

1 IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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3 JOE COMES; RILEY PAINT, )  
an Iowa Corporation; )

4 SKEFFINGTON'S FORMAL )  
WEAR OF IOWA, INC., an ) NO. CL82311

5 Iowa Corporation; )  
PATRICIA ANNE LARSEN; )

6 and MIDWEST COMPUTER )  
REGISTER CORP., an )

7 Iowa Corporation, )

) TRANSCRIPT OF  
8 Plaintiffs, ) PROCEEDINGS

)  
9 vs. )  
)

10 MICROSOFT CORPORATION, )  
)

11 Defendant. )

12 -----

13 The above-entitled matter came on for  
14 hearing before the Honorable Scott D. Rosenberg,  
15 commencing at 9 a.m., September 22, 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 (The following record commenced at 9 a.m.

3 on September 22, 2006.)

4 THE COURT: Please be seated.

5 Let the record reflect this is the matter

6 of Joe Comes, et al., vs. Microsoft Corporation,

7 CL82311.

8 This is the time and date set for hearing

9 on dispositive motions, including motions for summary

10 judgment filed by both parties. The Court has been

11 provided a list of order of which the parties

12 apparently have agreed to hear the motions, and I

13 have no problem with that. So the first one, I

14 guess, is the statute of limitations motion.

15 You may proceed.

16 MR. TULCHIN: Good morning, Your Honor.

17 David Tulchin from Sullivan & Cromwell.

18 May it please the Court. I will be arguing

19 the first motion concerning the statute of

20 limitations as it applies to the plaintiffs' claims

21 for damages pertaining to Microsoft's applications

22 products; and as the Court knows, those products that

23 are at issue in this case are word-processing

24 software: Microsoft Word, spreadsheet software,

25 Microsoft Excel; and office suite software, in this

1 case, Microsoft Office.

2 As the Court, I'm sure, knows, it wasn't  
3 until the plaintiffs filed their second amended  
4 petition on October 7, 2002, that they first made any  
5 claim of any sort for damages on account of some  
6 alleged unlawful monopolization of any markets of the  
7 applications products that I mentioned.

8 There had been an original petition filed,  
9 of course, in the year 2000 -- that was originally  
10 February of 2000 -- and a first amended petition  
11 filed in March 2002. Neither of those ever made any  
12 claim for damages for any Microsoft monopolization of  
13 the markets I've mentioned. And, of course, Your  
14 Honor, the application statute of limitations under  
15 the Iowa Competition Law is Section 553.16(2) which  
16 contains a four-year limitations period.

17 And to read the applicable sentence, quote,  
18 Suit under Section 553.12 must be commenced within  
19 four years after the cause of action accrues or if  
20 there is a fraudulent concealment of this cause of  
21 action within four years after the cause of action  
22 becomes known, whichever period is later, unquote. I  
23 will get to the second sentence of this statute a  
24 little bit later, Your Honor.

25 But just to set the stage here, there is a

1 four-year limitations period and, therefore, the  
2 claims first asserted on October 7, 2002, can seek  
3 damages unless there is an exception to the  
4 limitations period only going back to October 7,  
5 1998. And our motion, of course, Your Honor, is for  
6 summary judgment with respect to any claims for the  
7 pre-October 7, 1998 period.

8 The class period for claims pertaining to  
9 operating systems goes back to May 1994. And, of  
10 course, Your Honor, statutes of limitations are  
11 rules, the rules commonly found in the law of all our  
12 states and, of course, under federal law as well.

13 And statutes of limitations are in a sense,  
14 by their nature, arbitrary rules. A fixed period is  
15 set, and unless the plaintiff can find an exception,  
16 one is confined to claims for damages arising during  
17 that period.

18 The Supreme Court of Iowa in Beeck v.  
19 Aquaslide, 350 N.W.2d 149 at pages 157 to 58 said as  
20 follows:

21 Quote, A party asserting an exception to  
22 the expiration of limitations period has the burden  
23 of proving the exception. I will leave out some  
24 citations. The quote continues: The exception must  
25 be proven by clear and convincing evidence, unquote.

1 In this case, Your Honor, the fourth  
2 amended petition, the one filed earlier this year --  
3 I believe it was in February -- asserts one exception  
4 to the limitations period set forth in the statute,  
5 and that's the fraudulent concealment allegation. Of  
6 course, as I read the first sentence of the relevant  
7 section of the statute, fraudulent concealment is  
8 mentioned in that section.

9 But before we get to the elements for  
10 fraudulent concealment, I would like to note the  
11 following: Of course, as I said, it's Iowa law that  
12 the plaintiffs have the burden of proving that  
13 exception and doing so by clear and convincing  
14 evidence.

15 And the fourth amended petition, like the  
16 third and the second -- and, again, the second is the  
17 first time that the plaintiffs ever made claims for  
18 damages on account of any wrongdoing in the  
19 applications markets. The fourth amended petition  
20 goes to great lengths to make distinction between the  
21 markets at issue in this case and rightfully so.

22 The distinction of a market in an antitrust  
23 case is in a very real sense the most fundamental and  
24 basic requirement for any plaintiff asserting  
25 wrongdoing. The market has to be defined and then

1 proven, and the fourth amended petition sets forth  
2 the markets at issue here. It also defines the class  
3 at issue here very clearly to make the distinction,  
4 the separation that I'm referring to, between  
5 operating systems -- the operating systems market and  
6 the applications market that is in issue as well.

7 The definitions in the fourth amended  
8 petition do the same thing. Paragraph 26, page 9,  
9 defines applications to be software programs that  
10 perform specific-user oriented tasks. It goes on to  
11 say, "Applications programs are typically written to  
12 run on a particular operating system and then the  
13 distinction of an operating system."

14 Paragraph 40, page 11, it says that, "It's  
15 software that controls the allocation and use of  
16 computer resources."

17 And it goes on to say that, "The operating  
18 system acts as a platform to support the functions of  
19 the software applications programs."

20 So just as a reminder, Your Honor, we have  
21 separate classes, we have separate markets; and the  
22 definitions as well make clear that applications and  
23 operating systems are distinct and separate products  
24 and markets.

25 This motion is not whether plaintiffs can

1 proceed with their applications claims. Of course  
2 they can. They can do so for the four years  
3 preceding October 7, 2002. The issue here is whether  
4 or not there is an exception which allows them to go  
5 back an additional almost four and a half years to  
6 May of 1994.

7 And, Your Honor, I know there are a lot of  
8 motions before the Court, a lot of paper that has  
9 been submitted, but we have set forth in our papers  
10 on this motion concerning the statute of limitations  
11 a number of articles in the National Press from 1991  
12 and 1992 that speak exactly on the subjects of the  
13 applications claims that are made here.

14 For example, there are articles from  
15 USA Today and the New York Times from March 1991.  
16 This is Mr. Green's affidavit, Exhibits 7 and 8.  
17 Those articles talk about the so-called "headfake,"  
18 which sometimes is referred to as the "headfake":  
19 the allegations that Microsoft misled developers such  
20 as Lotus to develop for the wrong platform, that is,  
21 put resources into developing for OS/2, IBM instead  
22 of Microsoft Windows. Those allegations were in  
23 articles in 1991.

24 PC Week in 1991 -- this is Exhibit 1 to  
25 Mr. Green's affidavit -- has an article about the

1 so-called "Chinese Wall." That is whether developers  
2 at Microsoft working on applications could or should  
3 communicate with developers with Microsoft working on  
4 operating systems.

5 Mr. Green's affidavit in Exhibits 9 and 10  
6 from articles from April and May 1991 in Time  
7 Magazine and The Washington Post that are exactly on  
8 point to plaintiffs' allegations in their petition --  
9 it's around paragraphs 221 and 224 -- that Microsoft  
10 has an unfair advantage in developing applications  
11 because it was an integrated company with both an  
12 applications division and an operating system  
13 distinction.

14 And I want to start with these articles  
15 from 1991, Your Honor, because everything in  
16 plaintiffs' fourth amended petition on the issue of  
17 so-called "unlawful monopolization of the  
18 applications markets" has been out there in the press  
19 for the public to see for a long, long time.

20 I've mentioned these articles from 1991.  
21 There are others from other years shortly thereafter,  
22 but suffice it to say, those articles arose because  
23 of a publicly known investigation by the Federal  
24 Trade Commission on these subjects, an investigation  
25 which, by the way, does not lead to any charges

1 against Microsoft by the FTC and then an  
2 investigation by the Department of Justice.

3 The newspapers in many cases are reporting  
4 on allegations that pertain to those investigations.  
5 And these facts were well known publicly for other  
6 reasons as well. Indeed, the federal -- the  
7 Department of Justice investigation led to a consent  
8 decree that Microsoft and the Department of Justice  
9 entered into in 1994 that was required to be reviewed  
10 by a district court in the District of Columbia under  
11 the so-called "Tunney Act" provision.

12 All of this was widely reported on and the  
13 district judge in that case made public comments, and  
14 I'm going to come to the Court of Appeals' decision  
15 on this in a moment which is very clear. The  
16 district judge made public comments -- we're going  
17 back now to the mid-'90s -- about the same issue that  
18 now appears in the plaintiffs' fourth amended  
19 petition. All of this goes, of course, to the fact  
20 that there was, indeed, no fraudulent concealment,  
21 nothing was concealed, everything was out there for  
22 the public to see.

23 And when the district judge's decision was  
24 reviewed by the Court of Appeals -- this is U.S. v.  
25 Microsoft, 56 F.3d in 1995, obviously a publicly

1 available opinion which caught the attention of the  
2 press, the Court of Appeals said, for example, at  
3 page 1453 that "Objectors in the district court claim  
4 that Microsoft had the exhibits to leverage its  
5 installed base in the operating systems market so as  
6 to dominate the related markets for applications and  
7 other software products." This allegation of  
8 leveraging a position in the operating system market  
9 to gain strength in the related applications markets,  
10 of course, is the basis in large part for the claims  
11 now made.

12 At page 1454 the Court of Appeals again  
13 records that the district judge had requested the  
14 parties to explain why the consent decree didn't  
15 cover the absence of the so-called "Chinese Wall."  
16 That is -- it's in the fourth amended petition -- the  
17 allegation that there should have been some internal  
18 separation at Microsoft between the operating system  
19 division and the applications division. It's right  
20 there in 1995 in the D.C. Circuit's opinion.

21 At page 1455 the Court of Appeals refers to  
22 allegations that Microsoft had used its dominant  
23 position in operating systems to give it an undue  
24 advantage in applications, an allegation that  
25 Microsoft had manipulated operating systems to render

1 competing applications inoperable or more difficult  
2 for consumers to use. Again, we have a fraudulent  
3 concealment allegation in paragraph 263 of the  
4 complaint that says that the plaintiffs could not  
5 notice, could not have known, and they quoted;  
6 Microsoft was able to actively conceal from the  
7 public for years the truth about Microsoft's  
8 anticompetitive practices, unquote, when all of this  
9 was out in the public record many years beforehand.  
10 And, by the way, Your Honor, paragraph 69 enumerates  
11 no specific concealment but says, for example, that  
12 Microsoft has denied responsibility for its alleged  
13 anticompetitive action, and I will get to Iowa law on  
14 this.

15         The law is clear that denying  
16 responsibility is not concealment. The law is also  
17 clear that you have no obligation to open up all the  
18 files of the company, that all a plaintiff needs to  
19 know is sufficient facts to have a duty to  
20 investigate. The plaintiff doesn't need to have  
21 every exhibit marked as a possible trial exhibit  
22 later on years down the road.

23         And, Your Honor, one important fact that I  
24 think should be mentioned in connection with our  
25 motion, the plaintiffs have pointed to no specific

1 conduct by Microsoft that could fit within the rubric  
2 of fraudulent concealment, and they could not do so.  
3 As the Court knows, Judge Jackson issued his findings  
4 of fact in the D.C. case, the later Department of  
5 Justice case against Microsoft, in November 1999.

6 And after that there were a flood of  
7 actions filed all over the country against Microsoft,  
8 including this one in February of 2000. Indeed,  
9 there were more than 100 -- I lost count when it was  
10 more than, I think, 150. There was one consumer  
11 class action brought against Microsoft pertaining to  
12 the same claims at issue in this case before, even  
13 before Judge Jackson issued that decision in November  
14 1999. That was a case called Lingo, L-i-n-g-o, which  
15 was filed in February 1999 by lawyers in California  
16 against Microsoft.

17 And in the Lingo case in 1999 -- and it's  
18 in our exhibits, Your Honor -- the plaintiffs there  
19 made exactly the same allegations that are in the  
20 fourth amended complaint; that is, they alleged  
21 unlawful monopolization of the operating systems  
22 market and, on top of that, in 1999 unlawful  
23 monopolization of word-processing software,  
24 spreadsheet software and office suite software,  
25 defining the markets and the products almost exactly

1 as the plaintiffs do here.

2 So in connection with the argument that I  
3 know you'll hear from counsel for plaintiffs, it's  
4 more than interesting to note that in the Lingo case  
5 in 1999 the plaintiffs had all the information  
6 necessary sufficient to make the allegations about  
7 applications software that these parties, the  
8 plaintiffs and their lawyers here, chose not to make  
9 until October 7, 2002.

10 And one other thing about the Lingo case,  
11 Your Honor, it's not as if these lawyers and the  
12 Lingo case lawyers were not familiar with one  
13 another. Indeed, they are the same lawyers and  
14 there's some overlap. Mr. Hagstrom's firm, the firm  
15 of Zelle Hoffman in Minneapolis, has an office in  
16 California and the Zelle Hoffman firm was appointed  
17 to the executive committee in the Lingo case.

18 So the operating systems claims, of course,  
19 had been made by every party around the country, but  
20 the applications claims were out there as well. The  
21 newspaper articles establish that these were  
22 well-known allegations going back to 1991. I read  
23 you some excerpts from the D.C. Circuit's opinion in  
24 1995. These are exactly the same allegations that  
25 form the basis of the claim here for damages

1 pertaining to the applications market.

2 And I want now to discuss a little bit  
3 about the law of Iowa on the subject of fraudulent  
4 concealment. Again, exceptions to the limitations  
5 period are supposed to be just that: exceptions.  
6 "The courts have long resisted the idea that the  
7 exception should be treated so broadly as to swallow  
8 the rule. For them the limitations period and the  
9 purposes behind it become undermined." Christy v.  
10 Miulli -- I hope I'm pronouncing the second name  
11 correctly -- M-i-u-l-l-i, 692 N.W.2d 694 from the  
12 Supreme Court of Iowa, 2005, last year, 2005.

13 The Christy case says that the plaintiffs  
14 bear the burden of showing concealment and that the  
15 defendant did so through -- and now I'm quoting --  
16 "some affirmative act independent of and subsequent  
17 to the liability-producing conduct." That's at page  
18 702 of the decision.

19 I'm going to come back to the Christy case  
20 because I think it's important, Your Honor. There's  
21 also Schlote -- and again my pronunciation may be  
22 wrong, S-c-h-l-o-t-e -- against Dawson, 676 N.W.2d  
23 187 at page 195 from the Supreme Court in 2004.

24 And there the Court says, "In applying the  
25 doctrine of fraudulent concealment, we have insisted

1 several conditions must exist. The plaintiff must  
2 show that the defendant did some affirmative act to  
3 conceal the cause of action, and that the plaintiff  
4 exercised diligence to discover the cause of action."

5 On the facts, as we have them before the  
6 Court, the undisputed facts, the plaintiffs here can  
7 do neither. It is not sufficient, of course, for the  
8 plaintiffs to say that the underlying conduct itself  
9 constitutes the concealment. There must be more.  
10 Woods v. Schmitt, S-c-h-m-i-t-t, 439 N.W.2d 885 at  
11 862 makes that clear, and it makes the point that if  
12 the fraudulent concealment doctrine is applied  
13 broadly to allow the plaintiffs to assert that the  
14 concealment was the alleged wrongdoing itself, just  
15 another side of the same coin of the underlying  
16 conduct, then the statute of limitations, to use the  
17 words of the Court, "will be wiped out." And the  
18 Woods case also says at page 863 that, "Mere silence  
19 by the wrongdoer does not constitute fraudulent  
20 concealment."

21 I think that takes care of the point that I  
22 will anticipate I will hear from my colleague on the  
23 other side, that Microsoft never conceded that any of  
24 this conduct is wrongful. Of course, no court has  
25 ever held it's been wrongful as well. The government

1 case where the judgment as to which there is  
2 collateral estoppel here was rendered was a case  
3 about the operating systems market only.

4         So I want now to return to the Christy  
5 case, the Supreme Court's decision of last year.  
6 That was a case, Your Honor, where a surgeon  
7 conducted a biopsy on the brain of Daniel Hocker, who  
8 was Ms. Christy's husband, and he had developed a  
9 brain hemorrhage. And after the operation, the  
10 biopsy, Mr. Hocker's condition worsened. He died a  
11 week later, and  
12 Dr. Miulli in that case told Christy, whose husband  
13 had passed away, that there had been internal  
14 bleeding in the brain, but he had misrepresented to  
15 her that the hemorrhage had occurred some distance  
16 away from where he had done the biopsy.

17         After the lawsuit was filed, Dr. Miulli  
18 conceded that the cause of Mr. Hocker's death was his  
19 own error in performing the biopsy; that, in fact, he  
20 had performed the biopsy in the wrong location in the  
21 brain and that that had caused the hemorrhage. Not  
22 only did Dr. Miulli tell the plaintiff that her  
23 husband had died in a false way, he said that he had  
24 been bleeding elsewhere in the brain. He wrote up  
25 the medical records to reflect this

1 misrepresentation. He also included in the medical  
2 records a diagnosis of viral encephalitis in the  
3 brain which later he conceded was also false.

4         These concessions came after work that had  
5 been done by the Mayo Clinic to analyze the cause of  
6 death.

7         And the Supreme Court makes clear that what  
8 matters for purposes of fraudulent concealment is  
9 whether or not there is some separate, independent  
10 later misrepresentation that causes the plaintiff not  
11 to file suit. In this case, of course, Christy  
12 didn't find out until years later of the wrongdoing  
13 of Dr. Miulli and the defense raised was the statute  
14 of limitations.

15         The Supreme Court says at page 702 that  
16 what matters is, quote, Whether the defendant's  
17 conduct prevents the timely filing of the claim. It  
18 also characterizes fraudulent concealment as "an  
19 aspect of equitable estoppel." That is, it says that  
20 the limitations period applies, but if the elements  
21 of fraudulent concealment are met, the defendant is  
22 precluded from asserting the defense. And the  
23 Christy v. Miulli case is, indeed, what fraudulent  
24 concealment is about: The doctor performing an  
25 operation negligently who later tells the plaintiff

1 that her husband died for reasons that were untrue as  
2 he conceded after the action was filed.

3 There is no such misrepresentation here.

4 There is no such independent representation by  
5 Microsoft that would have prevented these plaintiffs  
6 from discovering their claims. In fact,  
7 Mr. Hagstrom's law firm was involved in the Lingo  
8 case in 1999 where all these same allegations are set  
9 forth.

10 And the Court of Appeals decision in 1995  
11 says the same thing, the newspaper articles from the  
12 early '90s based on the FTC investigation that  
13 ultimately was closed. But, of course, that's not  
14 the question: whether the FTC brought charges. The  
15 question is: Was the information out there from  
16 which the plaintiffs could have discovered the  
17 existence of a cause of action.

18 Your Honor, let me go on to the next  
19 argument made by the plaintiffs, which is whether or  
20 not there was tolling because of the existence of the  
21 case brought by the Attorney General of Iowa in 1998  
22 in Washington, D.C.

23 The Attorney General's action was part of  
24 an action brought by a group of states. That action  
25 was joined with the Department of Justice case. And

1 Section 553.12 -- I read the first sentence  
2 earlier -- has a second sentence. It says: "If this  
3 cause is based in whole or in part on the same set of  
4 facts as alleged in a suit brought under Section  
5 553.13" -- I'm going to interject here, that's a suit  
6 by the attorney general for damages -- "this period  
7 shall be suspended until one year after the suit  
8 brought under that section is concluded."

9 Now, this is not pled anywhere in the  
10 fourth amended petition. This so-called "tolling" is  
11 absent from any allegation in any of the petitions  
12 that have been filed since the second where these  
13 claims were first made. But we need to go back and  
14 look just briefly at what the action by the states in  
15 Washington involved.

16 The first action, the first complaint, was  
17 filed on May 18, 1998, the same day the Department of  
18 Justice brought its case; and in that complaint the  
19 State of Iowa by Mr. Miller did make claims, as did  
20 all the other states, pertaining to applications  
21 software.

22 There are at page 25 references to  
23 Microsoft Office. At page 25, paragraph 26, the  
24 point is made by these plaintiffs that applications  
25 are, quote, separate and distinct products from PC

1 operating systems, unquote.

2 And at page 33 there's an allegation made  
3 about maintenance by Microsoft of a monopoly in  
4 Office Suite software. There's also a claim made  
5 under Iowa law by the Attorney General of Iowa, but  
6 that complaint was amended on July 17, 1998, less  
7 than two months later; and in the first amended  
8 complaint all the claims pertaining to applications  
9 products were dropped. The first amendment  
10 complaint -- amended complaint, excuse me, just as  
11 the Department of Justice complaint had always been,  
12 was addressed to the operating systems market and  
13 also to an alleged market for browsers. That claim  
14 was never ultimately proved, but applications were no  
15 longer in the case as of  
16 July 17, 1998.

17 So, of course, the question is under the  
18 statute at issue whether or not there's tolling --  
19 assuming that it wasn't necessary for plaintiffs to  
20 plead this -- whether there's tolling, whether the  
21 claims by the Iowa Attorney General -- they were out  
22 there for only two months -- somehow can toll the  
23 applications claims here for one year after the  
24 action was ended.

25 Of course, the action was ended -- the Iowa

1 Attorney General's action against Microsoft was  
2 concluded with respect to the claims pertaining to  
3 applications. That action was concluded in July  
4 1998. If there's any tolling, it should be only for  
5 one year after July 1998 when the claims pertaining  
6 to applications were, to use the language of 553.16,  
7 concluded.

8 They were dropped. That's certainly  
9 concluded.

10 On top of that, Your Honor, the Iowa  
11 statute requires that the claims here be made based  
12 in whole or in part on the same set of facts as  
13 alleged in a suit brought by the Iowa Attorney  
14 General. The same set of facts. Well, federal law  
15 is actually a little more forgiving to plaintiffs on  
16 this subject. 15 U.S.C. Section 16(i) doesn't talk  
17 about the same set of facts. It provides for tolling  
18 based in whole or in part on any matter complained of  
19 in the prior complaint. Under Iowa law it has to be  
20 the same set of facts. And while I think the parties  
21 will agree that there are no Iowa cases interpreting  
22 this provision of the statute, there is federal law  
23 interpreting the "more generous for the plaintiffs"  
24 federal-tolling provision. Federal law, I might say,  
25 made by Microsoft.

1           In two cases, one called GO Computer v.  
2 Microsoft, decided earlier this year, June of this  
3 year -- it's 437 F.Supp.2d 497 -- and the Novell case  
4 against Microsoft decided last year -- and we have  
5 cited and quoted from both of those decisions in our  
6 papers, and both of them by Judge Motz, who is the  
7 judge in the MDL proceeding who has been presiding  
8 over Microsoft cases since the year 2000. In both of  
9 them Judge Motz makes very clear that tolling does  
10 not apply when the claims made by the plaintiffs  
11 pertain to markets that are different from the market  
12 at issue in the prior government case.

13           Here, of course, the applications claims  
14 are in markets that the plaintiffs themselves say are  
15 quite separate and distinct from the operating system  
16 market. And both the GO and Novell decision make the  
17 point that the mere fact that these markets are  
18 related because, of course, applications run on top  
19 of operating systems -- and, of course, Microsoft is  
20 one company -- allegations made against Microsoft may  
21 not be specific to conduct in a particular market.  
22 But the key issue in analyzing tolling under the  
23 federal statute, Judge Motz holds in accord with a  
24 long line of cases, is whether the two markets are  
25 the same. There is no tolling if the plaintiffs'

1 private case makes claims in a market that is  
2 distinct from, even though related to, even though  
3 adjoining, the market involved in the government  
4 case.

5 Again, the case by the Attorney General of  
6 Iowa had to do with operating systems only beginning  
7 in July of 1998. So I think it's quite clear not  
8 only that fraudulent concealment does not apply, but  
9 that there's no tolling based on the second sentence  
10 of the statute here as well.

11 There is one other argument that the  
12 plaintiffs make to try to save these claims: the  
13 pre-October 7, 1998 claims. They say that the filing  
14 of the second amended complaint in October 2002 --  
15 that is the first one that refers to the applications  
16 claims -- that that somehow relates back to the  
17 February 2000, the original petition; that the claims  
18 relate back under Rule 1.402(5) of the Iowa Rules.

19 Now, that rule, Your Honor, says in  
20 relevant part, quote, Whenever the claim or the  
21 defense asserted in the amended pleading arose out of  
22 the conduct, transaction or occurrence set forth or  
23 attempted to be set forth in the original pleading.

24 The amendment relates back to the date of  
25 the original pleading, and the plaintiffs argue that

1 these markets are pretty close, that there is conduct  
2 in one market that may have affected the outcome in  
3 another; that many of their applications can be read  
4 to apply -- many of their allegations, excuse me, can  
5 be read to apply to both markets. But, of course,  
6 that's not the task.

7 The rule permits relating back only under  
8 rather strict circumstances. And if I may offer an  
9 observation, I think those -- the reason that the  
10 circumstances are considered to be strict is  
11 otherwise if relation back is interpreted broadly,  
12 the policies and purposes behind a statute of  
13 limitations can be easily undermined and subverted.  
14 In the statutes of limitations in this case, the  
15 legislature has mandated a four-year period, and  
16 limitations periods have a very strong public-policy  
17 aspect behind them, whether created by legislatures  
18 for courts, one, to give the defendant repose; and,  
19 two, of course, to give the courts some ability to  
20 avoid inquiring into stale conduct. The Willson  
21 case -- there are two l's in Willson in this  
22 plaintiff's name, W-i-l-l-s-o-n -- v. The City of  
23 Des Moines. It's the Supreme Court of Iowa, 386  
24 N.W.2d 76 decided in 1986.

25 I want to spend -- with apologies for going

1 on so long, Your Honor, I want to spend just a few  
2 minutes on the facts of the Willson case. I think  
3 they are very important in evaluating the argument  
4 about "relationship back."

5 That was a case where on January 11, 1981  
6 members of a tactical unit of the Des Moines Police  
7 Department executed a search warrant. They were  
8 searching Mr. Willson's home and his place of  
9 business. And after the search warrant was executed  
10 and Mr. Willson, indeed, was arrested, the chief of  
11 police -- I believe it was -- Mr. Brown held a news  
12 conference. In fact, he's not the chief of police.  
13 My apologies, Your Honor. Police Officer Brown told  
14 the news media that he would have a news conference  
15 at the police station, and he made various statements  
16 to the media that attended that news conference on  
17 the same day that Mr. Willson was arrested and the  
18 search warrants were executed.

19 Now, Willson originally brought a claim  
20 that pertained to a violation of his constitutional  
21 rights concerning the execution and implementation of  
22 the search warrant. That claim was brought in  
23 June '81, just about five months after the search had  
24 been made.

25 In March of '84, almost three years later,

1 the plaintiff moved to amend his petition to add a  
2 claim for invasion of privacy, a claim that arose out  
3 of statements made by Police Officer Brown on the  
4 same January 11, 1981 date. And the Supreme Court of  
5 Iowa ultimately in 1986 had to deal with the question  
6 of whether or not this March 13, 1984 amendment  
7 related back to the original 1981 complaint.

8 The Supreme Court observes that the two  
9 incidents were distinct in time. They were distinct  
10 in time by a matter of a few hours only. And they  
11 noted at page 84 at issue here is whether plaintiff's  
12 invasion of privacy claim arose out of the same  
13 conduct, transaction or occurrence as his Section  
14 1983 claim for deprivation of constitutional rights:  
15 Quote, We believe it did not. The evidence showed as  
16 defendants contended before the amendment was allowed  
17 that Brown's statements to the media were made in a  
18 separate incident at the police station at a time  
19 after the execution of the search warrants at  
20 plaintiff's home and business place and the other  
21 Des Moines residences were completed.

22 The news media incident was not referred to  
23 in plaintiff's 1981 petition.

24 And so the Supreme Court made clear that  
25 Rule 1.402(5) or, really, the predecessor to this

1 rule, but it's the same language, has to be  
2 interpreted quite strictly. Here the question of  
3 relating back, again, would not only subvert the  
4 statute of limitations, but these claims are separate  
5 claims. Yes, they are in related and adjoining  
6 markets. Yes, a particular employee of Microsoft --  
7 let's just call him "Jones" for the sake of  
8 discussion -- Jones may or may not have separated his  
9 daily business into two pieces; but Mr. Brown, the  
10 police officer in the Willson case, was giving a  
11 press conference that pertained directly to the  
12 arrest and search of Willson's home and business, yet  
13 no relating back is permitted there. And the Novell  
14 case, again, is directly on point.

