. I'm going to go
15 through -- initially, I think we have -- the first
16 three slides here are the conclusions of law.
17 Because the first of the findings of fact here are
18 very important to understand all of these conclusions
19 of law, necessary to all of these conclusions. The
20 first conclusion -- well, there were four conclusions
21 of law that the district court found with respect to
22 Microsoft's conduct relating to Java.
23 First of all was that Microsoft developed a
24 Java Virtual Machine that was incompatible with Sun's
25 cross-platform Java Virtual Machine. I think Your

1 Honor will recall the notion behind Java and the Java
2 Virtual Machine Sun called the "right once, run
3 everywhere" and the notion that any computer on which
4 a Java Virtual Machine resides, a program written to
5 run on a Java Virtual Machine, a JVM, can run on that
6 machine.
7 The problem is once Microsoft -- the notion
8 these all would be compliant, cross-platform
9 compliant, and so you could run it on a Mac. You
10 could run it on Linux box. You could run it on a
11 Windows PC.
12 That was the first of the conclusions.
13 Now, that conclusion that that was illegal, just the
14 development of the incompatible Virtual Machine, that
15 was overturned by the D.C. Circuit. But there were
16 three other aspects to Microsoft's Java conduct that
17 were sustained by the D.C. Circuit.
18 First, Microsoft deceived Java developers
19 about the Windows-specific nature of Microsoft's Java
20 developer tools. Basically, these tools involve
21 certain keywords and compiler directives and the like
22 that could only be executed by Microsoft's version of
23 Java. So if a Java developer wrote with Microsoft's
24 tools, wrote a Java application and compiled it with
25 Microsoft's tools, using these directives it would

1 run on Microsoft's Java Virtual Machine; the
2 incompatible one, but not on the compliant, the
3 standard compliant Virtual Machine. So this sort of
4 broke the whole "right once, run everywhere"
5 objective of Java.
6 Microsoft deceived the Java developers
7 about this. It never told them that they were doing
8 this. It didn't tell them that they were writing
9 incompatible applications. The court of appeals
10 sustained that finding of -- that conclusion of that
11 liability conclusion.
12 Second, the second sustained liability
13 conclusion. Let's go on to the next.
14 "Microsoft coerced Intel to stop aiding Sun
15 Microsystems." Sun was the developers of Java in
16 improving the Java technologies. In the mid 1990s,
17 1995, Intel was helping Sun develop a
18 high-performance Java Virtual Machine for Windows.
19 Now, Microsoft wanted Intel to abandon that effort
20 because a fast Java Virtual Machine would threaten
21 Microsoft's monopoly in the operating system market.
22 The notion is the more people who write applications
23 for Java as opposed directly to APIs exposed by
24 Windows and then they could take those programs and
25 run them on other machines, the less important

1 Windows became.

2 So by 1996 -- sorry, 1996 until it

3 developed a JVM designed to run well, but then

4 Microsoft threatened Intel, "Stop helping Sun or we

5 will refuse to distribute Intel technology bundled

6 with Windows." Liability was affirmed on this by the

7 D.C. Circuit.

8 THE COURT: What did you say? That was a

9 finding of fact you had up on there the board.

10 MR. JACOBS: That is from the

11 D.C. Circuit's discussion.

12 THE COURT: Right. That is a fact, isn't

13 it?

14 MR. JACOBS: Well, this is how -- it's the

15 D.C. Circuit saying.

16 THE COURT: That is not a conclusion of

17 law. That is a fact.

18 Why don't I just copy that word-for-word

19 and say that's a finding of fact and say you're

20 precluded. It's a fact, isn't it? It's summarizing

21 a fact.

22 MR. ROSENFELD: Your Honor, I'm glad you

23 asked a question because this is not a conclusion of

24 law. As I understand it, this is what Judge Reis

25 came up with as --

1 THE COURT: I thought this was quoted right
2 from --
3 MR. ROSENFELD: No, I believe that she's
4 citing -- in some instances there are quotes, if I
5 understand this, and I think there is ambiguity here.
6 THE COURT: I'm sorry. I thought this was
7 the --
8 MR. ROSENFELD: She quotes, and as I said
9 before, Microsoft doesn't accept in any way, shape or
10 form these conclusions.
11 THE COURT: I'm sorry. I thought this was
12 a direct quote from the Circuit. Sorry.
13 MR. JACOBS: I can give Your Honor the
14 discussion in the D.C. Circuit.
15 THE COURT: I don't need it. That's okay.
16 MR. JACOBS: What the D.C. Circuit --
17 basically, therefore, the conclusion is that we
18 affirm the conclusion that Microsoft's threat to
19 Intel were exclusionary in violation of Section 2,
20 this following a long discussion of what exactly was
21 it that Microsoft was doing with respect to Intel.
22 So, okay. Let's move on to then -- okay,
23 "First Wave" Agreements. This was the other -- these
24 were the other Java-related acts that were found to
25 be illegal. Microsoft entered into -- these are the

1 same agreements with these ISVs forcing them to use
2 Internet Explorer, Web-centric applications, also
3 places certain requirements on them that they needed
4 to use Microsoft's non-Sun-compliant JVM as default
5 for their software. Again, getting people to write
6 to Microsoft's incompatible Java Virtual Machine as
7 opposed to Sun's compliant Java Virtual Machine.
8 So let's go through the findings of fact
9 then. Here we've got findings -- can you go to that
10 last one? Sorry. Okay.
11 Here is the outline in Judge Jackson's
12 findings of fact. The first one is Finding 386, a
13 summary finding; 387 through 394, this is all about
14 Microsoft's creation of a Java implementation that
15 was incompatible with other implementation. It goes
16 on then to discuss inducing developers to use
17 Microsoft's implementation rather than Sun and then
18 it goes on to discuss the effects of this conduct.
19 So let's go through 386, Finding of Fact
20 386. "For Microsoft, a key to maintaining and
21 reinforcing the applications barrier to entry has
22 been preserving the difficulty of porting
23 applications from Windows to other platforms, and
24 vice versa." Again, this is the overarching desire
25 of Microsoft that was litigated in this case, was to

