

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., October 24, 2006, in  
16 Room 404 of the Polk County Courthouse, Des Moines,  
17 Iowa.

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JANIS A. LAVORATO  
24 Certified Shorthand Reporter  
Room 405B-Polk County Courthouse  
25 Des Moines, Iowa 50309

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APPEARANCES

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1 PROCEEDINGS

2 (The following record commenced at 9 a.m.

3 on October 24, 2006.)

4 THE COURT: We're here on motion in limine

5 first in regard to defendant's motion to exclude

6 evidence of foreign antitrust proceedings and alleged

7 conduct in foreign countries.

8 Are the parties ready to proceed?

9 MR. HOLLEY: Good morning. Steve Holley

10 from Sullivan & Cromwell in New York.

11 Your Honor, plaintiffs have designated

12 various exhibits that relate to antitrust proceedings

13 brought against Microsoft in foreign countries,

14 notably in the European Commission, in Brussels and

15 in the Korean Fair Trade Commission in Seoul. And

16 their economic and technical experts make reference

17 to those proceedings in their reports. So that's one

18 category of evidence that this motion concerns.

19 The second category of evidence concerns

20 designated exhibits and deposition testimony relating

21 to conduct by Microsoft in foreign countries that had

22 no conceivable affect on consumers in this state.

23 Your Honor, the evidence at issue on this

24 motion is irrelevant under Iowa Rule of Evidence

25 5.402. The geographic market in this case is the

1 state of Iowa. That is what section 533.36 of the  
2 Iowa Code provides, and not surprisingly, that is  
3 what plaintiffs themselves alleged in paragraph 48 of  
4 the fourth amended petition.

5 The fact that Judge Jackson in  
6 United States v. Microsoft reached a different result  
7 under U.S. law does not trump Iowa law, nor does it  
8 obviate what plaintiffs said in their own petition.

9 Telling the jury that Microsoft has been  
10 found by the European Commission or by the Korean  
11 Fair Trade Commission, both of which are  
12 administrative agencies, not courts, that Microsoft  
13 violated provisions of EC law or Korean law does  
14 nothing to prove that Microsoft violated the Iowa  
15 Competition Law, which is, after all, what this case  
16 is about. But the prejudicial effect of that on the  
17 jury is obvious. It invites them to conclude that  
18 because foreign governments think that Microsoft's  
19 conduct is anticompetitive in other countries, then  
20 it is more likely that Microsoft has engaged in  
21 anticompetitive conduct in this state.

22 There are other reasons, Your Honor, why  
23 this evidence should be excluded. The EC case and  
24 the KFTC case are very different from this case.  
25 We've submitted to the court affidavits from two

1 lawyers, a man named Jean-Francois Bellis,  
2 B-e-l-l-i-s, who is partner of a law firm called  
3 Vandel and Bellis in Brussels, who is very active  
4 with me in representing Microsoft in the EC case, and  
5 also an affidavit from a gentleman named  
6 Jae Hong Ahn, A-h-n, who I worked with at Kim & Chang  
7 in Seoul in the KFTC case.

8           And what they explain is that the issues in  
9 those two cases are different from the issues in this  
10 case. And, more importantly, Your Honor, the  
11 relevant legal standards are different.

12           What is anticompetitive under European law  
13 or Korean law is quite different from what is  
14 anticompetitive under the Iowa Competition Law.

15           Moreover, Your Honor, these are not court  
16 decisions. These agencies, the European Commission  
17 and the Korean Fair Trade Commission, are  
18 administrative agencies. They are both the  
19 investigators, the prosecutors, the judge and the  
20 jury. They take all aspects of these cases. They  
21 are not adjudicators in the way a U.S. lawyer would  
22 think of an adjudication.

23           And also, Your Honor, they are both subject  
24 to judicial review and currently being appealed. The  
25 EC case has been appealed by Microsoft to something

1 called "The Court of First Instance of the European  
2 Communities in Luxembourg. And we were there in  
3 April for an amazing 40-hour oral argument on that  
4 case, and we're awaiting a decision there.

5 The KFTC decision is currently being  
6 appealed to the Seoul high court. It is not yet  
7 fully briefed, and I'm not sure when argument in that  
8 case will actually occur.

9 But in each case, Your Honor, it is open to  
10 those courts to decide to either reverse in the  
11 entirety or reverse in part or modify substantially  
12 these administrative decisions. So telling the jury  
13 about these decisions when they are from an  
14 administrative agency and they are subject to review  
15 and maybe reversed or modified is in our submission,  
16 Your Honor, a very bad idea.

17 Now, the plaintiffs say in their response  
18 to our motion that they do not intend to use evidence  
19 of these foreign-antitrust proceedings "as  
20 substantive proof of wrongful conduct by Microsoft."  
21 And then they offer some examples of how they do  
22 intend to use this evidence. And I would like to  
23 take one of those examples because I think it shows  
24 what is really going on here.

25 Plaintiffs have an exhibit, which is a

1 letter from the Competition Commissioner, now-retired  
2 Mario Monti, to Mr. Ballmer at Microsoft. In  
3 closing, a 112-page document which is called a  
4 statement of objections. It's sort of an initial  
5 statement of what the EC said that Microsoft had done  
6 wrong. And what the plaintiffs say is that they want  
7 to use that document to show the day that the case  
8 began.

9 Well, that date, (a), that the document  
10 doesn't show the case began on that date. The case  
11 began many years earlier. The date that the case  
12 really began is not controversial and can be proved  
13 in a variety of ways. And the prejudice to Microsoft  
14 of having this 112-page statement of objections from  
15 the European commission is obvious.

16 Now, plaintiffs say that this date is  
17 relevant because they are going to argue that  
18 Microsoft destroyed documents improperly after the  
19 case began.

20 Now, this makes no sense for a whole  
21 variety of reasons. First, there is no discovery in  
22 EC cases. There are no document productions. There  
23 are no depositions. Microsoft produced no documents  
24 in the EC case. This is not U.S. litigation. There  
25 are things called "Article 18 requests," which to

1 Your Honor would look like interrogatories because  
2 that is basically what they are. Microsoft answered  
3 a whole variety of these Article 18 requests and  
4 answered all the questions that the EC posed. And  
5 there has been no suggestion, either in Europe or in  
6 this case, that the answers to those Article 18  
7 requests were in any sense incomplete.

8 So the point of introducing this 118-page  
9 statement of objections not only fails to prove the  
10 point, which is the date that the case started  
11 because that actually happened in 1998, it also has  
12 no bearing at all on this notion of spoliation of  
13 evidence, because there were no document productions  
14 in the case.

15 The other examples in plaintiffs' brief are  
16 equally unpersuasive. These are trivial points that  
17 they say these documents are relevant to. They can  
18 be proved through other methods. And the prejudice  
19 of telling a jury in Polk County that Microsoft has  
20 been subject to these investigations in foreign  
21 countries is obviously prejudicial, Your Honor.

22 Now, the plaintiffs say they have an answer  
23 to this. They say that the court has already  
24 determined that evidence regarding these  
25 foreign-antitrust proceedings is both relevant and

1 admissible.

2 But Your Honor has never done that. What  
3 Your Honor found was that this information concerning  
4 the EC case and the KFTC case was discoverable under  
5 Iowa Rule of Civil Procedure 1.503.

6 But, of course, a lot of evidence that is  
7 discoverable is not admissible. In fact, the Iowa  
8 rules make clear that you can discover all sorts of  
9 things that might lead to the uncovering of  
10 admissible evidence. But not everything that you get  
11 in discovery is automatically admissible at trial. I  
12 think that point is quite obvious.

13 So I would like to turn, Your Honor, to the  
14 second category of evidence at issue on the motion,  
15 which is evidence that Microsoft's conduct in foreign  
16 countries with no conceivable impact on consumers in  
17 Iowa should be excluded. And I would like to give  
18 Your Honor a leading example of what the plaintiffs  
19 would like to tell the jury about.

20 There was a German computer manufacturer  
21 called Vobis, spelled "V," as in "Victor, o-b-i-s  
22 with which Microsoft had some contentious dealings in  
23 the early 1990s, almost 15 years ago.

24 Vobis never sold a single personal computer  
25 in the United States, and plaintiffs do not contend

1 otherwise. Nobody in Iowa has ever used a Vobis  
2 computer, as far as we know. So it is very hard to  
3 understand why Microsoft's interactions with Vobis in  
4 1991 and 1992 would have a substantial affect on  
5 commerce in Iowa. And that is what plaintiffs would  
6 need to establish before telling the jury about this  
7 sort of evidence.

8         They need to prove that Iowa consumers were  
9 damaged by actions by Microsoft. And talking about  
10 some German computer manufacturer that didn't sell  
11 PCs in the United States is far afield from that,  
12 Your Honor.

13         Now, plaintiffs say in response to our  
14 motion that Microsoft is seeking to exclude evidence  
15 of everything that Microsoft did outside of the  
16 United States. And that's just not correct.

17         If you look at Exhibit A to our reply  
18 brief, you can see, Your Honor, that we are not  
19 seeking that sort of relief. What we're trying to do  
20 is exclude evidence of actions in foreign countries  
21 that are disconnected from competition in Iowa.

22         Now, obviously, Microsoft enters into an  
23 agreement in Tokyo with Hitachi, but Hitachi is  
24 selling thousands of computers to people in  
25 Des Moines. We're not taking the position that the

1 dealings with Hitachi are irrelevant and can be  
2 excluded. We have not taken that position.

3 But plaintiffs have failed to show how  
4 Microsoft's dealings with the Communist party in  
5 Vietnam, that's the subject of one of the exhibits  
6 that we're seeking to exclude, or dealings with  
7 schools in Malaysia has anything to do with what  
8 people pay for operating systems in Polk County.  
9 That's what we're here to talk about.

10 We're to talk about whether Linux is fully  
11 available to people who live in Des Moines. It is.  
12 They can get it from Red Hat or Susa or a number of  
13 other vendors. So it's simply irrelevant to have  
14 this evidence come into the trial and highly  
15 prejudicial to Microsoft.

16 What plaintiffs have done is set up a straw  
17 man by arguing that Microsoft is seeking to exclude  
18 everything it ever did in any country other than the  
19 United States. But when you knock down that straw  
20 man, it doesn't explain why things, for example, like  
21 the creation of an Urdu version of Windows has any  
22 relevance to this case? Who in Des Moines uses the  
23 Urdu version of Windows. It's just irrelevant.

24 Your Honor, this case is -- the trial of  
25 this case is going to be very long and very

1 complicated, and we have plenty of evidence about  
2 things that happened in the United States that had an  
3 impact in this state. But there is a serious risk of  
4 confusing the jury and improperly prolonging an  
5 already long and difficult trial by introducing  
6 evidence about things that didn't have any impact on  
7 competition in Iowa.

8 So for that reason, Your Honor, Microsoft  
9 submits that its motion should be granted.

10 THE COURT: Response.

11 MS. CONLIN: Thank you, Your Honor. May it  
12 please the court.

13 There are really two motions here. And I  
14 think Mr. Holley handled them a bit separately, and I  
15 want to do the same thing. One motion affects the  
16 foreign proceedings and the other affects conduct in  
17 foreign markets.

18 With respect to foreign proceedings, the  
19 greatest part of the defendant's motion is devoted to  
20 convincing the court that foreign law is different  
21 than the Iowa law. That is self-evident. We do not  
22 contest that, and that's not what we're trying to do.

23 We are not trying to prove our allegations  
24 by presenting the results of allegations of  
25 foreign-antitrust proceedings. Instead, there are

1 six exhibits at issue here, Your Honor. Each have a  
2 relevant purpose for which they are offered, which  
3 has nothing whatsoever to do with foreign law.

4 First of all, Microsoft seeks to exclude  
5 evidence that we've already withdrawn. We've made a  
6 list of that, Your Honor.

7 And Microsoft says when we say, "Yeah, but  
8 we already withdrew those," they say to us, "Well,  
9 maybe you'll try to offer them again." In fact,  
10 Mr. Tuggy admitted to Lindsey that the letter that we  
11 had that said we were withdrawing the exhibits was  
12 mistakenly not entered into the database. So, in  
13 fact, Microsoft has appealed or has brought to the  
14 court exhibits that we have withdrawn and which they  
15 knew that we had withdrawn.

16 One of the exhibits, 3032, was excluded by  
17 the Special Master. The time for appeal has passed,  
18 and we've not appealed it. And the four remaining  
19 exhibits are offered -- are not offered for the truth  
20 of the matter asserted. And we've also, of course,  
21 conveyed that.

22 Microsoft bases its request for a broad  
23 ruling to exclude all exhibits relating to foreign-  
24 antitrust proceedings on documents that are either  
25 not exhibits in this action or that are not offered

1 for the truth. These six documents related to  
2 foreign-antitrust proceedings, that are actually  
3 offered by the plaintiffs, are relevant to narrow and  
4 nonprejudicial purposes.

5 Plaintiffs' Exhibits 5468 and 8666 are the  
6 only documents identified by Microsoft as relating to  
7 foreign-antitrust proceedings that are actually  
8 offered for the truth of the matter asserted. 5468  
9 is a Novell internal memorandum regarding whether the  
10 Korean government would refuse to approve Microsoft's  
11 contract with OEMs, containing per processor  
12 licensing terms. The court will recall the per  
13 processor license is a license where the OEM has to  
14 pay Microsoft for every single unit that goes out the  
15 door whether or not it contains a Microsoft operating  
16 system.

17 This document demonstrates that Microsoft  
18 was, in fact, making use of per processor licensing  
19 and that this was of concern, obviously, of its rival  
20 Novell, which by this time had merged with DRI, which  
21 made DR-DOS.

22 The exhibit is relevant to plaintiffs'  
23 allegations that Microsoft was using those kinds of  
24 licenses to exclude rival-operating vendors such as  
25 Novell. It's unrelated to the content of -- this is

1 not, "this is not" a document from the Korean  
2 proceedings. It is a document about the Korean  
3 proceedings. It's an internal Novell document  
4 offered to prove that Microsoft is using per  
5 processor contracts in Korean and that Novell knows  
6 about it, is concerned about.

7 8666 contains Microsoft formal discovery  
8 responses, Microsoft admissions, responses to  
9 interrogatories posed by the European Commission  
10 regarding issues related to the interoperability of  
11 Microsoft's operating systems with those sold by its  
12 rivals. The questions relate to software sold both  
13 in Europe and in the United States and involve  
14 Microsoft's effort to prevent interoperability or  
15 decrease interoperability between the operating  
16 systems, which is -- which is between the operating  
17 systems and other things, which is, of course, a very  
18 large issue in our case.

19 The rest of the exhibits at issue are not  
20 offered for the truth of the matter asserted. 6817  
21 is a press release from August 3, 2000, announcing  
22 the initiation of the European Commission proceedings  
23 against Microsoft.

24 8203 is the statement of objections, which  
25 formally initiated the EC proceedings, as I

1 understand it, much as a complaint or petition does  
2 in the United States. So as Mr. Holley points out,  
3 it is a much different procedure than in the United  
4 States. It's, perhaps, more akin to an  
5 administrative proceeding than it is to a judicial  
6 proceeding.