15 So, Your Honor, again, I've taken quite a  
16 bit of the Court's time and I know there is an awful  
17 lot of business to conduct today.

18 This motion seeks to confine the  
19 applications claims to the period in which it  
20 belongs: Four years, four years prior to  
21 October 7, 2002, exactly in accord with the  
22 limitations period adopted by the legislature and  
23 reflected in the Iowa Competition Law.

24 Plaintiffs have the burden of proving an  
25 exception, a very high burden. They have to do so by

1 clear and convincing evidence. Here there is just a  
2 mass of material showing that all the facts that give  
3 rise to the claims; indeed, everything in the fourth  
4 amended petition was known publicly in the early or  
5 mid-'90s. It's referred to in articles, in a Court  
6 of Appeals decision that got a lot of press at the  
7 time.

8           Indeed, the Iowa Attorney General started a  
9 case for only two months on the same facts but  
10 dropped it. The dropping of it means that the  
11 statute does not apply.

12           And the Lingo case brought in 1999 by  
13 lawyers in California, including the Zelle Hoffman  
14 Firm, confirms what is clear: The facts here have  
15 long been known. Plaintiffs waited too long. They  
16 have never given a reason why the applications claims  
17 were not in their original petition in 2000 when the  
18 same claims had been made a year earlier in the Lingo  
19 case. They've given no reason why they waited until  
20 October 7, 2002 to assert them. They were entitled  
21 to wait that long, Your Honor. Their amended  
22 pleading was permitted. We have to face these claims  
23 for the four-year period in question, but there's no  
24 basis to go back beyond that.

25           Thank you, Your Honor.

1 THE COURT: Response.

2 MR. HAGSTROM: Good morning, Your Honor,

3 Richard Hagstrom.

4 First of all, I would like to just sort of  
5 address overall what we're going to be dealing with  
6 in terms of the motions.

7 We have nine of them, and Microsoft is  
8 pursuing what it calls "partial summary judgment"  
9 with regard to these motions. And, quite frankly,  
10 under Rule 1.981(2) there is no such thing as partial  
11 summary judgment. There has to be summary judgment  
12 completely as to a party with respect to a cause of  
13 action as to that party.

14 And all but really one or two motions that  
15 you will be hearing today -- and whenever we finally  
16 finish this -- fit that category. One is Microsoft's  
17 motion on Count II of our complaint because, again,  
18 that's a motion for relief with respect to the  
19 complete count.

20 Similarly, we have a motion for partial  
21 summary judgment on liability. Now, while that is  
22 not a complete count, Rule 1.981(4) specifically  
23 allows summary judgment for purposes of liability.

24 Now, just another kind of overarching theme  
25 here, virtually every one of these motions has been

1 addressed to another court and Microsoft has lost.  
2 The statute of limitations was presented to the  
3 California court, and I don't recall whether or not  
4 Judge Alvarado ruled on that. But -- I take that  
5 back. On the security issues and innovation, those  
6 have not been presented. But for processor licenses,  
7 intentional perceived incompatibilities, product  
8 preannouncement claims, those were all denied in the  
9 Caldera court. It's a federal court: Judge Benson  
10 in the District of Utah.

11 The concerted action conspiracy claim, that  
12 was denied by Judge Benson. It was also rejected by  
13 Judge Alvarado in California because under the  
14 "Cartwright Act" in California, they did not have an  
15 equivalent of a Section 2 claim, a monopolization  
16 claim. All they have is the contract combination or  
17 conspiracy under the Cartwright Act, and that action  
18 proceeded and was proceeding and settled just a month  
19 before trial.

20 The essential facilities and leveraging  
21 motion for summary judgment, that was denied by  
22 Judge Peterson in the Minnesota case. And our motion  
23 for summary judgment on liability issues, that was  
24 granted by Judge Peterson in the Minnesota case.

25 And it's interesting that -- I mean, we're

1 not just making this issue up about partial summary  
2 judgment because in response to our motion for  
3 partial summary judgment on liability, Microsoft  
4 argues in its opposition that, quote, Rule 1.981 can  
5 be used as a vehicle to request piecemeal  
6 adjudication of individual elements of a claim short  
7 of summary judgment. So, in other words, complete  
8 summary judgment as to a party or as to a claim.

9 One of the cases that Microsoft cites in  
10 defending its position with regard to its motions,  
11 despite the fact that it's conceded the law in  
12 opposition to our motion, is Lamantia -- and I'm not  
13 sure if I'm pronouncing that correctly -- it's  
14 L-a-m-a-n-t-i-a -- v. Sojka, S-o-j-k-a, 298 N.W.2d  
15 245. In that particular case, there was a community  
16 college instructor that sued other employees of the  
17 community college. The allegations of the complaint  
18 were broad, intended to be nonspecific.

19 The defendants moved for summary judgment  
20 saying that, "Well, we are employees of a  
21 municipality and proper notice, timely notice, was  
22 not given under the torts -- Iowa Torts Claims Act."  
23 And so as a result, the trial court dismissed the  
24 action, granted summary judgment.

25 The Iowa Supreme Court ended up reversing.

1 It said, Well, in truth, the issue of municipality  
2 immunity would apply to claims against these  
3 defendant employees with regard to conduct within the  
4 scope of their employment. It doesn't protect them  
5 with regard to conduct outside of the scope of their  
6 employment. And even though the claims stated in the  
7 complaint -- I mean, there were fraud allegations.  
8 The Iowa Supreme Court emphasized that this is a  
9 notice-pleading state.

10 And even though there was not a nice  
11 separation of the claims, i.e., claims against these  
12 employees within the scope of their employment and  
13 separately claims against these employees outside of  
14 the scope of their employment, the Iowa Supreme Court  
15 said, "We look at this as notice pleading. There is  
16 sufficient allegations here to give the defendants  
17 notice that there was a claim for the defendants'  
18 conduct outside the scope of their employment."

19 And the Court noted, quote, It has been  
20 observed that under notice-pleading rules, it is very  
21 difficult for counsel to draft a pleading so badly as  
22 to lose the rights of its clients, close quote.  
23 That's on page 247.

24 So with that background, let's take a look  
25 at the original complaint filed in this action. In

1 the petition, the original petition filed back in  
2 February of 2000 -- and this is Exhibit 2 to  
3 Mr. Green's affidavit -- there is detailed  
4 allegations about the conduct of Microsoft.  
5 Mr. Tulchin mentioned, "Well, you know, key to  
6 plaintiffs' claims are issues surrounding OS/2."  
7 Well, OS/2 is discussed in this particular petition.

8       At length discussed in this original  
9 petition was the applications barrier to entry. And,  
10 Your Honor, having read it in detail, the findings of  
11 fact and conclusions of law in the D.C. Circuit's  
12 decision is intimately familiar with its applications  
13 barrier to entry. That applications barrier to entry  
14 relates to the protection of the monopoly on the  
15 operating system through the applications and it  
16 works vice versa.

17       You can recall that in the D.C. Circuit  
18 there is discussion of the chicken and the egg.  
19 Well, these two types of software are, in fact,  
20 interrelated. You can look at paragraph 39 of that  
21 original petition and it says, "At all relevant  
22 times, Microsoft has acted aggressively to protect  
23 its Windows monopoly against any such potential  
24 competitive threats to the applications barrier to  
25 entry that Microsoft created and enjoys, and to

1 leverage Microsoft's operating system monopoly into  
2 other software markets, by engaging in a plethora of  
3 anticompetitive and exclusionary activities.

4           Microsoft's conduct includes agreements  
5 tying other Microsoft software products to  
6 Microsoft's Windows operating system; exclusionary  
7 agreements precluding companies from distributing,  
8 promoting, buying, or using products of Microsoft's  
9 software competitors, including even potential  
10 competitors; and exclusionary agreements restricting  
11 the right of companies to provide services or  
12 resources to Microsoft's software competitors,  
13 including even potential competitors."

14           When we look at the notice-pleading rules  
15 of Iowa, as I just cited to you, by the Iowa Supreme  
16 Court, this puts Microsoft on notice. It puts  
17 Microsoft on notice about claims not only with regard  
18 to the operating system, but with its conduct with  
19 regard to applications software.

20           Your Honor is intimately familiar also with  
21 the number of motions to compel that have been  
22 brought in this case. And Your Honor can recall  
23 numerous times Microsoft has argued, "Well, this  
24 particular allegation wasn't in the petition;  
25 therefore, we, Microsoft, are not obligated to

1 produce discovery regarding the subject matter. As a  
2 consequence, we, as plaintiffs, have submitted  
3 amended petitions throughout the course of this case  
4 addressing that issue, i.e., being more and more  
5 specific as we learn of additional conduct.

6 Now it seems that Microsoft wants to use  
7 that process against us and say, "Well, look, you  
8 have to go to the fourth amended petition to see what  
9 plaintiffs are really arguing; but, in fact, we go  
10 back to the original petition and there is sufficient  
11 notice pleading there of plaintiffs' claims.

12 Mr. Tulchin quoted the Iowa Competition  
13 Law, Section 553.12, and he's correct, that statute  
14 provides for a four-year statute of limitations. He  
15 is incorrect, however, to suggest that the plaintiffs  
16 are required to plead in detail in a response to an  
17 affirmative defense by Microsoft as to the statute of  
18 limitations.

19 This statute of limitations is an  
20 affirmative defense, and as a result, Microsoft takes  
21 the statute as it is presented. There is a four-year  
22 statute of limitations subject to two provisions that  
23 are identified there. One is fraudulent concealment  
24 and the second is the presence of a prior government  
25 action. And, of course, there's also no dispute here

1 that there was a prior government action.

2 Now, Mr. Tulchin also focused on the phrase

3 "the same set of facts," but, in fact, the statute

4 says "in whole or in part" on the same set of facts.

5 It is a substantial and significant difference.

6 In fact, at page 20, footnote 9 of

7 Microsoft's own brief, it says that the statutory

8 test regarding this "in whole or in part," if the new

9 claims are not, quote, based on conduct wholly

10 unrelated to the conduct alleged in a prior

11 government case, close quote, the statute of

12 limitations is suspended.

13 So let me just read the whole sentence from

14 Microsoft's brief: "As with unrelated markets,

15 claims based on conduct wholly unrelated to the

16 conduct alleged in a prior government case do not

17 suspend the statute of limitations." So, in other

18 words, it's an exclusive test. So if there's in

19 whole or in part on the same set of facts, there is a

20 suspension of the statute of limitations. If it's

21 wholly exclusive of those facts, then there is not a

22 suspension of the statute of limitations.

23 Now, having gone through for purposes of a

24 collateral estoppel motion, Your Honor reviewed in

25 great detail the allegations of facts in the

1 government case. There were a number of facts  
2 addressing the same set of facts between those in  
3 this case and the government concerning the threat  
4 that middleware posed to Microsoft's monopoly, and  
5 that threat concerned the cross-platform threat that  
6 the middleware provided. The cross-platform threat  
7 had to do with applications software. Microsoft  
8 totally ignored these facts in its brief and they've  
9 been ignored by Mr. Tulchin here today.

10 The plaintiffs' application-related  
11 allegations in this lawsuit and the litigating  
12 states' actions are both based upon the same set of  
13 facts regarding Microsoft's actions towards other  
14 middleware threats. So as Your Honor may recall,  
15 there was Intel's Native Signal Processing, Apple's  
16 QuickTime and the RealNetworks software. Both  
17 plaintiffs in the litigating states rely upon the  
18 same set of facts regarding Microsoft's  
19 anticompetitive actions directed towards IBM's  
20 SmartSuite productivity applications.

21 And Your Honor may recall that Findings of  
22 Fact 115, 116, 120 through 125, 130 and 132 -- and  
23 these are all facts with regard to which Your Honor  
24 granted collateral estoppel -- there is detailed  
25 discussion by Judge Jackson regarding Microsoft's

1 conduct vis-a-vis its own Office Suite software,  
2 applications software, and IBM's SmartSuite. And, in  
3 fact, in Finding 116 Judge Jackson wrote: "Microsoft  
4 tried to convince IBM to move its business away from  
5 products that themselves competed directly with  
6 Windows and Office."

7 It goes on to say, "Microsoft leveraged the  
8 fact that the IBM PC Company needed to license  
9 Windows at a competitive price and on a timely basis,  
10 and the fact that the company needed Microsoft's  
11 support in many more subtle ways."

12 Continuing: "When IBM refused to abate the  
13 promotion of those of its own products that competed  
14 with Windows and Office, Microsoft punished the IBM  
15 PC Company with higher prices, a late license for  
16 Windows 95, and the withholding of technical and  
17 marketing support." There are similar discussions by  
18 Judge Jackson in the other findings that I quoted for  
19 you.

20 Let me also point out that in Finding 116  
21 that I just mentioned, as well as in other findings,  
22 Judge Jackson talked about the leveraging that  
23 Microsoft used for leveraging the monopoly from its  
24 operating system market into applications; and recall  
25 the paragraph that I read to you from the original

1 petition, paragraph 39, talked about leveraging the  
2 operating systems into applications software.

3 Now, Mr. Tulchin talks about the -- let me  
4 just back up a minute. Mr. Tulchin talked about the  
5 Lingo case and made some distinction. I'm not  
6 exactly sure what the distinction was, but in Lingo,  
7 if that was the notice to plaintiffs for purposes of  
8 the October 2002 amended petition, the Lingo  
9 complaint was filed three-and-a-half years prior to  
10 the October 2002 petition, in other words, within the  
11 four years provided by the Iowa statute.

12 And it was also interesting, as we point  
13 out in the brief, that when it came to some discovery  
14 issues in the consolidated discovery, Microsoft's  
15 corporate designee, Thomas Burt, who is in the  
16 general counsel's office at Microsoft, admitted in  
17 sworn testimony that the government action was so  
18 similar to the state indirect purchaser actions  
19 alleging applications and OS claims, operating system  
20 claims, that additional document retention and  
21 document collection policies was unnecessary. So we  
22 have a corporate designee of Microsoft taking the  
23 position that these state class actions that allege  
24 applications claims, that allege operating systems  
25 claims, are identical to the government case. So for

1 purposes of discovery, we get those kinds of  
2 arguments by Microsoft; but now when it comes to  
3 statute of limitations, they want to step back and  
4 say, "Oh, no, these state claims are different than  
5 the government case."

6 Let me turn to the fraudulent concealment  
7 issue. It's quite clear under the case law that  
8 we've cited in our brief that despite the fact there  
9 may be some articles out there somewhere that talk  
10 about some activity by a potential defendant, that  
11 that is not sufficient constructive notice to require  
12 a party to file a lawsuit.

13 The Iowa Competition Law provides that "If  
14 there is a fraudulent concealment of a cause of  
15 action, the plaintiff's claim must be brought within  
16 four years after the cause of action becomes known."

17 Now, Mr. Tulchin suggests that we did not  
18 provide any evidence of concealment by Microsoft.  
19 Well, as a matter of fact, we did in both our 1.981  
20 statement and in our brief.

21 For instance, we provided evidence to the  
22 Court that Microsoft misrepresented the relationship  
23 between its applications and operating systems  
24 divisions; in other words, Microsoft repeatedly in  
25 the public said there is a "Chinese Wall" between its

1 operating systems' group and its application group.  
2 In other words, the applications group was not  
3 receiving the benefit of any assistance from the  
4 operating systems group any different from any other  
5 independent software vendor. So, in other words, the  
6 independent software vendor had the same information  
7 that the applications group did and these type of  
8 allegations by Microsoft were made after -- I mean,  
9 they were ongoing.

10           Additionally, Microsoft repeatedly  
11 represented to the public that it did not make use of  
12 undocumented APIs, the applications did not make use  
13 of undocumented APIs. Well, as a matter of fact, we  
14 provided to Your Honor in the brief several examples  
15 of where there were internal Microsoft e-mails and so  
16 forth recognizing that this was a false statement.  
17 And, in fact, ultimately, when Microsoft settled the  
18 government case, part of the settlement required  
19 Microsoft to disclose undocumented APIs, and, indeed,  
20 Microsoft disclosed well over 200 undocumented APIs.  
21 And, in fact, our expert Andrew Schulman in his  
22 investigation in this case, has found even additional  
23 undocumented APIs. So for Microsoft to suggest that  
24 there was no conduct, no subsequent and independent  
25 conduct, of concealment is simply ludicrous.

1           And the important point is, Your Honor,  
2           that this issue, fraudulent concealment, is one for  
3           the jury. The jury gets to decide whether or not  
4           Microsoft fraudulently concealed. In the In re  
5           Coordinated Pretrial Proceedings in Petroleum  
6           Products Antitrust Litigation, 781 F.Supp. 487 at  
7           page 493, the Court talked about -- this is the  
8           Federal Court, Central District, California -- the  
9           Court talked about what are the standards for  
10          purposes of fraudulent concealment. It said: "Even  
11          where a plaintiff actually knows the public  
12          speculation, constructive knowledge cannot be  
13          established absent awareness of some evidence tending  
14          to support it."

15           And in the In re Beef Antitrust Litigation  
16          at 600 F.2d 1170 to 71 -- that's a Fifth Circuit  
17          Decision -- it held that, "Even the filing of a  
18          similar, quote, widely publicized, close quote,  
19          lawsuit did not suffice as a matter of law to give  
20          the plaintiff constructive knowledge of his claims."  
21          Again, it concluded the issue was one for the jury.

22           Let me just take a look and cite to Your  
23          Honor a couple of the cases that Microsoft cites in  
24          its brief on this issue. In Dayco Corp. v. Goodyear  
25          Tire & Rubber Co., the Court held that the

1 congressional hearings on the matter and FTC's  
2 publicly filed lawsuit had revealed the defendant's  
3 illegal conduct. So a publicly filed lawsuit by the  
4 FTC.

5 Now, recall what Mr. Tulchin was telling  
6 you about the early FTC investigation. There was  
7 speculation in the press as to what the FTC was  
8 investigating. The FTC never filed an action. It  
9 never released any findings. It never released any  
10 transcripts or -- of any sort. No evidence was  
11 released. So the Dayco Corp. case that Microsoft  
12 cites is totally irrelevant. It's clearly  
13 distinguishable on its facts. In the In re Shopping  
14 Carts Antitrust Litigation, the Court held that the  
15 public filing of a criminal indictment revealed the  
16 defendant's antitrust violations. So again, a public  
17 filing. Here again, the FTC did not make a public  
18 filing.

19 And with regard to the issue regarding the  
20 consent decree entered back in -- I forget, '94 or  
21 '95 -- that the D.C. Circuit ordered the district  
22 court to enter despite the district court's concerns  
23 about some objector's allegations about the  
24 possibility that this "Chinese Wall" between the apps  
25 group and the operating group didn't exist, the D.C.

1 Circuit simply ordered the entry of the consent  
2 order. There was no findings, no evidence of the --  
3 regarding the "Chinese Wall" or any of these other  
4 issues. So again, under these standards, including  
5 the standard under Iowa law, there is not  
6 constructive notice.

7 And in the Christy case that Mr. Tulchin  
8 mentions, the Iowa Supreme Court held that inquiry  
9 notice is insufficient to -- that's insufficient to  
10 end the estoppel produced by a defendant's fraudulent  
11 concealment. The Court says: "As we have now made  
12 clear, however, the discovery rule and inquiry notice  
13 are distinct from the doctrine of fraudulent  
14 concealment and the plaintiffs do need to exercise  
15 diligence to discover the defendant's concealment."  
16 So, in other words, these are separate issues from  
17 fraudulent concealment.

18 I mentioned some of the affirmative actions  
19 of concealment by Microsoft. I want to add a few  
20 more.

21 Microsoft used its public relations firms  
22 to actively spread the falsehood that Microsoft  
23 treated its apps division as just another ISV.  
24 That's referenced in Plaintiffs' Exhibit 619 that we  
25 attached. Microsoft employees deliberately timed

1 product releases and announcements to avoid revealing  
2 the fact that Microsoft applications received early  
3 and better disclosures and access to Windows.  
4 Plaintiffs' Exhibit 141 and 3618. So again, this --  
5 these types of issues create a fact issue for the  
6 jury. Let me just turn for a few moments to the  
7 "relation back" issue.

8 The applications barrier to entry, which  
9 was protected both by Microsoft's operating system  
10 monopoly and consequently its applications monopolies  
11 has always been a central theme of plaintiffs'  
12 allegations here. It was a central theme of the  
13 government case.

14 The plaintiffs, as I pointed out earlier,  
15 allege that Microsoft carried out this  
16 anticompetitive conduct not just to protect its  
17 Window's monopoly, but also to leverage Microsoft's  
18 operating system monopoly into other software  
19 markets.

20 Now, under the "relation back" rule,  
21 1.402(5), the test is: "Did the amended claim  
22 whether it arose out of the conduct transaction or  
23 occurrence set forth or attempted to be set forth in  
24 the original pleading and as such relate back to the  
25 date of the original pleading?"

1           Our position is the original pleading made  
2 clear, gave sufficient notice, to Microsoft that  
3 there was an applications claim. Nevertheless, if  
4 this Court were to rule otherwise, there was  
5 sufficient notice in that claim that the further  
6 detail provided in the subsequent amendments clearly  
7 relate back to that original petition.

8           Now, Microsoft in its brief and Mr. Tulchin  
9 here today wants to make a distinction between  
10 applications markets and operating systems markets  
11 and if there was -- that there is an operating system  
12 class and that there's an applications software  
13 class. That's not the issue. The issue is whether  
14 or not the set of facts apply to both, whether or not  
15 there's a common nucleus of facts for purposes of  
16 relation back, whether the facts -- the same set of  
17 facts from the government case in whole or in part  
18 are utilized here in this case. We meet all of those  
19 tests.

20           Let me also give you two additional  
21 thoughts on the statute of limitations issue. One is  
22 called the "continuing violation rule." And we  
23 haven't been able to identify any authority in Iowa  
24 on this issue; but in Minnesota, for instance, there  
25 is law that says, "Where you have a continuing

1 violation, the cause of action does not accrue until  
2 the last act."

3 Well, our position has been that Microsoft  
4 hasn't stopped its bad acts, but it certainly  
5 continued its bad acts through four years prior to  
6 the original petition and certainly four years prior  
7 to the petition, the amended petition that Microsoft  
8 focuses on in this motion, the October 2002 petition.

9 And additionally, I tried -- we've done  
10 some research on this but also didn't come up with a  
11 case. But, as Your Honor is aware, back in 2000,  
12 July of 2000, this case was dismissed on Microsoft's  
13 motion on the Illinois Brick argument, arguing that  
14 indirect purchasers do not have standing in Iowa.  
15 That case was reversed approximately two years later,  
16 23 months later, in June of 2002. During that time  
17 the plaintiffs could not have amended their  
18 complaint; and when the action was remanded,  
19 amendment promptly occurred.

20 So the point I'm making is that even if the  
21 pendency of the government action -- let me state it  
22 another way. Even if the government action was  
23 wholly unrelated, a test that Microsoft admits  
24 applies, but, of course, we dispute the government  
25 action was wholly unrelated. So even if that was

1 wholly unrelated, and even if there was no relation  
2 back and even if there was no fraudulent concealment,  
3 there should be a tolling for that 23-month period.

4         Let me just mention -- respond to a couple  
5 of other arguments that Mr. Tulchin made. He  
6 mentioned the GO Computer case v. Microsoft that was  
7 decided by Judge Motz. Judge Motz determined that  
8 GO's cause of action accrued in 1992, long before the  
9 government case even was -- even began in 1998. So  
10 GO is just totally irrelevant. GO Computer was a  
11 company that developed what essentially was an early  
12 laptop computer with pen-recognition software so that  
13 you could write it on the screen. There were  
14 allegations in this GO complaint about activities of  
15 Microsoft that foreclosed the markets for GO. And as  
16 Judge Motz found, those activities were back in the  
17 1992 area and that GO was aware of those activities  
18 in that time frame; so, therefore, they accrued back  
19 then and this whole issue of government -- tolling by  
20 reason of a government action simply did not apply.

21         And we have a very similar fact situation  
22 with Novell. Novell had a brief ownership of the  
23 WordPerfect and Quattro Pro software applications  
24 back in the early '90s, and those were basically in  
25 the 1994 to 1995 time frame. So again, those were

1 activities that Microsoft had preceded the government  
2 case against Microsoft; and, therefore, Judge Motz  
3 found that the tolling provision under the federal  
4 statute did not apply.

5 Let me also mention something about the  
6 litigating states and original complaint and  
7 particularly that of Iowa brought by Attorney General  
8 Tom Miller.

9 It sounds like Microsoft wants to assert  
10 that the standard is once that original complaint was  
11 amended, we had to bring claims within four years of  
12 that amendment. However, the statute 553.12 doesn't  
13 talk about amendments. It talks about suits. So the  
14 fact that the State of Iowa brought a suit and  
15 ultimately there may have been changes during that  
16 suit through amendment, the State of Iowa might have  
17 lost its claims. There's numerous federal court  
18 cases, including the U.S. Supreme Court cases, that  
19 state that even if the government loses, ultimately  
20 loses, the tolling is still in effect. Those cases  
21 also say if you have a whole host of defendants that  
22 are sued by the government and say some settle out by  
23 consent decree, for instance, the tolling applies  
24 until the end of the suit, including any appeals.  
25 And, of course, in this particular government case,

1 we had a judgment in November 2002, the State of  
2 Massachusetts appealed and that was ultimately ruled  
3 on in June of 2004.

4 And it's interesting in Microsoft's brief,  
5 it suggests that you have to compare complaints, so  
6 you look at the plaintiffs' complaint here and the  
7 Iowa Attorney General's complaint. It's interesting  
8 that Microsoft seems to be jumping around as to which  
9 complaint you look at. It doesn't like the first  
10 Iowa complaint. It wants to look at a subsequent  
11 Iowa complaint. But again, the statutory language  
12 says "suit" and that suit continued through, like I  
13 said, June of 2004.

14 Let me also just cite a few other cases for  
15 Your Honor and then I will wrap up.

16 Microsoft argues that, "Well, if there's  
17 different markets, then," you know, "then there is no  
18 tolling under this statute." But, in fact, even  
19 under the federal statute which talks about  
20 matters -- the cases have said the differences in  
21 geographic markets are irrelevant under the  
22 suspension provisions. I don't know why we have so  
23 many difficult to pronounce case names on this issue,  
24 but I think it's Chiapano, 702 F.2d 827, and a  
25 discussion is at 832 to 833. In Radio Corp v.

1 Rauland Corp., 186 F.Supp. 704 at 708, the government  
2 action involved the market for telephone equipment  
3 and lamps but yet that tolled the statute of  
4 limitations for a private action based on the market  
5 for radio apparatus. So different products.

6 In the In re Antibiotic Antitrust Actions,  
7 333 F.Supp. 317 at pages 320 to 321, the federal  
8 district court out of the Southern District New York,  
9 the government action was for the domestic market for  
10 human consumption of antibiotics. It tolled private  
11 causes of action based on foreign and animal  
12 antibiotics.

13 So there are a number of cases out there  
14 where difference in markets, difference in products,  
15 do not make a difference for purposes of the tolling  
16 provision.

17 In fact, in the Areeda & Turner -- excuse  
18 me, Areeda & Hovenkamp, Herb Hovenkamp from the  
19 University of Iowa, it cites to the Morton's Market  
20 case which is 198 F.3d 823 at 831. It's an Eleventh  
21 Circuit decision. Even when you have different  
22 conduct at issue, for instance, in Morton's Market,  
23 it was bid rigging in the government case in the  
24 wholesale market; private case, it was price fixing  
25 in a retail market. The Court said the purpose of

1 the defendant's conduct was the same. It was to  
2 eliminate competition in the marketplace in Florida.

3 Here we have the purpose of Microsoft was  
4 to eliminate competition in an operating system  
5 market and adjacent markets and to leverage its  
6 operating system market into the applications market  
7 and to similarly leverage the monopoly power and the  
8 applications market through the applications  
9 barrier-to-entry to further enhance and protect the  
10 operating system market. Clearly, the statute  
11 applies. Tolling applies. And to the extent there  
12 is a question here, it is on fraudulent concealment.  
13 That is a question for the jury, Your Honor, and this  
14 motion should be denied.

15 Thank you.

16 THE COURT: We will take a 15-minute  
17 recess. Thank you.

18 (A short recess was taken.)

19 THE COURT: Mr. Tulchin.

20 MR. HAGSTROM: Your Honor, I just have one  
21 quick thing to add, and I got permission from  
22 Mr. Tulchin.

23 THE COURT: You did? Okay. Is that all  
24 right, Mr. Tulchin?

25 MR. TULCHIN: Implicitly, I suppose.

1 THE COURT: All right.

2 MR. HAGSTROM: I double-checked on  
3 California, and the statute of limitations was not a  
4 motion brought there, so it has not been decided in  
5 any other state case.