1 kill the cross-platform threat posed by Java and by
2 Netscape and this sets that out. This establishes
3 that threat.
4 Okay. Let's go on. 388, the next finding.
5 In 1996 Sun licensed Java to Microsoft, the Java
6 technologies to Microsoft. Now, Microsoft then
7 developed its own -- its own Windows-compatible Java
8 Virtual Machine, Java runtime environment. However,
9 it implemented -- Microsoft implemented different
10 methods in its developers tools and in its JVM that
11 made it incompatible with the Sun version.
12 Now, Microsoft argues that -- and this
13 again goes into the imcompatability -- and that if a
14 developer relied on Microsoft's methods rather than
15 Sun's, its Java applications would be much more
16 difficult to port from the Windows-compatible JVM to
17 another. Again, this is all establishing that -- the
18 imcompatability undermining of the cross-platform
19 potential of Java.
20 Let's move on to 390. Now, Microsoft could
21 have implemented Sun's version but didn't. So if
22 somebody invoked Sun's method for making native
23 calls, it would not run on Microsoft's version of JVM
24 and vice versa. So this right here, it was
25 established that these are incompatibilities between

1 the Java Virtual Machine that Microsoft developed and
2 what would be the effects of writing for Microsoft's
3 Java Virtual Machine as opposed to Sun's Java Virtual
4 Machine.
5 391, this is, again, dealing with the
6 specifics of the incompatibilities that Sun added a
7 class library called "RMI." I don't think we need to
8 get into the details, but the more that Java -- this
9 is again Microsoft talking, "The more that Java
10 developers were able to satisfy their need for
11 functionality by calling upon the Java class
12 libraries, the more portable their applications would
13 become." Again, this all will go to effects.
14 Okay. 394 is conceded by Microsoft, but
15 let's go back to the findings we've already seen, and
16 those deal with Microsoft's development of an
17 incompatible Java Virtual Machine. Microsoft says
18 correctly in this case that the D.C. Circuit did not
19 ascribe liability simply to the development of the
20 Java Virtual Machine. That is correct. The
21 findings, nevertheless, that we're talking about here
22 were crucial to any determination that this other
23 conduct that Microsoft does acknowledge -- that it
24 had an exclusionary anticompetitive effect. Here,
25 for example, in Finding 394, this is dealing with

1 what we talked about before about Microsoft
2 developing its Java Virtual Machine and the tools
3 that would write to its platform but not to a Sun
4 compliant platform and deceiving Java developers
5 about that, that they were developing
6 Microsoft-specific applications rather than
7 cross-platform applications that would run on any
8 operating system.
9 Well, where is the harm in that? The harm
10 comes from the fact that -- in the deception, the
11 harm comes from the fact that they are writing to an
12 incompatible Virtual Machine. They deceived them and
13 the harm to competition is the fact that as a result
14 of that deception, rather than writing cross-platform
15 applications, they are writing Microsoft-specific
16 applications now. Had Microsoft not developed an
17 incompatible JVM but rather developed just a better
18 compatible Java Virtual machine, there would be no
19 harm. There would be absolutely no harm to
20 competition. The development itself, while not in
21 and of itself illegal, was crucial. It was crucial
22 to the findings, to the conclusions of liability.
23 Let's move on, and I note too that 394 was
24 the finding that was discussed yesterday where
25 Microsoft says, "Okay. 394 we concede, but in the

1 brief, you know, that they had most of the purpose
2 and effect of that cut out." So it was just
3 Microsoft encouraged developers to use these
4 extensions. I mean, but this was -- this was the
5 meat of it. It's the deception, the deception to
6 write to an incompatible JVM.
7 MR. ROSENFELD: Should I address these now
8 before the next batch?
9 MR. JACOBS: Why don't I just -- I was
10 thinking if I could just finish Java here, we could
11 get that done.
12 Okay. Now 395, Sun and Netscape reached an
13 agreement in May of 1995 that Netscape would include
14 a version of Sun's Java Virtual Machine with Netscape
15 Navigator. This was how Sun distributed its Virtual
16 Machine. The D.C. Circuit -- well, let's go on,
17 actually. We talked about how that was important,
18 how it was necessary to the findings of liability
19 here.
20 Okay. This here, Microsoft was -- wanted
21 developers to write to Microsoft's JVM rather than to
22 Sun's JVM. So to hinder Sun and Netscape, Microsoft
23 began pressuring Intel, and this is setting out the
24 pressure that Microsoft brought to bear on Intel, the
25 conclusion that we had talked about earlier. Again,

1 the conclusion that that conduct was illegal depends
2 entirely on the fact that Microsoft itself was
3 developing an incompatible Java Virtual machine.
4 Microsoft was just out there developing a great Java
5 Virtual Machine and what's the harm to competition.
6 So Microsoft was able to distribute its
7 JVM, but Microsoft was able -- because of its conduct
8 towards Netscape in exiling Netscape from the OEM and
9 IAP channel, was able to prevent Netscape from being
10 able to do the engineering work necessary to continue
11 bundling up-to-date Java Virtual machines.
12 Now, we will get into the specific
13 findings, but here the importance of these findings
14 are all that you need. Distribution, you need
15 widespread distribution of these Virtual Machines in
16 order to pose any sort of threat to Microsoft's
17 monopoly. So what is going on here is Microsoft is
18 precluding Sun from being able to get its compliant
19 Virtual Machine out there.
20 Let's move on to 399. So Microsoft then
21 when it's able, it's getting its Java Virtual Machine
22 out there. Microsoft then with its "First Wave"
23 agreements induces ISVs to begin writing to its
24 incompatible Virtual Machine. This is 399.
25 So 400 is, again, recognizing the

1 importance of the ISVs in getting that Java runtime
2 environment out there. This is crucial to the
3 anticompetitive effects.
4 Let's move on quickly here, 401. Here is
5 the "First Wave" that Microsoft agrees with.
6 MR. ROSENFELD: We agree with that.
7 MR. JACOBS: Yes. Microsoft agrees with --
8 and then "In addition to the 'First Wave' agreements,
9 Microsoft entered an agreement with at least one
10 other ISV that specifically required it to
11 redistribute Microsoft's JVM." This is what the
12 "First Wave" agreements were doing.
13 403, that was not -- yeah, 402 and 403 are
14 both referring to the same additional -- these are
15 agreements. They are basically the "First Wave"
16 agreements that Microsoft now says, "Well, these are
17 covered by the D.C. Circuit decision," but I think
18 there's no -- absolutely no reason to suspect that
19 these are any different than the "First Wave"
20 agreements, 402 and 403.
21 Going on to 404, again, Microsoft's effort
22 to lock developers into its Windows-specific JVMs.
23 405, that Microsoft was able to prevail on
24 Intel.
25 The 405 and 406 are what Microsoft did to