7 Plaintiffs' Exhibit 7273 is a two-page  
8 exhibit, which consists of the cover page of the EC  
9 judgment against Microsoft along with one page of  
10 that ruling, which discusses when the case was  
11 originally initiated.

12 We offer these exhibits to prove, for  
13 example, as Mr. Holley says, the time in which these  
14 proceedings began.

15 Mr. Holley says that because there is no  
16 formal discovery, that the question of when the  
17 proceedings began is not relevant.

18 Whether there is a type of discovery,  
19 namely, the interrogatories, and the issue of the  
20 preservation of documents would seem to me, at least,  
21 to be relevant, whether the proceedings -- whatever  
22 the proceedings require.

23 If there are documents pertaining to the  
24 proceedings, certainly Microsoft is under an  
25 obligation to preserve those documents, whether or

1 not they are required explicitly or not.

2 Plaintiffs' Exhibit 8718 is a portion of a  
3 report giving specific examples of how the ubiquity  
4 of Microsoft Windows Media Player. Your Honor, one  
5 of the issues in our case, which I'm not sure we've  
6 discussed very much, is Microsoft's bundling of the  
7 Windows Media player with the operating system. And  
8 this document, 8718, is a portion of a report giving  
9 examples of how that -- how the bundling and the  
10 ubiquity of the operating system harmed RealNetworks,  
11 which is Microsoft's -- or was Microsoft's principal  
12 competitor in the media player area.

13 It's offered not for the not truth purpose  
14 of demonstrating, for example, that Microsoft was  
15 aware of the fact that the bundling of the media  
16 player with the operating system was, in fact,  
17 harmful to RealNetworks and to competition.

18 We believe, Your Honor, that the limited  
19 and relevant purposes for which we offer these  
20 exhibits are not prejudicial. Given the limited  
21 purposes, we don't think that the prejudicial effect  
22 substantially outweighs -- how does that go? We do  
23 not think that the probative value is not  
24 substantially outweighed by undue prejudice. I'm  
25 still not sure I got that out right, but I know the

1 court already knows what the rule is. So you know  
2 what I'm trying to say, Your Honor.

3 Microsoft alleged only that because the  
4 factual claims and legal standards applicable in  
5 those proceedings differ from those in this action  
6 and because those proceedings are not final, that  
7 they can be approved, that it would be unduly  
8 prejudicial if a jury were told that Microsoft was  
9 accused of or found preliminarily liable for  
10 antitrust violations. However, none of plaintiffs'  
11 exhibits are offered for that purpose or even relate  
12 to such a purpose.

13 To the extent that any of the evidence  
14 reveals to the jury the mere existence of foreign  
15 proceedings against Microsoft, a limiting instruction  
16 would suffice to prevent any undue prejudice.

17 We don't seek to prove the contents or  
18 results of foreign antitrust proceedings; however,  
19 their mere existence -- and they do exist -- is  
20 nonprejudicial and relevant to issues in this case.

21 Your Honor, as I said when we last gathered  
22 and talked about other kinds of settlement, this is a  
23 sensitive area. And we think that a limiting  
24 instruction is necessary and appropriate for these  
25 kinds of materials. But we also think that there is

1 no -- nothing to suggest that the Iowa jury will not  
2 follow the court's instructions and use -- and misuse  
3 the document in some way when the court explicitly  
4 explains what the document is offered for and what it  
5 is to be used for.

6 Let me turn now, Your Honor, to the conduct  
7 abroad in foreign proceedings. We have, in fact,  
8 been here before. You have addressed and rejected  
9 Microsoft's exact same arguments that all evidence  
10 must be limited to Iowa, or at the most, United  
11 States, on at least three prior occasions.

12 Microsoft has also tried this tactic in  
13 other cases without success.

14 First of all, Microsoft tells the court  
15 that we have somehow misinterpreted their motion, so  
16 I quote from it. Microsoft seeks to exclude  
17 "evidence concerning alleged conduct and events  
18 outside the United States and exclusively affecting  
19 foreign markets."

20 The relevance of foreign documents and  
21 Microsoft's conduct abroad has been before the court  
22 on three occasions. Microsoft's domestic and foreign  
23 conduct to preserve the applications barrier to entry  
24 and its operating-systems monopoly preserves  
25 Microsoft's monopoly power not just in Iowa, but

1 elsewhere as well.

2           After considering all of the arguments of  
3 the parties regarding the relevancy of the EU  
4 proceedings, Your Honor, the court issued its ruling.

5 And if I may quote for the record from your ruling on  
6 the discoverability of the EU proceedings:

7           "In the EU proceedings the defendant was  
8 accused of having conditioned the availability of the  
9 Windows operating system on the simultaneous  
10 acquisition of the Windows Media Player. This  
11 conduct was directed at RealNetworks and was done to  
12 eliminate them from the market. Considering this  
13 anticompetitive tactic was allegedly used by the  
14 defendant to prevent a software application from  
15 rivaling and potentially hindering the Windows  
16 operating systems monopoly, the court determines that  
17 this information is discoverable and that disclosure  
18 of this information to plaintiffs may assist them in  
19 proving anticompetitive conduct was used by the  
20 defendant to maintain its monopoly over the computer  
21 operating system market." We believe the court got  
22 it exactly right.

23           You also ruled, Your Honor, with respect to  
24 the Korea Fair Trade Commission. You ordered that  
25 they produce the documents, and you ordered that they

1 produce the translation. You will recall the  
2 struggle over whether or not we could actually read  
3 the documents that they provided. And also the third  
4 time, Your Honor, was about the EDGI documents. That  
5 is the Education and Government Incentive Program,  
6 which Microsoft continues to characterize as a  
7 program which provides, and I quote, "discounts on  
8 Windows to resource-constraint schools and  
9 governments in less developed nations."

10 They portray it, Your Honor, as a program  
11 designed and intended to benefit exclusively these  
12 resource-constrained schools when, in fact, the  
13 internal documents -- which you ordered that they  
14 produce -- reveal that the program is designed not to  
15 help poor schools, but to keep Linux, the free  
16 operating systems, out of those schools and those  
17 governments.

18 It is by its very terms available only to  
19 poor schools where Linux is a factor. If they wanted  
20 to help poor schools, they could just give the poor  
21 schools some of their billions. Instead, they  
22 designed this program, yet can only use it where  
23 Linux appears to be about to get a deal. And then  
24 they rush in and provide these various benefits to  
25 the resource-constrained school or government,

1 including in one case the Vietnamese Communist Party,  
2 which refused to take the EDGI funds, fearing that it  
3 was a bribe.

4 What Microsoft is doing, of course, is  
5 trying to resist depression of the applications  
6 barrier to entry, not about poor schools.

7 Nevertheless, in filing the present motion,  
8 Microsoft insists on raising the same issue again.  
9 Microsoft argues that all foreign documents are  
10 irrelevant to this action and should be excluded and  
11 that what happened in European or Asian markets is  
12 not relevant and that we've gone far afield and that  
13 such documents have no relationship to Iowa commerce  
14 or injury purportedly suffered by Iowa consumers.  
15 The fourth time they raise this argument is no more  
16 persuasive than the first three.

17 Microsoft argues that the court has only  
18 held that the evidence is relevant for discovery, not  
19 for admissibility. However, the arguments that  
20 Microsoft makes today and in their briefs are exactly  
21 the same arguments that they made to the court in  
22 terms of whether or not the documents could be  
23 required to be produced.

24 Let me also address this issue of market.

25 The defendant seeks to confuse the court,

1 which they should learn is not easy to do, by saying  
2 that because the geographic market is Iowa -- I mean,  
3 that's the only place where we have jurisdiction.

4 The federal courts only have jurisdiction in the  
5 United States of America. That is the geographic  
6 market. That is not the product market.

7       The product market and Finding of Fact 18  
8 to which you have granted collateral estoppel says  
9 the market for PC or PCs is worldwide, "worldwide."  
10 So what happens in Korea, what happens in Germany,  
11 what happens in Malaysia affects the consumers of  
12 Iowa.

13       Let me talk for a little bit about why that  
14 is. Let's talk about the Linux market, the free-  
15 software market.

16       ISVs want to sell as many applications as  
17 they can. They have to develop their applications  
18 for an operating system. The more end users that the  
19 operating systems have, the more applications the  
20 ISVs can sell. And the more attractive the platform,  
21 the more ISVs will write applications for that  
22 platform. The chicken-and-egg problem that Judge  
23 Jackson discussed.

24       Free software like Linux accelerates the  
25 cycle, but it doesn't change it. If Microsoft wants

1 to break the cycle, it can do it in one of two ways:  
2 Stop the spread of the platform, including to  
3 Malaysia, or stop the increase of applications. And  
4 Microsoft in its effort to protect the  
5 applications-barrier-to-entry does both.

6 Let's say that there is an ISV here in  
7 Des Moines who writes Windows applications, but he  
8 would like to write to other applications, but it's  
9 not worth it until he reads that the Malaysian  
10 government has adopted the Linux platform. So  
11 there's going to be a million or, I don't know, five  
12 million new Linux machines out there.

13 So the Internet changes everything. He  
14 gets in touch with a Malaysian speaking person and  
15 together they write an application. And he  
16 collaborates in cyberspace and it becomes -- the  
17 application is a "killer app." Have you heard that  
18 term yet, the "killer app"?

19 So it makes Linux more popular. It's such  
20 a popular application. It causes more spread of the  
21 Linux platform. So because people want this  
22 application, they download Linux or buy it from Red  
23 Hat and pretty soon there are more people using Linux  
24 and more applications, therefore, written for Linux.  
25 That's how that works.

1           And the Internet makes development and  
2           communication worldwide. And I have to say, Your  
3           Honor, the only place that Microsoft ever suggests  
4           that the market is not worldwide is in litigation.

5           In their documents, in their internal communications,  
6           in their business strategy, they act and say, in  
7           fact, it is. No matter where people live, they are  
8           or can be consumers worldwide.

9           This is not -- we're not talking any more  
10          about a traditional storefront, off-the-shelf kind of  
11          thing. We're talking about a global economy. And  
12          particularly with respect to software where you  
13          can -- wherever you live, you can get a piece of  
14          software by downloading it from the Internet.

15          In determining whether the conduct, the  
16          documents and the evidence are in fact excludible,  
17          Mr. Holley mentioned Vobis. I want to talk about  
18          that too.

19          It was the largest OEM, probably, in  
20          Europe. It also used DRI. DR-DOS was -- it wanted  
21          to give consumers a choice, and so it preloaded -- it  
22          was kind of like a kit, as I understand, you know,  
23          that had a bunch of stores. And in the stores  
24          customers had the choice of DR-DOS or MS-DOS. And  
25          that gave DR-DOS a foothold in Germany and in Europe.

1 Microsoft -- and the document reflects  
2 this -- became increasingly alarmed by this sale of  
3 DR-DOS fearing that other OEMs would see the success  
4 that Vobis was having and want to load DR-DOS too.  
5 Microsoft's concern rose to the highest level.

6 Steve Ballmer told Brad Chase on the day  
7 that he became the product manager for MS-DOS 5.0  
8 to -- and I quote -- "eat, sleep and drink Vobis."

9 Now, he became the product manager for  
10 MS-DOS 5.0 in Redmond, Washington.

11 Mr. Lieven, who is planning to come to  
12 Iowa, he was the CEO of Vobis in Germany. He was  
13 very stubborn and refused to offer only MS-DOS. He  
14 liked DR-DOS better.

15 Finally, Joachim Kempin, Microsoft's  
16 worldwide OEM manager -- that's his title --  
17 worldwide OEM manager, met with Mr. Leavin and told  
18 him it would cost more to license Windows alone than  
19 it would cost to license Windows and MS-DOS together.  
20 Two days later Vobis signed the license for MS-DOS.

21 Microsoft's tactics continue because even  
22 though he signed the license for MS-DOS, he still had  
23 some DR-DOS -- I gather that these are like  
24 holograms, and you put them on the package. I'm not  
25 exactly clear about that, but he kept -- he had those

1 on these things. So he kept selling DR-DOS despite  
2 the contract that he signed which did not explicitly  
3 say he could not sell DR-DOS.

4 So Microsoft invited Mr. Leavin to come to  
5 Redmond, Washington in the United States of America,  
6 and meet with Kempin and others. And during the  
7 visit, Mr. Kempin offers -- this is in Redmond,  
8 Washington -- he offers Mr. Leavin \$50,000 to  
9 \$100,000 to stop selling DR-DOS.

10 Stephanie Reichel was the Vobis account  
11 manager in Germany, and she testifies that both Bill  
12 Gates and Steve Ballmer were aware of this cash  
13 payment to Vobis for the purpose of making him stop  
14 selling DR-DOS.

15 He takes the money. It comes through the  
16 market-development funds, which is -- or a marketing  
17 fund. I don't think that it was formalized at that  
18 time, and so Microsoft gets DR-DOS out of the  
19 account. And the fact that DRI loses its most rabid  
20 supporter in Europe, DR-DOS has less money for the  
21 things that it needs to do and less ability to  
22 challenge Microsoft everywhere including Iowa. These  
23 events are a part of a series of events illustrating  
24 that Microsoft will do anything necessary to win,  
25 whether it's legal or illegal.

1 Document destruction also plays a role,  
2 Your Honor, for many practices that we believe  
3 occurred worldwide. I have only foreign documents.

4 For example, in the 25 million pages or so  
5 of documents, I have very few price quotes, you know,  
6 "How much does the operating system actually cost?"  
7 Apparently, those were eliminated at some point by  
8 Microsoft's multipronged and interlocking policies to  
9 get rid of incriminating documents.

10 I'm a little uncertain, Your Honor, whether  
11 the lists that Microsoft attaches to its briefs are  
12 the universe of documents that they seek to exclude.  
13 Perhaps Mr. Holley will tell us if that is the  
14 universe.

15 I've looked at all of those, and I selected  
16 a few to illustrate both those that Microsoft seeks  
17 to exclude do not exclusively affect foreign markets  
18 and to illustrate the overbreadth of the defendant's  
19 motion and the documents that it seeks to exclude.

20 If I may give the court a few of these  
21 documents for that illustration purpose, the first of  
22 which, Your Honor, is Exhibit 458, the document that  
23 the defendant seeks to exclude, which originates in  
24 Redmond, Washington.

25 I also have to say, Your Honor, Microsoft's

1 argument is inconsistent. On the one hand, they say  
2 "geographic market," Iowa, so only Iowa evidence can  
3 come in. But then they permit the United States, but  
4 not foreign countries. So there's an inconsistency  
5 in the way that they approach this.

6 This document comes from the United States  
7 of America, and it is a memo to Ted Hannum on a trip  
8 report that he made to Commodore, which is a  
9 worldwide OEM.

10 The objectives of the trip, Your Honor,  
11 will note is: "Agree on a DOS price to prevent  
12 Commodore from making a DR-DOS decision and agreeing  
13 on a Windows price."