6 THE COURT: I wondered if that was the case  
7 because I saw counsel shaking his head at one point.

8 MR. TULCHIN: I think Mr. Hagstrom just  
9 addressed the first point I was going to make, which  
10 was that other courts have not decided this motion.

11 THE COURT: Okay.

12 MR. TULCHIN: Secondly, Your Honor, as  
13 Mr. Hagstrom would have it, one could never grant  
14 summary judgment on a statute of limitations issue if  
15 the plaintiff utters the words "fraudulent  
16 concealment." I think what counsel said is that  
17 necessarily there are fact issues and one must go to  
18 a jury. And, of course, that's not the law. If  
19 there are no disputed issues of material fact with  
20 respect to the issues on our motion, then judgment  
21 should be entered.

22 And on this question of whether one can  
23 have partial summary judgment or whether one has to  
24 address a claim in its entirety, the very case that  
25 Mr. Hagstrom cited, Lamantia against Sojka, 298

1 N.W.2d 245 at page 248, Supreme Court of Iowa 1980  
2 says, quote, Summary judgment provides a procedure  
3 for partial or full adjudication of cases on the  
4 basis of -- and it goes on -- pleadings, affidavits,  
5 et cetera, et cetera. And I really don't think  
6 there's any dispute about the fact that courts can  
7 and do grant summary judgment with respect to a  
8 portion of a claim.

9       Indeed, in a case like this where we have  
10 such an amazing number of different aspects, it would  
11 not, I respectfully submit, be sensible judicially to  
12 avoid paring down the claims when they should be  
13 pared down. And if partial summary judgment is not  
14 available, and the portion I read from the Lamantia  
15 case, of course, says it is, then one could never  
16 reach an issue such as this where allegedly there are  
17 damages going back to 1994 and the statute of  
18 limitations bars claims before October '98.

19       On a related point, Your Honor, the  
20 "continuing wrong" doctrine -- I think this is one of  
21 the things that Mr. Hagstrom mentioned, perhaps in a  
22 somewhat confusing way, that really doesn't address  
23 our motion. I think all will agree that in a case  
24 alleging a continuing wrong, the plaintiff can only  
25 collect damages for conduct going back four years

1 before the filing of the complaint. The continuing  
2 wrong might give rise to a cause of action at any one  
3 time, but the damages collectible can only extend  
4 four years prior to the filing of the complaint, and  
5 that's black letter law.

6 Next, Your Honor, the Lingo case.  
7 Mr. Hagstrom used it to illustrate something that  
8 we're not arguing. The point of the Lingo case, as  
9 with the Iowa action in May of 1998, is that all the  
10 information that is in this complaint on the  
11 applications claim was available three or four years  
12 before this complaint was filed. So the idea that  
13 there was some concealment clearly is incorrect.  
14 Mr. Hagstrom's own firm was working on the Lingo  
15 case.

16 Mr. Hagstrom talks about notice pleading,  
17 and, with all respect, I think there is some  
18 confusion here. An antitrust claim, whether it's  
19 under federal law or the law of Iowa or any other  
20 state, necessarily pertains to a particular market  
21 and particular products. For example, here the claim  
22 is monopolization, unlawful monopolization, by  
23 Microsoft of certain markets. If you allege in your  
24 complaint Microsoft has unlawfully acquired or  
25 maintained a monopoly in operating systems, it would

1 distort the English language quite drastically, I  
2 submit, to understand that to provide notice that the  
3 plaintiffs might later allege unlawful monopolization  
4 of the distinct market by the very nature an  
5 antitrust claim, particularly in the field of  
6 monopolization, is addressed to a defined market.  
7 Any other rule would completely eviscerate the  
8 statute of limitations.

9         And the Novell and GO cases, Mr. Hagstrom  
10 says they are relevant because they dealt with causes  
11 of action that arose long ago, around 1992, which is  
12 a little ironic because all of these causes of action  
13 arose then too as we've shown. But the Novell and GO  
14 cases dealt exactly with the argument about tolling  
15 that the plaintiffs make here. I didn't give the  
16 Court earlier the cite to Novell. It's 2005 WestLaw  
17 1398643, decided last year. And it was a case that I  
18 handled and argued, and Judge Motz says in the  
19 WestLaw opinion at page 5, "Novell accepts, as, of  
20 course, it must, that operating systems and office  
21 productivity applications are distinct products and  
22 are in separate markets. It also accepts, as  
23 unremarkable, the bright-line rule stated by  
24 Professor Areeda that limitations are not tolled when  
25 the government and subsequent private suits arose in

1 distinct markets."

2           And then Judge Motz cites to the treatise  
3 by Areeda & Professor Hovenkamp that Mr. Hagstrom  
4 referred to. The bright-line rule, there's no  
5 tolling when, in an antitrust case, there are  
6 distinct markets. The judge goes on to deal with the  
7 argument that the operating system and applications  
8 markets are, quote, Closely, indeed symbiotically  
9 related, unquote, which is essentially the argument  
10 that Mr. Hagstrom has made that these two markets are  
11 close to one another and that somehow Microsoft was  
12 on notice because of that.

13           And what Judge Motz says in the Novell case  
14 is that the bright-line rule, when you have distinct  
15 markets, there's no tolling applies to the Novell  
16 case. So Novell is not just a case about conduct in  
17 1992. Novell made the same argument that the  
18 plaintiffs make here, and I remember it well. So did  
19 Go in the GO case where at 437 F.Supp.2d at 502 again  
20 the court, the federal court says: "Tolling does not  
21 apply to the claims asserted by GO about its pen  
22 computer because these claims relate to conduct  
23 within a separate market."

24           And again, that is the point that we've  
25 been making in our papers and that I tried to make

1 earlier. It's not notice pleading. There's no  
2 tolling because an antitrust case by definition  
3 involves markets. It's the most fundamental thing in  
4 the case, and these are separate markets.

5 Now, lastly, Your Honor -- and I am almost  
6 done -- we did -- during my argument earlier, I did  
7 refer to the Christy against Miulli case which says  
8 quite clearly last year by the Supreme Court that the  
9 plaintiffs must point to some affirmative act  
10 independent of and subsequent to the liability-  
11 producing conduct. Some affirmative and independent  
12 act.

13 Mr. Hagstrom didn't address that and did  
14 not point to any such act. When he was arguing about  
15 what the concealment is by Microsoft, he talked about  
16 the "Chinese Wall." That's not concealment. That's  
17 part of their claim, the misrepresentation about  
18 whether a Chinese Wall existed. It's also in  
19 Exhibit 11 to Mr. Green's affidavit, which is the  
20 article from PC Week exactly on this point in 1991.  
21 And I agree with him in the case of GO that when a  
22 cause of action arose in 1992, it's long ago been  
23 barred. Here is one that arose in '91. So the  
24 concealment he says is the "Chinese Wall," which is  
25 alleged in the complaint to be a wrongful,

1 anticompetitive act. The Supreme Court of Iowa, of  
2 course, requires some affirmative and independent act  
3 subsequent to the liability-producing conduct that  
4 prevents a plaintiff from proceeding with a lawsuit.

5 The second thing Mr. Hagstrom pointed to as  
6 concealment was what he called "undocumented APIs."  
7 Now, this has been out there in the public domain for  
8 as long as the "Chinese Wall" allegations.

9 Mr. Schulman, Andrew Schulman -- Mr. Hagstrom  
10 mentioned his name -- is plaintiffs' expert in this  
11 case. He submitted an expert report on undocumented  
12 APIs. These are APIs, "applications programming  
13 interfaces," in Windows that allegedly Microsoft can  
14 use and other people can't.

15 Mr. Schulman wrote a full-length book on  
16 exactly this topic, which has all these allegations  
17 in it in 1992. We've given, Your Honor, excerpts as  
18 Exhibit 20 to Mr. Green's affidavit. Again, the  
19 alleged undocumented APIs were out there in '92, the  
20 Lingo people referred to them in '99; and more  
21 importantly, more on point, Christy against Miulli  
22 makes it clear that it's not enough for fraudulent  
23 concealment purposes to say that the liability-  
24 producing conduct is -- can sort of serve two  
25 functions: That it can be liability-producing and

1 also the concealment that is necessary to avoid a bar  
2 of the statute of limitations. You can't have the  
3 same conduct serve both purposes. That's exactly  
4 what the plaintiffs are asking to do here. They have  
5 identified nowhere in their papers and nowhere today  
6 an affirmative and independent act as Christy v.  
7 Miulli requires that would permit them to avoid the  
8 bar.

9 Thank you, Your Honor.

10 THE COURT: Thank you.

11 Move on to the dismissal of claims  
12 regarding security issues.

13 MR. ROSENFELD: Thank you, Your Honor. Bob  
14 Rosenfeld from Heller Ehrman.

15 I'm not going to argue collateral estoppel  
16 today. We're going to argue the motion for summary  
17 judgment on plaintiffs' claims for damages from  
18 increased security breaches.

19 This is a claim, as I will explain in the  
20 course of my argument, that is uniquely and  
21 classically suited for summary adjudication. It  
22 involves what the Iowa Supreme Court has called in  
23 this precise context a "controlling issue" of  
24 antitrust law. In the Next Generation case, Next  
25 Generation v. Iowa Realty, which is 686 N.W. 2nd

1 2069, the Supreme Court in 2004 addressed the issue  
2 of antitrust injury in the context of reviewing a  
3 motion for summary judgment.

4 In that context, as plaintiffs want to do,  
5 they suggested that there were all sorts of contested  
6 issues of fact that in the normal course precludes  
7 summary judgment. And the Court said that it found  
8 that a very tempting argument, very tempting, but in  
9 this context it was not dispositive. The dismissal  
10 was nevertheless correct because a controlling  
11 principle in the field of antitrust law renders the  
12 disputed issues irrelevant. That's what I'm going to  
13 talk about today, Your Honor, in precisely the same  
14 context. This motion presents a clear cut legal  
15 issue recognized by the Iowa Supreme Court.

16 Now, this claim for damages from security  
17 breaches wasn't in the early petitions, wasn't in the  
18 first one, the second one or the third one. It was  
19 added in the fourth petition, but just barely. If  
20 you read through it, you will find references in  
21 three or four paragraphs and in the prayer for relief  
22 at the end where it's set out as a separate request  
23 for damages. You won't find -- however, in the long,  
24 detailed story that plaintiffs tell, you won't find  
25 much discussion, indeed, any discussion, of this

1 particular claim.

2           You have to look at plaintiffs' expert  
3 reports to find this claim and not just one, but it  
4 is cobbled together in three or four of plaintiffs'  
5 experts' reports. And to cut to the chase, when you  
6 put all of those reports together, the picture you  
7 get is of a claim not for damages to members of the  
8 class but they incurred as a result of security  
9 breaches. That's not the claim. Indeed, plaintiffs  
10 say it would be impossible to make that claim because  
11 those damages would, in fact, be individual and you  
12 would have to talk to each member of the class to  
13 figure it out.

14           So, instead, what this claim is about is  
15 alleged damages that class members suffered as a  
16 result of Microsoft's efforts to protect them from  
17 the security breaches or from the vulnerability.  
18 It's a claim based on damages from Microsoft  
19 protecting people against security vulnerabilities,  
20 not a claim based on the vulnerabilities of the  
21 damages that resulted directly. And it is a claim,  
22 as a number of courts have recognized, addressing  
23 precisely the same claim. It is a claim for a  
24 product defect.

25           Now, just to give you a preview of some of

1 the coming attractions, this claim and the experts  
2 who make this claim are the subject of several  
3 motions that Microsoft has made. There is a  
4 decertification motion, and the argument there is  
5 that the damages sought are inherently individual  
6 damages; not classwide, can't be proven on a  
7 classwide basis. That's one argument.

8       There's also a motion in limine going to  
9 the testimony of the principal plaintiffs' expert on  
10 this claim, Dr. Gowrisankaran, who attempts to tone  
11 up the damages and he does it in a very speculative  
12 fashion which I will talk about later. So that's  
13 another motion that Microsoft has filed dealing with  
14 this particular theory.

15       I want to put those motions to one side.  
16 This motion, unlike those two, focuses on that legal  
17 issue that I described to you at the beginning. It  
18 focuses on the fact that the damages sought, that is,  
19 the harm to individual class members' computers by  
20 virtue of having to install patches, essentially a  
21 products liability claim, that that kind of injury  
22 does not count as antitrust injury. It is not  
23 recoverable under the antitrust laws.

24       Now, that's not to say that there might not  
25 be a claim out there for product liability or breach

1 of warranty or whatever. There might be. But this  
2 is an antitrust case. It carries with it potential  
3 for treble damages. And in antitrust cases, there is  
4 a limit on the kind of damages that can be sought.

5 Now, let me take a few minutes and explain  
6 that requirement and then we will get into the case  
7 law that deals with it and deals with it quite  
8 directly. What is the requirement of antitrust  
9 injury? It's a requirement -- it's a recognition  
10 that the antitrust laws are not generalized tort or  
11 contract statutes. They don't supplant all of tort  
12 law. They don't supplant all of contract law. They  
13 are limited to warranty damages for certain kinds of  
14 conduct. They limit recovery to injuries of the type  
15 the antitrust laws were intended to prevent and which  
16 flow from that which makes the conduct unlawful.  
17 That was established in the Supreme Court case of  
18 Brunswick v. Pueblo Bowl. Product defects, for  
19 example, do not fall within that category.

20 Let me try to be a little more explicit  
21 about this. Normally, in a nonantitrust context, you  
22 prove a violation, you prove causation and you get  
23 damages. In antitrust law, however, that is not  
24 quite the sequence because it is not enough that  
25 there is a causal connection that is proximate cause

1 between the conduct and the injury. The injury has  
2 to be of a certain type. It has to be the kind of  
3 injury that the antitrust laws are designed to  
4 prevent: harm to competition, to the markets. As  
5 the northwest -- excuse me, as the Next Generation  
6 software case says: Harm to individuals and as other  
7 cases demonstrate product defect claims. Those are  
8 not antitrust claims. That is not the kind of injury  
9 the antitrust laws were trying to prevent. That  
10 merely having a causal connection between the conduct  
11 and the injury, the antitrust is not enough. Only  
12 certain kinds of injuries qualify.

13 Now, why does that matter here? It is  
14 central, and I'm going to take you through the  
15 secrets. First of all, the antitrust injury  
16 requirement applies to Iowa Competition Law, and  
17 that's what the Next Generation court held just two  
18 years ago. And it said quite clearly there was no  
19 antitrust injury; and without an anticompetitive  
20 trust injury, the provisions of the Iowa Code Chapter  
21 553 do not apply. I will say it again: no antitrust  
22 injury. Without antitrust injury, the provisions of  
23 Iowa Code Chapter 553 do not apply. That is at 686  
24 N.W.2d page 208.

25 The Court went on to explain that it got

1 there through the harmonization provision under Iowa  
2 law and that as this doctrine of antitrust injury has  
3 developed, it has been adopted in Iowa. Unless there  
4 is any doubt, this case from the Iowa Supreme Court  
5 of two years ago makes that question beyond dispute.

6 Now, that same case also held, as I  
7 mentioned when I started, that the inquiry about  
8 whether or not a particular type of injury counts as  
9 an antitrust injury is a question uniquely suited for  
10 treatment on summary judgment and that, again, is  
11 exactly what the Next Generation court did.

12 The court observed that the marketplace is  
13 often unfair, sometimes brutal, sometimes tortuous  
14 acts take place there. Those, however, are not  
15 antitrust -- they don't give rise to antitrust  
16 injury. They are dealt with under other statutes or  
17 other provisions.

18 So we start "we start" with clear  
19 authoritative Iowa law from the Supreme Court on the  
20 issue of the antitrust injury before you.

21 Now, that's general authority in Iowa. In  
22 addition, there are two prior decisions that are on  
23 point. Actually, they are more than on point. They  
24 are virtually identical. The two cases involving  
25 Microsoft, two class actions, two class actions where

1 the plaintiffs have argued that these -- that the  
2 vulnerabilities in the software that gave rise to  
3 security breaches and the like were cognizable claims  
4 under the antitrust laws.

5 One of those cases was decided in the first  
6 instance by Judge Motz: A case called Kloth, and one  
7 was decided in the great state of Indiana, my home  
8 state, by the Indiana Court of Appeals.

9 As I walk through this, it might be useful  
10 to give you -- I have the key language if that would  
11 be okay. I will hand it up. It will make it a  
12 little bit easier.

13 THE COURT: Thank you.

14 MR. ROSENFELD: In the first case cited  
15 there, which is the district court opinion for  
16 Judge Motz, it says and I think it is, again,  
17 identical to the issue here, the degradation of  
18 computer performance alleged by plaintiffs is only  
19 incidentally related to the alleged anticompetitive  
20 behavior. Plaintiffs may have claims sounding in  
21 products liability law, but their antitrust claims go  
22 a stretch too far. And Judge Motz dismissed those  
23 claims because they did not establish antitrust  
24 injury.

25 Your Honor, those are the identical claims

1 at issue here. The Fourth Circuit agreed. You'll  
2 see the second of the courts here. To the extent  
3 that these claims for increased susceptibility to  
4 virus or security breaches are for actual injury to  
5 plaintiffs' computer, again, the claims raised here,  
6 the plaintiffs' claims amount to claims for defective  
7 products. This type of injury is simply not a type  
8 for which plaintiffs can recover under the antitrust  
9 laws.

10 Now I want to emphasize a couple of things  
11 about these decisions. One, they were at the motion  
12 to dismiss stage. The Court didn't need a lot of  
13 facts to decide these issues because the question is,  
14 rather, is the alleged injury of a type that  
15 constitutes an antitrust injury. As the Next  
16 Generation court in Iowa said and as the Kloth court  
17 said, these are legal issues, not factual issues.  
18 And as a matter of law, the Kloth court -- well,  
19 Judge Motz and the Fourth Circuit said product  
20 liability claims, claims for security breaches, do  
21 not make out an antitrust claim.

22 The same result was reached by the -- I'm  
23 not sure whose water this is, I'm sorry. That's  
24 yours. You've got no germs, right, that we haven't  
25 already shared? My hair will straighten maybe. But

1 anyway, the Indiana Court of appeals reached  
2 precisely the same conclusion. Again, parroting the  
3 language from Judge Motz, the degradation of computer  
4 performance resulting from the tying of Windows 98  
5 and Internet Explorer; that is, Your Honor, the exact  
6 claim here, that behavior is only incidentally  
7 related to the alleged anticompetitive behavior and  
8 does not demonstrate antitrust injury. That is the  
9 Berghausen case, and the citation there is 765 N.E.2d  
10 592 and 598.

11 Unusual, at least in my experience, to  
12 have, (a), clear, unequivocal guidance from the  
13 Supreme Court, which we have here in Iowa, that  
14 antitrust injury is a core principal of Iowa  
15 antitrust law and that claims relating to antitrust  
16 injury can be resolved as a matter of law. And then  
17 two cases, three judges -- or, actually, I think four  
18 because the Court of Appeals is dealing with the  
19 exact same conduct reaching the conclusion that  
20 antitrust injury has not been demonstrated here.  
21 And, frankly, that would seem to be the end of the  
22 matter, although I'm going to talk a little bit more.

23 First of all, I suspect that in response to  
24 this we will hear a number of things and I want to  
25 talk about those things. First, I expect we will

1 hear the plaintiffs refer, as they have already  
2 today, to Judge Jackson's findings. Judge Jackson  
3 does talk about security breaches and how the  
4 integration made the operating system more  
5 susceptible. But what Judge Jackson did not do, he  
6 did not establish that any consumer suffered any loss  
7 from any security breach. He did not determine that  
8 any consumer suffered any harm from the security  
9 patches; and most important of all, most important of  
10 all, he did not establish that any such harm, that  
11 is, the degradation that gave rise -- or the alleged  
12 degradation that gave rise to the security breaches,  
13 he didn't establish that that would constitute  
14 antitrust injury in a private action. That issue was  
15 appropriately left for the private actions. Private  
16 actions like Kloth where it was decided that, in  
17 fact, that kind of claim did not give rise to  
18 antitrust injury. Private actions like Berghausen  
19 where it was established that that kind of injury  
20 does not give rise to an antitrust claim.

21 So on this issue the findings really don't  
22 advance the ball at all, Your Honor.

23 Now, what do plaintiffs say? Well, to some  
24 degree they say what they always say: Iowa is  
25 different. And in some respects Iowa law is

1 different. In this respect Iowa law is not  
2 different.

3 Plaintiffs say, first of all, well, all of  
4 that federal learning and antitrust authority isn't  
5 applicable because the Iowa statute talks about  
6 actual damages; whereas, the federal statute talks  
7 about damages to business or property. And actual  
8 damages is a far more expansive term and concept and  
9 it includes everything and apparently overrides the  
10 antitrust injury requirement.

11 With all respect, that is silly. The  
12 actual damage terminology as the very cases that the  
13 plaintiffs cite demonstrate consistently in Iowa  
14 cases and statutes it is used to distinguish between  
15 compensatory damages and punitive or exemplary  
16 damages. Actual damages are compensatory damages.  
17 And, of course, under the Iowa competition statute,  
18 you get actual damages if you prove a violation. You  
19 have to prove more to get exemplary damages or  
20 punitive damages. So actual damages doesn't weed out  
21 the antitrust injury requirement. It just draws a  
22 distinction between actual and punitive damages and,  
23 indeed, the two cases plaintiff cites, the Nelson  
24 case and the Schneider case, both of those cases, of  
25 course, are not antitrust cases, but both of them

1 convert to precisely the distinction I'm making now  
2 between compensatory damages and exemplary damages.

3 Now the second thing plaintiffs emphasize  
4 is that there is a difference in the language between  
5 the Iowa statute and the Clayton Act in terms of the  
6 causation requirement and that maybe that makes a  
7 difference.

8 In Iowa damages resulting from an antitrust  
9 violation can be compensated or recovered. Under the  
10 Clayton Act damages sustained by reason of an  
11 antitrust violation can be compensated. With all  
12 respect, this takes me back to law school where we  
13 talked about the distinctions without a difference,  
14 whether it's "resulting from" or "by reason of." The  
15 language in Iowa and the language in the Clayton Act  
16 is designed to say precisely the same thing, that  
17 there needs to be some causal nexus between the  
18 violation and the injury. And as I said earlier, in  
19 addition to that causal nexus, there needs to be  
20 antitrust injury; that is, an injury of a certain  
21 type. And that is precisely what the Next Generation  
22 decision of the Iowa Supreme Court says.

23 What the plaintiffs are trying to do is  
24 conflate two issues. They want to talk about the  
25 liberality under Iowa law of calculating damages, but

1 that's not the issue here. The issue is the right to  
2 recover certain types of damages, not how you  
3 calculate them if you have a right to recover. And  
4 what the Next Generation case says and what Kloth and  
5 Berghausen say is certain kinds of damages, even if  
6 you could calculate them, are not recoverable in an  
7 antitrust action.

8 At the end of the day, I think all of this  
9 is interesting but irrelevant because I do think the  
10 Next Generation decision resolves the issue of the  
11 applicability of the antitrust injury requirement  
12 under Iowa competition law. Indeed, it's hard to  
13 imagine language clearer than if there's no antitrust  
14 injury, the provisions of Iowa Code Chapter 553 do  
15 not apply, and that is about as unequivocal as it  
16 gets.

17 Now, plaintiffs also make reference to  
18 Comes I, the first Iowa Supreme Court decision, and I  
19 think by mistake cited that as a 2006 decision when,  
20 in fact, the Comes I decision was 2002.

21 Comes I doesn't undermine the Next  
22 Generation court decision. It preceded it. Comes I  
23 was concerned with the issue of whether Iowa law in  
24 terms of this kind of standing requirement allowed,  
25 explicitly allowed, indirect purchaser actions. It

1 did not speak to the issue of the general  
2 harmonization of federal and state antitrust law in  
3 those areas where they overlap. That is precisely  
4 the issue that the Supreme Court spoke to in Next  
5 Generation and said in the antitrust injury the  
6 overlap is total.

7       So what do plaintiffs say next? Well, they  
8 do what they have to do, and they attempt to  
9 distinguish the Kloth and Berghausen cases and they  
10 attempt to do it by saying, "Microsoft is wrong.  
11 Those cases didn't really deal with the antitrust  
12 injury requirement. They dealt with the indirect  
13 purchaser issue, the Illinois Brick issue; and  
14 because they dealt with that issue, they are not  
15 authoritative here.

16       That one goes beyond silly. That one is  
17 wrong. And the language of those two court decisions  
18 makes that abundantly clear. In Kloth it is true  
19 that there was an indirect purchaser issue, the  
20 question of whether the class in that case could  
21 recover under the federal antitrust laws in federal  
22 court, and Judge Motz and the Fourth Circuit both  
23 said, "No. Their claims to have purchased and to  
24 have paid an overcharge or an elevated price fall  
25 within the strictures of Illinois Brick. They can't

1 recover."

2 Same thing is true in the Berghausen case;  
3 however, what plaintiffs don't tell you is both  
4 courts went another step. Because the plaintiffs in  
5 those cases were trying to argue, as a way around the  
6 Illinois Brick, that the injury to their computers,  
7 the injury resulting from the so-called "security  
8 vulnerabilities," were a direct injury; and,  
9 therefore, those kinds of claims could be brought,  
10 Illinois Brick and the indirect purchaser rule to the  
11 contrary notwithstanding. So it was an effort to  
12 demonstrate a direct injury. And again, I've got the  
13 key language that I would like to hand up if that's  
14 okay, Your Honor, to make this point clear as well.

15 THE COURT: Thank you.

16 MR. ROSENFELD: The first bullet point is  
17 the quote from the Kloth case: "In short, we agree  
18 with the district court that in addition to the  
19 barrier imposed by the doctrine of Illinois Brick" --  
20 that is the indirect purchaser barrier -- "plaintiffs  
21 have failed to demonstrate that they have sustained  
22 direct antitrust-type injury." So this wasn't  
23 decided under the strictures of Illinois Brick. It  
24 was decided as a separate issue by the Kloth court.

25 Similarly, in Berghausen exactly the same

1 thing. "Plaintiffs overcharge claim was barred by  
2 Illinois Brick. The plaintiffs alleged security  
3 damages did not constitute antitrust injury."

4 So once again, Your Honor, these two cases,  
5 Kloth and Berghausen, deal with the identical issue  
6 that is before this Court, the identical issue.

7 Now, just as an aside, the Kloth court made  
8 one other observation. They said, "To the extent  
9 that this claim is that the product, the software,  
10 was defective because it had these security bugs,  
11 it's really a part of an overcharge claim because  
12 plaintiffs are saying they paid too much for a  
13 product that was worth even less than advertised  
14 because it had all of these security bugs and so on.  
15 So to the extent that it was part of their overcharge  
16 claim, it's subsumed in the overcharge claim and  
17 would duplicate it. But to the extent that it is  
18 separate" -- and that's what these two quotes  
19 address -- to the extent that it is an effort to  
20 demonstrate a direct injury to get around Illinois  
21 Brick, both courts said it won't work. It won't work  
22 because this kind of injury does not constitute  
23 antitrust injury.

24 Now, plaintiffs make one more argument we  
25 should talk about. They emphasize that both Kloth

1 and Berghausen were decided at a motion-to-dismiss  
2 stage. They say "Here, by contrast we are dealing  
3 with a full record." And somehow that makes a  
4 difference. Well, I sort of previewed this point  
5 several times earlier; but, first of all, the Iowa  
6 Supreme Court in the Next Generation case said the  
7 full record and all the disputes that full records  
8 often have are irrelevant here because there is a  
9 controlling legal principle that covers. That's  
10 antitrust injury. It was on that basis that the Iowa  
11 Supreme Court upheld the summary judgment  
12 determination in that case.

13 I submit, Your Honor, that here precisely  
14 the same is true; that the type of injury being  
15 requested here, damages related to -- in some very  
16 attenuated and remote way, related to security  
17 vulnerabilities is the type of injury that is not  
18 compensable under the antitrust laws. It's for a  
19 product defect. And all you need to know is  
20 Professor Areeda and Turner say in their treatise and  
21 as all of these courts have emphasized, all you need  
22 to know is the type of injury because that's the  
23 basis on which this determination can be made.

24 The full record here, however, I think in  
25 an odd sort of way, is helpful in illuminating the

1 position Microsoft is taking because it does  
2 demonstrate, and the full record is three or four  
3 experts who in mixing-and-matching kind of ways rely  
4 on each other to cobble together a theory that gets  
5 you some damages. It shows how attenuating, how  
6 remote and how incidental this claim is to the  
7 alleged anticompetitive conduct. I want to be clear  
8 about a couple of aspects of the claim.