1 Intel in terms of pressuring them to seize their
2 development of a Java Virtual Machine. These
3 findings --
4 Now, 406 is directly quoted in the
5 D.C. Circuit's decision. 404 is also cited by the
6 D.C. Circuit. That is at 253 F.3rd at 77 and 405 is
7 also cited by the D.C. Circuit. But here's what the
8 D.C. Circuit says, though, that is important in
9 understanding the effects of this conduct,
10 particularly with the independent software vendors,
11 and this is why these findings go to distribution of
12 Sun's JVM with Netscape and how Microsoft was able to
13 distribute its JVM without any sort of hindrance
14 whatsoever, is that the D.C. Circuit noted that all
15 of this conduct with respect to the "First Wave"
16 agreement was occurring against a backdrop of
17 foreclosure that Microsoft -- I just want to find the
18 exact language here.
19 This is at 253 F.3rd at 75: "Microsoft's
20 exclusive deals with the leading ISVs took place
21 against a backdrop of foreclosure," and that
22 basically when Netscape announced in 1995 -- this is
23 citing Finding of Fact 394 -- that it would include a
24 copy of -- every copy of Navigator -- with every copy
25 of Navigator a copy of Windows JVM. It appeared that

1 Sun's Java implementation would achieve the necessary
2 ubiquity at Windows. Citing Finding of Fact 394, as
3 discussed above, however, Microsoft undertook a
4 number of anticompetitive actions that seriously
5 reduced the distribution of Navigator. All of these
6 findings that we're talking about with distribution
7 of Navigator and the distribution of the JVMs, this
8 is the background of foreclosure that we're talking
9 about.
10 Without these acts that Microsoft took and
11 the inability of Netscape to continue distributing
12 the Java Virtual Machine and you could not have made
13 the findings of anticompetitive harm. So basically
14 all of this Java -- this Java story depended on these
15 findings that regardless of whether or not liability
16 is ascribed for a particular finding or a particular
17 action of Microsoft doesn't change the fact that the
18 issue itself was important and the issue was
19 necessary to the judgment.
20 MR. ROSENFELD: My turn?
21 MR. JACOBS: Yes.
22 MR. ROSENFELD: You covered a lot of ground
23 there. Your Honor, I think I almost feel like the
24 proverbial horse returning to the stable. You kind
25 of hurry up at the end because you want to get home,

1 but this is a very important area. And I think it
2 illustrates why, for example, Judge Peterson did what
3 he did. Judge Jackson wrote these findings thinking
4 and indeed holding that Microsoft's development of
5 incompatible JVM was an antitrust violation and every
6 one of these findings or virtually every one of them
7 makes reference either directly or by implication to
8 the fact that Microsoft did that and that it was
9 wrong. And he really pivots off that central fact,
10 the incompatible JVM in all these findings.
11 The D.C. Circuit -- and I think we actually
12 agree on this -- the D.C. Circuit was unequivocal
13 about this, Microsoft developing its own Java Virtual
14 machine was not anticompetitive. Indeed, the Court
15 went on to say it was procompetitive. It worked more
16 quickly than the Java Virtual Machine that Sun came
17 up with. That fact is very difficult to excise from
18 these findings because they were written by somebody
19 who thought that fact was a core part of these
20 findings. That's why we try to identify three
21 findings, and it's not perfect because we couldn't
22 even get rid of all the references to the Java
23 Virtual Machine that Microsoft came up with, and
24 that's why Judge Peterson simply described the act
25 and didn't try to take these findings that were

1 written with a very different outcome in mind and
2 force them into this box.
3 So let's look at the findings that we think
4 are relevant. Let's start with 394.
5 And Mr. Jacobs is right to point out that
6 we, too, tried to edit this one in our brief because
7 it starts with a sentence that says, "In a further
8 effort to increase the incompatibility between Java
9 applications written for Windows JVM and other
10 Windows JVMs," and you can't read that without
11 thinking that there's something wrong with
12 Microsoft's incompatible JVM because that's what
13 Judge Jackson, who wrote this, thought. But there
14 isn't. Nonetheless, this finding in substantial
15 measure -- I think without that introduction -- but
16 anyway, this finding does incorporate largely what
17 the wrongful conduct is in terms of the deception of
18 the Java developers.
19 And it does so largely without implying
20 that there was something wrong with Microsoft's
21 coming up with its own Java Virtual Machine. That is
22 the key challenge with all of these findings. And
23 again, the best that the plaintiffs do on this is to
24 say -- I thought it was both candid and revealing --
25 all of this took place against the backdrop of

1 foreclosure. All of these findings that implicate
2 the incompatible JVM are relied upon by plaintiffs.
3 The best they can come up with, that is the backdrop
4 of foreclosure because it wasn't illegal.
5 So that's 394. Let's go to 401. 401 is
6 designed -- this is requiring ISVs to distribute
7 Microsoft's Java runtime environment and, again, this
8 was found to be unlawful. And Microsoft has agreed
9 to this finding because it sets out in quite abundant
10 detail, I think, what is an extremely complicated
11 computer science issue. And I will not pretend to
12 explain it because I don't understand it, but I do
13 know that there's a Java Virtual Machine that
14 Microsoft had, there's one that Sun had, and there's
15 an issue of what would work on what. And one worked
16 faster than the other and they didn't have a common
17 language. That's what all this is about. So 401 is
18 an attempt to distill that issue without getting into
19 the incompatibility issue.
20 And finally, 406 is pretty straightforward,
21 and it refers to efforts to impose on Intel not to
22 cooperate with Sun in developing -- I believe there
23 were multimedia applications for Sun's Java Virtual
24 Machine. I'm going to stop with mouthing the words
25 because that's as far as I can go. But this one,