14 These are worldwide prices. Your Honor, do  
15 you see down below? It says, "These royalty prices  
16 are for both U.S. and localized vendors of products."  
17 I don't think that even requires any interpretation.

18 On the second page -- I should say, Your  
19 Honor, I didn't give you all the pages. I only gave  
20 you the pages that I thought were illustrative. Some  
21 of these documents are quite lengthy.

22 The highlighted portion under results says,  
23 "Our strategy was to get all of the issues on the  
24 table at once so that we could try to put some kind  
25 of package together without appearing to 'tie' the

1 product." Again, probably requiring no  
2 interpretation.

3 The second document is Plaintiffs' Exhibit  
4 921, dated August 20, 1991. It's a memo to several  
5 people, including Cameron Myhrvold, who was in charge  
6 of interaction with ISVs for the world, Jonathan  
7 Lazarus and Steve Ballmer. This document -- of  
8 course, Your Honor, all of these people are top-level  
9 executives in Redmond with companywide and worldwide  
10 responsibilities. "The mission is to dominate the  
11 operating systems arena in international markets."  
12 Under II: "Develop and implement programs to  
13 proactively support ISVs in reaching to international  
14 customers."

15 As I read this document, Your Honor, I  
16 think the idea is to get United States ISVs to write  
17 for foreign markets.

18 Moving down a bit, "IBM has formed  
19 alliances with Apple, Borland, Patriot Partners and  
20 Novell to challenge our position in the PC industry."  
21 This, of course, happened in the United States and  
22 has an effect throughout the world. "Novell acquired  
23 DR-DOS." Also happened in the United States.  
24 "Without the dominance in the operating systems, we  
25 will not be able to drive and dominate the PC

1 industry. In order to win this war we must get our  
2 OEMs to love us and evangelize them to preinstall  
3 Windows and DOS on every 386+ machine. Windows has  
4 to become an integral part of the hardware in order  
5 to reposition it to be a complete operating system."

6 Turning to the next page. "Working with  
7 OEM management, account managers in the subsidiaries  
8 and Windows program management team, we will  
9 aggressively drive and roll out this program into  
10 international markets." Again, Your Honor, they are  
11 talking about rolling out U.S. programs into  
12 international markets.

13 The next paragraph marked specifically  
14 notes that it is worldwide data. And I have marked a  
15 few other pieces of information for the court's  
16 review.

17 The next document that the defendant seeks  
18 to exclude as not relevant is 1124. Again, Your  
19 Honor, it is to top-level Microsoft executives:  
20 Scott Okie, Russ Werner, Joachim Kempin, worldwide  
21 OEM manager Mike Maples, Ballmer, and "BUMS" means  
22 "business unit managers," and "GPM," I think, means  
23 "Group" -- well, I've now forgotten what that means.  
24 I get these things in me head and then they fall out.  
25 And it is an international marketing summary, and it

1 talks about "working with U.S. ROW" -- which means  
2 "rest of the world" -- "and European counterparts on  
3 20 worldwide agreements, two of them OEMs as well as  
4 on improving the process." It talks about "selling  
5 worldwide to multinational accounts. Spending more  
6 time than planned in just properly communicating  
7 marketing programs from the U.S. to international."  
8 It talks about special projects and trips. "Obsolute  
9 SKUs" means they are going to take things off the  
10 market worldwide. But look here, Your Honor, on page  
11 2 they talk about the worldwide agreements with DEC  
12 and Dell, "Dell."

13 They want to exclude this document on the  
14 basis that it does not affect the market in Iowa  
15 when, in fact, this is a worldwide OEM agreement with  
16 Dell which does, in fact, sell computers in Iowa.

17 1321 is from Steve Ballmer who took a trip  
18 to Europe. Mr. Ballmer now -- or then second in  
19 command or at some very high level, always at  
20 Mr. Gates's right hand, no matter what his title was.  
21 And he says, Your Honor, do you see right in the  
22 middle? I've highlighted this. This is Mr. Ballmer  
23 talking. "The suggestions are not specific to  
24 Europe. Read them all please."

25 So this exhibit by its very terms sets

1 policies for the United States. And I highlighted  
2 some of these folks, Your Honor, who are high-level  
3 executives in Redmond and some of the policies that  
4 he has set forward in this document.

5 Exhibit 1881 is from Mr. Maritz to  
6 Mr. Gates, Jeff Raikes, Mike Maples, and others,  
7 including Mr. Ballmer, about Mr. Maritz's European  
8 trip. He goes to Europe and they -- Microsoft wants  
9 to exclude this document, but what he says has to do  
10 with the worldwide market. And he's talking about  
11 how he went to Europe and tried to convince Europeans  
12 that now that they have already made a major  
13 investment in Windows as a client and in learning how  
14 to support it, that Microsoft offers that the  
15 products will be designed to leverage desktop  
16 investments and to work together. Something that we  
17 see in a lot of documents.

18 He talks about, "We have a framework now  
19 that leverages directly off the desktop where we are  
20 dominate and provides solutions for most of the new  
21 things that companies want to do." And, again, he  
22 sets out policies for Microsoft on a worldwide basis.

23 Exhibit 3044 which they seek to exclude as  
24 not affecting Iowa.

25 MR. HOLLEY: Your Honor, I hate to

1 interrupt, but every single one of these document is  
2 not subject to our motion.

3 MS. CONLIN: It's on your list, Steve.

4 MR. HOLLEY: I'm sorry, Ms. Conlin. It  
5 isn't.

6 MS. CONLIN: They are all on the list, and  
7 you've got that --

8 MR. HOLLEY: No. I'm looking at it now. I  
9 mean, I just -- I don't want to take time if we don't  
10 have a fight.

11 MS. CONLIN: Well, I don't want to take  
12 time if we don't have a fight either, but I got this  
13 list from your materials, Exhibit A, right here.

14 THE COURT: While you're doing that, can we  
15 take a short recess?

16 MR. HOLLEY: Yes, Your Honor.

17 THE COURT: Thank you.

18 (A short recess was taken.)

19 MS. CONLIN: It was good that we had the  
20 interruption because Mr. Holley has convinced me all  
21 these documents are the once they don't want to  
22 exclude and I misread. I had the wrong Exhibit A.  
23 So I am going to talk a little bit about a few  
24 documents that they do want to exclude.

25 THE COURT: Okay.

1 MS. CONLIN: Though the basic --

2 THE COURT: Are they in here?

3 MS. CONLIN: No, Your Honor.

4 Unfortunately, they are not. They are in Microsoft's  
5 attachment.

6 THE COURT: Okay. I have those.

7 MS. CONLIN: Exhibit V, Your Honor, is one  
8 that has to do with the Indonesia people PC's  
9 programs.

10 THE COURT: V?

11 MS. CONLIN: "V" as in "Victor" or  
12 "victory." It is plaintiffs' 9596 produced in the  
13 RealNetworks litigation.

14 THE COURT: I'm getting there.

15 MS. CONLIN: I'm sorry, Your Honor. I  
16 would have made copies of those if I had been paying  
17 greater attention.

18 THE COURT: I'm there.

19 MS. CONLIN: Okay.

20 THE COURT: 9596.

21 MS. CONLIN: Yes, Your Honor.

22 This is a message from Will Poole to Jim  
23 Allchin. Mr. Poole, I believe at this time, was the  
24 head of Microsoft's -- they change the name all the  
25 time, but the streaming media division or the digital

1 media division here in the United States of America,  
2 Redmond. Of course, Jim Allchin is now the  
3 co-president of the platform division of Microsoft,  
4 one of the highest-level executives in Microsoft  
5 since about 1990. And Kurt Kolb, another very  
6 high-level executive. And as I said to the court,  
7 Microsoft treats the market as worldwide. Its  
8 executives have jurisdiction over the entire world in  
9 terms of their ability to set policy and move the  
10 company. And there is simply little distinction  
11 within Microsoft in terms of what these executives  
12 do. This has to do with Indonesia.

13 As I pointed out to the court, the stopping  
14 of Linux or the stopping of DR-DOS in Germany does,  
15 in fact, affect the people of Iowa, the consumers of  
16 Iowa because if these competing-operating systems  
17 cannot get a leg up and it doesn't matter where, then  
18 they cannot continue in business as DR-DOS was  
19 eventually withdrawn from the market, and competition  
20 dies.

21 Exhibit -- let's see. Their Exhibit EE,  
22 and I chose these randomly, Your Honor. This one I'm  
23 quite familiar with personally. It is 9006. I used  
24 this in the deposition of Jody Snodgrass.

25 THE COURT: I'm there.

1 MS. CONLIN: Okay. Your Honor, Jody  
2 Snodgrass was the program manager for Windows 3.0.  
3 And in that capacity, of course, developed a product  
4 called Windows 3.0 which was sold not only in the  
5 United States but throughout the world. And in her  
6 capacity she gets from a person, I think, in Korea.  
7 He is the Far East Product Engineering -- he's in the  
8 Far East Product Engineering Group. And he sends her  
9 a message commenting on a document which I also have,  
10 Your Honor, but doesn't appear to be in here, saying,  
11 "Bill Gates ordered to all application-business units  
12 to include checking routines of operating  
13 environments and if it is Microsoft DOS, nothing will  
14 happen. But if it is a non-Microsoft DOS, such as  
15 DR-DOS, application will display messages saying that  
16 this application has been developed and tested for  
17 Microsoft MS-DOS," and so on.

18 And they want to know how to do that check,  
19 how to run that check. And so they write Jody  
20 Snodgrass, and she, in turn, sends this on to Phil  
21 Barrett and Tom Lennon. All of these people are in  
22 Redmond. Bill Gates is in Redmond. The order that  
23 he issued was not just to the Far East. It was to  
24 the United States of America and everyone else.

25 And if I may call the court's attention to

1 just one more document in this series. It's  
2 Exhibit GG, a letter from Samna to Jonathen Lazarus,  
3 who is the Director of Systems Strategy. And this is  
4 an ISV that produced a word processor, Your Honor,  
5 and providing to Mr. Lazarus information for his trip  
6 to Europe and complaining that in Europe they are  
7 considering Samna as a competitor only and treating  
8 us accordingly.

9 And the paragraph below the bullet point  
10 says, "We clearly understand that our product  
11 competes with your word processor. We believe that  
12 for Microsoft Windows to become a widely used  
13 graphical environment, your customers need and demand  
14 to have choices of high quality products in all the  
15 major applications areas. We are willing to work  
16 with you to promote windows and at the same time  
17 compete with you in the word processing market."

18 And again, Your Honor, this doesn't apply  
19 just to Europe. It applies to the worldwide market  
20 for Microsoft products, including word processors,  
21 operating systems, GUIs and office productivity.

22 THE COURT: Where is Samna out of? Where  
23 are they are from?

24 MS. CONLIN: Your Honor, they are in the  
25 United States. I'm sorry I can't --

1 THE COURT: They are a U.S. company?

2 MS. CONLIN: Yes, Your Honor. They are.

3 It doesn't --

4 THE COURT: That's all right. I was just

5 curious.

6 MS. CONLIN: I think -- it is cut off. It

7 eventually becomes a part of Lotus which becomes a

8 part of IBM.

9 THE COURT: Okay.

10 MS. CONLIN: Microsoft argues -- and I

11 apologize to the court for taking time to review

12 documents, but they were kind of fun.

13 THE COURT: Okay.

14 MS. CONLIN: I love my documents.

15 Microsoft argues that conduct outside the

16 relevant market is not relevant and the relevant

17 market is Iowa -- I believe that I've addressed that,

18 Your Honor -- contradicting its own argument that we

19 can't use documents in the world.

20 Microsoft seeks to exclude evidence only

21 outside the territorial boundaries of the United

22 States but does not explain why Microsoft conduct

23 outside of Iowa may be relevant.

24 Microsoft tries to confuse us about the

25 geographic market. The markets at issue in this

1 action are worldwide in their scope. The court has  
2 adopted a Finding of Fact 18 which says, "Therefore,  
3 in determining the level of Microsoft market power,  
4 the relevant market is the licensing of all  
5 Intel-compatible PC operating systems worldwide."

6 I believe, Your Honor, that that  
7 conclusively establishes for the purpose of this case  
8 that the operating system market is worldwide. And  
9 so what happens in other parts of the worldwide  
10 market has an impact on consumers in Iowa.

11 Microsoft argues that plaintiffs  
12 acknowledged the distinction between evidence from  
13 within Iowa and outside of Iowa in arguing that  
14 consumer testimony obtained from outside of Iowa  
15 would not be relevant to the views of Iowa consumers.  
16 We're not talking about views here, Your Honor.  
17 We're talking about Microsoft's conduct outside of  
18 Iowa which affected Iowa consumers.

19 Microsoft suggests in its brief that the  
20 court does not have jurisdiction to regulate conduct  
21 occurring outside of Iowa. We know that. The  
22 indirect purchaser actions in Minnesota, Wisconsin,  
23 California and other states were able to proceed  
24 because they seek to recover an overcharge and other  
25 damages incurred within the state regardless of where

1 the conduct that caused those damages occurred.

2 Microsoft's conduct outside of Iowa  
3 perpetuated the monopoly which Microsoft then used in  
4 Iowa to overcharge and otherwise harm Iowa consumers.  
5 We don't ask the court to regulate sales outside of  
6 Iowa.

7 Microsoft corporate culture demands that  
8 employees do whatever it takes to win, not only in  
9 the United States but also in Australia and Korea  
10 because Microsoft knows that the market is unitary  
11 because the market is worldwide. Anticompetitive  
12 conduct anywhere in the market is relevant. That is  
13 the fundamental error that underlies this motion.

14 Microsoft says it seeks to exclude the  
15 exhibits because they, quote, describe conduct that  
16 could not have affected Iowa consumers. But if the  
17 conduct affected the market, the worldwide market for  
18 computer software, then Iowa, as a part of that  
19 market, was affected."

20 We ask that the court deny Microsoft's  
21 motion in limine.

22 THE COURT: Rebuttal.

23 MR. HOLLEY: Your Honor, there is a  
24 profound confusion here that underlies the  
25 plaintiffs' submission. I've been an antitrust

1 lawyer for 22 years, and I've never heard anyone  
2 suggest that concept of a product market is the same  
3 as the concept of a geographic market.

4 The product market found by Judge Jackson  
5 is Intel-compatible PC operating systems. That is  
6 the product market. The geographic market found by  
7 Judge Jackson is the world, but that finding cannot  
8 trump the Iowa Code. It simply cannot.

9 Judge Jackson was not purporting to apply  
10 the Iowa Code, and whatever he said cannot change  
11 what the Iowa legislature said is the proper  
12 geographic market in an antitrust case in this state.  
13 So to the extent that plaintiffs' argument stand or  
14 fall on the notion that this is a world market, that  
15 argument simply is not available to them. And it  
16 does not matter what Judge Jackson said.

17 Now, turning first to the question of  
18 foreign antitrust proceedings. Ms. Conlin said that  
19 the purpose of the evidence that plaintiffs seek to  
20 admit has nothing whatsoever to do with foreign law.