9         Number one, as I said at the beginning,  
10 plaintiffs are not seeking damages -- notwithstanding  
11 what their complaint said, they are not seeking  
12 damages for any security breaches or vulnerabilities.  
13 They have said in their papers and elsewhere that  
14 they can't do that. That would be impossible because  
15 you would have to talk to all the individual class  
16 members, which, of course, is our point in the class  
17 decertification motion. Instead, instead -- and, in  
18 fact, the record does not show that any individual  
19 class member suffered any harm from the security  
20 breaches. Instead they're calculating damages based  
21 on Microsoft's efforts to protect users from  
22 potential security breaches. They are calculating  
23 damages based on the prophylactic measures that  
24 Microsoft took to deal with the hackers and others  
25 who play this cat-and-mouse game with all software

1 developers to try to hack into the operating system.  
2 They assume -- "they assume" -- that everyone had  
3 access to the Internet, a fact that is palpably  
4 false.

5 Indeed, in 1998, when this claim for their  
6 purposes commenced, roughly 50 percent of the people  
7 in Iowa had access, and you couldn't get a virus off  
8 the Internet if you didn't have Internet access and  
9 you sure couldn't download a patch from the Internet  
10 if you didn't have Internet access. That's  
11 assumption one.

12 Assumption two, they assume -- without any  
13 verification or proof, they assume that everyone  
14 downloaded the patches, including those folks who  
15 didn't have any Internet access and could not have  
16 downloaded. They assume again, without any  
17 verification, that everyone spent the same amount of  
18 time implementing these various patches. And they  
19 assume -- again without verifying -- that everyone  
20 gave up the same amount of work or leisure as a  
21 result of downloading the patches. Every one of  
22 those assumptions they know are not true, they know  
23 are not true. This is a damage analysis that is  
24 entirely free-floating. It's cobbled together from  
25 three to four experts, untethered to the facts of

1 this case, and it's done that way because plaintiffs  
2 can't make the demonstration of any individual harm  
3 without talking to the individuals. And, of course,  
4 that's inconsistent with their class claim, and as  
5 the Next Generation court said and the Iowa Supreme  
6 Court said, those kind of individual claims are not  
7 antitrust claims, not antitrust injury.

8 In short, it's hard to imagine a more  
9 speculative, untethered, attenuated, remote,  
10 free-floating theory -- I've run out of adjectives --  
11 free-floating damage theory than this one, but the  
12 point is -- and I don't want it to get lost -- but  
13 the full record here does nothing to help plaintiffs'  
14 response to the antitrust injury claim. The  
15 antitrust injury argument is purely a legal issue and  
16 two courts that have dealt with the identical issue  
17 have said product degradation and security breaches  
18 do not constitute antitrust injury.

19 One last one point I want make and then I  
20 will stop; and that is, we also talked about the fact  
21 in our brief that Microsoft enters into what is  
22 called a EULA, or end-user license agreement, with  
23 everyone who licenses its software. And one of the  
24 provisions of that license is that Microsoft is not  
25 responsible for the content that people download from

1 third-party Web sites and the Internet and so on and  
2 it's also not responsible for transmissions from  
3 those third-party sites to the users of its software.  
4 Of course, that's how a lot of these security  
5 breaches occur.

6 What plaintiffs are trying to do by making  
7 this degradation claim a part of their antitrust  
8 claim is simply to push the EULA aside. As they said  
9 in their papers, that's a tribunal pose, a contract  
10 defense to an antitrust claim.

11 They have it just backwards. This is a  
12 contract claim which plaintiffs are attempting to  
13 turn into -- or a breach of warranty claim which  
14 plaintiffs are attempting to turn into an antitrust  
15 claim so they can avoid the contract the parties  
16 entered into and so that they can perhaps get treble  
17 damages for a claim that otherwise, of course, would  
18 not warrant such damages.

19 Sum up, relatively simple. This is a claim  
20 uniquely suited for summary judgment. Authority  
21 clearly on point for the Iowa Supreme Court saying  
22 antitrust injury is an indispensable element of Iowa  
23 antitrust law.

24 Two other courts, the Fourth Circuit and  
25 the court of appeals in Indiana dealing with the

1 identical conduct, have both held that that conduct  
2 does not give rise to antitrust injury. It could not  
3 be more straightforward. It could not be more  
4 well-packaged as a summary judgment motion, a pure  
5 legal issue.

6 So this motion, Your Honor, respectfully  
7 submitted, should be granted. I'm finished.

8 THE COURT: Plaintiffs.

9 MR REECE: Good morning. My name is Jim  
10 Reece. I'm with the Zelle Hoffman Law Firm. I will  
11 be arguing this motion.

12 With Your Honor's permission, I had a few  
13 handouts similar to what Microsoft counsel has  
14 provided and blown up. If that's okay, may we put  
15 those on the board?

16 THE COURT: Sure.

17 MR. REECE: Good morning, Your Honor.  
18 Microsoft has two principal arguments: First, that  
19 plaintiffs' security damages are not antitrust  
20 injury; and, second, that the measurement that the  
21 plaintiffs' experts have come up with is wrong. In  
22 summary, plaintiffs' security damages falls squarely  
23 within Iowa's competition law. They also constitute  
24 antitrust injury under the federal law, and I will  
25 talk about that.

1           With respect to measurement, plaintiffs'  
2 method, as I will describe, is so conservative that  
3 we really didn't expect anything but lawyer  
4 arguments. Basically, what we've done -- and I think  
5 it's worth kind of just describing that the basis for  
6 our damages here is not an individual claim. It's  
7 just a part of our damages. It would be helpful to  
8 look at this diagram that one of our experts has  
9 provided of the components of Internet Explorer  
10 because I think if we understand what we're saying  
11 about Internet Explorer, then I think it answers a  
12 lot of the points raised by Microsoft. These are the  
13 different components within Internet Explorer.

14           Our experts have -- and there are several  
15 experts, I will talk about them -- said that absent  
16 Microsoft's illegal anticompetitive activity with  
17 respect to the bundling of Internet Explorer in  
18 Windows, this attack surface would be smaller. In  
19 other words, in essence -- and it's detailed in their  
20 reports -- instead of four circles that would be  
21 subject to attacks from third parties, you would only  
22 have essentially two circles. So the claim is absent  
23 the anticompetitive conduct, the nature of Internet  
24 Explorer would be very different.

25           First of all, that it wouldn't be hooked up

1 to Windows so you wouldn't have these  
2 vulnerabilities, but at a minimum, the attack surface  
3 would also be smaller. So we have a pure antitrust  
4 "but for" world where absent the anticompetitive  
5 bundling, you would have a different look to Internet  
6 Explorer. This isn't a products liability case. It  
7 isn't -- our case doesn't rely on that in any way.

8 So what we've done and to explain on  
9 measurement just in summary, Microsoft has issued  
10 patches to deal with vulnerabilities that relate to  
11 each of these components. Our damage claim is simply  
12 based on the time costs; and I will talk about that,  
13 the economic principle behind that, of dealing with  
14 patches that the licensee would not have had to deal  
15 with absent Microsoft's illegal activity; in other  
16 words, there would be a smaller attack surface and  
17 therefore fewer patches. Again, I'm using the very  
18 conservative approach because our expert has said  
19 Internet Explorer wouldn't be bundled with Windows at  
20 all so Windows users wouldn't have to deal with these  
21 patches. But, at a minimum, even if it were a  
22 bundle, you would have this much smaller surface and  
23 so, therefore, all the users would not have to deal  
24 with any patches that relate to these, and we have  
25 all those patches identified and quantified.

1           So what we have on the measurement side,  
2 despite ten or more experts from Microsoft, are  
3 simply lawyer cross-examination. And we figured that  
4 would be the case because all we've done is taken a  
5 really conservative amount of time that would be  
6 required for users to do exactly what Microsoft tells  
7 them they should do with respect to these patches.  
8 So Microsoft -- if there are 50 patches in these  
9 layers that would not have been there, Microsoft  
10 sends out 50 patches and says "Install these. We  
11 want you to do this to protect yourself against  
12 vulnerabilities." And all we've done is quantify  
13 that -- and I will explain how we've done that --  
14 what would be a reasonable, extremely reasonable  
15 amount of time to simply do what Microsoft says  
16 should be done.

17           Now I'll go back and start at the antitrust  
18 injury after -- I want to give the Court just a  
19 summary of our two positions here. Certainly our  
20 damages here fall squarely within the Iowa  
21 Competition Law. The law, as the Court knows,  
22 provides that a person shall not attempt to establish  
23 or establish, maintain, or use a monopoly of trade or  
24 commerce in a relevant market for the purpose of  
25 excluding competition or controlling, fixing or

1 maintaining prices. We, plaintiffs, have alleged  
2 that. We will prove that, have already collateral  
3 estoppel facts that support that.

4 Then the Iowa Competition Law says that a  
5 person, state or a person who is injured or  
6 threatened with injury by conduct prohibited under  
7 this statute may bring suit to recover actual damages  
8 resulting from conduct prohibited under this chapter.

9 Now, actual damages in Iowa means loss or  
10 harm from injury to person, property or reputation,  
11 and that is the Nelson case, 338 N.W.2d 881, 884.  
12 Actual damages are those which simply flow from an  
13 injury and fact. And clearly, the actual damage here  
14 is that the class members are forced to deal with  
15 patches they would not have otherwise had to deal  
16 with had Microsoft not acted illegally.

17 Now, given the Iowa statute, it's a fairly  
18 straightforward and simple result. Microsoft has  
19 established and maintained a monopoly in a relevant  
20 market and used that monopoly for the purpose of  
21 excluding competition. The plaintiffs have been  
22 injured by that conduct; therefore, under the Iowa  
23 Competition Law, they should be able to recover  
24 actual damages resulting from that conduct.

25 Now, Microsoft cites these couple federal

1 cases and also the next case and I will talk about  
2 those. Clearly, while it talked about the federal  
3 case, the statutes are very different and in wording  
4 it's under Iowa law any actual damages resulting from  
5 the conduct are recoverable. And my colleague from  
6 Microsoft has already stated here in oral argument  
7 that there is a causal nexus here between what we're  
8 claiming and Microsoft's actions.

9 Now, Microsoft's counsel has talked about  
10 this harmonization provision and says that federal  
11 law is identical here with respect to damages, and I  
12 would submit that the Iowa cases suggest that the  
13 harmonization and what the Iowa courts look to  
14 relevant to federal law is conduct and that they have  
15 their own view and own rules on what are appropriate  
16 damages. And in the Comes case -- and if I have this  
17 cite wrong as 2006, I apologize, I'm not sure -- but  
18 the Court stated very clearly that the purpose behind  
19 both state and federal antitrust law is to apply a  
20 uniform standard of conduct so that the businesses  
21 will know what is acceptable conduct and what is not  
22 acceptable conduct.

23 The Court went on to state that we don't  
24 find that the Iowa Code requires Iowa courts to  
25 interpret Iowa Competition Law the same way federal

1 courts have interpreted federal law. In fact, that  
2 harmonization statute specifically states that the  
3 provision shall not be made in a way to constitute a  
4 delegation of state authority to the federal  
5 government.

6 Microsoft's argument, to the contrary, as  
7 stated by the Comes court, has been consistently  
8 rejected by the United States Supreme Court and by  
9 the Iowa Supreme Court. Congress intended the  
10 federal antitrust laws to supplement, not to displace  
11 the remedies that the states provide in their own  
12 competition laws.

13 Now, counsel talked repeatedly about the  
14 Next Generation Realty case, and I think it's  
15 important to look at that case because he seemed to  
16 cite it for the proposition that an individual can't  
17 recover injury in an antitrust case. And clearly the  
18 statute provides in Iowa a person can recover actual  
19 damages. What the Next Generation Realty case said  
20 are a couple of things. First of all, it reiterated  
21 that the federal law and the harmonization is for the  
22 conduct, monopolistic practices. But what counsel  
23 kept saying about the Next Generation case is that  
24 there's no antitrust injury just like in this case  
25 and, therefore, summary judgment was appropriate, but

1 that is not what the facts of the case say. They are  
2 not related in any way.

3 In the Next Generation case, this is the  
4 lawsuit which the Court may be very familiar with  
5 about the antitrust case involving the realtors and  
6 the MLS listing and commissions in the State of Iowa.  
7 And, of course, the Court said antitrust is in place  
8 to protect the market, not an individual business,  
9 individual merchant doing business, and it said, "But  
10 until an act impacts on the public access to a  
11 competitive market, the injured are left to proceed  
12 with traditional tort or contract remedies."

13 Then it went on to say the record in that  
14 case contains no hint that the public was inhibited  
15 from access. In other words, there was no impact on  
16 the market in that case. So that's really all that  
17 case says, is that under the facts of that case,  
18 there was no impact on the market.

19 The issue in the federal case was whether  
20 harm to competition and, therefore, harm to consumers  
21 occurred. Judge Jackson found harm to consumers. It  
22 necessarily was antitrust injury to be necessary and  
23 essential to the judgment, as this Court has already  
24 determined in the collateral estoppel ruling. So in  
25 this case we actually have harm to competition and

1 harm to consumers. Unlike the Next case where the  
2 only significant point there was that factually there  
3 wasn't. So really the Next case, if anything,  
4 supports our view that, yes, if there is harm to  
5 competition, harm to consumers, then, yes, there is a  
6 remedy under the Iowa antitrust law.

7       Microsoft also, in trying to argue these  
8 federal cases, suggests that whatever a federal court  
9 says about damages has to be adopted by the Iowa  
10 court. And again, I believe that our damages would  
11 be recoverable under federal law or Iowa law; but the  
12 point is they say, "Well, we're going to argue these  
13 cases in federal law the same as Iowa law in  
14 damages." If there was harmonization of damages  
15 between federal law and Iowa law as they imply, then  
16 we should be entitled to automatic trebling of  
17 damages. In other words, that isn't the law in Iowa.

18       If there is harmonization, if the two were  
19 to go hand-in-hand, then we should be entitled to  
20 automatic trebling. So that just illustrates more  
21 the point that, no, Iowa has its own rules relative  
22 to damages, its own interpretations. Again, given  
23 under federal law if our claim is being described as  
24 we claim it, it still is antitrust injury. As I  
25 pointed out, Judge Jackson has already determined

1 impact on competition in the market.

2 Again, I think Microsoft has misunderstood  
3 what we're claiming. We're claiming, again,  
4 antitrust injury with a "but for" analysis, that this  
5 is Internet Explorer as people received it with four  
6 different layers that can be attacked and that are  
7 attacked and for which Microsoft issues patches for  
8 each attack.

9 Our expert, Ronald Alepin, is a computer  
10 security industry expert who submitted a hundred-plus  
11 pages of a report in this case and his view is absent  
12 the anticompetitive bundling of Internet Explorer  
13 with Windows is that, first of all, Internet Explorer  
14 would not be connected to Windows so the Windows  
15 users would not have to deal with those patches; but  
16 conservatively, even if it were connected to Windows,  
17 that the attached surface would essentially be levels  
18 zero and one on the large chart that I showed. And  
19 we have the patches identified by level, and so we  
20 have -- if it were simply taking out in quantifying  
21 the patches and damages related to levels three and  
22 four, we have that right in the report and that can  
23 be done.

24 Mr. Smith is a security expert in the  
25 computer area. What he did is he looked at every

1 single security bulletin that Microsoft issued for  
2 Internet Explorer with Windows during the time period  
3 1998 up to his report in May of this year. And he  
4 actually tested and had tested how long it would take  
5 to simply do what Microsoft tells its licensees they  
6 should do. In other words, Microsoft with these  
7 security patches says, "Okay. Let's just take levels  
8 three and four. We have 70 patches here. You really  
9 ought to install these because you're going to be  
10 susceptible to vulnerabilities," and he's determined  
11 the time it would take to simply download and install  
12 those.

13       Then, again, with a very detailed  
14 analysis -- and I think his report is almost 200  
15 pages, but I think the text is 30 some pages -- he  
16 describes how he comes up with three minutes as an  
17 extremely conservative time to deal with any of these  
18 patches; in other words, to learn about it; to read  
19 the security bulletins, which are lengthy, to read  
20 any other material that Microsoft gives you on it, to  
21 understand how you do it, check your computer  
22 afterwards. I mean, I think it would probably take  
23 more than three minutes just to read the security  
24 bulletin, and so he's designed that in an extremely  
25 conservative way. So now we have literal times

1 associated with each of these security bulletins.

2 Dr. Gowrisankan is an economist who has a  
3 great deal of background in both antitrust and  
4 innovation, and in his report he identifies and talks  
5 about the economic principle of revealed preferences.  
6 And he says if Microsoft has the interest of its  
7 licensees in mind when it says, "Install these  
8 patches," and if Microsoft has the technical  
9 expertise to develop those patches, then economic  
10 principles demonstrate that that is the least costly  
11 way of dealing with the vulnerabilities and that's  
12 the most conservative damage amount for these  
13 vulnerabilities that these people have been exposed  
14 to that they would not have otherwise been exposed  
15 to.

16 And so what he has done is he has then  
17 calculated -- and, again, he's taking into account  
18 all the variables of licensees -- the amount of dial  
19 up versus broadband use, all those different factors  
20 and has come up with a damage amount per patch.

21 And I will come back to that.

22 So then he comes up with a damage amount.  
23 If you had -- and the damages amount are, again, so  
24 conservative it's probably an average of about an  
25 hour and a half for a Window user to deal with all

1 patches that they would not have otherwise had to  
2 deal with during the time period involved. That's  
3 why we don't see any experts from Microsoft  
4 criticizing the numbers because we've come up with  
5 such an incredibly low number.

6 Now, Microsoft has identified these federal  
7 cases, the Kloth case, the MDL case, and the Indiana  
8 case, and they have repeatedly said these cases are  
9 directly on point. So it's really the MDL, Kloth and  
10 Indiana which has a statute with the identical  
11 language as the federal statute. And they say,  
12 "Well, they are absolutely identical. This issue is  
13 resolved." Of course, this is under federal law.  
14 There were indirect purchaser issues in each of  
15 these, but I think what's really important is that  
16 here these dealt with degradation of performance, and  
17 they repeatedly characterized our claim as a product  
18 liability claim for degradation of performance and  
19 that's what the literal language that they quote in  
20 all the analysis of the Court is based upon, that  
21 kind of an approach.

22 I don't know. I do a lot of product  
23 liability work. I'm not sure how I would frame a  
24 product liability claim for what we're talking about.  
25 I mean, we're simply saying -- very clearly, I

1 think -- that we're analyzing a "but for" world here.  
2 This is what we have now. This is what we would have  
3 had had Microsoft had not acted illegally. It's not  
4 a quality issue. We're not saying that the number of  
5 attacks are somehow changing because of something.  
6 It is simply we wouldn't have the attack surface that  
7 we have.

8 And, of course, on these cases, because  
9 they are simply talking about a phrase and a  
10 complaint degradation of performance, they go off on  
11 this product liability analysis; and maybe, indeed,  
12 that's what those courts were talking about but  
13 that's not at all what we're talking about here.

14 When we get to the measurement, again,  
15 we've built in so many levels of conservatism here,  
16 we have experts who have considered the data from  
17 numerous sources so that we literally have a damage  
18 amount for every patch. So if ultimately a jury  
19 says, "Yes, we agree these two levels, as an example  
20 hypothetically, should not have been there," then  
21 there are 70 patches and damage amounts. So if the  
22 jury says it wouldn't have been connected at all,  
23 we've got the 113 and damage amounts. If a jury  
24 says, "Gee, there should have only been five patches"  
25 if that is something Microsoft argues that you were

1 exposed to additionally, then we have that amount.

2 Now, our experts have said -- and this is  
3 getting back to Dr. Gowrisankaran -- the damage  
4 amounts that he's come up with and, of course, I mean  
5 what he's analyzed is, okay. With the facts we have  
6 available and the data we have available, it would be  
7 the most conservative to simply quantify and put a  
8 damage amount on doing what Microsoft tells you to  
9 do. So that's the way we have done it.

10 Now, we get the cross-examination of three  
11 minutes isn't the right number, download and install  
12 time, maybe we would have a different time. They  
13 mention the Internet and what they don't say is that  
14 Microsoft in these 113 security bulletins doesn't  
15 say, "Don't worry, if you're not on the Internet,  
16 don't pay any attention to it." I mean, what  
17 Microsoft understands in the real world is that if  
18 someone isn't on the Internet right now, they may be  
19 tomorrow. In fact, this Internet argument, even if  
20 it were one, I don't think once the factual record is  
21 developed, it will be at all, but it kind of goes  
22 away by Microsoft's own statistics starting in early  
23 2000 because 85 percent of the people are more -- are  
24 hooked up to the Internet at home.

25 So Microsoft doesn't make this distinction

1 in their bulletins. They say, "You should install  
2 this to protect yourself." Microsoft identifies  
3 percentages of people, again, hooked up at home.  
4 And, again, as I say, the issue kind of goes away for  
5 a number of these patches because people are hooked  
6 up almost, again, by 2001 more than 85 percent. But  
7 the point is whether you're hooked up at home at one  
8 particular point in time really isn't that  
9 meaningful. You can take your computer and hook up  
10 to the Internet in other locations, and, of course,  
11 you've got the life of the computer. So when the  
12 factual record is developed, I think this whole  
13 Internet argument, cross-examination will go away.  
14 Although, again, most everything they say about  
15 measurement is cross-examination. And again, it's  
16 because we've chosen to do the least damage amount  
17 possible.

18 Now, with respect to security damages being  
19 duplicative, we have provided an affidavit from our  
20 expert economist who handles the overcharge analysis.  
21 And she has explained in her affidavit in connection  
22 with this motion why security damages are not  
23 duplicative of the overcharge damages. And, of  
24 course, the whole argument arises from their  
25 mischaracterization or misunderstanding of our case

1 as a product liability case. What is very telling  
2 here is that Microsoft has five or six expert  
3 economists that they've retained and that have  
4 offered reports in this case. Not one of them has  
5 submitted an affidavit in response to this motion  
6 saying that the security damages that plaintiffs are  
7 claiming are duplicative in any way of overcharge  
8 damages.

9 The final point I would make, Your Honor,  
10 is, again, we have developed a factual record. They  
11 are absolutely right about that. I mean, that's a  
12 huge distinction between the federal cases. Apart  
13 from the fact that we were talking about different  
14 things, we've developed a factual record with an  
15 expert computer industry person, a computer security  
16 person, two economists to come up with a very  
17 conservative amount. What they'll testify to is an  
18 extremely conservative amount of damages resulting  
19 from the anticompetitive bundling. In fact, I think  
20 the security industry person puts a more realistic  
21 number at many multiples of what we've suggested, but  
22 it is -- we've got a record.

23 They simply, with all their 10 or 12  
24 experts, offer nothing. They had one computer  
25 security expert in response to this who really, I

1 think, supports our point by saying the greater the  
2 attack surface, the more attacks. You can't help it.  
3 So if you have a greater attack surface, you know,  
4 you're going to get more attacks and that's their  
5 security person.

6 But when you then get to an antitrust case,  
7 the plaintiffs are entitled to some leeway in proving  
8 their damages because a wrongdoer shouldn't profit  
9 from the harm occasioned both by its actions and also  
10 its actions in preventing a more detailed analysis.

11 I mean, it's kind of interesting in this case  
12 Microsoft says, "Well, not everybody is  
13 necessarily -- not 100 percent of the people are  
14 getting the notice from us to do what we're telling  
15 them to do."

16 So they are really saying, "Yeah, maybe  
17 we've harmed these people; but because we haven't  
18 actually succeeded in correcting that harm to these  
19 people, you don't" -- you know -- "we're going to  
20 take advantage of that." So clearly in these kind of  
21 cases, the case law is very clear that if we present  
22 evidence of damage -- and I believe we have, as I've  
23 gone over probably more than necessary -- it really  
24 is a jury issue, and it's -- their points are  
25 cross-examination points. They can make them at

1 trial and the jury will either agree with us or not.

2 Finally, Microsoft says in the end-user  
3 license agreement for some of their products for some  
4 of the time, they have this provision that says,  
5 "We're not responsible for the conduct of third-party  
6 sites," and they say somehow that this is intended to  
7 relieve them from antitrust damages.

8 First of all, just factually, again, the  
9 argument misunderstands what we're saying. What  
10 we're saying is if there is third parties out there  
11 that will injure the licensee, if Microsoft had not  
12 acted illegally, a whole bunch of these or all of  
13 them, depending upon which interpretation that the  
14 jury may believe, would never, ever get to the  
15 licensee. So it's really Microsoft's conduct in  
16 creating an additional attack surface that was the  
17 direct result of its anticompetitive bundling. So  
18 this doesn't -- reading through this, this doesn't  
19 have anything to do with that. This is like if, you  
20 know, your child goes to a site, then we're not  
21 responsible if there's something bad on that site. I  
22 mean, this can't -- the literal wording of it doesn't  
23 remotely reach this.

24 If there were any language in there -- and  
25 I don't believe there is -- that would even in the

1 abstract touch this issue, then we've cited the Iowa  
2 cases that say, "Well, any ambiguity will obviously  
3 be in favor of the person who is not the drafter." I  
4 don't think there's any ambiguity because I don't  
5 think this could remotely address this situation.

6 The other point, of course, is that courts  
7 generally look at this in disfavor upon a party  
8 trying to exclude itself in a printed contract from  
9 intentional misconduct, which this is.

10 I have nothing further. Thank you very  
11 much, Your Honor.

12 THE COURT: We will be in recess until  
13 1:30.

14 (A noon recess was taken from 12:30 p.m. to  
15 1:30 p.m.)

16 THE COURT: Defendants. Defendants  
17 response.

18 MR. ROSENFELD: Yes. Thank you, Your  
19 Honor.

20 And I'm not going to take very long, but as  
21 I listened to Mr. Reece, I did have this sense of two  
22 ships, really, passing in the night. And I want to  
23 go back to where I started, which was I keep this up  
24 as a fairly discrete motion that turns on a legal  
25 issue. I didn't ask you to take my word for that,

1 but I referred to the Next Generation Realty case  
2 which said precisely that. It said that antitrust  
3 injuries is a controlling legal principle in Iowa and  
4 which decided that issue in affirming a summary  
5 judgment motion.

6 Now, Mr. Reece talked a lot about, as I  
7 predicted, about Iowa law and statutory language and  
8 the decision in Comes I, and he did continue to cite  
9 it as a 2006 case and I'm not being picky.

10 I think it's very important that the Court  
11 understand Comes I was decided in 2002. The Supreme  
12 Court of Iowa decided Next Generation Realty in 2004.  
13 So all these issues about what harmonization means  
14 and so on, the Next Generation Realty case tells us  
15 what harmonization means. They harmonize and they  
16 said they were bound to follow federal law in this  
17 regard and they did. They said without antitrust  
18 injury, there is no violation of Iowa Competition  
19 Law, Chapter 553. So I think there was a lot of  
20 dust, but I don't think that opinion and what it  
21 holds, I don't think plaintiffs cast any doubt on  
22 that, on its applicability here.

23 Then we go to the two cases: The federal  
24 case and Indiana case, both at the Court of Appeals  
25 level.

1           And as I recall, the only argument that  
2           Mr. Reece made was that those cases were different  
3           because they dealt with product degradation, and here  
4           we're dealing with security issues. So somehow this  
5           was more direct or apt than those cases. Again, I  
6           think Mr. Reece has it just opposite. First of all,  
7           I believe if you read plaintiffs' complaint, there is  
8           discussion about product degradation in this case in  
9           this complaint.

10           Second, if you look at the decision in  
11           Kloth in the Fourth Circuit, the Court says, "But the  
12           plaintiffs also claim that the integration of Windows  
13           and the Internet Explorer Web browser resulted in  
14           specific harms to the computers, including loss of  
15           speed and memory, loss of operating system stability  
16           and increased susceptibility to virus and security  
17           breaches, exactly the same claim that is being made  
18           here.

19           So although Mr. Reece tried to cloud that  
20           issue, he's wrong. Those cases dealt with precisely  
21           the same issue that is being dealt with in this case.  
22           Indeed, I submit they dealt with it more directly  
23           because in those cases the plaintiffs were arguing to  
24           recover damages for the security vulnerabilities or  
25           breaches, that is, the injury that allegedly

1 resulted.

2 Plaintiffs are not doing that here.

3 They've gone one step further in the direction of

4 indirection, if you will, or indirectness. They are

5 not seeking damages for the security breach or the

6 vulnerability. They are seeking damages for the time

7 they spend downloading and installing the fixes that

8 Microsoft provided to guard against those security

9 vulnerabilities. So they've gone even a step further

10 in terms of remoteness and indirectness, a step

11 further than the plaintiffs in the Kloth or the

12 Indiana case, Berghausen. So, if anything, those

13 cases argue more strongly for the outcome here, not

14 less.

15 Finally, I want to go back and try to put

16 this all in context, this narrow issue because this

17 is not, Your Honor, about how you calculate damages,

18 about how many experts relied on how many experts to

19 come up with what numbers. That's the subject of

20 some other motions.