1 again, 406 is an attempt to capsulate what was
2 unlawful without all the other references.
3 Now, I believe, Mr. Jacobs, we started
4 at -- where did we start? 394 or 386?
5 MR. JACOBS: 386, correct.
6 MR. ROSENFELD: Sorry. And I would first
7 note that 386 is, again, one of those findings that
8 was cited neither by Judge Jackson nor by the
9 D.C. Circuit. And it, again, is telling a story.
10 388 is a perfect example. If you could put
11 that up there, please. He talks about Microsoft
12 getting a license from Sun, and then it says,
13 "Microsoft used this license to create its own Java
14 tools and its own Windows-compatible Java runtime
15 environment." And then it talks about it in that
16 regard. And it plainly -- you can't read this
17 without thinking that there is something nefarious
18 going on here. And yet the D.C. Circuit said no.
19 This is about Microsoft's developing its own
20 incompatible-Java Virtual Machine.
21 And it talks a lot about the motivation and
22 so on, but if the conduct is legal, inquiring into
23 the motives of selling of competition is not pretty
24 and it certainly is the approach in antitrust these
25 days to say we want competitors to be out there

1 really butting heads. It's not pretty. Microsoft's
2 intent, its motivation, whatever aside, the conduct
3 that it engaged in was perfectly lawful.
4 389, same thing. It references conduct
5 that was found lawful by the D.C. Circuit, and I
6 would suggest, Your Honor, in this area especially
7 the potential for confusion, distortion and prejudice
8 is well nigh overwhelming because this is a
9 technology that very, very few people understand.
10 And these findings will take on far more of a life of
11 their own than they should and what they suggest will
12 be far more important than what they say. And in an
13 environment where the key element of conduct is
14 lawful, not unlawful, that risk of prejudice, I
15 submit, is overwhelming.
16 We can keep going. 390. 390 says,
17 Microsoft could easily have implemented Sun's
18 approach. Well, so what? The law doesn't require
19 that Microsoft implements Sun's approach. The
20 D.C. Circuit says you didn't have to and, indeed, it
21 was procompetitive that you developed a better
22 product. This finding is plainly prejudicial. It
23 can't be critical and necessary to a liability
24 determination because there was no liability
25 determination for the Java Virtual Machine.

1 Similarly, and I think all of these are
2 much to the same effect: 391, 394 -- 395 starts out
3 by saying "If all Microsoft had done to combat the
4 growth of easily portable Java applications had been
5 to increase the incompatibility between its Java
6 implementation and ones complying with Sun's
7 standards, the effect might have been" -- I believe
8 it says -- "limited." Again, that's Judge Jackson
9 speculating about the effect, the competitive effect,
10 of conduct that the D.C. Circuit found to be lawful.
11 Similarly, it talks about "linking."
12 Linking a copy of -- excuse me, it talks about
13 linking a copy of the Java Virtual Machine to the
14 browser, this finding and in a subsequent finding.
15 Again, there is nothing unlawful about that linkage.
16 No finding of liability that says there is.
17 Similarly, when we get to Finding 396, it's
18 the same point, determine to induce developers to
19 write Java applications for Microsoft's version
20 rather than for Sun's. Microsoft made a large
21 investment of resources and the like. This made
22 Microsoft's version of the runtime environment
23 attractive on a technical -- on technical merits. To
24 hinder Sun and Netscape from improving the quality of
25 Windows JVM, Microsoft pressured Intel.

1 Now the Intel finding is in 406. This
2 finding, again, is predicated and pivots off the Java
3 Virtual Machine.
4 Looking at 397, and this -- I apologize.
5 This is the finding I was thinking of when it talked
6 about the bundling. It says "By bundling its version
7 of Window's JVM with every copy of Internet Explorer
8 and expending some of its surplus monopoly power to
9 maximize the usage of Internet Explorer, Microsoft
10 endowed its Java runtime environment with the unique
11 attribute of guaranteed, enduring ubiquity across the
12 enormous Microsoft installed base." Well, that might
13 all be true, but it's not unlawful. There has been
14 no liability determination in this case that
15 Microsoft's attaching a copy of its JVM runtime
16 environment to the browser was in any way unlawful.
17 No finding, can't possibly be necessary and essential
18 to a liability finding.
19 398 pivots off the same point. It starts
20 out by saying "The guaranteed presence of Microsoft's
21 runtime environment on every Windows PC," again,
22 clearly suggesting that there was something unlawful
23 about the conduct Microsoft engaged in. It says
24 "Owing to Microsoft's deliberate design decisions,
25 more developers using Microsoft's Java tools meant

1 that more Java applications would rely on those
2 Windows-specific technologies." What was wrong in
3 that conduct was just the deception, and that has
4 been dealt with in Finding 394. Microsoft's conduct
5 otherwise was not unlawful. I think I'm coming to
6 the end of these.
7 Finding 400. Well, first of all, the last
8 several findings that I talked about, 395 to 400,
9 these are the findings that the plaintiffs attempt to
10 justify as simply being made against the background
11 of foreclosure. Judge Jackson described them. I
12 submit that the background of foreclosure falls into
13 one of those categories that the Iowa Supreme Court
14 said should not be a basis for collateral estoppel
15 setting the background, setting out the foundation of
16 the story. These findings plainly were not critical
17 and necessary to a liability determination, and they
18 inexorably involve conduct that was found to be
19 lawful.
20 Now, Findings 402 to 403 describe an
21 agreement with at least one ISV, and I think these
22 findings are -- plainly cannot be deemed critical and
23 necessary to a liability finding. I think the best
24 plaintiffs do here is they say, "Well, yes, the
25 D.C. Circuit really didn't talk about these." But we

1 have determined that they are identical to the
2 "First Wave" agreements that the D.C. Circuit did
3 talk about, and, therefore, I think the language was,
4 "It's reasonable to suspect that they are not
5 different." Well, reasonable for whom to suspect?
6 The issue is what the D.C. Circuit came up with, what
7 they decided about these agreements, and we know that
8 they didn't decide anything about these agreements.
9 This finding wasn't referenced. These
10 findings were not a basis for a liability
11 determination, and the best plaintiffs can do is to
12 say, "Well, they look and feel a lot like the
13 agreements that the D.C. Circuit did find to be a
14 basis for liability." I submit, Your Honor, that
15 can't make these findings conclusive. It simply
16 can't. They are not necessary and essential to the
17 judgment here.
18 I think I'm looking -- I'm going to the
19 last set here. Yes. These are pressuring
20 developers, principally Intel, into not developing.
21 As I said before, Finding 406, which we've agreed to,
22 deals with those particular findings. So on that
23 note, I think I'm going to stop. I think we're
24 almost there.
25 MR. JACOBS: I think we are almost there.