21 Well, if that's right, then the evidence  
22 doesn't belong in this trial. I thought of an  
23 example as she was talking, and I think this is  
24 actually a very fair analogy. Say that there's an  
25 issue in this case about my birthday, and you could

1 ask me the question: Mr. Holley, what is your  
2 birthday? And I could tell you it's April 5th of  
3 1958.

4 But also assume that five years ago I was  
5 involved in a contentious lawsuit in Germany and I  
6 lost and there is a very nasty adverse judgment  
7 against me which is completely irrelevant to the  
8 matters in this case. But somewhere in the course of  
9 that 112-page judgment, it says, "Mr. Holley's  
10 birthday is April 5th of 1958." It's obvious, Your  
11 Honor, that using that adverse foreign judgment to  
12 prove my birthday has a prejudicial affect that  
13 grossly outweighs its probative value.

14 There is no dispute, for example, Your  
15 Honor, that Microsoft used per processor licenses.  
16 Microsoft contends and always did contend that  
17 there's nothing illegal about per processor licenses.  
18 If the plaintiffs want us to stipulate that Microsoft  
19 used per processor licenses prior to the 1994 consent  
20 decree, we will. That is not an issue in the case  
21 and certainly not a reason to admit a document  
22 relating to the Korean Fair Trade Commission to prove  
23 the point.

24 There also, Your Honor, is no dispute that  
25 Novell, as the owner of Digital Research DOS did not

1 like per processor licenses. Presumably, there are a  
2 multitude of exhibits that show that. And again,  
3 Your Honor, there is no need to introduce the concept  
4 of the Korean Fair Trade Commission into this case in  
5 order to prove either that Microsoft used per  
6 processor licenses or that Novell didn't like them.  
7 That is just extraneous evidence, and its prejudicial  
8 effect very much outweighs whatever probative value  
9 it has.

10 Another example that Ms. Conlin used is a  
11 document -- a response by Microsoft about the  
12 interoperability of its server operating systems with  
13 Unix and Linux server operating systems, a document  
14 submitted in Europe.

15 As far as I know, Your Honor, there is  
16 nothing in the fourth amended petition about in  
17 interoperability between Microsoft and non-Microsoft  
18 server operating systems. So we will object to this  
19 document introduction on that basis.

20 But it also has nothing to do with commerce  
21 in Iowa. These answers relate to European Commission  
22 case about whether Microsoft's conduct violated  
23 Article 82 of the Treaty of Rome. The Treaty of  
24 Rome, the last time I looked, has no application in  
25 this state. So this is completely irrelevant

1 evidence.

2           And I don't agree, Your Honor, with respect  
3 to plaintiffs' admission that it's perfectly all  
4 right to tell the jury about these foreign-antitrust  
5 proceedings. It does matter. It's prejudicial. It  
6 invites them to believe that Microsoft is the subject  
7 of antitrust proceedings around the world. And where  
8 there is smoke, there must be fire. That's why the  
9 plaintiffs want to tell them about these proceedings.

10           So I think, Your Honor, the record is clear  
11 that if the probative value of these documents is as  
12 marginal as Ms. Conlin accepted that it is, the  
13 prejudicial effect far outweighs that.

14           I would like to turn now, Your Honor, to  
15 the question about documents relating to conduct in  
16 foreign markets. And with apologies for interrupting  
17 Ms. Conlin, for which I should not have done, she was  
18 talking about the very sorts of documents that prove  
19 our point. They are on Exhibit A to our reply brief,  
20 and we are not making this overbroad request that  
21 plaintiffs accuse of us of making.

22           What we're saying is that some conduct that  
23 occurred in foreign countries, for example, in  
24 relation to OEMs that import large number of  
25 computers into the United States or dealings with

1 ISVs in foreign countries, that is, independent  
2 software vendors, Your Honor, that sell their  
3 products in the United States. We're not saying that  
4 because a meeting occurred in London, that that is  
5 irrelevant to this case.

6 But we are saying, Your Honor, that there  
7 are some actions by Microsoft in foreign countries  
8 that have no substantial bearing on competition in  
9 the state of Iowa. And those documents, Your Honor,  
10 should be excluded.

11 THE COURT: This is Exhibit A to your  
12 memorandum, right?

13 MR. HOLLEY: The opening memorandum, Your  
14 Honor -- this is part of the confusion. Exhibit A to  
15 the opening memorandum is the list of documents --

16 THE COURT: Right.

17 MR. HOLLEY: -- that we believe should be  
18 excluded, and then maybe we should call it Appendix A  
19 to the reply brief which is a list of documents that  
20 we do not want excluded. And I think this is part of  
21 the source of confusion this morning.

22 THE COURT: Okay.

23 MR. HOLLEY: So the EDGI documents, Your  
24 Honor, are an example of what I'm talking about.

25 The argument that what people pay in

1 Indonesia for Windows has any bearing on what people  
2 in Iowa pay for Windows is just pure speculation.  
3 There's nothing in the expert reports that I'm aware  
4 of that says that there is a linkage between the  
5 price paid for Windows in Indonesia and the price  
6 that people pay in Des Moines for Windows. It's  
7 simply irrelevant, Your Honor.

8 And there are other examples which are even  
9 more pronounced, such as my Urdu example of Windows.  
10 I mean, there are some things that Microsoft does in  
11 the world that don't have any bearing on what happens  
12 here in Polk County. And the jury doesn't need to  
13 hear about them. And there is a potentially adverse  
14 effect on Microsoft in terms of just prolonging the  
15 trial and confusing matters to bring all these things  
16 in.

17 THE COURT: So all these exhibits in your  
18 reply brief, Exhibit A, you're requesting that they  
19 not be allowed, is that right?

20 MR. HOLLEY: No, Your Honor, just the  
21 opposite, that the reply brief Exhibit A are examples  
22 of documents involving foreign conduct where we are  
23 not saying that they should be excluded.

24 THE COURT: Okay. Sorry.

25 MR. HOLLEY: No. We should have figured

1 out a better way to do this, Your Honor.

2 Now, Ms. Conlin spent a long time talking  
3 about Vobis. And since I've been dealing with Vobis  
4 since 1991, and I apologize for taking the court's  
5 time, but I just can't allow those statements to  
6 stand because they aren't true. Vobis.

7 Vobis, as Theo Lievin, the former president  
8 testified, owned a bunch of computer stores in  
9 Germany. They gave their customers the choice of  
10 MS-DOS versus DR-DOS. And nobody wanted DR-DOS,  
11 which is why Mr. Lievin found himself with 50,000  
12 useless holograms, which Mr. Kempin did him the favor  
13 of buying from him. That is not anticompetitive.  
14 The U.S. Federal Trade Commissions spent a long time  
15 looking at all of this and nothing ever happened in  
16 connection with the episode.

17 It is true that Mr. Kempin testified that  
18 he got angry with Mr. Lievin because he thought  
19 Mr. Lievin had backed out of the deal that the two of  
20 them had. Mr. Kempin said to him that the price of  
21 Windows would be higher if he took it without MS-DOS.  
22 But the next day he realized his mistake and the  
23 agreement that Vobis signed does not reflect any  
24 different pricing than the pricing that existed  
25 before the fight between these two German gentlemen

1 in Hanover, Germany.

2 I don't think any of this alters our  
3 argument, Your Honor. Nobody in Polk County owns a  
4 Vobis computer unless it's by some freak accident  
5 that they happen to have one. The dealings between  
6 Mr. Kempin and Mr. Lievin do not affect competition  
7 in the state of Iowa.

8 Now, after our break Ms. Conlin pulled out  
9 a couple of exhibits that we say do deserve to be  
10 excluded. And she made the argument that because  
11 executives in Redmond make decisions about foreign  
12 countries, that somehow those decisions are relevant  
13 to this case.

14 Let's use a different example. Let's  
15 assume that we're talking about a Swiss  
16 pharmaceutical company that fixes prices of bulk  
17 vitamins to farmers in Iowa. This example is real.  
18 This happened. The question is: Did those decisions  
19 in Zurich affect consumers in Iowa? In that case the  
20 answer is obviously, yes, they did.

21 But in our case the fact that certain  
22 decisions were made in Redmond does not answer the  
23 question whether the actions that were taken as a  
24 result of those decisions in Japan or in Indonesia,  
25 Malaysia or Bangladesh had any effect in Iowa.

1           And I think, Your Honor, we've gone through  
2           and carefully looked for -- we did this, you know,  
3           advertently. We looked for documents where the  
4           foreign conduct just did not affect Iowa. And I  
5           think that if Your Honor looks at the two sets of  
6           documents in Exhibit A to the motion versus Exhibit A  
7           to the reply, you'll see that, you know, that we  
8           accept the proposition that sometimes things that  
9           happen in Paris affect Des Moines. There's no doubt  
10          about that. But sometimes no. And it's in the  
11          second category of cases, Your Honor, that the  
12          prejudice of having these things in the case  
13          outweighs their probative value.

14          This is particularly true, Your Honor, when  
15          the document contains an allegation that Microsoft  
16          violated the law someplace. So one of documents that  
17          plaintiffs particularly like is some Novell document  
18          accusing Microsoft of violating Japanese competition  
19          law. So here we have our foreign-antitrust-  
20          proceeding issue times two because now we don't even  
21          have a proceeding from the Japanese Fair Trade  
22          Commission. We have an allegation by a competitor  
23          that something Microsoft did violated Japanese law.

24          Well, nobody is going to come testify, (a),  
25          there was never any finding by the Japanese that that

1 was so. And there's no evidence that is going to  
2 come into the trial about that. So the prejudice of  
3 telling our jury that Microsoft was accused of  
4 violating Japanese law outweighs whatever -- I'm not  
5 even sure what the probative value of that is.

6 I mean, people from Utah can come to this  
7 courtroom and testify about what they say Microsoft  
8 did and how it affected their business. We will see  
9 whether they show up. But if they do, they can  
10 testify about that. They don't need to do it by  
11 reference to the Japanese government. It's just not  
12 necessary. And the prejudicial impact of it far  
13 outweighs the value.

14 So for those reasons, Your Honor, Microsoft  
15 submits that its motion should be granted.

16 THE COURT: Thank you, sir.

17 Move on to the second motion in limine.  
18 The Microsoft motion to preclude plaintiffs from  
19 presenting evidence of unethical business conduct.

20 MR. HOLLEY: Your Honor, you have me again  
21 on this one.

22 This motion presents issues that are  
23 similar to ones that Your Honor has heard me describe  
24 previously in connection with some of Microsoft's  
25 motions for partial summary judgment.

1           And that's because, as I've told the court  
2 before, this is not a tort case. It is not a  
3 business tort case. Nor is it some sort of  
4 generalized referendum on whether the jury thinks  
5 that Microsoft is a good company or a bad company.

6           This is an antitrust case, and there are  
7 very clear rules about what does and does not  
8 constitute anticompetitive conduct that can give rise  
9 to an antitrust liability. There are many things  
10 that companies do to one another that may constitute  
11 business torts. And they may be actionable in the  
12 state of Iowa, but they do not constitute antitrust  
13 violations. And the view that the plaintiffs are  
14 urging on the court is in my submission, Your Honor,  
15 a plea for the abandonment of legal standards that  
16 have been developed over many years.

17           After I was here the last time, Your Honor,  
18 I had occasion to look at the ABA Model Antitrust  
19 instruction and their verdict forms in there, Your  
20 Honor. And at an appropriate time, we will be  
21 submitting a copy of that book for the court's  
22 consideration. But you'll notice, Your Honor, that  
23 there is no notion in there of asking a jury: Did  
24 the defendant violate Section 1 or Section 2 of the  
25 Sherman Act? That is not the way these cases are

1 tried. It's not the way they are sent to juries.  
2 And there's a very good reason why, Your Honor. And  
3 that's because aggressive competition, even  
4 competition that is so harsh that it drives people  
5 out of business, is not necessarily anticompetitive.

6 There are many, many cases that say this.

7       If I have competitive advantages that I got  
8 justifiably because I'm smarter, because I work  
9 harder, because I was lucky, because I made a good  
10 guess, I am entitled to the benefits of those  
11 advantages, even if everybody else goes out of  
12 business. That is the law in this country, Your  
13 Honor. And this is the law in Iowa.

14       Two years ago the Iowa Supreme Court in the  
15 Next Generation Realty case said exactly what I'm  
16 saying this morning, Your Honor. The court in that  
17 case held that the Iowa Competition Law does not  
18 prohibit aggressive business conduct even if it is --  
19 and these are the Supreme Court of Iowa's words,  
20 "unfair, brutal or even tortuous as long as it's not  
21 anticompetitive."

22       And I call Your Honor's attention to the  
23 Iowa Supreme Court's use of the word "tortuous."  
24 Again, Your Honor, this is not a case of business  
25 torts. There are many things that companies do to

1 one another that are very nasty and unappealing, and  
2 they are not anticompetitive.

3 So, Your Honor, telling the jury about  
4 actions that Microsoft has taken that did not impair  
5 the competitive process itself as opposed to making  
6 life difficult for IBMs, for Novell or Sun  
7 Microsystems or Digital Research invites the jury to  
8 decide this case on an improper basis.

9 The jury cannot impose liability on  
10 Microsoft under the Iowa Competition Law because it  
11 was mean or unfair or nasty. They have to find that  
12 what Microsoft did was anticompetitive in that it  
13 prevented these other people from competing fairly in  
14 the marketplace.

15 And again, Your Honor, over the years, both  
16 under federal law and the Iowa Analog to federal law,  
17 courts have figured out what these sorts of things  
18 are. And it isn't a generalized, you know,  
19 throw-it-up-in-the-air and see-what-you-think kind of  
20 test. There are very clear rules about what the line  
21 between aggressive conduct that is okay and  
22 anticompetitive conduct that is not.

23 So I would like to borrow Ms. Conlin's  
24 analogy from the last time she and I were here about  
25 the traffic accident case. What if we told the jury

1 that the defendant in a traffic accident case knocked  
2 somebody down at the Iowa football game last week.  
3 Just knocked them down. That's not nice. It paints  
4 the defendant in a very bad light, and it had  
5 absolutely nothing to do with whether the defendant  
6 was negligent in causing the accident. And what it  
7 does, it invites the jury to make a finding on an  
8 improper basis.

9           So the same is true in actions that  
10 Microsoft described in its opening brief. Those two  
11 things were hiring talented people away from Sun's  
12 Microsystems and gathering competitive intelligence  
13 about RealNetworks.

14           Plaintiffs appear to suggest, based on  
15 questions at depositions and in briefing, that these  
16 things are things Microsoft should not have done.  
17 Somehow they are not nice. Well, there is no case  
18 that I'm aware of, Your Honor, in any jurisdiction  
19 that has ever held that either of those things is  
20 anticompetitive.

21           As Mr. Johnson told Ms. Conlin in his  
22 deposition, he has two choices in hiring salespeople  
23 at Microsoft who know anything about software. He  
24 can go to the computer science departments of  
25 colleges and business schools and try to hire them

1 there or he can go hire them from his competitors.  
2 But where else is he going to get them? And what is  
3 anticompetitive about offering somebody who works at  
4 Sun or IBM or Novell or Red Hat a better job to come  
5 to Redmond, make more money and work under better  
6 circumstances. That's not anticompetitive. People  
7 do that all the time.