21 They said at the beginning the issue here

22 is not about how to calculate damages. The issue

23 here is whether plaintiffs are entitled to recover a

24 certain type or category of damages or a certain type

25 or category of conduct. So while it was illuminating

1 to hear Mr. Reece talk about all the ways in which  
2 they were going to calculate damages, with all  
3 respect, it had nothing to do with the point that is  
4 at issue in this motion, and that is whether they are  
5 entitled under Iowa law to seek recovery under the  
6 Iowa Competition Act for this kind of injury.

7 Now, let me take it one last step and I'm  
8 almost finished. I want to talk a minute about the  
9 notion of antitrust injury and what it means.

10 You'll recall Mr. Reece put up a chart that  
11 quoted several sections out of the Iowa Competition  
12 Law. He said a person shall not attempt to establish  
13 or maintain or use a monopoly "da-da-da-da" for the  
14 purposes of excluding competition or of controlling,  
15 fixing, or maintaining prices.

16 And then it says, "You're entitled to  
17 recover actual damages resulting from conduct  
18 prohibited under the chapter." That is excluding  
19 competition, that is controlling, fixing or  
20 maintaining prices. That's what the Iowa statute  
21 says. The damages being sought here are not damages  
22 that result from excluding competition or from  
23 controlling, fixing, or maintaining prices. No one  
24 has alleged that part of Microsoft's strategy or  
25 alleged unlawful conduct was to provide its customers

1 with defective products. No one has made that  
2 argument and for good reason. It makes no sense.  
3 If we wanted to help our competitors,  
4 providing our customers with defective products is  
5 the way we would do it. So if that was a  
6 consequence, that is, the anticompetitive conduct  
7 that is alleged to say it took place and then  
8 excluded Netscape from certain distribution channels,  
9 maybe, maybe it was an indirect, unintended, and  
10 incidental effect of that conduct that there were  
11 some security breaches. Maybe. But that's exactly  
12 what the antitrust injury filter or doctrine is  
13 designed to screen out. It says, yes, you get  
14 damages that are directly related to excluding  
15 competition, controlling, fixing, or maintaining  
16 prices. But when the causal chain is so attenuated  
17 and so drawn out as it is here that now we're saying,  
18 "Oh, there was an incidental indirect effect," that  
19 is what the Kloth court and that is what the Indiana  
20 court said. Those are not antitrust injuries. You  
21 may have other ways to sue for, whether breach of  
22 warranty, whatever, but that kind of remote  
23 attenuated indirect injury, that clearly wasn't  
24 intended even on plaintiffs telling of the worse  
25 possible story, wasn't intended here.

1           Those are not the kind of damages that the  
2 Iowa Competition Law speaks to. Those are not the  
3 kind of damages that the antitrust injury test speaks  
4 to. So you've got Iowa law clearly on point, and  
5 you've got two cases that are identical -- and I  
6 don't believe plaintiffs did anything to distinguish  
7 them. Identical dealing with precisely the same  
8 allegation, albeit slightly more direct than say  
9 these kinds of damages are not the kind of damages  
10 you can recover for under the antitrust laws. This  
11 is a motion that should be granted.

12           Thank you, Your Honor.

13           THE COURT: Thank you. Issue No. 3.

14           MR. TULCHIN: Thank you, Your Honor. David  
15 Tulchin, again.

16           Your Honor, the fourth amended petition,  
17 which is the one that is now extant and that we will  
18 be trying this case on in just several weeks from now  
19 is more than 90 pages long, and I want to make the  
20 point to the Court that even if all eight of our  
21 motions for partial summary judgment are granted, the  
22 great bulk of the allegations in those 90 pages, some  
23 substantial part of them will remain.

24           The core issues about the operating system  
25 claim and many of the others will still be present

1 but what we try to do in these motions for partial  
2 summary judgment, Your Honor, was to pick out legal  
3 issues. We certainly weren't trying to burden the  
4 Court. I know it's a lot of paper, but to pick out  
5 legal issues where we felt the law was clear and  
6 things could be pared down -- and I must say that  
7 this Item No. 3, our motion concerning plaintiffs'  
8 claims for the so-called loss of innovation and  
9 denial of choice is at least as clear as any of the  
10 others, perhaps more so.

11 For one, Your Honor, never in the history  
12 of our country -- and the Sherman Act was passed in  
13 1890 -- has any court awarded damages in an antitrust  
14 case for loss of innovation or denial of free choice.  
15 No court has ever denied a motion of this sort that  
16 we've made, and Mr. Hagstrom earlier was talking  
17 about the fact -- he said that a number of these  
18 motions had been denied in other cases. This one  
19 certainly has not been, and no court has ever  
20 permitted a claim such as this to go to trial.  
21 Indeed, hardly ever has this theory been advanced,  
22 although it was in the Kloth case, the Kloth case  
23 that Mr. Rosenfeld referred to has this as part of it  
24 as well.

25 And there it was very emphatically

1 rejected. At page 2 of the plaintiffs' brief, they  
2 acknowledge the other plaintiffs in other cases have  
3 not sought damages for loss of innovation. It's  
4 interesting, Your Honor, that Forbes, Forbes Magazine  
5 has an Online version and today the newest issue is  
6 posted Online.

7 Ms. Conlin is quoted in today's Forbes as  
8 saying, "Can this case expand the thinking of courts  
9 generally about what appropriate damages are in  
10 antitrust cases?" Yes, I think so. The article is  
11 about exactly this question of loss of innovation.

12 THE COURT: Does this article hold  
13 precedent with this Court?

14 MR. TULCHIN: No, it isn't, Your Honor, but  
15 the point I think it's quite clear.

16 THE COURT: Is there an affidavit you're  
17 attacking by her --

18 MR. TULCHIN: No --

19 THE COURT: Is this sought for an admission  
20 by the other side?

21 MR. TULCHIN: No, Your Honor.

22 THE COURT: Then it has no relevance  
23 whatsoever. Move on.

24 MR. TULCHIN: All right. I will.

25 It's quite clear that what plaintiffs are

1 doing here is trying to expand Iowa law that a claim  
2 for loss of innovation has never before been made or  
3 been successfully tried. And I'll come to the  
4 reasons for that, Your Honor.

5 But the complaint here, the fourth amended  
6 petition at paragraph 269 says Microsoft's illegal  
7 conduct has also harmed plaintiffs and members of the  
8 class by significantly limiting the range of choices  
9 that a free market would have provided to them.  
10 Certain innovative products and technologies that  
11 would have truly benefited consumers never occurred  
12 or were prevented from reaching the market.

13 Paragraph 271 makes a similar allegation;  
14 that consumers have been denied a free choice in a  
15 competitive market as well as the benefits of  
16 software innovation. And, Your Honor, the basic  
17 allegation here that we attack in this motion is  
18 that, if I can put it this way, the world would be a  
19 better place had it not been for the fact that  
20 Microsoft obtained monopolies, allegedly unlawfully,  
21 that there would have been increased software  
22 innovation and that consumers would have had  
23 additional choice.

24 Now, are these really antitrust damages  
25 that are as a matter of law permitted? The

1 deposition of Plaintiffs' expert Roger Noll was taken  
2 in July, Your Honor, of this year. Roger Noll is  
3 plaintiffs' expert on liability, and he has a very  
4 lengthy and wide-ranging report in which he draws  
5 conclusions about Microsoft's conduct. He said at  
6 page 145 of his transcript, and this is in the  
7 papers, Your Honor, "I personally don't know how to  
8 estimate the monetary damage to a consumer in 2006  
9 who is using a product that would have advanced more  
10 in a competitive world than it has in a less  
11 competitive world.

12 In other words, if one can on the one hand  
13 make an argument that technological competition in  
14 some form has been reduced, but that's a very  
15 different matter than saying what technology would  
16 have actually emerged and how much it would have cost  
17 and how much consumers would be willing to pay for it  
18 and how much were they damaged in a monetary fashion.

19 My experience has been that that is  
20 virtually always impossible to estimate. Professor  
21 Noll was an economist at Stanford University. His  
22 testimony goes on, Your Honor. I asked the next  
23 question: "Is that because it's too speculative? Is  
24 that the reason you can't estimate it?" Answer:  
25 "That's one reason." I mean, I guess there are two

1 dimensions in which you have problems. The first is  
2 exactly what the technology would be, and the second  
3 is to estimate the demand conditional upon the  
4 instance of the technology when no transaction  
5 happened.

6 I just want to pause here, Your Honor. The  
7 basic problem of a claim for loss of innovation is  
8 that it is remote and speculative and the antitrust  
9 laws, including Iowa's, do not permit remote and  
10 speculative claims. Because here what the plaintiffs  
11 will be asking the jury to do is to imagine -- and  
12 I'm not using that word unintentionally -- to imagine  
13 a world that never existed with new products that  
14 would have been developed. We don't know what they  
15 would have been. We don't know what they would have  
16 cost on the open market, and as Professor Noll says,  
17 we don't know how to estimate the demand for those  
18 products, to imagine these new products, and then to  
19 come to some money value as damages to the class for  
20 the fact that these unknown new products never came  
21 to the market.

22 Now, the plaintiffs say, "Well, you know,  
23 you can get damages for pain and suffering in an  
24 automobile class." There are economic damages such  
25 as expenses like medical expenses that you incur if

1 another driver has been negligent and you've been  
2 injured. And on top of that, there are noneconomic  
3 damages such as pain and suffering. But this is not  
4 the sort of noneconomic damages such as pain and  
5 suffering that exists in those cases.

6           Number one, in such a case there is a human  
7 being, the plaintiff on the stand, who can testify to  
8 her or his pain and suffering. The jury can evaluate  
9 the person on the stand and consider all the  
10 circumstances, all the facts in evidence. Here we  
11 have as many as a million people, plaintiffs say  
12 hundreds of thousands up to possibly a million humans  
13 and entities. And the claim is, of course, that the  
14 jury should be allowed to let imagination run wild  
15 about what the world would have looked like.

16           Very importantly, Your Honor, here as the  
17 plaintiffs have conceded -- Ms. Conlin said this on  
18 June 9th to the Court in a hearing -- no expert for  
19 the plaintiffs has attempted to quantify these  
20 damages for loss of innovation.

21           In fact, none of their experts in any way  
22 make a claim for loss of innovation or attempt in any  
23 way to state what innovative products would have come  
24 on the market. None of them attempt to expound on  
25 what those products would have cost, what demand

1 would be for those products, who would have chosen to  
2 buy them and who would not have. None attempt to  
3 quantify in any way the so-called "lost of free  
4 choice," that is, extra choices in the market for  
5 consumers.

6 And the plaintiffs, I think, have been  
7 quite candid in saying that what they would like the  
8 Court to permit them to do at trial is to put in no  
9 evidence about loss of innovation, but merely in  
10 summation to ask the jury to imagine a world where  
11 other products would have been developed. No  
12 evidence. Besides the fact that there are no experts  
13 who have testified to this or who have referred to it  
14 in expert reports, none of the named plaintiffs will  
15 testify to this either.

16 You'll remember, Your Honor, that we tried  
17 to take depositions of class members. We asked the  
18 Court for permission to take depositions of class  
19 members, and then later, consumers outside the state.  
20 And in response plaintiffs' counsel said, "No  
21 consumer can testify about the injury that he or she  
22 has suffered. That is something for experts."

23 And so Microsoft's requests to take  
24 depositions of consumers about how they like  
25 Microsoft products, whether or not they believe it's

1 a good value, whether they think they've suffered  
2 damages, whether there are other choices out there --  
3 and we specifically mentioned that as a reason for  
4 taking those depositions -- counsel said, "No, no  
5 consumer can testify. No one can have that  
6 information. That's for experts."

7 When the reports of experts came in, we  
8 discovered that there is no reference to loss of  
9 innovation in any of those reports as well. So we're  
10 really at a point where I think the plaintiffs have  
11 conceded that they would ask the jury, in effect, to  
12 be free, to run away with a verdict in some rough  
13 amount based on their own imagination. And, Your  
14 Honor, the question then arises, Why is there a claim  
15 for loss of innovation? A claim, as I said, that no  
16 court has ever permitted in an antitrust case. Why  
17 is that legally deficient? And it really goes back  
18 to two of the cases that my colleague Mr. Rosenfeld  
19 referred to in the prior motion. So I can shortcut  
20 this is a little bit. I know the Court has heard  
21 about it.

22 The last word from the Supreme Court of  
23 Iowa on harmonization and antitrust injury is the  
24 decision in the Next Generation Realty v. Iowa  
25 Realty Company case, 686 N.W.2d 206 from 2004. And

1 there the Supreme Court says in adopting Iowa Code  
2 Chapter 553, the legislature left us without  
3 authority to innovate from the federal courts  
4 understanding of federal antitrust law. The word  
5 "innovate" is used there too, although it's not in  
6 the same context. And the Next Generation Realty  
7 case as Mr. Rosenfeld pointed out, had to do with  
8 exactly this question of antitrust injury.

9         And the Comes case, which again is from  
10 2002, so it predates Next Generation Realty, has been  
11 cited by plaintiffs' counsel as authority for the  
12 proposition that innovation damages are permissible.  
13 I think what the plaintiffs have said, Your Honor, is  
14 is that the Comes case dealt with what remedies the  
15 plaintiffs can have, and the Court there was very  
16 expansive in allowing these plaintiffs' remedies that  
17 would not be available under federal law. Well, of  
18 course, the issue in Comes was whether indirect  
19 purchasers have a cause of action for overcharge  
20 damages. That is the Illinois Brick question: Do  
21 indirect purchasers have a cause of action for  
22 overcharges, not for innovation or loss of  
23 innovation.

24         That's what the Court ruled on, and one of  
25 the important grounds for its decision at page 447

1 was the court's recognition that the Iowa -- the  
2 current version of the Iowa Competition Law was  
3 enacted by the legislature in 1976, one year before  
4 Illinois Brick was decided by the Supreme Court of  
5 the United States.

6 And the Court says, "Consequently, it was  
7 impossible for the legislature to have adopted a  
8 judicial construction which did not exist at the  
9 time." The Court goes on to point out that  
10 pre-Illinois Brick, a number of federal courts had  
11 permitted indirect purchaser claims for overcharges.

12 Here no federal court before 1976 had ever  
13 permitted a claim for loss of innovation. The  
14 plaintiffs cite to none. There are no such cases.  
15 There is the Kloth case, 444 F.3d 312. It's a  
16 decision of the United States Court of Appeals for  
17 the Fourth Circuit rendered earlier this year.

18 And I want to take just a moment on the  
19 aspect of the Kloth case that deals with exactly this  
20 claim, Your Honor. It's a little different from what  
21 Mr. Rosenfeld was referring to. At 318, that is  
22 444 F.3d at 318, the Court says that, "The plaintiffs  
23 allege that they paid super competitive prices for  
24 software and were deprived of the benefits of  
25 competition including, but not limited to,

1 technological innovation, market choice, product  
2 variety and substitutable supply." The very claim  
3 that has been made here in almost the exact same  
4 words.

5 At page 323 of the Kloth decision, the  
6 Court goes on to say, "As we've already noted,  
7 plaintiffs have alleged that they were deprived of  
8 the benefits of competitive technology." Now, Kloth  
9 did not decide this claim on Illinois Brick. There  
10 was an Illinois Brick aspect to the Kloth decision.  
11 At 323 the Court, quoting the United States Supreme  
12 Court in Associated General Contractors says, "The  
13 question of which persons have been injured by an  
14 illegal overcharge for purposes of Section 4 --  
15 that's the Illinois Brick question -- is analytically  
16 distinct from the question of which persons have  
17 sustained injuries too remote to give them standing  
18 to sue for damages under Section 4." That's what  
19 we're dealing with here, "injuries too remote."

20 The Court goes on, "Plaintiffs must  
21 demonstrate direct antitrust-type injury, not simply  
22 any injury that was caused by an antitrust  
23 violation." So the Kloth decision is exactly  
24 consistent with the Next Generation Realty case where  
25 the Supreme Court of Iowa talks about antitrust

1 injury.

2 And, of course, it goes on to say that the  
3 claims for loss of generation are too speculative and  
4 too remote. You'll find the language in 324.  
5 Plaintiffs' claims raised insuperable problems in  
6 measuring and allocating damages. And I might just  
7 make, if I could, a verbal footnote. That's what  
8 Professor Noll, the expert for the plaintiffs, was  
9 saying. These are insuperable problems in measuring  
10 and allocating damages. Economists can't do it as  
11 their expert acknowledged. Instead, they want the  
12 jury to be free to run with this question and award  
13 any amount the jury comes up with with no evidence  
14 from experts or, for that matter, from the  
15 plaintiffs.

16 The Kloth case goes on at 324, quoting the  
17 district court's decision in this Kloth case, "It  
18 would be entirely speculative and beyond the  
19 competence of a judicial proceeding to create in  
20 hindsight a technological universe that never came  
21 into existence."

22 That's exactly our point. Do plaintiffs  
23 want permission to ask the jury to speculate about a  
24 technological universe that never came into  
25 existence?

1           Now, Your Honor, I want to pause here  
2           because, of course, there are situations where a  
3           court or a jury is permitted to imagine a world that  
4           doesn't exist. In calculating economic damages under  
5           the antitrust laws, the experts for the plaintiffs  
6           here, primarily Janet Netz, the professor from  
7           Michigan who has submitted a report on damages for  
8           the plaintiffs, posits a "but-for" world. That is,  
9           she creates a world that she says -- plausible  
10          scenarios of a world that would have existed where  
11          there was competition instead of monopolization. And  
12          in measuring economic damages, economists have tools  
13          to do so. We disagreed with what Professor Netz did.  
14          We intend to cross-examine her at trial about her  
15          methodologies and whether they are sensible, but, of  
16          course, that's not the point here. The point is that  
17          in an antitrust case economics is what matters.  
18          Economists do come up with a "but-for" world in  
19          trying to measure economic damages. But this claim  
20          for loss of innovation, as the Fourth Circuit said,  
21          requires one to imagine a technological universe that  
22          never existed. Not the question of which company and  
23          how much market share in operating systems. For  
24          instance, I think Professor Netz in one of her  
25          scenarios imagines a world where there were five

1 companies, Microsoft and four others, who sold  
2 operating systems where they each had 20 percent of  
3 the market. Well, that's one thing. One can think  
4 about that. Here it's a technological universe.  
5 What software would have been created and come on the  
6 market and been purchased by consumers that never in  
7 fact was. A whole different thing requiring a whole  
8 different, different level of speculation and  
9 remoteness.

10 There's an interesting case, Your Honor,  
11 decided in 2004, late 2004, by Judge Goodhue in Iowa  
12 District Court called Southard, S-o-u-t-h-a-r-d,  
13 v. Visa USA. Judge Goodhue, and I've forgotten what  
14 county he was in, but I think it's a county just west  
15 of Des Moines, if I remember. Is that right, Ed?

16 MR. REMSBURG: Yes.

17 MR. TULCHIN: Ed Remsburg was counsel in  
18 that case, and that's 2004 Westlaw 2030028. Judge  
19 Goodhue dealt with a similar argument to the argument  
20 being made here. I say similar. It was a situation  
21 where the damages sought were much less speculative  
22 and much less remote than those here. Though he  
23 rejected them. That was a case where there were  
24 allegations by the plaintiffs that Visa and  
25 MasterCard had imposed excessive fees on merchants

1 within the state of Iowa. And that the merchants,  
2 because they paid high fees to the credit card  
3 companies, to the banks, really, had passed on those  
4 damages and that all residents of Iowa who went to  
5 those merchants had suffered injury because the  
6 merchants themselves had paid too much.

7 Now, just a little aside. It's not an  
8 Illinois Brick case because the indirect purchasers,  
9 if you will, are not buying the same thing that the  
10 merchants are. It's a little bit different. And the  
11 question there was the same question here, "Does the  
12 Comes decision permit courts in Iowa to precede with  
13 speculative and remote claims?" The plaintiffs in  
14 that case contended that the Comes decision from  
15 2002, not 2006, have language broad enough to allow  
16 them to continue to prosecute their claim. But the  
17 Court rejected it on the grounds of remoteness and  
18 adopted the five-factor test set out in the U.S.  
19 Supreme Court's decision in Associated General  
20 Contractors. Indeed, this is sort of basic common  
21 law material. That was an antitrust case, but in  
22 evaluating the factors a very important point which a  
23 court must look at -- this is wholly apart from the  
24 Illinois Brick question -- is the character of the  
25 alleged damages including the risk of duplicative

1 recovery, the complexity of the apportionment and  
2 their speculative nature. And the Court there held,  
3 "The thrust of the Comes case is that although the  
4 bright-line exclusion of indirect purchasers as set  
5 out in Illinois Brick has been abrogated under the  
6 Iowa Competition Law, an analysis of standing and  
7 remoteness is still appropriate and must be made."  
8 And, of course, that is the basis of our motion here.  
9 There's no antitrust injury and these damages are too  
10 remote.

11 I want to come to a Supreme Court decision  
12 on remoteness in just a moment, and I know these  
13 analogies are never perfect, Your Honor, but to come  
14 up with an analogy on the question of remoteness, one  
15 that is simple and I think easy to deal with.

16 If a plaintiff brings a contract action  
17 against a defendant claiming that the defendant  
18 failed to pay, let's say, \$10,000, of course the  
19 plaintiff is entitled to \$10,000 if he prevails, plus  
20 interest. What he's not entitled to is a remote and  
21 speculative measure of damages. For example, a  
22 plaintiff could contend if the defendant had paid me  
23 on time, I would have purchased stock of Google in  
24 the year -- whatever year it was when Google first  
25 went public, I don't know what it was -- and I would

1 have made a big, big bundle of money.

2 Now the courts reject those claims not  
3 because the plaintiff isn't entitled to damages for  
4 breach of the contract, but because the sort of  
5 requests inherent in that claim requires a level of  
6 speculation and remoteness from the contract that  
7 common law courts simply do not recognize. And  
8 that's why no such claim has ever proceeded in an  
9 antitrust claim and never has a plaintiff even gone  
10 to trial as far as any of us know in any of the cases  
11 cited on a claim such as this one for loss of  
12 innovation.

13 And I'm almost done, Your Honor, but I do  
14 want to bring the Court's attention to, I think, what  
15 is an instructive case, Tredrea, T-r-e-d-r-e-a, v.  
16 Anesthesia & Analgesia. It's a Supreme Court of  
17 Iowa, 1998, 584 N.W.2d 276. And there the plaintiffs  
18 had a contract. I will call it "ANA" Anesthesia and  
19 Analgesia. "ANA." The plaintiffs had a contract  
20 which was set to expire in 1996. The contract had an  
21 automatic renewal clause that it would be renewed  
22 from year to year unless one of the parties  
23 affirmatively declined renewal.

24 At trial the plaintiff prevailed on the  
25 contract claim but sought damages of over four

1 million dollars on the grounds that the two plaintiff  
2 doctors would have practiced medicine until -- in one  
3 case 2008 and another in 2010 and their damages  
4 should have been over four million dollars measured  
5 to compensate them for damages after 1996.

6 The district court refused to allow  
7 evidence of damages beyond the termination date of  
8 the agreement on the ground that it was too  
9 speculative. Now, this is an awful lot less  
10 speculation that is involved here. There was a  
11 contract. The terms were known. The contract had  
12 this automatic renewal provision for one-year terms,  
13 but the Supreme Court says at page 288, "Several  
14 factors make the plaintiffs' loss of income after the  
15 expiration date of the contract speculative. First,  
16 even though the doctors apparently enjoy a large  
17 following of patients, that is only part of the  
18 picture." "Genesis" -- the defendant -- "would still  
19 have to consent to the renewal of the contract.  
20 Perhaps even more problematic for the plaintiffs is  
21 the question of mitigation of damages."

22 And so, Your Honor, the point, of course,  
23 is here there are no experts to tell us about what  
24 the technological universe would have looked like.  
25 The plaintiffs themselves will not testify to that,

1 and I think counsel has so said. But instead,  
2 counsel wants to put to the jury in summation the  
3 question of how the world could have been a better  
4 place technologically had it not been for what is  
5 contended to be unlawful monopolization. These are  
6 just speculative and remote damages not permitted  
7 under common law principles as well as Associated  
8 General Contractors, and the Supreme Court's decision  
9 in the Realty case is exactly on point.

10       Lastly, Your Honor, the plaintiffs cite two  
11 articles which they say support their argument that  
12 innovation damages are appropriate. The first  
13 article was published in the George Washington Law  
14 Review in 2001, and it concedes at page 913 that many  
15 of these nonprice harms are difficult or impossible  
16 to quantify, which, of course, is exactly the point.  
17 The second article, as far as I can tell, has never  
18 been published. It's a draft or so it appears. It  
19 has never been accepted for publication as far as  
20 anyone can tell. It also doesn't advocate for a jury  
21 to measure damages through loss of innovation, but  
22 only for antitrust agencies in evaluating mergers to  
23 take that into account and for the government to take  
24 into account inequitable enforcement actions, but not  
25 private cases for damages.

1 Thank you, Your Honor.

2 THE COURT: Thank you. Response.

3 MS. CONLIN: Yes, Your Honor. May it  
4 please the Court.

5 I think that Mr. Tulchin in his last few  
6 remarks did, in fact, say what Microsoft's problem  
7 is. They think that if you cannot quantify damages  
8 you don't get them, and that is not the law. That is  
9 not the law in Iowa. It's never been the law in  
10 Iowa, and certainly this is not the case to make it  
11 the law in Iowa.

12 Long-standing Iowa jurisprudence strongly  
13 favors a determination of claims on their merits.  
14 It's really nearly hostile to summary judgment.  
15 Summary judgment is rare, unlike federal court, and  
16 it should be rare. The Iowa Constitution guarantees  
17 a trial by jury and only in the clearest and most  
18 compelling cases can the court remove a case from the  
19 jury in the absence of a full record and make a  
20 pretrial determination on the merits. None of these  
21 multiple what defendant called motions for summary  
22 judgment which are, in fact, distinguished motions in  
23 limine, none of these motions would justify such a  
24 drastic action.

25 Microsoft should face a jury and account

1 for all of its actions. At base the defendant's  
2 argument is plaintiffs cannot recover because the  
3 damages are not quantifiable. That is the basis for  
4 absolutely everything that they argue and it is  
5 plainly false.

6 And, Your Honor, it's also important to  
7 remember that in order to prove an antitrust  
8 violation, you know, the liability part, you have to  
9 show harm to competition. And in showing harm to  
10 competition, you can show overcharges. You can show  
11 loss of innovation. Explicitly the cases say that  
12 one of the ways to show the result of an antitrust  
13 violation is to show loss of innovation or loss of  
14 security.

15 This is the affect of an antitrust  
16 violation, and it's also important for me to  
17 emphasize that our claim here is not a claim for  
18 innovation damages. Our claim is Microsoft  
19 blatantly, repeatedly, and over a very long period of  
20 time violated the antitrust laws of the state of  
21 Iowa. That is our claim. Under our claim we seek  
22 elements of actual damages, one of which is  
23 innovation.

24 The Iowa Supreme Court has had occasion to  
25 comment specifically on this very issue, and it's

1 squarely held that items of damage are not claimed.  
2 Now, you know, in our colloquial way of speaking, we  
3 talk about claiming damages for loss of innovation or  
4 we use the word "claim," but when the rules use the  
5 word "claim" -- this is the Dickerson case, Your  
6 Honor -- when we talk about "claim" in the formal  
7 rule of sense, we are talking about a claim for  
8 personal injury, a claim for antitrust violation.  
9 That's what a claim is.

10 The defendants here seek to secure summary  
11 judgment on this element of damage and that violates  
12 the rules with respect to what kinds of things are  
13 even subject to a motion for summary judgment.

14 The defendants pooh-pooh the differences in  
15 law between Iowa and federal, but that would be --  
16 that would make Iowa's law meaningless and we don't  
17 like to think our laws are meaningless. Under  
18 553.12(2) there are two things that differ  
19 dramatically. One is a person injured may recover  
20 actual damages. There is a second part of that, and  
21 it says, "Resulting from conduct prohibited under  
22 this chapter." The "resulting from" language is also  
23 different. But the actual damages starting with  
24 that -- and I don't want to be too repetitive, Your  
25 Honor -- but actual damages are available under Iowa

1 law. Under federal law you have to show that the  
2 person is injured in his or her -- presumably, his or  
3 her business or property. That's not what Iowa law  
4 says. And the federal law goes on to say, "By reason  
5 of, not resulting from," as the Iowa law says, but  
6 "by reason of" anything forbidden in the antitrust  
7 laws.

8         The federal law requires "by reason of,"  
9 and the Court will not be surprised to learn that the  
10 federal courts have interpreted the "by reason of"  
11 language very, very narrowly. Because of that narrow  
12 construction when states developed the uniform state  
13 antitrust act and variations of that, many, like  
14 Iowa, intentionally modified that language. We don't  
15 say "by reason of." We say "resulting from." Unlike  
16 what Mr. Tulchin and Mr. Rosenfeld say, there is a  
17 difference, and the Iowa Supreme Court in Comes I  
18 said, "Where there is a difference in language, we  
19 don't just rely on federal interpretation."