1 Okay. Just a few points on Java here.
2 402 and 403, Judge Jackson includes 402 and
3 403 along with the "First Wave" agreements. It's not
4 just us making this up. Judge Jackson does -- I will
5 get the cite to you momentarily on that. So even to
6 the extent that the D.C. Circuit didn't include those
7 findings, inferentially, if you will -- here is the
8 cite. 87 F.Supp.2d at 44. 403 and 404 where Judge
9 Jackson writes "Finally Microsoft impelled ISVs,
10 which are dependent upon Microsoft for technical
11 information and certifications relating to Windows,
12 to use and distribute Microsoft's version of the
13 Windows JVM rather than any Sun-compliant version."
14 This citing Finding of Fact 401, which was the "First
15 Wave" agreement; to 403, which was the identical type
16 of agreement with RealNetworks.
17 Even to the extent that the D.C. Circuit
18 didn't mean to include 402 and 403, just for the same
19 reasons as we are, Findings of Fact 230 to 238 are
20 subject to preclusion here. The D.C. Circuit did not
21 reverse any finding of liability with respect to
22 those particular findings, so those findings are
23 necessary to the conclusion that Microsoft's ISV
24 agreements were anticompetitive.
25 Now, let's go back to Finding 397, if I

1 could. Finding 397, this is the background of
2 foreclosure, but those aren't my words and they are
3 not Judge Jackson's words. Those are the
4 D.C. Circuit's words. At 253 F.3rd at 371, the
5 D.C. Circuit writes "While the district court did not
6 enter precise findings" --
7 THE COURT: Did you say 371?
8 MR. JACOBS: I'm sorry. That can't
9 possibly be right. 253 F.3rd at -- no, I'm
10 looking -- at 75. I'm sorry, I had two sets of
11 numbers, page numbers, in here.
12 "While the district court did not enter
13 precise findings as to the effect of the 'First Wave'
14 agreements upon the overall distribution of rival
15 JVMs, the record indicates that Microsoft's deals
16 with the major ISVs had a significant impact on JVM
17 promotion." And "As discussed above, the products of
18 'First Wave ISVs' reached millions of consumers."
19 It goes on and cites a bunch of materials.
20 "Moreover, Microsoft's exclusive deals with the
21 leading ISVs took place against a backdrop of
22 foreclosure." And then the Court cites specifically
23 Finding 394, but it's clear that what the Court is
24 looking at is what is going on here: The foreclosure
25 of Netscape no longer being able to distribute Sun's

1 compliant version of the JVMs.

2 That's the background -- the backdrop of

3 foreclosure. These aren't just context. This is

4 what the Court looked at, the D.C. Circuit looked at,

5 to conclude that this conduct had anticompetitive

6 effects. This backdrop of foreclosure was critical

7 to the outcome in the case, so it's not just -- it's

8 not just additional materials. It's just not context

9 or background. These are necessary issues from the

10 government case.

11 388. Now, 388, this notion that this is

12 just discussing legal conduct, this is talking about

13 Gates' discussions with Intel, with Andy Grove at

14 Intel, with the Intel Architecture Labs, telling them

15 to shut down these software labs or we're not going

16 to support -- we don't want you developing for Sun.

17 I just also note for the record quickly

18 that in the section on deception -- I'm sorry,

19 within the section on Java within the D.C. Circuit

20 decision, numerous findings are cited: 28, 73, 74,

21 76, 394, 396, 401, 404, 405, 406. So even if you

22 were to use the citation to a particular finding of

23 fact as a requirement that a finding be held to be

24 necessary, there are numerous findings that Microsoft

25 doesn't include that are included there.

1 And actually with the final section here,
2 I'm going to turn things back over to Mr. Hagstrom
3 just for a quick change of pace.
4 THE COURT: Very well.
5 MR. HAGSTROM: Your Honor, the final
6 section in the findings of fact of Judge Jackson,
7 it's as you see up on the screen, Roman Numeral
8 (VII), "The effect on consumers of Microsoft's effort
9 to protect the applications barrier to entry." We
10 have asked for preclusive effect on Findings 408 --
11 or, excuse me, 409, 410, 411 and 412. And what Judge
12 Jackson does with regard to these findings is he goes
13 through the conduct that has been established
14 throughout the findings and makes his conclusions
15 about the effect upon competition and harm to
16 consumers. As you may recall, Your Honor, from
17 yesterday, when we talked about the elements of the
18 antitrust case, a monopolization case, one of the
19 elements that the D.C. Circuit wrote must be shown --
20 it wrote, quote, and this is at page 58, "To be
21 condemned as exclusionary, a monopolist's act must
22 have an anticompetitive effect. That is, it must
23 harm the competitive process and thereby harm
24 consumers," end of quote.
25 So when we look at, for instance, Finding

1 409, it starts out "To the detriment of consumers,
2 Microsoft has done much more than develop innovative
3 browsing software of commendable quality and often
4 bundled with Windows at no additional charge.
5 Microsoft has engaged in a concerted series of
6 actions designed to protect the applications barrier
7 to entry, and hence, its monopoly power, from a
8 variety of middleware threats, including Netscape's
9 Web browser and Sun's implementation of Java."
10 He says, "Many of these actions have harmed
11 consumers in ways that are immediate and easily
12 discernible and they also cause less direct but
13 nevertheless serious and far-reaching harm by
14 distorting competition."
15 He then moves on into the next finding,
16 paragraph 410. Again, here he goes through and
17 identifies what Microsoft did to cause consumer harm.
18 He identifies things such as the restrictions on OEMs
19 that we've talked about earlier today --
20 MR. ROSENFELD: Sorry.
21 MR. HAGSTROM: -- earlier today and
22 yesterday, I guess, as his blowups are falling on the
23 floor there.
24 And Judge Jackson notes that by
25 constraining the freedom of OEMs to implement certain