8 My law firm hires people away from other  
9 law firms. People do it to us. That's just the  
10 nature of commerce.

11 The same is true about gathering  
12 information about what your competitors are doing.

13 We watch other law firms in New York and  
14 Chicago and Los Angeles and London to see what they  
15 are doing, what prices they are charging, what kind  
16 of services they are offering competitors, offering  
17 clients, based on publicly available information that  
18 we can get. We need to do that. That's how we  
19 determine whether we're conducting our business in a  
20 proper way.

21 Microsoft does exactly the same thing. It  
22 gathers as much information as it can about companies  
23 like RealNetworks to make sure that it's competing  
24 with them as effectively as possible. That's not  
25 anticompetitive. And there's no judge in the country

1 that I know of who has ever said that it was.

2 So the jury should not hear evidence about  
3 actions that are not anticompetitive just because  
4 someone thinks that they are not savory in some way.  
5 That is irrelevant evidence, and it has a serious  
6 thread of prejudicing the jury against Microsoft.

7 THE COURT: What if the anticompetitive  
8 evidence that was gathered is used to formulate an  
9 anticompetitive -- I'm sorry.

10 What if the evidence that was gathered, for  
11 instance, from another company like Sun is then used  
12 in the process of forming an anticompetitive plan or  
13 conduct by, say, Microsoft, is it relevant then?

14 MR. HOLLEY: I don't think so, Your Honor.  
15 I would say that in the circumstance you just posed,  
16 what would matter to the jury and what evidence they  
17 could hear about was the evidence of what Microsoft  
18 did to Sun that was anticompetitive.

19 I think it would be wrong to suggest to the  
20 jury that gathering evidence from Sun was also  
21 anticompetitive. So, you know, in your hypothetical  
22 either the actions taken against Sun standing on  
23 their own are anticompetitive or they are not. But  
24 you can't bolster that by saying that they did  
25 something perfectly proper, which was they gathered

1 as much publicly-available information as they could  
2 about Sun in order to formulate this improper plan.

3 Now, what do plaintiffs say about this,  
4 Your Honor? Their basic argument is founded on a  
5 case cited by the U.S. Supreme Court called  
6 Continental Ore. They put a whole lot of weight on  
7 Continental Ore and its progeny in the Eight Circuit.  
8 But those cases really do not apply here and here is  
9 why: Those cases are all conspiracy cases. They are  
10 not unilateral conduct cases.

11 Now, with the exception of the conspiracy  
12 claim that we've moved to dismiss, this is mostly, 99  
13 percent, a unilateral conduct case. The allegation  
14 is Microsoft did this to IBM, did that to DR-DOS, not  
15 that five vitamin manufacturers got together and  
16 fixed prices to Iowa farmers.

17 In a conspiracy case, unlike a unilateral  
18 conduct case, many things that, when viewed in  
19 isolation seem quite innocuous and perfectly legal,  
20 can become illegal if they are the product of illegal  
21 collusion. And in a conspiracy case, we fully agree  
22 with the concept that it is a bad idea to  
23 compartmentalize very tightly what drug company  
24 number one and drug company number two did and drug  
25 company number three did because then you can't see

1 the scope of the conspiracy.

2 So what the Supreme Court said in  
3 Continental Ore makes perfect sense. Its application  
4 in this case does not make sense.

5 The more recent and directly relevant  
6 precedent is United States v. Microsoft, where the  
7 en banc D.C. Circuit refused to predicate liability  
8 on Judge Jackson's "course of conduct" because it was  
9 comprised of acts that were not themselves unlawful.  
10 You cannot take a series of perfectly lawful, maybe  
11 even pro-competitive acts, and pile them all together  
12 and squint at them and say that somehow they are  
13 transformed into an antitrust violation. That is not  
14 possible. There is no case that has ever said that,  
15 and we encourage the court not to follow that course.

16 Now, the plaintiffs say that actions that  
17 are not anticompetitive can still be admissible to  
18 show Microsoft's intent to "drive its rivals from the  
19 market." Well, that's a very dangerous -- and in our  
20 submission -- incorrect argument, Your Honor.

21 Everybody in business is supposed to want  
22 to get all of the business. That's what business  
23 people want to do. They want to hurt their rivals as  
24 much as they can and get as much business as they  
25 can.

1           Everybody should be in business, unless  
2 they are following some nonprofit-maximizing theory  
3 in order to get all of the business. And, in fact,  
4 that's what the antitrust laws are all about, about  
5 not punishing companies that seek to get the  
6 business.

7           It's when you cross the line and prevent  
8 competition from functioning that you run into  
9 trouble. And as I said before, Your Honor, that's  
10 why most serious antitrust violations do not involve  
11 unilateral conduct. Most of them are collusion  
12 cases.

13           Unilateral conduct is rarely the subject of  
14 antitrust scrutiny, and the reason why is because of  
15 what the Supreme Court of the United States said in  
16 Spectrum Sports. It's a very fuzzy line between  
17 going out there and fighting as hard as you can to  
18 get all of the business and going over the line and  
19 becoming anticompetitive. And we don't want to have  
20 such sweeping rules about anticompetitive conduct  
21 that we actually deter business people from engaging  
22 in vigorous competition because they are afraid that  
23 in hindsight someone is going to say, "Hey, you went  
24 over the line. You shouldn't have competed so hard.  
25 You should have left that guy a little more room."

1 Consumers do not benefit from that, Your Honor.

2 So what the plaintiffs want to do in this  
3 case is tell the jury about all sorts of things that  
4 Microsoft did that are not, perhaps, as attractive as  
5 one might like them to be. We, obviously, don't  
6 accept the plaintiffs' characterization of those  
7 actions and then invite them to punish Microsoft for  
8 competing too hard.

9 And as the Seventh Circuit said in the A.A.  
10 Poultry case, that we referred to in our papers:  
11 That sort of imposition of antitrust liability would  
12 discourage Microsoft from competing as hard it as  
13 can, which benefits consumers because they get lower  
14 prices and they get the steady introduction of new  
15 products, which are the result of Microsoft's  
16 competition to stay ahead.

17 So for these reasons, Your Honor,  
18 Microsoft's view is that evidence of allegedly  
19 unethical conduct, which is not itself  
20 anticompetitive, is irrelevant under Iowa Rule of  
21 Evidence 5.402. And its introduction would be  
22 unfairly prejudicial under Iowa Rule of Evidence  
23 5.403. And, as a result, this motion should be  
24 granted.

25 THE COURT: Response.

1 MS. CONLIN: Thank you, Your Honor.

2 Because Microsoft fails to identify the  
3 universe of evidence that it seeks to preclude by  
4 this broad motion, it will be necessary for the court  
5 to go line-by-line, exhibit-by-exhibit in any event,  
6 which makes this motion unnecessary and inefficient.

7 Besides that, Your Honor, with respect to  
8 the two things they do cite: One being the testimony  
9 of Kevin Johnson regarding Microsoft's attempt to  
10 hire away Sun employees and the second being the  
11 testimony of Mr. Lappenbusch with respect to sending  
12 people to a conference, RealNetwork conference under  
13 a false name. With respect to those two, they are  
14 admissible for proper purposes.

15 We do have, rather, an impossible burden in  
16 terms of addressing, Your Honor, anything other than  
17 those two cited examples.

18 Contrary to Microsoft's attempt to paint  
19 this type of evidence as irrelevant and prejudicial,  
20 evidence of Microsoft's unethical business practices  
21 is, in fact, relevant to plaintiffs' claims of which  
22 there are two, Your Honor. One of which is contract,  
23 combination or conspiracy. Two big claims, one of  
24 them is conspiracy.

25 Plaintiffs are entitled to introduce such

1 evidence under the Iowa rules. In fact, evidence  
2 regarding Microsoft's unethical business practices  
3 may be admissible for many purposes depending on  
4 which unidentified evidence Microsoft has in mind.

5 Microsoft argues that all evidence of  
6 Microsoft's conduct must, standing alone, be in  
7 violation of the Iowa Competition Law in order to be  
8 admissible.

9 Microsoft's assertion is unsupported by the  
10 law. The admissibility of evidence concerning  
11 Microsoft's conduct does not hinge on whether the  
12 conduct is lawful or unlawful. Regardless of whether  
13 Microsoft's unethical business practices violate the  
14 Iowa Competition Law when viewed in a box in  
15 isolation, plaintiffs are permitted to present  
16 evidence of that conduct to establish violations of  
17 the Iowa Competition Law.

18 You know, Your Honor, we're not confused at  
19 all about what we're trying to prove. Microsoft is,  
20 in fact, mean and nasty and unfair. But as  
21 Mr. Holley so passionately points out, that is not  
22 illegal. What is illegal is being mean and nasty and  
23 unfair and taking actions that are anticompetitive.  
24 And that's what we seek to prove and what we're  
25 entitled to prove.

1 Evidence of unethical and unfair business  
2 practices, Your Honor, was admitted in the National  
3 Farmers Organization case, which we have cited in our  
4 brief. And there's just a whole line of cases that  
5 explicitly and specifically say, "Do not view X in  
6 isolation." We are entitled to have the acts viewed  
7 as a part of Microsoft's anticompetitive conduct.

8 In the NFO case, Your Honor, the court  
9 held, "The court should recognize that the harmful  
10 consequences of certain unlawful conduct may have  
11 been exacerbated by otherwise lawful conduct," a  
12 direct quote, Your Honor, from the NFO case in the  
13 Eight Circuit under federal law.

14 The court goes on to say, "In such a  
15 situation the fact that lawful conduct contributed to  
16 additional injury should not prohibit recovery for  
17 that injury." It is just a very clear statement of  
18 universal law with respect to this issue. And  
19 Mr. Holley's attempt to make it something that it is  
20 not by suggesting that somehow only one of our two  
21 claims should be considered by the court -- I know  
22 that the court has under consideration Microsoft's  
23 motion for summary judgment on the conspiracy cases,  
24 but it has not been granted. And we certainly hope  
25 that it is not granted. But whether it is a

1 conspiracy or a monopoly charge, there is no  
2 distinction made in the cases between those two kinds  
3 of antitrust violations.

4         The United States Supreme Court case is the  
5 Continental Ore case, to which Mr. Holley referred to  
6 briefly. In that case plaintiff alleged that it was  
7 the victim of a conspiracy in furtherance of  
8 monopolistic and restrictive practices aimed at  
9 restricting the supply in order to drive it out of  
10 business -- Continental Ore out of business, out of  
11 the business of selling and refining Ore.

12         The Tenth Circuit examined the evidence and  
13 the allegations of the defendant -- against the  
14 defendant, each of them separately in a box and found  
15 each insufficient all by itself to establish a claim.

16 The Supreme Court clearly repudiated that way of  
17 looking at the evidence saying, "It is apparent from  
18 the foregoing that the Court of Appeals approached  
19 Continental's claims as if they were five completely  
20 separate and unrelated lawsuits. We think that this  
21 was improper. In cases such as this, plaintiffs  
22 should be given the full benefit of their proof  
23 without tightly compartmentalizing the various  
24 factual components and wiping the slate clean after  
25 scrutiny of each."

1 Another Eight Circuit case, Your Honor, is  
2 Alexander v. NFO. Again, the Eighth Circuit  
3 admonished the district court for viewing the many  
4 incidents of conduct as isolated, self-contained  
5 actions.

6 But what the court said in that case is,  
7 "The specific overt acts of the defendant must be  
8 viewed in light of their concerted marketing  
9 practices as a whole." Here, plaintiffs may  
10 introduce evidence of Microsoft's hiring away of  
11 competitor's employees.

12 The evidence is not to establish that that  
13 practice, standing alone in a box, is unlawful. But  
14 it's part of the scheme to eliminate competition,  
15 which does violate the Iowa Competition Law.

16 We should be given the full benefit of our  
17 evidence, including the evidence of Microsoft's  
18 unethical, unfair, mean and nasty business practices  
19 that were part and parcel of Microsoft's concerted  
20 exclusionary campaigns to monopolize and unreasonably  
21 restrain trade.

22 One of the things that Microsoft says, Your  
23 Honor, is intent is not an issue. In fact, the very  
24 definition of conspiracy includes -- which is one of  
25 the plaintiffs' two claims -- says that an agreement

1 between Microsoft and one or more companies which.

2 Microsoft specifically intended would  
3 restrain trade. You can put that issue to rest  
4 insofar as this motion seeks to exclude evidence of  
5 intent. It seeks to exclude evidence that goes  
6 directly to an issue in this case: What was  
7 Microsoft's intent? Was it specifically to exclude"  
8 -- I beg your pardon -- "explicitly intended to  
9 restrain trade?" That's the very definition.

10 Another issue that is -- well, let me say a  
11 word about Mr. Holley's analogy. He suggests that if  
12 someone hit someone and knocked them down at the Iowa  
13 State game, that that evidence would not be relevant  
14 to a traffic accident. Well, it would, Your Honor,  
15 under these circumstances: If the person that was  
16 knocked down was also the person hit and the question  
17 at issue is: Did the hitter run down the person in  
18 the car or bang into the person in the car on  
19 purpose? Then the fact that there was a fight before  
20 this would certainly be relevant to the issue of  
21 intent, relevant to the issue in a traffic case of  
22 punitive damages, relevant to the issue in this case  
23 of whether or not Microsoft's conduct was willful.

24 Another issue that is always significant is  
25 credibility, who to believe. When I started the

1 questioning of the two witnesses at issue, Your  
2 Honor, I had no idea that both of them would show  
3 themselves in connection with these issues to be, in  
4 my opinion, unworthy of belief. And certainly that  
5 is an issue the jury has to determine in every case.

6 The court may remember that I had to file a  
7 motion in order to finish Mr. Johnson's deposition.  
8 In that motion I attached several pages to illustrate  
9 why the deposition went so long. And some of those  
10 pages were about this memo about hiring people away  
11 from Sun.

12 Let me hand the court and counsel a copy of  
13 the memo at issue, which is what is marked as J1 to  
14 the deposition of Mr. Johnson.

15 The court may recall it because we have  
16 previously discussed it.

17 Bridgett Paradise writes Mr. Johnson. Ms.  
18 Paradise is a human relations -- or a human resources  
19 person. Mr. Johnson at this time is in the sales  
20 area. And she clearly says that one of the ways to  
21 bring Sun down is to go after their talent, and they  
22 are going to give them a reward to the recruiter with  
23 the highest number of Sun hires.

24 And Mr. Johnson replies, "This is great,"  
25 and goes on to suggest that "if we can get some of

1 their top people, they will bring others." And then  
2 says some specific areas where he wants to hire Sun  
3 people.

4 It says very clearly -- this document says  
5 very clearly, "We want to hire away specific  
6 employees of Sun in order to bring Sun down," to  
7 destroy Sun. I called his attention to his own  
8 words, which he spent many pages trying to distance  
9 himself from, with occasional smart-aleck remarks by  
10 his attorney.