20         Microsoft says that you should deny  
21 plaintiffs the opportunity to seek these damages  
22 because you can't predict what the damages were to  
23 these plaintiffs because the innovations were never  
24 in the hands of the plaintiffs. They never got to  
25 the plaintiffs. Well, why would that be? That would

1 be because Microsoft violated the antitrust laws. It  
2 is bad public policy, and more importantly, bad law  
3 to punish the plaintiffs for the defendant's  
4 wrongdoing. Any uncertainty in the law about this is  
5 legion. Any uncertainty -- the burden of any  
6 uncertainty lies with the wrongdoer, not with the  
7 victim. And also even like an overcharge, the  
8 individual class representatives never knew about the  
9 innovations that Microsoft killed. Until we get to  
10 court in this case, few will know about what  
11 Microsoft did and what innovations Microsoft killed.  
12 So it doesn't matter at all that our plaintiffs are  
13 not aware of the damages to innovation that occurred.  
14 Just because they weren't aware of it doesn't mean  
15 that they were not harmed.

16 And also Microsoft tries to avoid the fact  
17 that Comes I even exists. They only mention it in  
18 passing. They want to still believe that they are in  
19 federal court, and that there is no statutory  
20 provision allowing the Court to award actual damages.  
21 Unfortunately for us, for Microsoft, we're here in  
22 Iowa and we do have a provision in the statute for  
23 actual damages.

24 I found a recent law review article that  
25 happens to write about Comes I, and I did not cite it

1 in the brief, Your Honor, so I'm just going to cite  
2 it in passing here, that what it says that I think  
3 is important is that, "Comes I allows" -- and I  
4 quote -- "allows judges great discretion to craft  
5 antitrust remedies that adequately reflect the  
6 damages imposed by antitrust violators. This is not  
7 fundamentally inconsistent with the policies behind  
8 the Iowa Competition Law. It maximizes enforcement  
9 effort and allows all parties injured by a legal  
10 action to enforce their rights." This is by a man  
11 named Adam Thimmesch. It's a note -- probably a law  
12 student -- called "Beyond Treble Damages," and the  
13 citation is 90 Iowa Law Review 1649.

14 Mr. Tulchin says, and I have absolutely no  
15 idea where he got this idea, but he says,  
16 nonetheless, to the Court that plaintiffs want to put  
17 in no evidence of loss of innovation. I just don't  
18 know what he's talking about. There is already  
19 evidence in this record by virtue of the Court's  
20 findings, by virtue of Judge Jackson's decisions  
21 there is a great plenty of evidence already in the  
22 record on what Microsoft did to innovation. There is  
23 evidence in the record as we sit here, but there will  
24 be more, Your Honor, just because the class  
25 plaintiffs aren't going to testify but it doesn't

1 mean we're not bringing evidence to the jury.

2 The very idea that I would come here and  
3 say to the Court, "Let me get up in summation and  
4 argue something even though I haven't proven it is  
5 simply absurd." We will have evidence, Your Honor.  
6 We already have enough evidence to get by this motion  
7 in summary judgment, but certainly we will have, for  
8 example, a man named Steven McGeady.

9 McGeady was the head of Intel Architecture  
10 Labs. Intel Architecture Labs, as the Court will  
11 recall, was working on an amazing innovative product  
12 called "Native Signal Processing," a product that  
13 would have improved for all users of the Windows  
14 platform the audio and video experience.

15 Today, Your Honor, that technology is still  
16 unavailable, and the Court will recall that the  
17 reason it's unavailable is because Microsoft said to  
18 Intel, "You can't do this." Microsoft killed Native  
19 Signal Processing because it was inconsistent with  
20 its own desires. Native Signal Processing had APIs  
21 and Microsoft doesn't want any APIs except its own to  
22 be available in the market. There will be other  
23 industry witnesses talking about what innovations  
24 were lost because of Microsoft anticompetitive  
25 conduct.

1           While innovation damages are not the same  
2 as damages in tort cases for things like pain and  
3 suffering, they are akin to such damages.

4           I want to be clear, Your Honor, that we are  
5 not seeking damages for pain and suffering or for  
6 personal injury as were the plaintiffs in the many  
7 cases cited by the defendant. We are not seeking  
8 personal injury damages in an antitrust case. We are  
9 seeking damages for a quintessential,  
10 "quintessential" antitrust injury and that is loss of  
11 the benefit of innovation on the Microsoft platform,  
12 and I will get to the issue of standing.

13           Defendant demands to know what new  
14 products, what new features were not developed.  
15 We're going to tell them. They want to know were  
16 they technically feasible and how much would they  
17 cost and would customers have bought them and on and  
18 on and on.

19           Again, let's compare what defendant demands  
20 of these plaintiffs to the nonprice personal injury  
21 damages, and I'm going not do pain and suffering,  
22 Your Honor, because I don't want to be misunderstood.  
23 I'm going to do loss of consortium, and we can think  
24 through together what a spouse needs to prove in  
25 order to have a jury decide the issue of the amount

1 of the damages for loss of consortium.

2 Under that rubric, in order to recover does  
3 the wife, whose husband is injured, have to tell the  
4 jury exactly what services the husband would have  
5 provided. I mean, would he have taken her to the  
6 movies on Friday night? What movie? How long would  
7 it last? That's the kind of thing that the defendant  
8 demands of us that is never demanded of a plaintiff  
9 in a personal injury case because, you know, it is  
10 both unnecessary and impossible. Would a wife have  
11 to show that the husband would have done the dishes  
12 on a particular night? If so, how many dishes?  
13 That's the kind of thing, Your Honor, running a list  
14 of unknowns and unknowables does not defeat this  
15 element of damage any more than it would defeat a  
16 claim for loss of consortium because the wife cannot  
17 say that the husband would have done the dishes every  
18 Friday night. It would have taken 20 minutes, and  
19 there would have been 17 dishes. That is just an  
20 absurd thing to require of a person who has lost the  
21 consortium of the services, society and companionship  
22 of a spouse. It's an absurd thing to require of  
23 these plaintiffs here who have lost the benefit of  
24 innovation because Microsoft has broken the law again  
25 and again. The failure to prove that kind of

1 specific is not required.

2 Microsoft also insists that in a tort case  
3 once a jury decides -- and I'm quoting here now --  
4 "that the plaintiff was injured and entitled to  
5 compensation, there is no question but that pain and  
6 suffering occurred," to which a personal injury  
7 lawyer can only respond, "Huh?" It's really quite a  
8 remarkable statement. I can think of plenty of  
9 examples where that is simply not so. One, of  
10 course, would be instant, immediate and permanent  
11 coma; but more important, in order to establish  
12 antitrust liability, harm to competition must be  
13 shown. It's already been shown. We've got Judge  
14 Jackson's finding. One effective harm is  
15 overcharging, but another is, without question and  
16 according to  
17 Judge Jackson, loss of the benefits of innovation  
18 and, of course, he specifically mentions Native  
19 Signal Processing and McGeady will be here to tell  
20 the jury all about it in enormous detail as will  
21 other members of the industry.

22 Microsoft either misunderstands antitrust  
23 law as it misunderstands tort law or is making  
24 misleading arguments intentionally. The Court has  
25 just heard so much about the Kloth case that it seems

1 almost redundant to bring it up again, but I'm going  
2 to.

3 In this instance, Your Honor, they cite not  
4 even a Fourth Circuit case but a lower court decision  
5 and it is simply inarguably that those plaintiffs  
6 lack standing because of Illinois Brick. The lower  
7 court's dicta is not binding anywhere, let alone in  
8 Iowa and let alone in interpreting Iowa's much  
9 different statutory language.

10 The Fourth Circuit also is, of course, not  
11 binding on this Court, and this Court has already  
12 rejected Fourth Circuit authority in its ruling on  
13 collateral estoppel.

14 And, of course, Your Honor, if Kloth was  
15 the law in Iowa, we wouldn't be here. We simply  
16 wouldn't be here. Illinois Brick would apply and we  
17 would have completed this case many, many, many years  
18 ago.

19 Also, Your Honor, we have cited a case --  
20 the Court to another Fourth Circuit case called Iron  
21 Ore. It's much closer to our case than Kloth and the  
22 defendants ever to distinguish it ineffective.

23 But there is a real distinction, Your  
24 Honor, and that is that the Iron Ore plaintiffs were  
25 able to bring expert testimony. The product that --

1 the innovative product, what had existed, was in use  
2 in some places, and the difference in the cost of  
3 loading with it and without it could be figured out.  
4 Not so here.

5 Here the defendant killed innovation before  
6 it could get to market, and they did it to maintain  
7 their monopoly and expert testimony to quantify those  
8 lawsuits is impossible and unnecessary. And also,  
9 Your Honor, in Iron Ore the Court let the evidence go  
10 to the jury. It went to the jury. There was a full  
11 record from which the Fourth Circuit made its  
12 decision, unlike Kloth, in which there was simply no  
13 record of any kind.

14 As Mr. Tulchin said, there is -- we know of  
15 no case in which damages or loss of the benefits of  
16 innovation have been awarded. We made that clear in  
17 the brief. I make it clear to you now, Your Honor.  
18 I am simply not deterred by that fact. We indicated  
19 in the brief that other plaintiffs in other cases  
20 have not sought these damages does not mean, has  
21 never meant, and should not mean that these  
22 plaintiffs in this case who seek these damages should  
23 not get them.

24 It's just not material, and in this case  
25 our plaintiffs have already been found to have

1 suffered injuries to innovation by Judge Jackson, and  
2 there is no legitimate reason in fact or in law to  
3 deny them this element of full compensation. The  
4 defendant also cites what it calls Professor Noll's  
5 requirements.

6 Professor Noll, as the Court is aware, is  
7 the plaintiffs' economic expert. He's a very  
8 distinguished Stanford University professor of  
9 economics. He is, however, not in any way involved  
10 in this issue, and he has no requirements. He is an  
11 economist, neither requested nor required to opine  
12 about innovation damages. Again, however, even in  
13 their mistaken reliance on what Professor Noll --  
14 what his duties in connection with this case are,  
15 Microsoft misquotes and distorts his testimony.  
16 We've set this all out in our brief, Your Honor.  
17 What Dr. Noll was talking about is how an economist  
18 does research, not how a jury would assess damages.

19 As is so often the case, the defendant  
20 reframes what the plaintiffs say and then advises the  
21 Court that what they say we say is wrong. Here they  
22 say our claim is for lack of availability of  
23 alternatives and that's handy because then they can  
24 say, "Therefore, we cannot recover because the harm  
25 is not exclusive to class members." This is not what

1 we claim, and the damages we claim are exclusive to  
2 members of the class, and let me explain a little  
3 bit.

4 This is not harm to the public as a whole.

5 This is not general social harm, though certainly  
6 Microsoft has done a lot of harm generally and  
7 socially, but this is about specific harm done to a  
8 specific group of people, the class of people who  
9 purchased Microsoft products. The damages are  
10 intrinsic to the purchase of Microsoft products.

11 We're not saying lack of innovation in the world at  
12 large. We are saying Microsoft's antitrust conduct  
13 has harmed innovation in the Microsoft platform, in  
14 and on the Microsoft platform. That's the operating  
15 system. You've got to have the operating system to  
16 be harmed. If you have the operating system, you're  
17 a member of the class, and that is the harm for which  
18 we seek compensation and for which we're entitled for  
19 compensation.

20 Also, Your Honor, it is availability of  
21 innovation, not the use of innovation for which  
22 damages are allowed. It simply doesn't matter  
23 whether a particular class member would have used a  
24 particular innovation, and because these innovations  
25 would have been available only on or in the Windows

1 platform, they would not have been available to  
2 anyone who doesn't have a Windows platform.

3 It's hard to understand why defendants  
4 continue to rely on the harmonization provision. I  
5 don't know if they are trying to convince the Court  
6 that the Next Realty case overruled Comes I or if  
7 they think that we are not careful readers.

8 If defendant's interpretation of the Iowa  
9 law was correct, we would not be here. It is not  
10 correct. Harmonization refers explicitly,  
11 specifically to standards of conduct, what violates  
12 the law. If you do this, does it violate the law?  
13 If the federal law says it's a violation, it's an  
14 Iowa violation. It does not refer to who may sue --  
15 we know that because we're here -- and what they may  
16 sue for. That is lack of innovation.

17 And certainly, certainly not when the  
18 statutory language differs, which it does in this  
19 case.

20 Given the strength and clarity of  
21 Judge Jackson's findings of fact to which the Court  
22 has granted collateral estoppel, it's a little hard  
23 for me even to understand how the defendants can  
24 suggest there is not evidence from which a jury could  
25 find that defendant's anticompetitive conduct caused

1 harm to Iowa consumers by depriving them of the  
2 benefits of innovation. Judge Jackson says so in no  
3 uncertain terms again and again. I will not burden  
4 the record with a recitation, but there is just no  
5 question about that, Your Honor. You read all of  
6 those findings of fact. He says what he said. They  
7 can't run away from it. You granted collateral  
8 estoppel. The record already says that these people,  
9 the plaintiffs in this lawsuit, suffered a lack of  
10 innovation because Microsoft broke the antitrust law.  
11 NSP is the perfect example, and Judge  
12 Jackson concludes his recitation about Native Signal  
13 Processing with these words: "The ultimate  
14 result" -- and that is of Microsoft's killing an  
15 SP -- the ultimate result is that some innovation  
16 that would truly benefit" -- I'm sorry, Your Honor,  
17 I'm going to quote -- it's paragraph 101 which deals  
18 with Native Signal Processing. The conclusion of the  
19 entire lengthy opinion is what I want to quote to the  
20 Court. "The ultimate result is that some innovation  
21 that would truly benefit customers, customers,  
22 plaintiffs' class, never occur for the sole, sole  
23 reason that they do not coincide with Microsoft's  
24 interest." Causation and innovation damages, that's  
25 what he says. And there's nothing even slightly

1 equivocal about what he says. All that is left in  
2 terms of that group of finding is for the jury to  
3 evaluate what that loss of innovation is worth.

4 Standing is also simply not an issue. The  
5 plaintiffs have been determined to have standing by  
6 the Iowa Supreme Court. Microsoft again attempts to  
7 reformulate plaintiffs' own statement and what they  
8 seek and how and why. What they are doing is  
9 rehashing the same arguments they already made in  
10 Comes I, and I will tell you that they talked about  
11 speculation again and again.

12 Microsoft relies heavily, also, of course,  
13 on a case of Ford v. Lane. That is a Michigan  
14 federal district court opinion, which this could not  
15 be further from the facts in this case.

16 Mr. Lane brought an action, apparently  
17 poorly drawn. He was a consumer of gasoline and he  
18 sued all the car companies because they did not make  
19 available the existing technology to make cars more  
20 fuel efficient, and he got thrown out of court for a  
21 number of reasons including those standing under  
22 Illinois Brick but also because he failed to allege  
23 that -- here is what he failed to allege, Your Honor:  
24 That there has been a reduction of competition in any  
25 market due to the defendant's conduct. That would

1 seem to me to be pretty much a fatal flaw in an  
2 antitrust case. We did not make that mistake here.  
3 Remoteness. The defendants string together  
4 a bunch of unrelated cases for the proposition that  
5 the plaintiffs' innovation injuries are too remote.  
6 They also say that the independent software vendors,  
7 some of them have already sued the defendant about  
8 this. And then they say there is thus no policy  
9 reason to grant standing to plaintiffs to assert the  
10 claim. Well, there is. Probably the strongest  
11 policy reason in the state of Iowa is that people who  
12 cause harm should account for that harm in dollars to  
13 those they harm, and it should be a full accounting.  
14 It should make the plaintiffs whole. That is a very  
15 strong underlying principle in all of Iowa's  
16 jurisprudence and Microsoft needs to be held  
17 accountable and hopefully deferred from continuing to  
18 violate the law and others who might be tempted to  
19 violate the law will be deterred from doing so.  
20 Those are very strong public policies.  
21 Microsoft says that the Court cannot permit  
22 the jury to award nonprice damages in a class action,  
23 and they cite two cases which deal with attempts to  
24 actually get pain and suffering damages. That's not  
25 what we're doing here. Can the class recover for

1 nonprice damages? Of course, they can. The  
2 defendants cases are simply inapposite. The Court  
3 can say by instruction, "Jurors, what is the value of  
4 the loss of benefits of innovation to the class?"  
5 The jury, if they find liability or if they find  
6 causation, cannot find a number based on the evidence  
7 and their best judgment and with the assistance of  
8 the court, a formula for the amount will be developed  
9 and the money will be distributed to the class.

10 Are you about to ask a question, Your  
11 Honor?

12 THE COURT: I will wait until you're done.

13 MS. CONLIN: Okay. There's nothing that is  
14 even very complicated about this despite Microsoft's  
15 ability to complicate even the simplest concepts.

16 Microsoft also criticizes us because we  
17 cited the Landy article. The only reason we cited it  
18 because Microsoft had cited it in their brief and  
19 they had miscited it and misquoted it, and so we went  
20 and found it and found that it was very supportive of  
21 our position generally and we sought to explain to  
22 the Court what it actually said.

23 Your Honor, there is also a very practical  
24 reason to permit this element of damage to go to the  
25 jury and also the security damages. I suspect that

1 at some point the Iowa Supreme Court will tell us  
2 whether Microsoft is right or we are. There will be  
3 a separate line on the verdict form for loss of the  
4 benefits of innovation and loss -- and security  
5 problems. The jury will fill that in. If the jury  
6 makes an award for this kind of damage, the Supreme  
7 Court will decide. If they say it's not available,  
8 they subtract that amount from the verdict. If they  
9 say it was available, we get to keep it. But if  
10 there's no line on the verdict form, we get to try  
11 the lawsuit again. Certainly, in the interest of  
12 judicial economy and overall sanity that would not be  
13 an outcome to be desired. And if the verdict form is  
14 properly drawn and as it must be, set out specific  
15 damages, then whatever the ultimate outcome, there  
16 will not need to be a retrial.

17 Stripped of all of Microsoft's nonsense,  
18 this is simple and straightforward proposition. Iowa  
19 law provides recovery for any person who has been  
20 injured.

21 Two, Iowa law permits recovery of actual  
22 damages, not just damages that you can quantify,  
23 actual damages, and not just harm to business or  
24 property, actual damages.

25 Three, one of the most frequent elements of

1 damage mentioned by the Court is in antitrust cases  
2 and in Judge Jackson's opinion is loss of the  
3 benefits of innovation.

4 Four, Iowa law demands that people injured  
5 by the wrongful actions of others be made whole, and  
6 it doesn't care one wit that the losses can't be  
7 calculated with mathematical certainty. I would  
8 guess the Court gives that very instruction again and  
9 again and again. These are damages that cannot be  
10 calculated with mathematical certainty. That's what  
11 the standard instructions in a tort case say.

12 Five, both Iowa and federal law say that  
13 damages in antitrust cases can be inferred or  
14 approximated. We gave you lots of cases. Gosh,  
15 Judge, it is just so clear in the law. Once you  
16 prove an entitlement to damages, the amount can be  
17 inferred, approximated. And, in fact, in the Orkin  
18 case, the Iowa Supreme Court said and I quote, "Some  
19 speculation is possible." Some speculation is  
20 possible. So all of the defendant's arguments that  
21 suggest we cannot collect these damages because they  
22 are speculation are for naught, not Iowa law. The  
23 Iowa Supreme Court says some speculation is  
24 acceptable. We don't think these damages are  
25 speculative in the least, any more than other

1 noneconomic damages are speculative. But the Iowa  
2 Supreme Court says, "Even if they are, some  
3 speculation is acceptable once you have proven a  
4 right to the damages."

5 As we sit here today, Your Honor, with the  
6 collateral estoppel granted by the Court, we have  
7 proven loss of the benefits of innovation that harmed  
8 consumers. This class of plaintiffs. This class of  
9 plaintiffs suffered harm and through Iowa law there  
10 must be a recovery.

11 Thank you, Your Honor.

12 THE COURT: Rebuttal.

13 MR. TULCHIN: Yes, Your Honor. Thank you.

14 Counsel for the class acknowledged during  
15 her argument that no case in any jurisdiction  
16 anywhere in our country, federal or state, has ever  
17 permitted a jury to evaluate a claim for loss of  
18 innovation in an antitrust case.

19 After saying that, Ms. Conlin referred to  
20 my argument as nonsense, absurd. She said that I  
21 either didn't understand the antitrust laws or had  
22 deliberately misled the Court. Well, two things,  
23 Your Honor, if I may. I guess I practice law  
24 normally in another part of the country. Those sort  
25 of attacks are not considered appropriate there, but

1 let me try to deal with the dichotomy, if I could, of  
2 the fact that plaintiffs have acknowledged that such  
3 a claim has never been made and then the argument  
4 that it's nonsense to argue this position.

5 First of all, there's a basic  
6 misunderstanding, if I may. Of course it is true  
7 that particularly in a government, equitable  
8 enforcement action which didn't seek damages, just an  
9 injunction, Judge Jackson's case, a Court can  
10 consider conduct, conduct that is anticompetitive  
11 that causes a loss of innovation. That is  
12 anticompetitive conduct that might well violate the  
13 antitrust laws. And Judge Jackson did so consider a  
14 number of things, including the Native Signal  
15 Processing. But, of course, that's miles and miles  
16 from a situation where a private plaintiff seeks to  
17 get damages on account for loss of innovation and  
18 it's standard for the former to occur in a government  
19 equitable enforcement case and in the latter case of  
20 a private plaintiff it has never occurred.

21 And here what's particularly striking, Your  
22 Honor, is that, as the Court now knows, no expert  
23 will testify about what the damages are for loss of  
24 innovation. No one will suggest a number to the jury  
25 or say this is how I got to it, and none of the

1 plaintiffs themselves will have a number. As  
2 Ms. Conlin said, they don't know how they were  
3 injured or if they were injured at all through the  
4 loss of innovation.

5 So when I said there was no -- there was  
6 going to be no evidence at trial about damages, of  
7 course I was referring not to the underlying conduct  
8 or to the collateral estoppel, but to the claim that  
9 the plaintiff class should be compensated for the  
10 loss of innovation. The conduct is admissible with  
11 respect to the claim for overcharges, for economic  
12 injury. Certainly there it is. But that's, I think,  
13 the source of some disagreement between the parties,  
14 and I hope I've made it clear.

15 I'm a little still taken aback with the  
16 argument that the Comes case is the last word on  
17 harmonization. I know the Court has heard this  
18 before. The Next Generation Realty case was decided  
19 two years after Comes by the Iowa Supreme Court. It  
20 was a case about antitrust injury, not standards of  
21 conduct, 686 N.W.2d at 208. "The legislature left us  
22 without authority to innovate from the federal  
23 court's understanding of federal antitrust law."  
24 And I think that is a complete answer to the argument  
25 by Ms. Conlin that federal law here is irrelevant.

1 It's not only relevant according to the Supreme Court  
2 two years ago, the legislature left this Court  
3 without authority to deviate from it.

4 Ms. Conlin points to loss of consortium and  
5 says, "Well, there is a form of noneconomic damages."  
6 In that case the spouse is on the witness stand, and,  
7 of course, no one asks for the creation of a  
8 different universe, but the spouse can be asked,  
9 "Have you ever gone to the movies before the  
10 accident, you and your husband?" "Had your husband  
11 normally done the dishes?" And at least there is a  
12 witness to examine, to cross-examine on the issue of  
13 damages for loss of consortium.

14 Here, of course, there are hundreds of  
15 thousands of class members and not an expert or a  
16 plaintiff to cross-examine at all on the question of  
17 damages. So when we talk about speculation, what we  
18 have here is really a request that the Court permit  
19 the jury to indulge in pure speculation about  
20 damages. No one on the stand will testify about it.  
21 Only counsel will submit argument on the subject.

22 Ms. Conlin said that I misquoted  
23 Professor Noll, and I'm reluctant to burden the Court  
24 with more paper, but could I hand up three pages?  
25 These were attached to our papers on this motion.

1 It's pages 145, 6 and 7 from Professor Noll's  
2 deposition in July of this year.

3 THE COURT: Thank you.

4 MR. TULCHIN: Thank you, sir. And these  
5 are the three pages of his testimony that we attached  
6 to our motion papers.

7 And with all respect, I ask the Court, if  
8 you have a moment, Your Honor, to please review them.  
9 I did not misquote Professor Noll. He says clearly  
10 these damages are virtually impossible to quantify  
11 and an economist, renowned or otherwise, whether from  
12 Stanford or the University of Iowa or anywhere else  
13 would never try, I submit, Your Honor, to pretend  
14 that damages like this are quantifiable.

15 Lastly, Your Honor, Ms. Conlin said that  
16 the Kloth case has nothing to do with this, that the  
17 Kloth case was about other issues. It was about  
18 Illinois Brick, and that if federal law applied, we  
19 wouldn't be here because of Illinois Brick.

20 She says there was just dicta by the  
21 district court, but at 444 F.3d, page 324, the U.S.  
22 Court of Appeals for the Fourth Circuit says, "It  
23 would be entirely speculative and beyond the  
24 competence of a judicial proceeding to create in  
25 hindsight a technological universe that never came

1 into existence." It was on that basis that the same  
2 claims made here for loss of innovation, denial of  
3 choice were rejected by that Court.

4 Next Generation, I believe, requires this  
5 Court to follow that decision, but even if it were  
6 otherwise, the reason no Court in Iowa or elsewhere  
7 has permitted loss of innovation damages to go to a  
8 jury in a private antitrust case is equally  
9 applicable here. It goes back to the very questions  
10 of remoteness and speculation that we've been talking  
11 about.

12 And again, Your Honor, it's particularly  
13 apt to talk about speculation and remoteness in a  
14 case where no expert tries to quantify damages and  
15 none of the plaintiffs say that they can testify on  
16 the subject.

17 Thank you, Your Honor.

18 THE COURT: Thank you. 15-minute recess.

19 (A short recess was taken.)

20 THE COURT: Before we begin, Mr. Tulchin, I  
21 apologize if I was too direct in my stopping you on  
22 the Forbes article. I just didn't see the relevance.

23 MR. TULCHIN: Your Honor, there is actually  
24 no need to refer to it. I will be happy to forget  
25 all about it.

1 Thank you.

2 THE COURT: I tend to be direct.

3 MR. TULCHIN: No problem.

4 THE COURT: Per processor license.

5 MR. NEUHAUS: I will be arguing that, Your

6 Honor. Joe Neuhaus from Sullivan Cromwell.

7 This motion seeks dismissal of claims that

8 two types of licenses that Microsoft used or uses

9 with computer manufactures are anticompetitive. Just

10 in a nutshell, the plaintiffs' theory is this license

11 type illegally tied up so many computer manufacturers

12 for so long that Microsoft competitor's like DRI,

13 which you heard of before, I think, could not

14 distribute the operating system into that channel to

15 the computer manufacturers. But the clear,

16 unambiguous figures as to how many OEMs the computer

17 manufacturers had these licenses and their terms

18 defeat this claim under the law. For almost all of

19 the years at issue -- and I'll come back to this --

20 the majority of OEM sales, in some years 70 or 80

21 percent, were made under licenses that no OEM or

22 other witness has ever said were exclusive or could

23 not -- were exclusive dealing.

24 The licenses, moreover, came up for renewal

25 continuously. So that 40 to 50 percent of OEM sales

1 were up for grabs for DRI or other competitors each  
2 year. These facts -- these are the facts of economic  
3 impact, are not disputed on this motion. And they  
4 mean that the claims fail.

5 But before I get to that, plaintiffs first  
6 in their brief on this motion, they combine their  
7 brief on this motion with their brief on the two  
8 following motions, and they say that summary judgment  
9 can't be granted on only part of a monopolization  
10 claim.

11 And you've heard that argument again  
12 earlier today from Mr. Hagstrom, and I think Ms.  
13 Conlin also made a similar kind of argument that  
14 summary judgment can only be made on a claim. And  
15 Mr. Tulchin referred you to the Lamantia case. I  
16 would just like to refer you to the language of Iowa  
17 Rule of Civil Procedure 1.981(2) that explicitly  
18 says, "A party against whom a claim, counterclaim,  
19 cross-petition or cross-claim, is asserted or a  
20 declaratory judgment is sought may, at any time, move  
21 with or without supporting affidavits for a summary  
22 judgment in that party's favor as to all or any part  
23 thereof."

24 In addition, the plaintiffs expressly argue  
25 in their breach that each of these categories of

1 conduct is itself a violation of the Iowa Competition  
2 Law so, of course, we can move for summary judgment  
3 on that argument on that claim. And as has been  
4 previously pointed out, the plaintiffs themselves are  
5 seeking to obtain summary judgment on part of their  
6 claim here that Microsoft is liable for violation of  
7 the Iowa law for acts that are subject to collateral  
8 estoppel.