1 software programs in the Windows boot sequence,
2 Microsoft foreclosed an opportunity for OEMs to make
3 Windows PC systems less confusing and more
4 user-friendly, as consumers desire. In going on he
5 notes that Microsoft forced consumers who otherwise
6 could have elected Navigator as their browser to
7 either pay a substantial price in the forms of
8 downloading, installation, confusion, degraded system
9 performance and diminished memory capacity or content
10 themselves with Internet Explorer.
11 And finally, by pressuring Intel to drop
12 the development of platform-level NSP software,
13 Microsoft deprived consumers of software innovation.
14 And he says, "None of these actions had
15 procompetitive justifications."
16 And then Finding 411, he talks about many
17 of the tactics that Microsoft has employed have also
18 harmed consumers indirectly by unjustifiably
19 distorting competition.
20 He notes that Microsoft's conduct has
21 hobbled innovation in the form of basically hobbling
22 Netscape Navigator, its constructed barriers that
23 make it very difficult to compete. And, in general,
24 he concludes that Microsoft has retarded and perhaps
25 altogether extinguished the process by which these

1 two middleware technologies could have facilitated
2 the introduction of competition into an important
3 market.
4 And finally in 412, he goes on to talk
5 about the further effects of Microsoft's conduct.
6 For instance, through its conduct toward Netscape,
7 IBM, Compaq, Intel and others, Microsoft has
8 demonstrated that it will use its prodigious market
9 power and immense profits to harm any firm that
10 insists on pursuing initiatives that could intensify
11 competition against one of Microsoft's core products.
12 And going on, the ultimate result is that some
13 innovations that would truly benefit consumers never
14 occur for the sole reason that they do not coincide
15 with Microsoft's self-interest.
16 So having gone through a 70-plus-day trial
17 and herding volumes and volumes of evidence and
18 hearing from various witnesses, he's come to the
19 conclusion that, indeed, Microsoft's conduct did harm
20 the competitive process and did harm consumers, both
21 directly and indirectly. And since this is an
22 element of a monopolization claim, he needed to make
23 those findings. And ultimately when you go through
24 the D.C. Circuit decision, they don't have a separate
25 section addressing solely these findings, but they

1 identify the harms throughout their decision and
2 recognize that there is both anticompetitive effect
3 and harm as a result of Microsoft's conduct.
4 MR. ROSENFELD: Your Honor, Mr. Hagstrom
5 fails to point out that these findings by Judge
6 Jackson were in a section of his opinion relating to
7 course of conduct violation and also in relating to
8 effect on competition.
9 Now, the D.C. Circuit rejected liability
10 for course of conduct. In addition, I believe they
11 are actually captioned "Effects on Competition."
12 This is at the end of 408, findings before these last
13 four where Judge Jackson has identified everything
14 that he thought was unlawful. And then at the end of
15 the day, he reaches a conclusion about what the harm
16 was from all of that conduct and that's what these
17 findings are intended to do, at least in his
18 presentation.
19 Now, first of all, I should point out 409
20 was neither cited by Judge Jackson nor by the D.C.
21 Circuit. It's hard to see how it could have been
22 critical and essential to the judgment. 410 was
23 cited by neither Judge Jackson nor the D.C. Circuit.
24 Hard to see how it could have been critical to the
25 judgment.

1 411 -- and if you could put that up, that
2 would be great -- 411, we talked about this
3 yesterday. 411 was cited twice by the court of
4 appeals. 409 and 410 were cited neither by
5 Judge Jackson nor by the D.C. Circuit. 411 is cited
6 twice by the D.C. Circuit, but only with reference to
7 one portion of the findings, and that's the last one
8 and that's the causation point that we've been
9 talking about now for two days.
10 The D.C. Circuit repeats twice that there
11 is insufficient evidence to find that absent
12 Microsoft's actions, Navigator and Java already would
13 have ignited genuine competition in the marketplace
14 for -- excuse me, for Intel-compatible PC operating
15 systems. It is clear, however, that Microsoft has
16 retarded and perhaps extinguished the process by
17 which technology could have facilitated the
18 introduction of competition. Twice the D.C. Circuit
19 reiterated the lack of a causal nexus between the
20 conduct to be unlawful and the marketplace.
21 But most interesting of all is Judge
22 Jackson, who thought that much, much more about
23 Microsoft's conduct was unlawful than the
24 D.C. Circuit, even he couldn't conclude that there
25 was any causal nexus.

1 In short, Your Honor, there is very good
2 reason why no judge, no court, has been willing to
3 entertain the notion that these findings and this
4 issue of harm should be given preclusive effect in
5 these proceedings. Judge Pollack and Judge Alvarado
6 in California were quite clear, spent many days
7 arguing before both of them, that this issue could
8 not be given preclusive effect; that these findings
9 which lump together all of this conduct, some legal,
10 some illegal, could not be given preclusive effect.
11 Judge Peterson in Minnesota explicitly
12 rejected these findings as a basis. Even Judge Motz,
13 who was no great friend of Microsoft's on the
14 collateral estoppel issues -- even Judge Motz said
15 causation has not been established. Harm in the
16 sense that is required in a private action has not
17 been established in this case.
18 THE COURT: Was Motz removed from the case
19 also?
20 MR. ROSENFELD: No, no. Motz still has a
21 number of these cases. He's the MDL judge, so he --
22 THE COURT: Has there been something to
23 have removed if he's no great friend?
24 MR. ROSENFELD: No. What I mean is he
25 didn't rule for us in collateral --

1 THE COURT: I thought he did something like
2 Jackson; therefore, there was some effort to have him
3 recused.
4 MR. ROSENFELD: No, no, no. I didn't mean
5 to suggest that. What I meant in the big colloquial
6 that he said he embraced the broadest standard for
7 collateral estoppel, but even he did not feel that
8 these particular findings should be given preclusive
9 effect. The causation issue could be established,
10 simply put.
11 So at the end of the day, Your Honor, these
12 particular findings, the bulk of them, were not cited
13 by either court.
14 Second, 411 was only cited for the
15 causation issue, and by definition these findings
16 were in an effort by Judge Jackson to take all the
17 conduct that he found to be unlawful and to assess
18 its effect, and we know that the bulk of the conduct
19 he found unlawful was rejected by the D.C. Circuit.
20 He himself rejected exclusive dealing. Tying was
21 reversed and remanded; Sherman Act, Section 2,
22 monopoly leveraging, he rejected; attempted
23 monopolization was reversed and remanded; the
24 predatory course of conduct, reversed; and as you've
25 seen over these last couple of days, monopoly