11 I want to show those to the jury to see if  
12 they see what I saw, which is that the guy is just  
13 not truthful.

14 Lappenbusch was similar, only what was at  
15 issue was whether Microsoft sent people to  
16 RealNetworks under false names to learn their  
17 technical secrets. Again, credibility is an issue.  
18 And assembling under oath tends to prove relative  
19 facts about credibility.

20 The authority relied upon by Microsoft is  
21 inapposite, Universal Analytics. In that case the  
22 plaintiff claimed that the defendant's hiring away of  
23 the plaintiffs' employees was predatory. And that  
24 based upon that conduct alone was in violation of  
25 Section 2 of the Sherman Act.

1           That's not what we say here, Your Honor.  
2           It's not this conduct alone that is at issue. It's  
3           this conduct along with much other conduct to destroy  
4           Sun, to destroy competition in the relevant market  
5           that is at issue. And, of course, as I said,  
6           credibility is always at issue.

7           The cases relied upon by Microsoft involve  
8           situations where the only conduct alleged as the  
9           basis for the antitrust violation was the unethical  
10          or unfair business practices. That is just not the  
11          case here.

12          In addition, Your Honor, the evidence of  
13          Microsoft's business practices may assist the jury in  
14          understanding the likely effect of Microsoft's  
15          anticompetitive acts. Intent is relevant to the  
16          extent that it helps the finder of fact understand  
17          the likely effect of the monopolist conduct.

18          Evidence of Microsoft's unethical, unfair,  
19          mean and nasty business practices, such as the hiring  
20          away of competitors' employees, to drive its rivals  
21          from the market, is relevant to assist the jury in  
22          understanding the likely effect of Microsoft's total,  
23          concerted, anticompetitive campaign. And all of this  
24          kind of evidence may be relevant to treble damages.  
25          And I do want to say a word about that.

1 Microsoft seems to be confused, or at least  
2 some members of the team are confused about what Iowa  
3 law provides in that respect. And they think they  
4 are only liable for double damages. But they need to  
5 read the statute a little more carefully because what  
6 it says is that the court may award damages of up to  
7 double the amount of the actual damages. So that's  
8 three. Not double.

9 Plaintiffs must still prove at trial that  
10 they are entitled to treble damages and prove that  
11 Microsoft's conduct was willful and flagrant.

12 Microsoft -- plaintiffs' evidence regarding  
13 Microsoft's unethical business practices may be  
14 important to prove that willful and flagrant conduct.

15 Microsoft also says that this evidence is  
16 unduly prejudicial. There is just no support for the  
17 claim that evidence relating to Microsoft's business  
18 practices will cause the jury to punish Microsoft or  
19 to confuse the jury.

20 Microsoft has not identified any prejudice.  
21 They just assume that Iowa juries are not all that  
22 smart, much less prove that the evidence it seeks to  
23 preclude is substantially outweighed by the danger of  
24 unfair prejudice, confusion of the issues or  
25 misleading the jury, as is required.

1           We believe that evidence relating to  
2           Microsoft's business practices is admissible, and it  
3           goes to several issues that the jury needs to  
4           determine. And it is appropriate and fair to prove  
5           what Microsoft does in furtherance of its conspiracy  
6           and in furtherance of its maintenance of its  
7           monopoly.

8           THE COURT: Rebuttal.

9           MR. HOLLEY: Your Honor, Ms. Conlin has  
10          proved my point in multiple ways.

11          I called Your Honor's attention to the  
12          language in Alexander, the Eighth Circuit case on  
13          which she relies. It is, as I said, a conspiracy  
14          case, not a unilateral conduct case like this case.  
15          And I'll turn in a moment as to why that is so.

16          And what the Eighth Circuit said -- and  
17          this is quoted in footnote 4 of our reply brief on  
18          page 3 -- the Eighth Circuit expressly recognized  
19          that "no antitrust damages are recoverable" for  
20          injuries occurring "as a result of a competitor's  
21          lawful acts."

22          That is our point. No antitrust damages  
23          are recoverable as a result of a competitor's lawful  
24          acts, and no amount of talk about Continental Ore can  
25          change that result.

1 Both the Alexander case and the National  
2 Farmers Organization case, which is a companion case,  
3 involved the question of compartmentalizing proof  
4 alleged against coconspirators.

5 Ms. Conlin wants to characterize her case  
6 as a conspiracy case because in the Iowa Analog of  
7 Section 1 of the Sherman Act the word "conspiracy"  
8 appears. Well, many, many, many Section 1 claims  
9 have nothing to do with conspiracies, including most  
10 of the Section 1 style claims asserted in this case.

11 For example, the leading examples of  
12 Section 1 claims are "tying" and "exclusive  
13 dealings." And those are not conspiracy claims. And  
14 if you're trying a tying case or an exclusive dealing  
15 case, which is what the plaintiffs want to do here,  
16 the case law about conspiracy has nothing to do with  
17 it. It is a unilateral action, and each and every  
18 one of the actions alleged to be anticompetitive must  
19 be anticompetitive standing on its own.

20 These cases are very clear, and I encourage  
21 Your Honor in particular to read the Eighth Circuit  
22 decision in Alexander. It could not be more clear.

23 Now, I want to turn to this question of the  
24 Sun document, because I think it proves our point.

25 Microsoft can say until the cows come home,

1 "Let's go kick some Sun butt." Who cares? There's  
2 nothing wrong with that. People say things like that  
3 in business all the time. Every marketing person in  
4 America tells his or her salespeople to go "kick the  
5 butt" of the other company. If that is the source of  
6 antitrust liability, we're in a lot of problems here.  
7 That is not the basis for saying that somebody  
8 behaved in an anticompetitive way.

9         And the notion that you can impose  
10 exemplary damages under the Iowa Competition Law  
11 because somebody did things which are unfair has no  
12 basis in the law. You have to show willful and  
13 flagrant anticompetitive conduct, anticompetitive  
14 conduct. This is a term that has a very precise  
15 meaning, Your Honor. So we cannot ask the jury to  
16 impose a punitive sanction on Microsoft because  
17 Microsoft did things that the plaintiffs find  
18 unpleasant. That is not the law.

19         So for these reasons, Your Honor, I  
20 continue to believe -- and Microsoft urges the court  
21 to grant our motion on unethical but not  
22 anticompetitive conduct.

23         THE COURT: Thank you.

24         Plaintiffs' motion to compel Microsoft to  
25 make Mr. Gates and Mr. Ballmer available for

1 examination.

2 MS. CONLIN: Thank you, Your Honor. We ask  
3 the court to use its power under Iowa Rule of  
4 Evidence 5.611 to exercise control over "the mode and  
5 order of interrogating witnesses and presenting  
6 evidence to make the interrogation and presentation  
7 effective for the ascertainment of truth." This rule  
8 is the same as the federal rule under which many  
9 courts have entered orders requiring witnesses named  
10 by defendant and outside the jurisdiction of the  
11 court to come to court and testify in the plaintiffs'  
12 case in chief.

13 We have cited six or seven -- not the four,  
14 as defendant said -- cases which are directly on all  
15 fours with what we ask the court to do here.

16 One case went to the Tenth Circuit, and a  
17 certiorari was denied. And let me hand the court the  
18 relevant portions of the cases. I'm not going to  
19 read them to you, Your Honor, but I thought it might  
20 be handy to have them available.

21 THE COURT: Thank you.

22 MS. CONLIN: Because there is in the cases  
23 language that directly responds to everything that  
24 the defendant says.

25 In the Masons case, which is the first one,

1 Your Honor, that was a products case. It was the  
2 benzene case where the plaintiff had gotten Leukemia  
3 from benzene. And this is on a motion for judgment  
4 notwithstanding the verdict. And that was denied.

5 In that case, Your Honor, the court ordered  
6 the attendance of a witness from outside the  
7 jurisdiction, who was a Texaco employee. They  
8 ordered Texaco to bring that witness in the  
9 plaintiff's case-in-chief. The defendant assigned  
10 error, and the court overruled it.

11 Most of the cases deal with a question of  
12 whether the fact that a witness is outside the  
13 subpoena power of the court prevents the court from  
14 ordering attendance of a witness under the power of  
15 the -- let me start again.

16 The question of whether or not the witness  
17 is outside the subpoena power of the court is really  
18 not the question, not the issue. If the witness is  
19 under the power of the defendant, then the court has  
20 the power to order that person brought in the  
21 plaintiffs' case-in-chief. In every case the court  
22 says, "The defendant" -- like the defendant here --  
23 "misses the point." Those cases are Maran, Hitachi  
24 and Shawnee.

25 The cases usually hold that the court has

1 the power to do this. And in every case that we've  
2 found, the courts have granted the plaintiff's  
3 request. In every case, Your Honor -- the defendants  
4 cite no case, none, in which the request is denied.  
5 There may be some out there that I don't know about  
6 and that are not reported. But the ones we've  
7 found -- defendants have simply not found or at least  
8 brought to our attention any in which this kind of a  
9 request is denied.

10 I thought I had brought the court also one  
11 case that is not reported, but it seemed to us be  
12 important because -- the name of the case is Eolas v.  
13 Microsoft. And in that case -- I'm sorry I can't put  
14 my hands right now on those matters. I'll just tell  
15 the court, and I'll find it later. The exact same  
16 request that we make here was made. Only in that  
17 case, Your Honor, the plaintiffs, the Eolas, asked  
18 that the defendant make, as I understand it, all of  
19 the witnesses on its witness list available and the  
20 plaintiffs -- or apparently at the plaintiffs' option  
21 make those witnesses available in the plaintiffs'  
22 case.

23 Microsoft's only response is that there's  
24 nothing that permits this and these witnesses want to  
25 arrive during the defendant's case and then I can

1 cross-examine them. And besides that, there are lots  
2 of depositions, none of which, Your Honor, were taken  
3 by the plaintiffs in this case, and none of which  
4 addressed all of the issues in this case.

5 It also appears, Your Honor, that there  
6 was, according to the court, voluminous deposition  
7 testimony in Hitachi, and the court still ordered  
8 foreign citizens outside of the Continental United  
9 States to come to court and testify in the  
10 plaintiffs' case in chief.

11 Also, Your Honor, obviously, Iowa Rule of  
12 Civil Procedure 5.611 does give the court the power  
13 to do exactly this. And many federal cases under the  
14 very same rule say exactly that. The defendant  
15 helpfully tells us about the Iowa Rules of Civil  
16 Procedure that limit the court's subpoena power,  
17 which is not at issue here.

18 We will -- according to the defendants, if  
19 the court let's us call Mr. Ballmer and Mr. Gates in  
20 our case-in-chief, we will get what defendant calls  
21 "two bites at the apple." Microsoft isn't exactly --  
22 get's exactly the same thing. They cross-examine the  
23 witnesses in the depositions, and they can have these  
24 two witnesses come as many times as they choose  
25 during their case because they are under the control

1 of the defendants.

2 Microsoft also says something that, I  
3 think, is really quite remarkable. And that is that  
4 videotape testimony is the practical equivalent of  
5 live testimony. I don't think so. It's just not.

6 Certainly, Your Honor, it's better than  
7 what we used to have to do, which is read the  
8 depositions to the jury. But it is no substitute for  
9 having the witness live in court and being able to  
10 observe the witness directly.

11 Microsoft insists that it has a right, and  
12 I quote "to present a coherent case to the jury, not  
13 bits and pieces of its defense during the plaintiffs'  
14 case-in-chief."

15 We have precisely the same right, and we  
16 should not be forced to wait until the defendants get  
17 around to bringing these two important witnesses, if  
18 ever they do.

19 Particularly offensive, Your Honor, is  
20 Microsoft's statement from page 7 where they say,  
21 "There is good reason to believe that plaintiffs'  
22 request may be motivated by a desire to generate  
23 publicity and create a spectacle rather than any real  
24 need for the testimony."

25 Your Honor, the defendant presents

1 absolutely no support for its suggestion. The  
2 predilection for spectacle creating belongs  
3 exclusively to the defendant, who notified the press  
4 of the hearing on my motion -- on the motion to  
5 disqualify me in order to trash my reputation. And  
6 it did, in fact, get on the front page of the paper.

7       Microsoft has never before nor since  
8 notified the press of any hearings. I know they  
9 notified the press, Your Honor, because I called  
10 Mr. Elbert on the way home from the hearing and asked  
11 him exactly that question. And they told me that  
12 they had. He got notified by a Microsoft PR person.  
13 Otherwise, he wouldn't have known about the hearing.

14       So I think, Your Honor, that this  
15 additional attack on us, the idea that we would be  
16 asking Mr. Gates and Mr. Ballmer to come to court and  
17 provide testimony in order to present some kind of  
18 spectacle is just simply ridiculous.

19       Whenever Mr. Gates and Mr. Ballmer arrive,  
20 whether it's in our case or the defendant's case,  
21 there is likely to be public attention. It's hard  
22 for me to see how that presents any reason whatsoever  
23 to deny this motion.

24       Microsoft also assures the court that we  
25 really don't need the testimony of Mr. Gates and

1 Mr. Ballmer, the two top level executives directly  
2 and deeply involved in the decision that led to the  
3 conduct that we complain about. I just don't know  
4 how they reach that conclusion. And they don't say.

5 With respect to Mr. Gates, there is much  
6 deposition testimony. But as I said, none addresses  
7 issues like Linux, undocumented APIs in Office Today,  
8 the 12 tenets that Microsoft has recently within the  
9 last few months come out with, and hundreds and  
10 hundreds of other topics.

11 With respect to Mr. Ballmer, there's  
12 relatively little deposition testimony. And again,  
13 none on the critical -- on some of the critical  
14 issues in this case.

15 Microsoft cites no cases in support of its  
16 position, and we have found none. It does make a  
17 halfhearted stab at distinguishing a few of those  
18 cites by the plaintiffs. But the fact is, Your  
19 Honor, they are simply not distinguishable. They are  
20 directly on point, and they say exactly what we say  
21 they say. The court has the power to order Microsoft  
22 to produce any of its witnesses in plaintiffs'  
23 case-in-chief.

24 We only want two, Your Honor. The two most  
25 important representatives of Microsoft. We need the

1 testimony to present our case in a coherent fashion,  
2 and we shouldn't be forced to wait until Microsoft  
3 brings them at whatever time it sees fit.

4           Of course, Microsoft has often named  
5 witnesses and not brought them. So plaintiffs do not  
6 want to risk that outcome where plaintiffs are not  
7 only forced to wait and present their evidence on  
8 cross. Of course, the court, as an experienced judge  
9 knows, a lot of difference between the way  
10 cross-examination is conducted and the way direct  
11 examination is conducted. We don't want to have to  
12 wait and present that evidence on cross rather than  
13 direct. But we also risk the possibility that the  
14 defendant will not bring these witnesses at all. And  
15 we have a right to their testimony. The jury has a  
16 right to see them, to hear them, to assess their  
17 credibility and to hear from them on issues directly  
18 relevant to this case as opposed to those other  
19 cases.

20           So we ask the court to exercise its power  
21 under 5.611 and bring these two witnesses out of the  
22 many, many dozens that the defendant names to court  
23 in our case-in-chief.