9 But plaintiffs in this set of papers on  
10 this motion make a somewhat different argument also.  
11 They say that, "Otherwise legal acts, otherwise  
12 separate categories of legal conduct can add up to a  
13 kind of monopoly broth, in a kind of monopoly broth  
14 to a violation of the antitrust laws." This argument  
15 is unsound. The antitrust laws draw a line between  
16 hard competition, which is good for consumers, and  
17 conduct that suppresses competition. And if legal  
18 conduct, legal competition of various kinds were  
19 allowed to add up to a violation of the antitrust  
20 laws, you are penalizing competition, which is  
21 precisely what the antitrust laws are designed to  
22 protect. So you can't have intellectual sloppiness  
23 or lack of rigor, which is what this monopoly broth  
24 theory does.

25 The cases that they cite don't permit this.

1 All the cases say is that you can consider together  
2 evidence that bears on the legality of particular  
3 conduct so that in Continental Ore, the Supreme Court  
4 case they rely on most heavily, all the Supreme Court  
5 said is that you have to consider the evidence -- it  
6 was a conspiracy case. There were five conspirators,  
7 and the Supreme Court said you had to consider the  
8 evidence with respect to each of the alleged  
9 conspirators to determine whether a conspiracy  
10 occurred. That is simply pulling together all of the  
11 evidence with respect to that category of conduct.

12 So in this case, as I will come to, there's  
13 nothing wrong with considering the minimum  
14 commitments that are a feature of these licenses as  
15 they were in the industry generally and asking  
16 whether they reinforce the effect of the per  
17 processor licenses clause in the same contracts.

18 But it's not because -- there's a theory  
19 that they reinforce each other logically, but it is  
20 not proper to say that evidence of -- take another  
21 allegation -- Vaporware.

22 If that were completely legal, if the  
23 allegations of Vaporware on their own were unfounded  
24 along with the evidence regarding license practices  
25 add up to some kind of monopolization claim, if both

1 are legal, because these do not logically reinforce  
2 each other in any way, the Vaporware does not  
3 logically reinforce the exclusionary impact of the  
4 contract claims.

5 Let me go now back -- take on the license  
6 practices claim. The claims, just to be clear,  
7 relate to terms in, as I said, the OEM or computer  
8 manufacturer licenses. And so we're talking about  
9 sales of the operating system. We're not talking  
10 about Office and Word and Excel, most copies of which  
11 are not sold through computer manufacturers.

12 Microsoft uses essentially three -- or has  
13 used three types of licenses. There's a per copy  
14 license, which a royalty is paid for each copy of the  
15 operating system that is shipped. Then there is a  
16 per system license where a royalty is a paid for each  
17 computer of a given computer model that the OEM  
18 ships. So if the OEM ships a Compaq Deskpro 1500,  
19 the royalty is paid on all Compaq Deskpro 1500s.

20 The third kind is the so-called "per  
21 processor licenses" where a royalty is paid for each  
22 computer with a given type of processor; that is, the  
23 central processor of a computer like an  
24 Intel 486 DX or whatever.

25 Now, a few things about this. The per

1 system licenses can be changed, that is -- sorry, a  
2 per system license, as I said, applies only to every  
3 computer of a given model. So an OEM -- if it wanted  
4 to use a different operating system -- can simply  
5 take the same computer and change its model  
6 designation -- instead of a Compaq Deskpro 1500, it  
7 could designate it as Compaq Deskpro 1510, and as  
8 long as that was not listed in the per system license  
9 could then sell that computer -- sell that  
10 operating -- computer line with a different operating  
11 system.

12 The per processor licenses were used from  
13 1988 until July 1994. July 1994 is approximately two  
14 months after the beginning of the class period in  
15 this case, which is May 18, 1994. Per processor  
16 licenses as well as per system licenses were used  
17 because it simplified administration of the royalty  
18 system and it reduced the sales of -- or tended to  
19 reduce the sales of naked machines. If the computer  
20 manufacturer was paying a royalty for every computer  
21 with a given type of processor on it, it was less  
22 likely to be selling machines without any operating  
23 system and reducing naked machines is aimed at  
24 reducing piracy because if naked machines are sold,  
25 people can then take a stolen copy or an improperly

1 packaged copy of the operating system and put it on  
2 the machine and use a pirated copy. DRI used per  
3 processor licenses or something that is actually even  
4 more restrictive as well. DRI used licenses that  
5 required OEMs to sell DR-DOS on every computer the  
6 OEM sold. This is set forth in a summary of DRI's  
7 pricing policies that is Exhibit 32 in our papers and  
8 there are numerous examples in Exhibits 28 through 31  
9 of just this kind of license. And DRI witnesses  
10 testified to the same purpose of using these; that  
11 is, to reduce piracy.

12 As I said to you, Microsoft stopped using  
13 these licenses, the per processor licenses in July of  
14 1994 and existing licensees, OEMs at that time who  
15 were reduced from those restrictions. This is the  
16 result of an agreement to end them with the DOJ at  
17 the end of the DOJ's investigation. At that time the  
18 DOJ's economist, a Nobel prize winner named Kenneth  
19 Arrow, expressly testified and the DOJ agreed and in  
20 its brief said the same, that the per processor  
21 licenses that had not at that time affected the  
22 installed base, that is, that Microsoft would have  
23 made the same sales that it had made up until that  
24 time, and that this was a prophylactic remedy, this  
25 consent decree was putting in place a prophylactic

1 remedy for the future.

2 Now, I said at the outset that a key factor  
3 here, the central fact on this motion, the essential  
4 fact of economic impact would require the claim to  
5 fail.

6 I've handed up or I asked Mr. Green to hand  
7 you a chart that comes from our brief that shows the  
8 percentages of MS-DOS licenses under per system or  
9 per copy licenses, not under the per processor  
10 licenses. And you'll see that the figures range from  
11 70 to 80 percent under per system or per copy  
12 licenses down to -- the lowest is 38 percent, or that  
13 they go in the final years that they were being used,  
14 around 40 percent. In the early years 80 percent of  
15 sales of operating systems to OEMs were made under  
16 licenses under the per system or per copy licenses.

17 And in the later years, half or up to 40  
18 percent, 40 percent to 50 percent were available to  
19 competitors that were being sold under per system or  
20 per copy licenses, not under the per processor  
21 licenses.

22 I'm going to come to -- let me explain this  
23 a little bit more in a moment, but the crucial point  
24 about these figures is that it means two things:  
25 That OEMs had a choice, that is, in the early years

1 80 percent and in the later years 40 to 50 percent of  
2 OEMs were choosing not to take per processor  
3 licenses. And I'll come back to why that is critical  
4 in this motion because the law is quite clear that  
5 these kinds of even per processor licenses are  
6 perfectly legal if the OEM customer has a choice to  
7 pick another as an alternative licensing form, and  
8 these figures show that. And they also show -- and I  
9 will come back to both of these points -- that for a  
10 very large portion of sales an OEM could buy DR-DOS  
11 operating system simply by creating a new model of  
12 computer and relabeling a new model line and selling  
13 the computer under that line.

14 Now, let me make a few more sentences about  
15 describing what the record is that is absolutely  
16 clear with respect to these two license types.

17 First of all, plaintiffs claim that per  
18 processor licenses were equivalent to licenses for  
19 all sales of product, and that's not true. There is  
20 plenty of evidence in the record and we've summarized  
21 it on pages 7 and 8 of our brief, that OEMs did, in  
22 fact, who had per processor licenses prior to 1994  
23 did, in fact, purchase other operating systems when  
24 there was demand for it even when they had a per  
25 processor license so that per processor licenses

1 which did not require every computer to be shipped  
2 with Microsoft's operating system, they permitted --  
3 all they required were a royalty on every computer  
4 with that processor that went out the door.

5 But that did not dissuade many OEMs from  
6 buying competing operating systems. But even if it  
7 were true, even if it were true that OEMs -- that  
8 these per processor licenses were licenses that in  
9 effect required OEMs to ship every computer -- to  
10 load MS-DOS on every computer, these figures show  
11 that Microsoft had a choice and competitors were not  
12 foreclosed from the market; that is, that the OEMs  
13 could choose that license or a different license,  
14 many OEMs chose a different license, not the per  
15 processor license, and all of those OEM's were  
16 available to DRI.

17 Plaintiffs do point to declarations and  
18 testimony that some OEMs -- they put some in the  
19 record -- said that they were offered only the per  
20 processor license or it was too good of a deal to  
21 turn down so they had to take the processor license.  
22 So it wasn't really an alternative, but plaintiffs do  
23 not dispute the economic fact these figures show that  
24 as a group OEMs were given a choice and the antitrust  
25 laws do not deal with exceptions but with the

1 demonstrated effect on competition.

2 Now, there is no evidence whatsoever that  
3 per system licenses prevented sales to that OEM by  
4 other operating system manufacturers. All that  
5 plaintiffs say on that point so that we have per  
6 processor licenses where we have some testimony, "I  
7 had no choice" where they say that there was -- that  
8 per processor licenses effectively amounted to a  
9 requirement that all computers sold by that  
10 manufacturer have the MS-DOS. But with respect to  
11 the per system licenses, there is no such evidence.

12 Plaintiffs with respect to per system  
13 licenses and their reason apparently they are being  
14 challenged at all is twofold: One is that they say  
15 that some licenses that were on the per system form  
16 were, in fact, word processor licenses because they  
17 define the systems that were covered by the license  
18 in terms of the processor and that's true. There  
19 were some licenses where that was the case.

20 But these figures I just handed to you were  
21 based on an audit of per system licenses and they  
22 properly categorized those licenses as per processor  
23 licenses, and so those are included in the figure in  
24 the 20 percent per processor licenses, for example.

25 Plaintiffs also say that the requirement of

1 a per system license that meant that not only would  
2 the OEM have to designate the model but they would  
3 have to actually sell the model under that name. And  
4 the answer is, yes, that was the requirement, but  
5 there's no evidence that that prevented other  
6 operating system manufacturers to sell to that OEM.

7 Under the law, Your Honor, as our briefs  
8 explain, a copyright or patent holder or holder of  
9 intellectual property can license its work for a  
10 single payment that covers all the sales of a  
11 manufacturer's product that contain or use that work.

12 That is called the "total sales royalty provision."  
13 And these total sales royalty cases uniformly uphold  
14 those provisions as long as the purchaser, in this  
15 case, the computer manufacturer, has an alternative,  
16 as long as that is not the only way in which you  
17 obtain a license for the product, and as long as the  
18 computer manufacturer can license on a per use or  
19 other basis.

20 So that in this case even if you treat per  
21 processor licenses as total sales licenses, as ones  
22 that cover all the sales, a royalty for all of the  
23 sales of the OEMs products, this chart shows that  
24 OEMs had a choice not to use per processor licenses  
25 and many, many OEMs chose per system or per copy

1 licenses as to which there is no evidence, no  
2 testimony that they effectively required -- they  
3 effectively required all the sales by the OEMs.

4 Plaintiffs' answer to the total sales  
5 royalty cases are, first, they say that those cases  
6 don't apply outside of the packing context. That is  
7 not true. We've cited in our brief, and I will  
8 mention again, that the BMI line of cases, the most  
9 pertinent one is Columbia Broadcasting Systems v.  
10 ASCAP, 620 F.2d page 930 at 935 to 936, Second  
11 Circuit 1980, a copyright case in which a total sales  
12 royalty provision was upheld, a provision that  
13 conditioned use of the intellectual property and the  
14 total sales on the total use by the buyer of the  
15 product at issue. In that case it was music  
16 licenses.

17 And you should recall, Your Honor, that the  
18 operating system product that we're talking about is  
19 a work of software that includes patented technology  
20 and copyrighted work, and so the total sales royalty  
21 provisions applied squarely and have been applied in  
22 both patent and copyright cases.

23 Plaintiffs also have a -- this is more a  
24 generalized answer to our argument. They point to  
25 reports by salespeople, Microsoft salespeople

1 congratulating themselves on signing up an OEM  
2 customer and how that kept DRI out of that business.  
3 A couple of things on that. One is salespeople  
4 always boast about their accomplishments and courts  
5 recognize this and look to evidence of actual  
6 economic effect, the kind of evidence that I put  
7 before you. And that evidence shows, as I've said,  
8 that at least 40 percent and as much as 80 percent of  
9 OEM business was under licenses that cannot and  
10 there's no evidence could be called exclusive.

11 And as I said earlier, these licenses  
12 expired regularly so that even with respect to those  
13 licenses that were under per processor provisions, a  
14 large proportion came up for renewal every year. And  
15 those facts -- the large proposition of sales that  
16 were not under per processor licenses and the  
17 constant turnover of licenses means that there can be  
18 no claim that DRI was excluded from this channel of  
19 distribution.

20 Plaintiffs also say that Microsoft's  
21 minimum commitments -- and I mentioned to you early  
22 on that they argue that the minimum commitment  
23 provisions of these licenses meant that even though  
24 the contracts came up for renewal, DR-DOS couldn't  
25 get those contracts when they were renewed and here

1 is how that is worked to explain that.

2 Microsoft would provide volume discounts,  
3 and there's nothing illegal about volume discounts.  
4 DRI did the same thing. This is a form of volume  
5 discount. And to get a volume discount, the OEM  
6 would make a minimum commitment saying, "I will be  
7 selling 500,000 computers or 50,000 computers and,  
8 therefore, I need 50,000 licenses," and they would  
9 then get the 50,000 license price, the price per --  
10 at that level of sales. And that was a minimum  
11 commitment and they would pay at that rate.

12 DRI did the same thing. DRI called it a  
13 prepayment, but in either case you paid up front for  
14 the amount you forecasted. And then if at the end of  
15 the license term you hadn't sold all those that you  
16 had expected, there would be money, in a sense, that  
17 you had prepaid that had not been used.

18 Both Microsoft and DRI commonly allow the  
19 OEM to use those amounts for the next contract,  
20 applied those amounts to the next contract. And we  
21 provided testimony -- cited testimony and provided  
22 you with copies of deposition testimony by DRI's  
23 witnesses that show they did exactly the same thing.  
24 And plaintiffs' argument is that, well, if Microsoft  
25 did it, it meant that the price for the new contract

1 was so low by taking the minimum commitment and  
2 applying to the new contract, the OEM had no choice  
3 but to take the new contract. But the problem with  
4 that argument is that allowing the OEMs to use the  
5 prepayment for the next contract is really just a  
6 price cut. It just is a reduction of the price of a  
7 new contract. Price cuts, as long as they are above  
8 cost, and there's no allegation here that this  
9 predatory pricing is always good for consumers. In  
10 fact, they are the essence of competition. If DRI  
11 wanted to get that business where there was a  
12 prepayment, DRI could simply lower its prices. That  
13 is what competition is all about.

14 So there is nothing wrongful about the  
15 minimum commitment provision and to say that it  
16 reinforced somehow the exclusive nature of these  
17 provisions is an argument that the antitrust laws do  
18 not permit because, in fact, all they are talking  
19 about is a drop in price.

20 Now, the plaintiffs in their papers, and I  
21 suspect we will hear about it here too, cite to the  
22 consent decree that I mentioned at the outset and to  
23 the decision in the Caldera case and to the treatise  
24 by Areeda & Hovenkamp. So I want to address each of  
25 those.

1 The consent decree in 1994 by which  
2 Microsoft agreed not to have any per processor  
3 licenses going forward is, of course, not admissible  
4 evidence and cannot defeat a summary judgment motion.  
5 The law is absolutely clear on that.

6 Moreover, as I said to you, and I want to  
7 just read that finding to you, the DOJ expressly  
8 found no adverse effect on competition at that time.  
9 And as I mentioned to you, and this is Exhibit 35,  
10 Professor -- the DOJ's economist at that time said --  
11 it quoted these figures, the figures in this chart  
12 and said that -- it actually quoted the percentage  
13 that were for processor licenses, but the same  
14 figures, just reverse. In other words, instead of  
15 the 80 percent, the 20 percent, and said the data on  
16 the fraction of the OEM channel affected by  
17 Microsoft's anticompetitive process lead to the  
18 inescapable conclusion that the per processor  
19 contract did not have a material impact on the  
20 installed base of Microsoft operating system  
21 software. This is not a friend to Microsoft.  
22 Obviously, this is an economist for a party attacking  
23 Microsoft. But they found, the DOJ economist found  
24 and the per processor licenses which were being  
25 attacked in that proceeding and which Microsoft

1 agreed to eliminate had not at that time had a  
2 material impact on the installed base. Now, that  
3 just means that as I said, Microsoft would have made  
4 all of those sales even without the per processor  
5 licenses.

6 And the basic -- the rationale is, again,  
7 that these numbers show that there was plenty of  
8 places that DRI could have sold its computer, its  
9 operating system. Plenty of OEMs were not under  
10 these licenses, and that its failure to sell the  
11 operating system licenses had nothing to do with  
12 these license provisions but simply were a matter of  
13 a demand for the product.

14 The court in the Caldera case in Utah  
15 denied summary judgment on this claim, a summary  
16 judgment motion with respect to the per processor  
17 licenses. The court at that time said that Microsoft  
18 had failed to define the market that was at issue and  
19 without that it couldn't grant summary judgment.  
20 Here Microsoft concedes for purposes of this motion  
21 that the market is the market for Intel-compatible  
22 PC operating systems that plaintiffs' plead. That  
23 was also a suit by a competitor brought in 1996 for  
24 injury prior to that time; that is, in the period of  
25 1988 or '92 or so. This is suit by consumers seeking

1 damages for the period of 1994 to date. The  
2 plaintiffs here need to show that the licenses that  
3 were eliminated two months into the class period had  
4 an effect on prices that they paid for the next 12  
5 years and there is no way they can show this to be  
6 the kind of evidence of economic impact that I've  
7 laid before you.

8 Plaintiffs also point to certain language  
9 from the treatise by Areeda and Hovenkamp; and in  
10 particular, that Areeda has examples of operating  
11 systems -- of license types that Hovenkamp cites  
12 holds up as examples that he suggests might have an  
13 anticompetitive effect. That portion of the treatise  
14 was written by Hovenkamp after he was retained by the  
15 state attorney general in the DOJ case, so he's  
16 hardly an unbiased observer. At that point Professor  
17 Areeda had passed away. But his examples in any case  
18 are based on an all-or-nothing hypotheses; that is,  
19 that OEMs did not get a choice. They either had to  
20 take a license type that required them to put the  
21 operating system and every computer that went out the  
22 door or they couldn't get the operating system at  
23 all. And that is not, as this evidence shows, what  
24 the facts in the real world say. So that for  
25 plaintiffs to say it is held that Areeda and

1 Hovenkamp have said this, this is clearly  
2 anticompetitive, which is wrong. The example he says  
3 is roughly on the facts of the Microsoft case depart  
4 from the fact in a crucial way; namely, the concept  
5 that his examples posited that the OEMs were not  
6 offered the choice, which these figures show that  
7 they clearly were and that many OEMs did not take the  
8 per processor licenses that the plaintiff -- that are  
9 attacked.

10 So to sum up, Your Honor, the plaintiffs  
11 here on this part on this claim ignore the economic  
12 facts. The economic facts are what matter in an  
13 antitrust case.

14 The question is whether Microsoft's  
15 licensing practices locked up the market as a whole  
16 so that DRI could not compete even with lower prices.  
17 And as I've shown, as these figures show, the  
18 economic facts are that many OEMs, 40 to 80 percent  
19 of those sales made were not made under any kind of  
20 license that any witness has called exclusive or  
21 equivalent of an exclusive deal. And the contract  
22 expired regularly so that 40 to 50 percent of sales  
23 were up for grabs each deal. There's no dispute  
24 about these facts. Plaintiffs have not argued with  
25 them in any shape or form other than to cite

1 individual OEMs, but nothing about the facts that  
2 I've laid before you.

3 And on that basis, the motion should be  
4 granted and these claims should be -- summary  
5 judgment should be granted on these claims.

6 THE COURT: Thank you.

7 MS. CONLIN: Your Honor, may I be excused?

8 Yes.

9 THE COURT: Response.

10 MR. JACOBS: Good afternoon, Your Honor.  
11 Michael Jacobs for plaintiffs.

12 This motion on plaintiffs' supposed claims  
13 on Microsoft's licensing practices for processor per  
14 system licensing practices and the next two motions  
15 that the Court will hear are claims about Microsoft's  
16 intentional incompatibilities and product  
17 preannouncements are virtually identical to motions  
18 that Microsoft brought and lost in the Caldera  
19 lawsuit.

20 Indeed, Microsoft's arguments in this case  
21 borrow liberally from Microsoft's brief in the  
22 Caldera case. Mr. Tulchin mentioned earlier that  
23 Microsoft brought motions where the law was clear.  
24 Well, I agree with Mr. Tulchin that a case of this  
25 motion and the next two motions that you're going to

1 hear, the law is quite clear and the law is clear  
2 that Microsoft loses. In fact, I would submit that  
3 Your Honor need look no further than Judge Benson's  
4 ruling in Caldera denying Microsoft's nine motions  
5 for partial summary judgment as the basis for denying  
6 the same motions that Microsoft is recycling here.

7 Now, it's interesting that Microsoft  
8 repeatedly cites to the so-called "harmonization"  
9 provision of the Iowa Competition Law to argue that  
10 this Court must follow certain decisions from federal  
11 courts that Microsoft likes, the Kloth case, for  
12 instance.

13 Mr. Reece and Ms. Conlin have both pointed  
14 out why those arguments are wrong where Microsoft has  
15 invoked the harmonization provision. But here we're  
16 dealing with a situation where a federal court has  
17 decided the very substantive questions that are also  
18 at issue here, and Microsoft simply wishes -- tries  
19 to wish away the Caldera decision.

20 As Mr. Rosenfeld argued earlier today, it's  
21 very unusual to have another court dealing with the  
22 exact same issue. And as he said, that should be the  
23 end of the matter.

24 I would also note, just as an aside, that  
25 in Minnesota Microsoft did not try to recycle these

1 same motions in that case, which may lead one to  
2 wonder how seriously they take these arguments.

3 Now, as a final preliminary remark I would  
4 note that Mr. Neuhaus's argument was fact issue, fact  
5 issue after fact issue. Mr. Neuhaus says we ignore  
6 the economic facts. We put in the record here in  
7 connection with our brief on this motion which was a  
8 consolidated brief with this motion and Microsoft's  
9 other motion on our supposed intentional  
10 incompatibilities and product preannouncement claims,  
11 we put in the expert report of Professor Roger Noll,  
12 one of our economic experts. And his testimony on  
13 these subjects is directly contrary to all of these  
14 facts that Microsoft says are undisputed. So their  
15 argument that we ignore the economic facts is simply  
16 saying there is a fact issue here and it's properly a  
17 question that's to be decided by the jury.

18 Now, before delving into the specifics of  
19 Microsoft's motion on plaintiffs' supposed claim on  
20 Microsoft's licensing arrangements, I want to provide  
21 some background on why Microsoft's several motions  
22 here are procedurally improper.

23 As we've noted earlier today, plaintiffs  
24 assert two causes of action in their fourth amended  
25 petition.

1 First, that Microsoft illegally monopolized  
2 the operating systems and applications software  
3 markets in violation of Iowa Code Section 553.5; and  
4 second, that Microsoft unreasonably restrained trade  
5 in those markets in violation of Iowa Code 553.4.

6 Now, we assert in our petition that  
7 Microsoft utilized a variety of practices in  
8 contractual and technical exclusionary practices to  
9 achieve and maintain its monopolies and to  
10 unreasonably restrain trade in those software  
11 markets.

12 Examples of Microsoft's exclusionary  
13 conduct was pointed out in more detail in our brief  
14 and particularly our brief on Microsoft's motion for  
15 summary judgment on our supposed leveraging and  
16 essential facilities claims. But those practices  
17 include per processor licenses which are at issue in  
18 this motion; per system licenses, which are at issue  
19 in this motion; Microsoft's use of long-term  
20 contracts; Microsoft's use of minimum commitment  
21 provisions; Microsoft's exclusive dealing contracts;  
22 Microsoft's use of fear, uncertainty and doubt about  
23 competitors products; Microsoft's illegal conduct to  
24 prevent middleware from eroding the applications  
25 barrier to entry. There is a plethora of conduct,

1 illegal conduct that has worked together in  
2 conjunction with one another to obtain and maintain  
3 these monopolies and we are not asserting separate  
4 claims, just like the plaintiffs in Caldera did not  
5 assert separate claims. They are part of plaintiffs'  
6 overarching causes of action.

7 Just as Microsoft tried to do in Caldera,  
8 however, Microsoft here wants to slice and dice  
9 plaintiffs' causes of action and seek what it calls  
10 partial summary judgment on the various aspects of  
11 Microsoft's challenged conduct.

12 Judge Benson in the Caldera case recognized  
13 that Microsoft's approach was improper. In one  
14 passage that we cite in our brief at 72 F.Supp.2d  
15 1295 at 1309 Judge Benson observed, "Plaintiffs'  
16 entire case is based on the synergy of all this  
17 conduct to demonstrate anticompetitive intent and  
18 effect. Plaintiff has not averred a separate claim  
19 of product disparagement or a refusal to deal claim  
20 or any other independent claim in support of its  
21 overall Section 2 claim. Consequently, the Court  
22 sees no reason why plaintiff should now be required  
23 to submit to Microsoft's reclassification of its  
24 claim and to independently support each of the seven  
25 claims as classified by Microsoft as an independent

1 legal claim upon which relief could be granted and  
2 liability could be independently based in order to  
3 survive summary judgment."

4 Now, Microsoft says in its reply and  
5 they've argued here today that the Iowa Rules permit  
6 summary judgment on a claim or "any part thereof,"  
7 but Microsoft cites no case that reads any part  
8 thereof to mean certain evidence in support of a  
9 claim. In fact, the Lamantia case that was discussed  
10 before, Microsoft cites it to say that the Supreme  
11 Court talks about theories of liability; but it is  
12 clear when you read the case, it was referring to an  
13 entire cause of action, not to part of a cause of  
14 action as Microsoft would lead this Court to believe.

15 In fact, it's also worth noting that the  
16 Lamantia case was brought under rule -- former Rule  
17 237D, which is now rule 1.981(4) which allows for  
18 partial summary judgment only when you are dealing  
19 with issues of liability -- on partial summary  
20 judgment on part of a claim only when you're finding  
21 liability leaving damages for trial. That was  
22 where -- that was the rule under which Lamantia was  
23 decided.

24 And actually as another aside, as we will  
25 talk about in one of our later motions, that is also

1 the basis for plaintiffs' motion for partial summary  
2 judgment. So there is a distinction between what we  
3 are seeking as a partial summary judgment and what  
4 Microsoft is seeking in partial summary judgment.

5 I would also point the Court to Microsoft's  
6 opposition to plaintiffs' motion in page 12, footnote  
7 4, where Microsoft expressly argues that Iowa does  
8 not allow for summary judgment on part of a claim.

9 Now, in *Caldera* Microsoft insisted, as it  
10 does here, that each allegation of anticompetitive  
11 conduct must be examined separately to determine if a  
12 Section 2 violation has occurred; that a specific  
13 anticompetitive conduct fails by itself to support a  
14 Section 2 claim, then such conduct may not later be  
15 considered in determining whether a Section 2  
16 violation has occurred based on the totality of the  
17 circumstances.

18 Microsoft is wrong. Relying on *Continental*  
19 *Ore v. Union Carbide Corporation* at 370 U.S. 690,  
20 1962, Judge Benson in *Caldera* rejected Microsoft's  
21 position that it could compartmentalize *Caldera*'s  
22 overarching Section 2 claim into seven independent  
23 claims.

24 Judge Benson wrote that the Supreme Court  
25 directed in *Continental Ore* that a plaintiff should

1 not be denied the full benefit of its proof is  
2 equally applicable here. The Court finds nothing in  
3 the relevant law that prevents a plaintiff from  
4 asserting one overarching claim of a Section 2  
5 violation conversely to allow the defendant to carve  
6 plaintiffs' complaint into seven discrete claims that  
7 plaintiff never intended to allege an independent  
8 claim not only appears to offend the purpose behind  
9 Section 2 but also turns basic civil procedure  
10 principles on their head.

11 I would also note also that the trial court  
12 in Gordon similarly rejected Microsoft's  
13 compartmentalization of plaintiffs' cause of action  
14 in that case when Microsoft brought a motion on what  
15 plaintiffs there also characterized as an essential  
16 facilities and of an monopoly leveraging claim which  
17 the plaintiffs in Minnesota had not asserted. Both  
18 the Gordon court and the Caldera court recognized  
19 that antitrust plaintiffs must be given the full  
20 benefit of their evidence taken as a whole.

21 Now, in its reply Microsoft says that  
22 Caldera is against the weight of authority and was  
23 not the basis for the result even in that case  
24 because the Court considered the categories  
25 separately by performing an evidentiary analysis of

1 each motion.