1 maintenance was only affirmed in part and reversed in
2 large measure by the D.C. Circuit. So it would be
3 distorting and prejudicial in the extreme were these
4 findings to be given preclusive effect.
5 I think at the end of the day, Your Honor,
6 that brings us back to the decision of the Iowa
7 Supreme Court which gave relatively -- I would say
8 very clear guidance as to how the findings should be
9 assessed here. And we've walked through all of these
10 findings and the Court in Iowa provided guidance. It
11 said, first of all, to what extent was a finding
12 referred to or relied upon in the earlier decisions?
13 It singled out, in fact, instances where even Judge
14 Jackson didn't cite his own findings. He said it was
15 not enough that a finding provided a proper
16 foundation or a proper basis for the individual
17 elements of the claim. A question to what extent was
18 the finding of fact upon which the case turned or a
19 fact, one that would have been vital or crucial to
20 the ultimate issue precluded, to what extent was a
21 subsidiary fact -- and we've talked about that in
22 terms of "supportive."
23 The Court went on to say its brief review
24 of the 356 findings reveals an inordinate number
25 could confuse or mislead the jury. And finally, it

1 emphasized the potential prejudice inherent in such a
2 large list of subsidiary facts.
3 At the end of the day, the Court said it's
4 not the purpose of collateral estoppel to start the
5 case with a panoply of facts that are deemed
6 established that don't require further proof, to
7 provide a broad landscape background of facts on
8 which to park the case, or to start with a foundation
9 of basic facts. It's to identify that core of facts
10 that are critical, vital, necessary, essential to the
11 liability determination.
12 Finally, this record, because of the way
13 the facts -- findings of fact were written before the
14 liability determinations were made, these facts do
15 not fit well at all in terms of separating out what
16 was lawful, what was unlawful.
17 Judge Reis' conclusions of law, which
18 Microsoft also challenges, are guilty of the same
19 confusion of legal and illegal conduct, of not
20 satisfying the "necessary and essential" standard.
21 As Judge Peterson said in Minnesota: Snippets from
22 the conclusions of law, (A), are not a proper basis
23 for preclusion; and, (B), overlaps substantially,
24 "overlaps substantially" with the individual
25 findings. The test is which findings are necessary

1 and essential to the judgment.

2 We submit that the 16 findings that we've

3 come up with are the core. They are an effort to

4 distill what was illegal, to excise what was not

5 found illegal, and to just have -- and I don't mean

6 by "excised" to carve out from those findings. I

7 mean to present only those findings that deal with

8 the illegal conduct, not with conduct that was legal.

9 We submit that those findings packaged as

10 Judge Peterson did in Gordon are the best way to

11 comply with the Iowa Supreme Court's decision. This

12 Scrabble-board approach with all these various tiles

13 and so on, when you look at it, it is clear what the

14 potential for prejudice and distortion is from any

15 other approach.

16 Finally, Your Honor, we have prepared a

17 proposed order, if you would like us to hand that up.

18 But at the end of this, I would like to say thank you

19 very much for putting up with us. Walking through

20 412 findings is quite an ordeal, and we greatly

21 appreciate your intention and your endurance. So

22 thank you.

23 THE COURT: You're welcome. I will take

24 those before you leave. Mr. Hagstrom.

25 MR. HAGSTROM: Thank you, Your Honor. I

1 guess since Mr. Rosenfeld got his closing remarks in
2 before me, I will go with mine.
3 It's interesting that we've seen throughout
4 this two days what I would call some "misconstruing"
5 of not only the facts but the record. You just heard
6 Mr. Rosenfeld say that the D.C. Circuit talked about
7 Finding 411 and, you know, basically disregarded it.
8 Well, under the "Causation" section of the
9 D.C. Circuit decision, which is at page 77, I
10 believe, it starts out "As a final parry, Microsoft
11 urges this Court to reverse on a monopoly maintenance
12 claim because plaintiffs never established a causal
13 link between Microsoft's anticompetitive conduct; in
14 particular, its foreclosure of Netscape, and Java's
15 distribution channels and the maintenance of
16 Microsoft operating system monopoly," citing
17 paragraph 411. So we start off with a "Causation"
18 section with Microsoft making an argument which the
19 D.C. Circuit is now going to respond to, Microsoft's
20 argument that says because of Finding 411 there is no
21 causation, just what you heard Mr. Rosenfeld say
22 here.
23 The D.C. Circuit says that this is really
24 the flip side of some other arguments regarding
25 middleware, but ultimately it concludes that in short

1 causation affords Microsoft no defense to liability
2 for its unlawful actions undertaken to maintain its
3 monopoly in the operating system market.
4 So the D.C. Circuit did make findings on
5 causation for purposes of the Section 2 claim. There
6 was harm to the competitive process. There was harm
7 to consumers, all required elements. And by the way,
8 Judge Motz did apply collateral estoppel to these
9 final findings. We can provide the Court with his
10 decision, if that would be of any assistance.
11 So let's kind of look at what has really
12 happened over the course of the two days. We've seen
13 Microsoft through Mr. Rosenfeld kind of pick at these
14 findings, and we've seen with regard to -- I think it
15 was Finding 261 where he focused in on some language
16 because Judge Jackson used the terms "could have" and
17 that was supposedly some future tense.
18 Well, the context of that finding -- if you
19 can pull that up -- Microsoft could have covered the
20 costs of developing and maintaining the Internet
21 connection with Wizard and even made a profit by
22 charging higher referral fees. So what this is doing
23 is it's saying what Microsoft could have done if it
24 was a fair competitor, but instead what it did is it
25 engaged in anticompetitive conduct. It bartered away

1 so much of the referral fees for the specific purpose
2 of excluding competition. So the fact that it could
3 have done something in a profitable manner is, in
4 fact, the evidence of intent and evidence of
5 exclusion that Judge Jackson found necessary to the
6 particular elements of the claim.
7 262 is really kind of the same thing, and I
8 won't go into that, and another thing we heard when
9 we were talking about some of these issues that,
10 well, all of these findings goes to the browser
11 market. This isn't about the operating system
12 market. Well, I would sure like to hear what the
13 D.C. Circuit says and would have to say to an
14 argument like that; but it's very, very clear, when
15 you look at the table of contents and the
16 organization of the D.C. Circuit's decision, it
17 starts out with a monopolization claim, and that
18 monopolization claim goes up to the attempted
19 monopolization claim of the browser market, which is
20 around -- I think it's page 80. That whole
21 discussion, all of this discussion we've had here
22 today and yesterday, that whole discussion relates to
23 the Section 2 monopolization claim, not to the
24 browser market. And, in fact, we could go back
25 through the D.C. Circuit decision and look at some of