24           THE COURT: How does Iowa Rule of Civil  
25 Procedure 1701 play in this case?

1 MS. CONLIN: I don't think it plays in at  
2 all. You have the -- these two guys are under the  
3 control of Microsoft, which is a party to this  
4 litigation.

5 Indeed, Mr. Gates is practically synonymous  
6 with Microsoft. 1701 has nothing to do with this.  
7 It doesn't have to do with the court's subpoena  
8 power. It has to do with the court's ability to  
9 control the mode of interrogating witnesses and  
10 presenting evidence.

11 All the cases I gave you, Your Honor, deal  
12 with the issue of subpoena power and whether this has  
13 anything to do with it. And the courts say, "No.  
14 Misses the point." You have the power to order  
15 Microsoft to bring these two witnesses to court in  
16 the case-in-chief of the plaintiffs.

17 THE COURT: Have you come across any Iowa  
18 cases?

19 MS. CONLIN: No, Your Honor, I have not.

20 THE COURT: How about any particular  
21 federal case in Iowa that tried to interpret Iowa  
22 law?

23 MS. CONLIN: No, Your Honor. All of these  
24 cases are from other jurisdictions. I don't think  
25 this issue has -- to my knowledge, the issue has not

1 previously come up.

2 THE COURT: Very well. Thank you.

3 Mr. Holley -- or, Mr. Green, sorry.

4 MR. HOLLEY: Mr. Green, Your Honor.

5 MR. GREEN: Thank you, Your Honor.

6 Let me address, before I get into my  
7 presentation, some of the more unsupportable  
8 statements that were made by Ms. Conlin.

9 First of all, 5.651 is not a Rule of Civil  
10 Procedure. It is a Rule of Evidence. That rule  
11 assumes that the witnesses are already lined up, so  
12 to speak, and the court has exercised whatever power  
13 it has to bring the witnesses. It only has to do  
14 with the court being able to control -- you know, in  
15 what order -- the matter. It doesn't have anything  
16 to do with the ability of the court to have these  
17 witnesses compelled to show up at a certain time.

18 And I think the rule you cited, the Rule  
19 17.1 or whatever it is, which I'll get into, does  
20 apply in spades to this situation, contrary to what  
21 Ms. Conlin said.

22 This business about we made an allegation  
23 to create a spectacle, that's the only thing you can  
24 really conclude for why they would want to bring  
25 Mr. Gates and Mr. Ballmer here because there is no

1 justification for them wanting to call them in their  
2 case-in-chief for several reasons, which I'll get  
3 into.

4           And to say that we're creating a spectacle  
5 in reference to a motion to disqualify, that order  
6 setting that hearing on the motion to disqualify was  
7 a matter of public record for everybody to observe.  
8 Even I found it on the court's online search. And  
9 the order that was entered was a result of them  
10 wanting additional time. And the court entered an  
11 order and said exactly what the motion was about and  
12 set it for a date. So, you know, that's all absurd  
13 allegations. We don't have anything to do with it.  
14 But they need to be talked about just to show how  
15 absurd they are.

16           And then to say the videotape testimony  
17 that we say that the videotape deposition is the  
18 practical equivalent to live testimony, that's what  
19 the cases say. That's not what we say. The cases  
20 say that, and it's true. I mean, I've been around as  
21 many trials as Ms. Conlin has, and it is. In fact,  
22 there is some support for the fact that people watch  
23 so much TV that they pay more attention to a  
24 videotape testimony than they do live testimony.

25           Now, I'll get into the argument -- you

1 know, one thing -- two things I think we want you to  
2 consider, Your Honor.

3 First of all, there was an order entered by  
4 Judge Reis. I think it was back in 2002, and it's  
5 Exhibit A to our papers. I don't know the exact date  
6 here, but anyway, that was a denial of a motion to  
7 compel by the plaintiffs.

8 And out of that came the ruling, which has  
9 been followed in this case, that if anybody wants to  
10 take a deposition of anybody on "Iowa specific issues  
11 or for other good cause, they can do so."

12 They never once asked to take the  
13 deposition of either Mr. Gates or Mr. Ballmer in this  
14 case. If they were so critical, if their testimony  
15 was so critical to their case-in-chief, there is  
16 provision in the Iowa Rule for them to take those  
17 depositions and present them in their case. They  
18 never did it. They never asked, which goes to show,  
19 what is the purpose of this?

20 The purpose of it is either to disrupt  
21 Microsoft's presentation or to create harassment to  
22 Mr. Gates or Mr. Ballmer or to create the spectacle  
23 that we allege.

24 Their own actions deny their statement that  
25 they need this testimony for their case-in-chief.

1 And that is a requirement -- in fact, it has to be a  
2 critical need, according to their own cases that they  
3 cite.

4 Go back to the start, Your Honor. They are  
5 outside of the subpoena power, and that's the only  
6 power -- that Rule of Civil Procedure, it's  
7 not -- the rule of evidence doesn't have anything to  
8 do with it. That has to do with the court being able  
9 to control the presentation. But it only talks about  
10 the subpoena power, and it does talk about trial. So  
11 it doesn't apply just to depositions.

12 And contrary to what Ms. Conlin said, it  
13 was her own judge, Judge Bennett, the one she likes  
14 so well up in the Northern District, that was a  
15 vice-president of Land of Lakes, who lived outside  
16 the 100-mile radius of Fort Dodge where the trial  
17 was. And he said, you know, "I can't compel them to  
18 come to trial. But that rule, which is equivalent to  
19 the Iowa rule, only gives me the power to quash  
20 subpoenas, it doesn't go the other way." And he, in  
21 a footnote in that opinion, Your Honor, said  
22 nobody is -- because federal procedures says, "Okay.  
23 If the state or city expands that power, you can use  
24 that, right?" In other words, Iowa. And he, in a  
25 footnote in that case, says, "Nobody cited to me

1 anything under the Iowa Rules of Civil Procedure that  
2 says I have this authority." That is as close as we  
3 have to an Iowa case, Your Honor, and we think it  
4 clearly applies.

5 The live testimony of Mr. Gates and  
6 Mr. Ballmer is not necessary for the jury to  
7 understand the issues presented during the  
8 plaintiffs' case. They don't even allege that. They  
9 don't even really say why they want Gates and Ballmer  
10 involved in there. If they thought that they needed  
11 their testimony in their case-in-chief, they had  
12 every ability to take their depositions. And they  
13 chose not to do so. So it just isn't true.

14 And the fact is they don't need it because,  
15 one, they know they are going to be called in our  
16 case. And I represent to the court that we are going  
17 to call them.

18 And they also know that they have all sorts  
19 of video testimony from Gates and Ballmer to play in  
20 their case-in-chief, and they have so designated.  
21 And they had much more available than they  
22 designated.

23 So they will not be prejudiced if they do  
24 not appear in the case-in-chief. And the defendant  
25 because it will -- maybe -- I mean, they talk about

1 calling them the second month of trial. That's what  
2 they put in their motion.

3 Well, we know, at least, the statements  
4 that have been made, that their case is going to go  
5 at least three months, maybe four months, I don't  
6 know, which means that there's going to be a lot of  
7 evidence presented in their case after they are going  
8 to call Mr. Gates and Ballmer, if they can get the  
9 court to grant the order that they are asking for  
10 now, which means there will be a lot of things that  
11 might come up which we would have to bring Mr. Gates  
12 and Ballmer back to testify and give them another  
13 opportunity for cross-examination. So they would  
14 really have three bites of the apple.

15 They have all this video testimony. They  
16 had a bite of the apple that they didn't take, and  
17 that was to take the depositions. But they have all  
18 the video deposition from prior proceedings. They  
19 want them in chief, and then they want to be able to  
20 cross-examine them again. And that's just not fair  
21 either to the witnesses or to Microsoft's  
22 presentation of the case because they don't have the  
23 critical need.

24 Now, they allege that they asked that they  
25 be produced in the case-in-chief, and we

1 categorically denied it. That's not the way it was.

2 We just never answered the letter because, frankly,

3 the request was so absurd.

4 As I stated, there is no power or authority

5 that can be cited by the plaintiffs in support of

6 what they are asking to do under Rule 1.701. 1.701

7 is the subpoena power rule and is limited at best to

8 statewide for trial purposes. It used to be more

9 limited than that. But it's a statewide subpoena

10 power. But neither Mr. Gates or Mr. Ballmer live in

11 this state.

12 The "officer of a party" language does not

13 expand the power. And the Johnson case, which is the

14 case of -- Judge Bennett's case cited on page 4 of

15 our brief, and the Jamsports case that I've cited on

16 page 4, clearly say that. Really all it does is it

17 governs the court's ability to quash the subpoena

18 power.

19 And as I said, Judge Bennett made clear in

20 his opinion in Johnson that there was no -- the Iowa

21 Rule of Civil Procedure didn't help him because it

22 didn't expand it.

23 Now, Iowa Rule 1.7 -- 1.1704(3) does allow

24 deposition testimony when the deponent is out of the

25 state. That's the language. Gates and Ballmer prior

1 testimony is going to be introduced. They could have  
2 taken their deposition in this case. They have  
3 designated in this Exhibit B to our papers, Your  
4 Honor, a lot of testimony from Mr. Gates and  
5 Mr. Ballmer.

6 Exhibit C, which is attached to our brief,  
7 is the Gordon testimony, which was available to them.  
8 I mean, they've made their decisions on this, their  
9 own decisions.

10 And I told you about -- they could -- the  
11 court order was dated, I'm sorry, 12/17/02 -- '04, I  
12 mean, '04, Judge Reis. And they exercised no  
13 inclination even to try to say there was good cause  
14 for Iowa specific testimony they needed to take of  
15 these individuals.

16 We've calculated what they have designated,  
17 Your Honor, with regard to Mr. Gates and Ballmer, and  
18 it's all video, by the way. And it is two to four  
19 days of testimony that they've already designated for  
20 their case-in-chief. Assuming you can read a page of  
21 testimony at proximately a minute or so.

22 The cases on page 5 of our brief have held  
23 video testimony is the equivalent of live testimony  
24 is not something we say. So there's no substantial  
25 need that the plaintiffs can show.

1           What the plaintiffs would like to require  
2           would not promote the interest of justice or the  
3           efficient management of the case.

4           As I said, it's likely to require these  
5           witnesses to come two times live and three times if  
6           you count their testimony that is already going to be  
7           read in.

8           It is an unnecessarily waste of time and  
9           resources for everybody, including the court and all  
10          the parties involved.

11          Iowa Rule of Evidence 5.611, two of the  
12          points in that rule are, one, the court should  
13          exercise its reasonable discretion to avoid needless  
14          consumption of time and to protect witnesses from  
15          harassment.

16          Well, what they propose would consume more  
17          time because of the unnecessary bringing back; and,  
18          three, plaintiffs well know that these witnesses are  
19          very busy people, and that's why these two are  
20          singled out. It's not because they need them. It's  
21          because they want to, frankly, cause problems for  
22          these witnesses. And that's another reason that  
23          under Rule of Evidence 5.611 the court should deny  
24          this motion.

25          As I've said, Microsoft should not have to

1 present its case piecemeal. And I want to get a  
2 little bit into the cases they cite.

3 Number one, they are all federal cases,  
4 Your Honor, some of which are not reported. None of  
5 them are on point because in those cases either, one,  
6 the witnesses were critical and necessary for the  
7 jury's understanding of the plaintiffs'  
8 case-in-chief. That's not true here. Or the  
9 defendant was not calling -- or threatening not to  
10 call these witnesses so they would be available for  
11 cross-examination.

12 And as we know, when you cross-examine you  
13 can open up your case-in-chief. And deposition video  
14 testimony was not available to the plaintiff to show  
15 during their case-in-chief in any of those cases. So  
16 those cases really don't have anything to do with  
17 this case. They are all very distinguishable.

18 You know, as I said, we have the abundant  
19 video testimony from Mr. Gates and Mr. Ballmer, and  
20 there's not even any allegation in these papers where  
21 they say that their live testimony is critical for  
22 the jury understanding of the issues in this case  
23 because it just -- they can't make that allegation  
24 because it just isn't.

25 They've listed 62 live witnesses and

1 thousands of lines and months of video and other  
2 deposition testimony with -- you know, I don't know  
3 how many exhibits. Plus, Your Honor, they have 146  
4 findings of fact, which this court has given  
5 collateral estoppel effect to.

6 I mean, for them to say that they need  
7 Mr. Gates and Ballmer in this case for the jury to  
8 understand the issues, which is what they have to  
9 show, they have to show the critical need, is absurd.  
10 They have more or less admitted that they don't need  
11 it -- or they haven't admitted they don't need it  
12 because they didn't ask to take their deposition in  
13 this case. And they have all this available to them  
14 by video, collateral estoppel, all live witnesses.

15 And there would be absolutely no prejudice  
16 to the plaintiffs to wait to cross-examine Mr. Gates  
17 and Mr. Ballmer, who we will call. And there is  
18 something to be said, Your Honor, that a party should  
19 be able to control how they present their case. That  
20 is kind an old rule that, I guess, the plaintiff  
21 would just like to ignore. They can reopen their  
22 case-in-chief for the Iowa Rules, if they feel the  
23 need when Gates and Ballmer are called. And to say  
24 that it's a different way of examination if you have  
25 them on direct or in your case-in-chief, that doesn't

1 make any sense.

2 Either way these two witnesses are hostile  
3 witnesses, "hostile witnesses." The examination  
4 would be the same regardless. So that's the  
5 distinction that there is no difference.

6 Anyway, Your Honor, for the reasons that  
7 I've given and really to exercise and to cloud an  
8 attempt to really try to disrupt the way that the  
9 defendants want to present their case when there's no  
10 need for same and also to prevent harassment of these  
11 witnesses, we ask that this motion be denied.

12 Thank you.

13 THE COURT: Thank you. Mr. Green.

14 Rebuttal.

15 MS. CONLIN: Yes, Your Honor.

16 A party should be able, as Mr. Green says,  
17 to control how they present their case. That rule  
18 applies equally to the plaintiffs. We want to be  
19 able to control how we present our case, and that  
20 includes a presentation of testimony from Mr. Gates  
21 and Mr. Ballmer. I think that I do have to say, Your  
22 Honor, I think Judge Bennett would be a bit shocked  
23 to hear himself referred to as "my own judge."

24 MR. GREEN: I said "favorite."

25 MS. CONLIN: No. You said "my own judge."

1 In any event, he's not. He is one of my favorite  
2 judges. I think he's smart and writes good opinions.

3 The case, however, that they rely on from  
4 Judge Bennett is just not applicable here, Your  
5 Honor. It doesn't have anything to do with the  
6 request that we're making of the court.

7 Mr. Green says that we have to show  
8 critical need. Your Honor, it's just not so. That  
9 is not what the cases say.

10 Mr. Green also says that there can be only,  
11 according to him, three purposes for to us call  
12 Mr. Gates and Mr. Ballmer. I just cannot think it is  
13 necessary for me to make a record about the fact that  
14 Mr. Gates and Mr. Ballmer have been involved directly  
15 in every single decision that affects competition in  
16 these two markets.