2 Now, it's untrue that Judge Benson's  
3 analysis of Continental Ore was not the basis of its  
4 result and I refer the Court to 87 F.Supp.2d at 1251  
5 the discussion there where the Court makes clear that  
6 that is the basis for its summary judgment decision;  
7 that it was not going to allow Microsoft to slice and  
8 dice plaintiffs' claims there.

9 The Court wrote that it is not a discrete  
10 claim of exclusive dealing. Microsoft's per  
11 processor agreements may not amount to a finding of  
12 Section 2 liability standing alone; however, use of  
13 per processor licenses viewed in context with other  
14 alleged anticompetitive behavior may give rise to a  
15 Section 2 violation as complained by Caldera;  
16 therefore, summary judgment on Microsoft's licensing  
17 practices is denied.

18 Also, Microsoft's argument that Caldera was  
19 against the weight of authority, I pointed the court  
20 to numerous cases from the Eight Circuit and other  
21 circuits cited in our combined that show, in fact,  
22 Caldera was following well-settled law.

23 In National Farmers Organization,  
24 Incorporated v. Associated Microsoft Producers,  
25 Incorporation, that's at 850 F.Supp.2d 1286, the

1 Eighth Circuit emphasized that "the unlawful acts of  
2 the appellees cannot be viewed in isolation from the  
3 context in which they occur." That was at page 1302.

4 The Court refused to compartmentalize the  
5 plaintiffs' proof even when both lawful and unlawful  
6 conduct was tightly intertwined in the illegal  
7 conspiracy. The Court noted that, "It should  
8 recognize that the harmful consequences of certain  
9 unlawful conduct may have been exacerbated by  
10 otherwise unlawful conduct. In such a situation the  
11 fact that lawful conduct contributed to additional  
12 injury should not prohibit recovery for that injury."

13 So, therefore, Mr. Neuhaus's argument that  
14 you can't consider things like Microsoft's  
15 preannouncements or Microsoft's technical trickery  
16 that is discussed in their intentional  
17 incompatibilities motion when considering the effects  
18 of this other illegal conduct, if it were -- in fact  
19 that other conduct were, in fact, legal, that's just  
20 wrong under the Eight Circuit law.

21 Similarly, the Tenth Circuit in Aspen  
22 Highlands Skiing Corp. v. Aspen Skiing Company held  
23 that the plaintiffs' evidence considered in the  
24 aggregate was sufficient to establish a violation of  
25 Section 2. The plaintiff alleged six things tending

1 to show deliberate exclusion from the market and  
2 intent to maintain a monopoly by this defendant. The  
3 defendant sought to compartmentalize the evidence and  
4 argued that each of the six things on which  
5 plaintiffs' relied must be supported by sufficient  
6 evidence to support a Section 2 verdict. The Tenth  
7 Circuit declined to follow this argument stating that  
8 we cannot agree that each of the six things which  
9 plaintiff argued demonstrated abuse of monopoly power  
10 taken alone must be supported by sufficient evidence  
11 to find a Section 2 violation.

12 The defendant's argument would require that  
13 we view each of the six things in isolation. To do  
14 this, however, would be contrary to the Supreme  
15 Court's admonition that an antitrust plaintiff should  
16 be given the full benefit of its proof without  
17 tightly compartmentalizing the various factual  
18 components in wiping the slate clean after scrutiny  
19 of each. That is precisely what Microsoft is asking  
20 this Court to do in these three motions.

21 Microsoft wants the Court to take a look at  
22 per processor licenses standing alone in isolation  
23 from the context in which they were occurring. Look  
24 at them, decide, standing alone, are they a violation  
25 of the antitrust law? Actually, we would argue that

1 standing alone, indeed, they were a violation of an  
2 antitrust case law; but, nevertheless, that is not  
3 the proper approach in deciding whether or not  
4 plaintiffs have shown -- made out a proper claim for  
5 a monopolization.

6 Now, Microsoft argues that our position  
7 that the conduct must be evaluated as a whole is  
8 improper because antitrust laws do not adopt such a  
9 counterintuitive result to deter the kind of vigorous  
10 competition those laws were intended to preserve.

11 Indeed, Microsoft's position, however, that  
12 is counterintuitive and logically incoherent, the  
13 antitrust laws look at the anticompetitive effects of  
14 conduct, but Microsoft wants the Court to examine  
15 some sets of challenged conduct in complete  
16 isolation. You can't do that unless you're  
17 considering the totality of the circumstances, and I  
18 will discuss shortly why it was that we did  
19 consolidate these three motions together and deal  
20 with these as one single response because contrary to  
21 what Mr. Neuhaus suggests, Microsoft's conduct at  
22 issue in this per processor and per system licensing  
23 motion, its intentional incompatibilities that are at  
24 issue in that motion and the conduct that is at issue  
25 in Microsoft's preannouncement motion, all of those

1 were used in conjunction by Microsoft at  
2 approximately the same time, early 1990s, to freeze  
3 competing operating systems such as Digital  
4 Researches DR-DOS and IBM's OS/2 from the market.

5 So let me move on to that briefly and  
6 provide some background on the conduct at issue in  
7 these three motions. And so I want -- the reason I  
8 want to take this together is to provide the Court  
9 some feel for the synergistic nature of this conduct  
10 that was directed towards the same end which was  
11 illuminating DR-DOS and OS/2.

12 Now, Mr. Neuhaus talked about these per  
13 processor licenses, and basically what the per  
14 processor licenses did was they would require an OEM  
15 to pay Microsoft a royalty for every computer that  
16 was shipped out of the door from that OEM that used a  
17 particular processor; so, say, a 486 processor or 386  
18 processor or the various type of computer chips from  
19 back at the time and whether or not Microsoft's  
20 operating system was actually installed on that  
21 computer.

22 Now the effect of that was that if an OEM  
23 that was subject to a per processor license wanted to  
24 install, say, Digital Researches DR-DOS or wanted to  
25 install OS/2 from IBM or some other competing

1 operating system, it would have to pay a royalty to  
2 DRI or to IBM or to the developer of the other  
3 operating system and it would have to pay a royalty  
4 to Microsoft. So it would increase the cost of that  
5 system for the OEM. And given the very tight margins  
6 that these OEMs were operating under, it became  
7 economically unfeasible for the OEMs who were subject  
8 to per processor licenses to be able to offer  
9 alternative operating systems.

10 We provided, along with our briefing,  
11 testimony by Rick Apple, who was an executive with a  
12 company called Zeos Company in Minneapolis during the  
13 early 1990s.

14 Zeos was a company that prided itself on  
15 offering choice to consumers; offering choice of what  
16 processor he wanted or how much memory he wanted,  
17 what kind of monitor he wanted, what size of disk  
18 drive he wanted. It made available choice on every  
19 aspect of its computer. The one area it couldn't  
20 offer choice was in the operating system. Why? It  
21 was subject to the per processor licensing. It  
22 didn't want to be, but according to his testimony,  
23 essentially the margins in the industry were such  
24 that in order to be competitive they needed to have a  
25 per processor license and that as a result were

1 unable to offer competing operating systems.

2 Now, Microsoft readily admits that in 1993  
3 62 percent of MS-DOS units licensed OEM customers  
4 recovered by per processor licensing, but that is not  
5 the end of the story. As Professor Noll notes  
6 Microsoft had another form of exclusionary license  
7 which it characterized as a per system license. And  
8 on pages 19 through 20 of our brief, we talk about  
9 some of the different forms of per system licenses  
10 that Microsoft used that oftentimes the equivalent of  
11 per processor licenses, and I won't go into more  
12 detail than that right now.

13 Now, Microsoft provides a chart here that  
14 apparently was attached to an affidavit, a Green  
15 affidavit filed in connection with this motion. I  
16 would point out to the Court, however, that this  
17 affidavit was submitted in connection with an expert  
18 report of William Wacker in the Caldera case. This  
19 could also be a declaration of Kenneth Jay Arrow  
20 dated January 17, 1995, and maybe on reply  
21 Mr. Neuhaus will let this Court know there has  
22 been -- this has been offered in an expert report or  
23 as an exhibit in this case. And as Mr. Neuhaus  
24 argued, inadmissible evidence cannot be used in a  
25 summary judgment motion. So I'm not sure who for

1 Microsoft will actually be testifying to these  
2 numbers that Microsoft is offering here.

3 But in any event, plaintiffs offer in  
4 connection with their motions expert report of  
5 Professor Noll who discusses the exclusionary effects  
6 of Microsoft's conduct of Microsoft's per processor  
7 licenses. Microsoft is going to dispute that.  
8 That's an issue for trial. That is an issue for the  
9 jury to resolve, who is right.

10 Now, the exclusionary effect of these per  
11 processor and per system licenses was reinforced by  
12 these other licensing provisions that Mr. Neuhaus  
13 touched upon in his argument. For instance,  
14 Microsoft oftentimes used terms, licensing terms that  
15 were two, three years or more in length. So when  
16 Microsoft says that its per processor licenses were  
17 expiring all the time, they are just churning away  
18 and DRI or IBM can just go in and get into the OEM  
19 channel, it really needs to be remembered that these  
20 licenses would lock out individual OEMs for a long  
21 period of time. Also, keep in mind that at this time  
22 that we're talking about here when Microsoft was  
23 using two and three-year licensing agreements, that  
24 new OS versions, new operating system versions were  
25 coming out about every 18 months or so. It's not the

1 case now where Microsoft has gone from October of  
2 2001 with a release of XP until, perhaps, January or  
3 February of 2007 between major version releases.  
4 This was a time when DRI and Microsoft were  
5 leapfrogging one another in terms of capabilities and  
6 this is precisely why Microsoft was concerned to use  
7 these licensing agreements for processor per system  
8 with long-term provisions to try to keep DRI out of  
9 the OEM channel.

10 Also, Microsoft at this time was requiring  
11 OEMs to make large minimum commitments with up front  
12 payments and Microsoft's licensing structure rewarded  
13 OEMs that made overly optimistic minimum commitments.  
14 What did this mean? This meant that an OEM with a  
15 very large, unrealistically large minimum commitment  
16 would be left with a prepaid balance. They pay their  
17 balance up front, and at the end of the contract term  
18 they would have a prepaid balance remaining that  
19 would be unused.

20 Now, one of two things could happen.  
21 Either the OEM could, perhaps, go to a different  
22 software vendor, go to a DRI, licensed DR-DOS,  
23 licensed OS/2 from IBM. It would lose that prepaid  
24 balance or Microsoft oftentimes said, Hey, let's free  
25 up this contract for another two years, another three

1 years. So essentially these prepaid balances, as  
2 Professor Noll discusses in his report, became a way  
3 of extending these already long-term contracts into  
4 essentially evergreen contracts, self-renewing  
5 contracts. So it would extend that period of time  
6 under which the OEM was locked up even further.

7 Now, all of this was the backdrop on which  
8 all of the other conduct that we discuss in more  
9 detail with the other motions was occurring.

10 Microsoft was locking up the OEM channel.  
11 Microsoft was locking it up with a per system per  
12 processor licenses for long periods of time with  
13 minimum commitment balances so that as to minimize  
14 this churning; but Microsoft then was using other  
15 tactics as well, as plaintiffs discuss in their --  
16 plaintiffs' experts discuss in their reports:  
17 Mr. Alepin discusses in his expert report; Professor  
18 Noll discusses in his expert report.

19 What Microsoft was doing at this time was  
20 engaging in other conduct that would discourage OEMs  
21 who, perhaps, would be considering switching to DRI  
22 or to IBM from actually making a move to any of these  
23 other operating systems. The preannouncements, for  
24 instance, Microsoft preannouncing MS-DOS 5.0 well  
25 before it had any realistic chance of releasing it

1 would freeze the market so that an OEM who, perhaps,  
2 coming up for renewal would say, "Why should I go  
3 with DRI now when Microsoft says it has something  
4 better coming down the pipe in just a couple of  
5 months?"

6 Well, it turns out it wasn't just a couple  
7 of months by the time the OEM would be looked up.  
8 Same thing with Microsoft's intentional  
9 incompatibilities that we will be discussing and OEM  
10 may want to consider the use of DR-DOS.

11 Microsoft, however, was sending out betas.  
12 In 1991 it sent out Windows 3.1 Christmas Beta with a  
13 false error message in it to create fear, uncertainty  
14 and doubt among influential customers such as OEMs as  
15 to whether or not DR-DOS and Windows 3.1 would be  
16 compatible with one another. All of this stuff needs  
17 to be viewed together to truly appreciate the  
18 exclusive anticompetitive nature of this conduct, and  
19 that is why this is part of a single cause of action,  
20 a single claim by plaintiffs and not broken up into  
21 small, small pieces.

22 Now, the Caldera court rejected the same  
23 arguments in that case that Microsoft makes here.  
24 First and foremost, the Caldera court, as we  
25 mentioned, recognized that the per processor and per

1 system licenses were only pieces of the puzzle  
2 presented by Caldera to establish Microsoft's  
3 anticompetitive conduct.

4 Second, the Caldera court rejected  
5 Microsoft's argument that per processor agreements  
6 were not exclusive and therefore supposedly could not  
7 be illegal since they did not require an OEM covered  
8 by such an agreement to purchase all operating  
9 systems from Microsoft. The Court recognized that a  
10 contract need not be denominated exclusive nor must  
11 exclusivity be an express condition of a contract in  
12 order for it to be exclusive under Section 2.

13 In fact, we provided a number of e-mails  
14 and other reports in conjunction with our brief on  
15 page 21 of our brief.

16 Now, Mr. Neuhaus talks about those, "Oh,  
17 those are just salesperson bravado. You know, it is  
18 the sort of thing a salesperson would say." Well,  
19 let me refer the Court to page 37 of our brief. And  
20 here you have an e-mail by a Microsoft Executive Jim  
21 Allchin, who is a high-up Microsoft executive, to  
22 Bill Gates. And in this Mr. Allchin writes, "I feel  
23 we are being too smug" -- I'm sorry. Let me start  
24 over again. "I feel we're much too smug in dealing  
25 with Novell." By this time -- this e-mail was

1 written in March of 1993 -- Novell had purchased  
2 DR-DOS from Digital Research so now Novell owned  
3 DR-DOS.

4 Mr. Allchin said, "I feel we are much too  
5 smug in dealing with Novell. Perhaps they didn't  
6 hurt us in DOS yet, but it's not because of product  
7 or their time or their trying. It's because we  
8 already had the OEMs wrapped up." I mean, this is  
9 not just some low-level salesperson who recognizes  
10 that Microsoft's exclusionary license agreements were  
11 able -- they were able to lock down that channel. At  
12 a very minimum, these are issues to be decided by the  
13 jury as to what the effect was and how exclusive  
14 these contracts were and what ultimately was the  
15 anticompetitive effect of these.

16 Mr. Neuhaus argued that one of the purposes  
17 of these per processor license agreements was the  
18 simplified administration of royalties. This was the  
19 rationale for it. That's the rationale that  
20 Microsoft executives have provided for this conduct,  
21 and I believe that's all they cite in support of  
22 this, is essentially self-serving testimony on this  
23 point.

24 Rick Apple, however, again the Zeos  
25 executive who testified in Minnesota, was asked on

1 cross-examination -- this is quoted on pages 38 and  
2 39 of our brief. He was asked, "And you agree, don't  
3 you, that it's easier to account for royalty  
4 obligations on a per system basis than a copy basis  
5 because under the former options Microsoft and the  
6 OEM need only keep track of the total number of  
7 systems sold; correct? Answer: "Absolutely not  
8 correct. We took orders for custom-built computers  
9 to keep track of how many people actually order DOS  
10 or Windows is absolutely trivial. This is like, you  
11 know, charging people that walk into Target for  
12 everything in an aisle because it would be easier  
13 than going through their shopping carts."

14 So there are definitely disputed issues  
15 here as to the pro-competitive rationale that  
16 Microsoft is setting forth in its arguments and its  
17 briefs here. Mr. Apple provided this testimony in  
18 Minnesota. This testimony will be part of this case.

19 Kail Levine, who was an executive with a  
20 German OEM that was subject to per processor  
21 licensing, is going to be testifying here in this  
22 case in person. There will be other testimony on  
23 this issue. Professor Noll, whose report we  
24 submitted in connection with this motion, talks about  
25 the fact that these were not -- there was not a

1 procompetitive justification for these license  
2 practices.

3 Now, Mr. Neuhaus also talks about, "Well,  
4 Digital Research also used these per processor  
5 licenses. That is, basically, "Well, they did it  
6 too" kind of defense. DRI was doing it so,  
7 therefore, it must be okay if Microsoft is doing it.  
8 Well, there is a significant difference here.  
9 Microsoft was a monopolist. DRI was not. The affect  
10 of Microsoft using per processor licenses, being able  
11 to distract per processor licenses from OEM is  
12 significantly different than the ability of DRI to be  
13 able to extract a per processor license.

14 I would refer the Court to testimony on  
15 page 19, from our brief, again, from Mr. Apple  
16 provided in Minnesota. Mr. Apple testified: "I  
17 don't think there was any way the Zeos could have  
18 existed as a company without Microsoft as an option."  
19 No PC OEM on a planet can exist without a Windows 95  
20 contract. There's a world of difference between  
21 Microsoft using per processor licensing and a small  
22 company like Digital Research using these per  
23 processor licenses.

24 The discussion that the per system -- that  
25 there was no evidence that they were exclusionary,

1 that's simply not the case. Again, Professor Noll  
2 will testify that as an economist these were  
3 exclusionary license agreements and they were  
4 exclusionary.

5 Now, Microsoft makes the argument that  
6 these were total sales royalty provisions, but as we  
7 point out, this argument is just inapplicable here.  
8 It has absolutely nothing to do with the situation.  
9 We quote from Areeda -- and I will try to get my --  
10 we quote from Areeda & Hovenkamp in our brief on this  
11 issue, and the reason why this is not a total  
12 royalty -- total sales royalty type-license  
13 agreement. And basically, these total sales royalty  
14 provisions oftentimes occur where you've got  
15 intellectual property that may or may not be subsumed  
16 in a particular product. You may have an unknown  
17 number of patents or an unknown number of instances  
18 of intellectual property in a particular product or  
19 process or whatnot. So you end up licensing --  
20 taking a broad license to that intellectual property.  
21 That is not the case here.

22 As Areeda & Hovenkamp note in their  
23 treatise -- in fact, they use Microsoft per processor  
24 licenses as something to show the difference between  
25 total sales royalty provisions and what Microsoft was

1 doing with per processor licenses. You know whether  
2 or not Microsoft software was included on a  
3 particular system or not. There's not a question  
4 there. There's no justification for that type of  
5 agreement.

6 And in any event, there is nothing that  
7 says that those type of royalty provisions are per se  
8 legal as opposed to Microsoft saying, "Well, courts  
9 have found -- some courts have found that these are  
10 okay," but, you know, there is nothing saying that  
11 those types of royalty provisions are per se legal  
12 under the antitrust laws.

13 So to summarize, this motion is deficient  
14 for a couple of reasons. One, it's procedurally  
15 deficient. There is no such thing under Iowa law as  
16 a motion for partial summary judgment on a subset of  
17 a claim of a single cause of action. Under  
18 Continental Ore plaintiffs are entitled to present  
19 the totality of their evidence on Microsoft's  
20 exclusionary conduct. Microsoft cannot carve up  
21 plaintiffs' claims into various subclaims and then  
22 move for partial summary judgment on each of those  
23 and say that plaintiffs must be able to show for each  
24 of those that they stand alone and would violate  
25 Section 2 of the antitrust laws.

1           And, third, in every one of the issues here  
2           there is a fact issue. Mr. Neuhaus's argument was,  
3           as I mentioned before, fact issue after fact issue  
4           after fact issue. Professor Noll -- I'm sorry,  
5           Mr. Alepin, the testimony that we have submitted in  
6           connection with our brief, testimony that will be  
7           presented at trial by witnesses, both through  
8           deposition and live, clearly lead to a question of  
9           fact that precludes summary judgment in this case.

10           THE COURT: Thank you. Rather than begin,  
11           we will have to take this matter up at another time.  
12           When are the parties available to resume the hearing  
13           on the motion?

14           MR. HAGSTROM: We would suggest Monday,  
15           Your Honor.

16           MR. NEUHAUS: No, we can't.

17           MR. HOLLEY: Your Honor, we suggested doing  
18           this on Friday and Monday, and they rejected that  
19           suggestion.

20           We then ordered the arguments in the way  
21           that we did based on who could be here when. If they  
22           had wanted to do Friday and Monday, they should have  
23           told us that last week. For example, Ms. Nellis  
24           cannot be here on Monday, and she's slated to argue  
25           some of these motions. I have the next two and

1 Monday will be extremely inconvenient for me. If the  
2 Court orders me to be here, I will, but I don't  
3 understand why we have this sort of ambush. If they  
4 wanted to do Friday and Monday, we could have done  
5 that, but now we've all made different plans, so  
6 we --

7 THE COURT: Go ahead. I'm sorry. Tuesday  
8 then?

9 MR. HOLLEY: Your Honor, we would, frankly,  
10 prefer to do them on Wednesday when the Court has the  
11 hearing already scheduled on the issue of publicity.

12 THE COURT: Okay. Mr. Hagstrom, it's my  
13 understanding in talking to Ms. Conlin, that Monday  
14 you were adamantly opposed to it. Why was it  
15 changed?

16 MR. HAGSTROM: We were trying to get time  
17 limits so we could have them all done Friday so we  
18 could avoid two trips here. So since the Court  
19 rejected the time limits and Microsoft rejected the  
20 time limits, then we presumed we're probably going  
21 back to the Friday/Monday scenario. Our problem is  
22 that --

23 THE COURT: I thought you suggested or your  
24 side suggested Friday/Monday?

25 MR. HAGSTROM: Pardon?

1 THE COURT: I thought you suggested or at  
2 least plaintiff suggested Friday/Monday?

3 MR. HAGSTROM: I wasn't participating in  
4 those conversations.

5 THE COURT: Well, I will tell you it was my  
6 recollection you were suggesting Friday and Monday.  
7 Now Monday is no longer convenient.

8 MR. HAGSTROM: I understand that from  
9 Microsoft's standpoint.

10 THE COURT: No, I understand it from --  
11 yeah, from their standpoint. Now you're saying  
12 Monday is okay. It wasn't convenient before, and now  
13 it's okay.

14 MR. HAGSTROM: Well, we have a number of  
15 things going on next week and so --

16 THE COURT: I want to know the change? Why  
17 the change? Is there a reason?

18 MR. HAGSTROM: The reason for the change,  
19 we were hoping to get it done in one day.

20 THE COURT: Why did you suggest that we do  
21 it -- I guess I'm asking for consistency and it's not  
22 going to happen.

23 MR. NEUHAUS: They advised us --

24 THE COURT: I want to know what dates you  
25 are available and I want to know on the record right

1 now and it better be right.

2 MR. HAGSTROM: We are not available next  
3 Friday. We are available Monday. We are available  
4 the following Monday. If the Court wants it on next  
5 Wednesday, we will make ourselves available on next  
6 Wednesday.

7 THE COURT: So you're proposing that we go  
8 next Friday even?

9 MR. HAGSTROM: No, I said we can't do next  
10 Friday.

11 THE COURT: Okay.

12 MR. HAGSTROM: A preferable date if we  
13 can't do next Monday would be the following Monday.

14 MR. HOLLEY: Can we discuss for a moment,  
15 Your Honor?

16 THE COURT: Sure, take your time.

17 MR. HOLLEY: Your Honor, a week from Monday  
18 is Yom Kippur, which is not very convenient for some  
19 people in our team. If we can't, I think the logical  
20 day to do it is next Wednesday because the Court has  
21 already scheduled a hearing on another matter in this  
22 case on that day.

23 THE COURT: Can we get it all done though  
24 with the other?

25 MR. HOLLEY: Well, I guess then, Your

1 Honor, I would suggest that we do Wednesday extending  
2 into Thursday to the extent that we need that time.  
3 We're going to be here anyway. I appreciate that  
4 Mr. Hagstrom and his colleagues have to come from  
5 Minneapolis. We have to come from New York. This  
6 case is priority to us, and we will be here.

7 THE COURT: Okay. Did I misunderstand?  
8 Maybe I got it wrong. Didn't Roxanne say --

9 MR. GREEN: This morning Roxanne said --  
10 Well, why don't we do it on Wednesday?

11 THE COURT: I'm talking about the other  
12 day. Was I wrong? Were you suggesting  
13 Monday/Tuesday? What day were you suggesting?

14 MR. GREEN: We were suggesting Friday and  
15 Monday.

16 THE COURT: What were you suggesting?

17 MR. HAGSTROM: We were hoping to get it  
18 done today.

19 MR. GREEN: Then we rearranged because we  
20 thought they were adamantly opposed to Monday and  
21 then so now we've got conflicts. But I don't see why  
22 we couldn't try to do it -- we can do it on  
23 Wednesday. They got to be here any way for the other  
24 motion.

25 MR. HAGSTROM: Well, that is not true.

1 Roxanne will be her by herself for the single motion  
2 on Wednesday. The rest of us do not travel. If Yom  
3 Kippur is on Monday, does that continue Tuesday?  
4 Maybe we can do it the following Tuesday.

5 MR. GREEN: I think we ought to do what we  
6 can on Wednesday on some of these motions regardless  
7 of the orders. It looks like to me if today is any  
8 indication, we're not going to get it done anyway.

9 THE COURT: Why can't you travel on  
10 Wednesday? What is the problem?

11 MR. HAGSTROM: We have our rebuttal expert  
12 reports due on Friday, so I'm working with the  
13 experts on those. And so if I've got to be here on  
14 Wednesday going into Thursday, that obviously  
15 significantly interferes with being able to do that.

16 MR. HOLLEY: Your Honor, we can be here a  
17 week from Tuesday, although we're obviously concerned  
18 as the time keeps ticking, you know, that we would  
19 like to argue these motions and give the Court plenty  
20 of time to resolve them. So if there's no way for  
21 the people from Zelle Hoffman to be here next  
22 Wednesday, then we will come here the following  
23 Tuesday and stay until they are done.

24 MR. GREEN: Is Roxanne not going to argue  
25 any more of these motions for summary judgment?

1 MR. HAGSTROM: Correct.

2 THE COURT: Is your preference not Tuesday  
3 for holiday reasons?

4 MR. HOLLEY: Your Honor, we're fine. We  
5 will be here a week from Tuesday if that's what  
6 people want to do.

7 THE COURT: I don't want to interrupt  
8 anyone's holiday plans.

9 MR. HAGSTROM: Your Honor, perhaps this  
10 might work. Because Mr. Jacobs is going to be doing  
11 the next two, if those were done on Wednesday. Then  
12 we could finish up with the remainder on the  
13 following Tuesday, so at least that way because I'm  
14 concerned we've made it -- we actually haven't quite  
15 made it through four of these today. We have  
16 obviously a little bit left on the fourth one and  
17 then there's five more, so it might take more than a  
18 day.

19 MR. GREEN: That's okay. Fine.

20 THE COURT: That's not a bad solution, but  
21 does that interrupt Yom Kippur plans for anybody?

22 MR. HOLLEY: That's fine. I don't have a  
23 Yom Kippur problem.

24 THE COURT: Do you have a problem?

25 MR. NEUHAUS: No. I can do Wednesday.

1 THE COURT: Yeah. You got Wednesday anyhow  
2 so you're okay.

3 MR. GREEN: We need it on the following  
4 Tuesday.

5 MR. TULCHIN: I think that will work out  
6 fine, Your Honor. As it turns out, I can't be here  
7 either day but I don't want to get in the way of  
8 this. Other people will argue what I was supposed to  
9 argue because, you know, my schedule is bad and with  
10 Yom Kippur and so on I think its best to get these  
11 scheduled and get them argued.

12 THE COURT: So you're okay then with  
13 Wednesday too?

14 MR. TULCHIN: Wednesday, the 27th and then  
15 October 3rd, is that what it would be?

16 MR. NEUHAUS: Yeah. October 3rd.

17 MR. HAGSTROM: Who is doing No. 7?

18 THE COURT: Okay.

19 MR. HOLLEY: Sharon Nellis was going to  
20 argue that one, Mr. Hagstrom. I will have to check  
21 with her. I don't know if she can or can't.

22 THE COURT: I'm sorry. I don't mean to  
23 interrupt you.

24 MR. HOLLEY: I don't know what Your Honor's  
25 schedule is like. That's four motions in one day.

1 THE COURT: I'm freeing up my schedule for  
2 you guys.

3 MR. HOLLEY: Your Honor, I could go call  
4 her and ask.

5 MR. HAGSTROM: Because it may be if we can  
6 fit that third one in Wednesday.

7 THE COURT: Do we need the court reporter  
8 for anything else, counsel?

9 MR. NEUHAUS: I don't think so, Your Honor.

10 (Record closed at 4:34 p.m.)

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CERTIFICATE TO TRANSCRIPT

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

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

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

Dated at Des Moines, Iowa, this 2nd day of October, 2006.

\_\_\_\_\_  
JANIS A. LAVORATO  
Certified Shorthand Reporter