1 these various findings of anticompetitive effect.
2 On 87 -- 67, sorry, "We hold that
3 Microsoft's exclusion of IE," so IE is the browser.
4 So Mr. Rosenfeld would have you believe that this is
5 regarding a browser market, not an operating system
6 market. We hold that Microsoft's exclusion of IE
7 from the "Add/Remove" programs utility and its
8 commingling of the browser and operating system code
9 constituted exclusionary conduct in violation of
10 Section 2. All of this is part of the operating
11 system discussion.
12 We've got the same thing with Apple. The
13 exclusionary deal with -- the exclusive deal with
14 Apple is exclusionary.
15 So we've got several places throughout the
16 decision where the D.C. Circuit is referring to the
17 exclusionary conduct as affecting the operating
18 system market.
19 When you take findings -- well, let me back
20 up. We've heard a lot of argument about this tying
21 claim, and let's just be very, very clear about this,
22 Your Honor. The tying claim was one of the claims
23 brought by the government entities arguing that
24 Microsoft used its monopoly in the operating system
25 market to force the taking of the less desirable

1 product, a separate product.

2 Judge Jackson applied what's called a "per

3 se illegal standard." Under the antitrust laws going

4 back for literally a century, there are two types of

5 standards that are applied in analyzing conduct. One

6 is a per se illegal standard, and a per se illegal

7 standard is really a substitute for analyzing either

8 behavioral or -- behavioral analysis or a structural

9 analysis; for instance, price fixing. Price fixing

10 is so pernicious and so illegal that if established

11 it is per se illegal, a defendant is not allowed to

12 come in and offer justifications as it would under a

13 rule of reason.

14 Judge Jackson applied the tying -- the

15 per se standard to the tying claim. The D.C. Circuit

16 said, "Well, in light of the unique nature of

17 software markets, we're going to remand this issue to

18 allow the district court to address it under a rule

19 of reason standard." That isn't saying that all of

20 this conduct, the intermingling of code, et cetera,

21 to weld or technologically bind IE to the operating

22 system is somehow now legal. As we heard

23 Mr. Rosenfeld say repeatedly over the last couple of

24 days, it's absolutely, unequivocally clear that the

25 D.C. Circuit said it was illegal.

1 But yet we heard Microsoft through
2 Mr. Rosenfeld attempt to argue that away, to, you
3 know, get out from underneath that conclusion. And
4 that's exactly what's going to happen in trial if we
5 don't have specific, specific findings of fact that
6 are subject to collateral estoppel here.
7 By having 16 findings, there is no doubt,
8 based upon the experience in Minnesota, that
9 Microsoft is going to come in through its experts,
10 through lay witnesses and even through the
11 introduction of documents to try and undercut these
12 very well-established facts and conclusions, and
13 that's going to burn up an awful lot of time in this
14 proceeding.
15 We believe that under the Iowa Supreme
16 Court standard that it's very clear that you don't
17 just reach ultimate facts for purposes of collateral
18 estoppel. I mean, it's abundantly clear from that
19 decision. It rejected the ultimate evidentiary test
20 and then it further distinguished subsidiary or
21 innocuous findings. So if a fact is evidentiary and
22 was important to the parties and considered necessary
23 by the trier, collateral estoppel applies.
24 And if you notice throughout the last
25 couple of days, Mr. Rosenfeld went from identifying

1 some facts of subsidiary to evidentiary and then
2 there was the discussion this morning, Your Honor,
3 about, "Well, okay, Microsoft, are you going to agree
4 that if I don't apply collateral estoppel to all of
5 these findings that you've identified as evidentiary,
6 relating to these ultimate finding that you've
7 identified, that you will be precluded from offering
8 contradictory testimony?" There was an agreement
9 there, but then after that you noticed a shift in the
10 language used by Mr. Rosenfeld.
11 Suddenly all of these findings were
12 supportive. They were no longer evidentiary. They
13 were supportive, and that was to now slide -- attempt
14 to slide these facts over underneath the whole
15 proceeding before Judge Motz and the Fourth Circuit,
16 and the Fourth Circuit, as Mr. Jacobs has already
17 pointed out, applied a totally different standard
18 than the Iowa Supreme Court. They didn't address the
19 standard in the same way. They didn't address
20 Restatement Section 27 the way this court -- this
21 Iowa Supreme Court did.
22 And to make it clear, as I mentioned
23 yesterday morning, we're not here to get a panoply of
24 subsidiary, innocuous facts. That is not what these
25 are. We've demonstrated how these facts were

1 important to the parties and necessary to the trier.
2 This is not a long list of innocuous facts.
3 Thank you, Your Honor.
4 THE COURT: Anything else, Mr. Rosenfeld?
5 MR. ROSENFELD: No. Thank you very much,
6 Your Honor.
7 MR. HAGSTROM: I too thank you for your
8 accommodation over the past two days because this was
9 obviously a very tedious job.
10 THE COURT: That's my job. I'm happy to do
11 it. I want to compliment the attorneys, counsel,
12 very well prepared, very well argued and presented
13 with great confidence, professionalism, courtesy, and
14 I thank you very much. Have a safe trip home
15 wherever you're going.
16 MR. ROSENFELD: Thank you, Your Honor.
17 (Record closed on April 18, 2006, at
18 4:30 p.m.)
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1 CERTIFICATE TO TRANSCRIPT

2 The undersigned, Janis A. Lavorato, one of

3 the Official Court Reporters in and for the Fifth

4 Judicial District of Iowa, which embraces the County

5 of Polk, hereby certifies:

6 That she acted as such reporter in the

7 above-entitled cause in the District Court of Iowa,

8 for Polk County, before the Judge stated in the title

9 page attached to this transcript, and took down in

10 shorthand the proceedings had at said time and place.

11 That the foregoing pages of typed written

12 matter is a full, true and complete transcript of

13 said shorthand notes so taken by her in said cause,

14 and that said transcript contains all of the

15 proceedings had at the times therein shown.

16 Dated at Des Moines, Iowa, this 9th day of

17 May, 2006.

18

19 ______________________________

JANIS A. LAVORATO

20 Certified Shorthand Reporter

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