17 The documents that the court has already  
18 seen, the findings of fact, indicate that these two  
19 people -- I don't think there's any real issue about  
20 particularly Mr. Gates's direct involvement in  
21 decisions about how to attack Netscape and Java. I  
22 mean, the evidence is stunning about his direct  
23 involvement in the anticompetitive acts.

24 We do not seek to disrupt Microsoft's case,  
25 Your Honor. We seek to make our own. And Microsoft

1 still has the right to call Mr. Gates and Mr. Ballmer  
2 when they wish to.

3 We don't seek to harass Mr. Gates and  
4 Mr. Ballmer. Certainly, we would work with the  
5 defendants to find a time that is convenient and  
6 least disruptive to the two witnesses. And on the  
7 issue of spectacle, Your Honor, I just don't even  
8 understand it except as another attack on me  
9 personally.

10 When they come, there is going to be a  
11 spectacle. They are famous people, and I would  
12 expect that their presence in Des Moines will cause  
13 some attention, public attention, not related to when  
14 they are called, but related to the fact that they  
15 are here. And whether they are called by -- perhaps  
16 defendant just seeks to have the spectacle in its own  
17 case, and they can call him again -- call them again  
18 if they wish to.

19 More deposition testimony is not what we  
20 want, Your Honor. Plus, the parties had an agreement  
21 that if a witness had been previously deposed in  
22 related cases, that no additional deposition  
23 testimony would be taken.

24 There was one witness that I identified  
25 early on that I wished to take another deposition of

1 because for reasons that are not clear to me, he was  
2 not asked any questions about his then current  
3 position, which was quite relevant to our case. And  
4 I sought, by permission, to take his deposition, his  
5 name was of Dan'l -- I think it is Lewin. Microsoft  
6 refused to permit it. They denied me the opportunity  
7 to take that person's deposition, even though I had  
8 made a clear case for needing to do so.

9 So I did not bring that to the court, and I  
10 did not then request any additional depositions of  
11 people whose depositions had already been taken and  
12 that, of course, includes Mr. Gates and Mr. Ballmer.

13 In the Gordon case, Your Honor, this same  
14 motion was made, but it was made just right before  
15 the beginning of trial, as I recall, and the court  
16 felt that there was not enough time to cause them to  
17 be called. I don't think that that is the case here.  
18 We have great plenty of time.

19 With respect to the cases, Mr. Green says,  
20 first of all, that Ballmer and Gates are not  
21 critical. And if that is true, then I don't know the  
22 definition of a critical witness. But there's no  
23 language in the case that requires that we show a  
24 critical need.

25 He also says that in those cases that the

1 defendant was not calling or threatening not to call  
2 the witnesses. Again, Your Honor, it just isn't so.  
3 And he says that the depositions were not available.

4 On the issue of subpoena, Your Honor, let  
5 me quote from the Shawnee Holdings case. In that  
6 case -- that was a fraud and bad faith, insurance  
7 bad-faith case. And one of the four witnesses that  
8 the plaintiff wanted was amenable to subpoena and  
9 three were not.

10 And the court held that the defendants'  
11 argument -- and I quote -- "Defendants nevertheless  
12 argue that the three witnesses are not amenable to  
13 subpoena because they are located out of state over  
14 100 miles from the courthouse. Defendant's argument  
15 misses the point. The plaintiff has not asked the  
16 court to issue subpoenas. As the plaintiff correctly  
17 asserts, subpoenas are not required for party  
18 witnesses. Instead, the plaintiff has asked the  
19 court to order the defendants to produce certain  
20 witnesses for trial. We certainly have jurisdiction  
21 over the defendants. Moreover, we do not feel  
22 plaintiffs' request is unreasonable. The witnesses  
23 are in important decision-making positions within the  
24 defendant corporations and appear to have been key  
25 participants in the circumstances surrounding the

1 present action. Accordingly, we will direct  
2 defendants to present the witnesses for trial."

3 In the Hitachi case, Your Honor, that case  
4 involved witnesses from foreign countries. And,  
5 "Defendants contest the motion to present their  
6 officers and other representatives and make much of  
7 the fact that the court has no power to enforce the  
8 service of subpoenas on foreign citizens and foreign  
9 countries. But, as plaintiffs point out, this  
10 argument misses the point: The court has not been  
11 asked to issue subpoenas," and they go on.

12 And, Your Honor, in this case the court  
13 specifically says in its opinion, "Conversely, the  
14 court is aware that discovery in this case has been  
15 extensive, and is also aware that plaintiff has taken  
16 voluminous testimony if most, if not all, of the  
17 demanded witnesses." And I believe, Your Honor, this  
18 involves a number of witnesses, though the exact  
19 number is not specified in the order.

20 And in the Societe Generale case, again,  
21 the defendant says, "SGS further argues that these  
22 witnesses are beyond the 100 mile radius of the  
23 subpoena power of the court under Rule 45(b)(2),  
24 Federal Rule of Civil Procedure, and that, because  
25 they are neither officers nor managing agents of the

1 SGS, the court lacks the power to compel SGS to  
2 produce the witnesses at trial."

3 Skipping down, "SGS's arguments ring hollow  
4 in light of its own representation to the court in  
5 its letter of August 17th, that although Mr. Walker's  
6 deposition has been taken" -- note again, Your Honor,  
7 the deposition was taken -- "his importance as a  
8 witness is such that it would be fairer to both sides  
9 to have him appear live. The court agrees with SGS."

10 These cases, Your Honor, are directly on  
11 point. They say what I said, which is this has  
12 nothing to do with the court's subpoena power. It  
13 has to do with the court's ability to control the  
14 order of the witnesses. We need these witnesses in  
15 our case-in-chief to present a coherent story, a  
16 coherent presentation, just as defendants say they  
17 need the same thing. We have the same right as they  
18 do.

19 I cannot find the Eolas case, Your Honor,  
20 so I will send it over later. But that case, which  
21 was a case in which Microsoft was directly  
22 involved -- not a case in Iowa -- but a case in which  
23 Microsoft was ordered to bring its witnesses as  
24 requested by the plaintiff in the case-in-chief.

25 We're only asking for two. We're asking

1 for the two most important witnesses. We will work  
2 with defendants to assure that it is not disruptive  
3 or harassing to Mr. Gates or Mr. Ballmer. We simply  
4 want to present our case to the jury in the way that  
5 the defendant says it wants to present its case to  
6 the jury.

7 The court has the power to do this without  
8 question. And we ask that the court exercise that  
9 power to ask -- to require that Mr. Gates and  
10 Mr. Ballmer appear at a convenient time for them in  
11 plaintiffs' case-in-chief.

12 THE COURT: Thank you.

13 Anything else for the record today?

14 MR. GREEN: Your Honor, on the Eolas case,  
15 I haven't seen it personally. I think Mr. Holley is  
16 aware of it. We don't think it has anything to do  
17 with what Ms. Conlin is talking about, but if we  
18 think we need to talk about it, I'll respond in some  
19 way because -- the first time I knew it was going to  
20 come up was this morning.

21 THE COURT: The court will take a look at  
22 it when it is presented. And if the defendant wishes  
23 to respond, I'll let it respond in writing.

24 MR. GREEN: Thank you, Your Honor.

25 THE COURT: Any other matters.

1 MS. CONLIN: One additional thing, and I  
2 indicated to Mr. Green when we spoke yesterday and  
3 decided we could not take up the source code issues,  
4 that I would want to call the court's attention to a  
5 couple of things.

6 The source code motion is probably ripe for  
7 hearing. I don't know if the court has had an  
8 opportunity to look at the pleadings yet. I'm not  
9 surprised, Your Honor.

10 That's why I want to call the court's  
11 attention to what Microsoft says in response. There  
12 is no question at all, Your Honor, that we do not,  
13 "do not" as I sit here today have all of the source  
14 code that the court has ordered produced. We do not  
15 have it.

16 We have been getting it in drips and drabs.  
17 We got some more yesterday. We have an expert, and,  
18 the court is aware of this, to examine this stuff.

19 Microsoft says, you know, he didn't say  
20 anything about the source code in his expert report.  
21 It's because we didn't have it. And he didn't file a  
22 supplemental report. Well, we still don't have it.  
23 And I just want to make the court aware of that.

24 They say that they are going to give us all  
25 of the source code by October 31st, two weeks before

1 trial. Much of this source code the court ordered  
2 produced in its order of last July, not this last  
3 July, Your Honor, July of 2005. So we can't come to  
4 the court and say we're missing stuff if they produce  
5 it. They haven't produced it yet.

6 The motion may become one not for the  
7 production of these missing things. If they do, in  
8 fact, produce all of it, then it will be a motion  
9 simply to bring to the court's attention and ask for  
10 the court's intervention in connection with what to  
11 do with this kind of production that has been  
12 relatively typical.

13 I notified the defendant yesterday that we  
14 would not be prepared to address the issues today  
15 because we don't have the source code.

16 So October 31st, Your Honor, we will get  
17 it. It's going to take some time to look at it and  
18 make a determination as to whether or not it is now  
19 complete. And we will be in trial, which we perceive  
20 to be unfair, but we will take that up at the  
21 appropriate time. There's no -- we just don't think  
22 that -- we can't address these issues today. We  
23 don't have the source code.

24 THE COURT: Is it set for hearing right  
25 now?

1 MS. CONLIN: We were going to hear it, Your  
2 Honor.

3 MR. HOLLEY: Your Honor, just briefly.  
4 This is Mr. Neuhaus's baby, and I don't want to take  
5 away -- steal his thunder.

6 I would like to say that there have been  
7 problems with the production of the source code,  
8 which we acknowledge and regret. And we are working  
9 as hard as we can to resolve those problems.

10 An example, Your Honor, is that a lawyer in  
11 Sidney and Austin in Chicago, unbeknownst to any of  
12 us, had a disk containing source code locked in his  
13 desk in Chicago. You know, those sorts of things  
14 happen. It's unfortunate. We're not happy about it.  
15 And we are working as quickly as we can to rectify  
16 the situation.

17 I don't want to go into all the gory  
18 details because I don't know all the gory details.  
19 Mr. Neuhaus will be prepared to respond to them. I  
20 want to assure the court that we are aware of the  
21 this issue, and we're working as hard as we can to  
22 resolve it. And we will be prepared to address the  
23 motion itself at the appropriate time.

24 THE COURT: Do the parties wish me to set a  
25 time right now to hear it?

1 MS. CONLIN: Your Honor, we don't feel like  
2 we can do that even because we don't have it. We  
3 don't know how long it's going to take to examine it.

4 THE COURT: Where did this October 31st  
5 date come from?

6 MR. HOLLEY: That is the date - as we find  
7 this stuff, Your Honor, we're giving it to the  
8 plaintiffs' lawyers. We're not going to wait until  
9 October 31st to give them things. For example, this  
10 disk that was in the man's desk in Chicago they now  
11 have. The problem arises because these are enormous  
12 products, and there's no single -- they call these  
13 things source code trees, Your Honor. I don't want  
14 to go into the weeds on this, but one would think  
15 that there would be --

16 THE COURT: You're getting botanical on me  
17 here.

18 MR. HOLLEY: You would think there would be  
19 one tree and it would all be there and understandably  
20 the lawyers who went about gathering this stuff  
21 thought that. It turns out that that isn't correct.  
22 That these products have pieces coming in from  
23 outside the company and from different groups inside  
24 the company and those pieces, which one logically  
25 would have thought would be part of the tree, turn

1 out not to be.

2 We are now in the process -- Ms. Davidoff  
3 is spending every waking hour looking with lawyers  
4 from Preston Gates & Ellis in Seattle for every last  
5 piece of this. Every piece we find, we will get to  
6 the plaintiffs' lawyers as soon as we can find it.  
7 It is just that we can't in good faith represent to  
8 the court that that will be done tomorrow because it  
9 has involved contacting hundreds of developers and  
10 saying, "Do you have this stuff? Where is it?" I  
11 don't understand why this is so complicated, but it  
12 is.

13 And as I say, we will get this stuff to  
14 Ms. Conlin and her colleagues as soon as we can. We  
15 just can't represent that we will be done and  
16 prepared to represent that we've got it all until  
17 October 31st. If we're done sooner, I will be happy,  
18 I'm sure everyone will be, and that is certainly our  
19 goal.

20 THE COURT: So that's just a self-imposed  
21 deadline.

22 MR. HOLLEY: Yes, Your Honor. And if I  
23 were closer to the details of what is going on, I  
24 would understand why it's two weeks from now, but I'm  
25 informed by Mr. Neuhaus that it can't happen any

1 faster than that.

2 THE COURT: We will take it up at that  
3 time.

4 MS. CONLIN: It's not two weeks, it's only  
5 one.

6 MR. HOLLEY: It will take a few days, Your  
7 Honor.

8 MR. GREEN: We're going to have a status  
9 conference, Your Honor, if that's okay with you.

10 MS. CONLIN: Is that all right, Your Honor?

11 THE COURT: Perfectly.

12 MR. HOLLEY: One last matter, Your Honor.

13 There was a hearing scheduled for Friday on  
14 some Special Master Appeals, but I understand that  
15 that is the day the court is moving offices. So if  
16 it's all right with you, the lawyers who are handling  
17 that matter can do it on Monday or Tuesday, whatever  
18 is the court's preference. I think for people  
19 traveling from San Francisco and New York they would  
20 appreciate Tuesday, if that's all right with the  
21 court.

22 MS. CONLIN: I just don't know --

23 THE COURT: Did I change the date?

24 MS. CONLIN: No, Your Honor, you did not,  
25 but Carrie mentioned that you would be moving and it

1 really is fine with us to move the date.

2 THE COURT: All right.

3 MS. CONLIN: These are going to be pretty  
4 extensive hearings, I'm afraid, Your Honor. And what  
5 I don't know is whether any of the people involved --  
6 it's probably going to be me, and I'm not involved in  
7 any additional depositions that are being taken of  
8 experts witnesses, so it should not be a problem for  
9 us.

10 MR. HOLLEY: We're happy to go forward on  
11 Friday. We were trying to avoid interfering with the  
12 court's move.

13 THE COURT: As long as you're both are okay  
14 with the court moving it, that's fine, as long as  
15 Carrie can come up with some date.

16 MS. CONLIN: Let's do Tuesday.

17 THE COURT ATTENDANT: I have something to  
18 say about Thursday. I just realized we have a  
19 compliance hearing that might go a couple of hours.

20 MS. CONLIN: When does it start?

21 THE COURT ATTENDANT: It starts at 9.

22 MR. GREEN: We can do it any time.

23 MS. CONLIN: Why don't we say 1:30.

24 THE COURT ATTENDANT: Is 1:30 okay?

25 MR. GREEN: Roxanne and I will come live.

1 I don't think we need that reported.

2 MS. CONLIN: We haven't in the past.

3 (Record closed on October 24, 2006, at

4 11:51 a.m.)

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CERTIFICATE TO TRANSCRIPT

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

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

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

Dated at Des Moines, Iowa, this 5th day of November, 2006.

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