

1 IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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

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

5 Iowa Corporation; )  
PATRICIA ANNE LARSEN; )

6 and MIDWEST COMPUTER )  
REGISTER CORP., an )

7 Iowa Corporation, )

) TRANSCRIPT OF

8 Plaintiffs, ) PROCEEDINGS

)

9 vs. )

)

10 MICROSOFT CORPORATION, )

)

11 Defendant. )

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13 The above-entitled matter came on for  
14 hearing before the Honorable Scott D. Rosenberg,  
15 commencing at 8:45 a.m., October 3, 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 on

3 October 3, 2006, at 8:45 a.m.)

4 THE COURT: We're on No. 8 on the list

5 here, which is the Trinko dispositive motion for

6 summary judgment.

7 MR. GREEN: That's mine, Your Honor.

8 THE COURT: You're arguing it?

9 MR. GREEN: Yes, I am. So you know it must

10 be one that would be easy for you to grant since I'm

11 arguing it.

12 THE COURT: Well, I know it will be simple.

13 MR. GREEN: Touche.

14 THE COURT: Go ahead, Chris.

15 MR. GREEN: This is basically a legal

16 argument, a summary judgment just as a matter of law.

17 The plaintiffs in their petition make two

18 claims which are related and are both in our view not

19 viable as a matter of law and as a matter of the

20 undisputed facts.

21 One of the claims is what is loosely termed

22 as an "essential facilities claim." And both these

23 claims add to the market monopoly leveraging claims

24 that are laid out -- are referenced in the fourth

25 amended petition on pages 2 through 4 of our opening

1 memo in support of this motion.

2 But the essential facilities claim, the  
3 allegation is that Microsoft violated the Iowa  
4 Competition Law by failing to disclose source code  
5 and proprietary technical specification of its  
6 operating system which is essential to Microsoft's  
7 competitors, and the competitors we are talking about  
8 are people in the applications market. Specifically,  
9 plaintiffs claim that Microsoft withheld this  
10 information to competitors in a browser and  
11 applications software market because of the  
12 widespread use of Microsoft's operating system.  
13 Plaintiffs claim that this information was essential  
14 for the independent software vendors to compete and  
15 because Microsoft provided such information to its  
16 own application developers. That's the essential  
17 facilities claim.

18 In other words, we didn't give them the  
19 technical proprietary information to essentially our  
20 competitors so that they could properly compete with  
21 us.

22 The market monopoly leveraging claim in  
23 this claim, the plaintiffs claim that Microsoft  
24 leveraged its monopoly power in the operating system  
25 to gain unfair advantage in the relevant applications

1 market. So you can see it's a very similar claim  
2 with a different label. And then somehow these two  
3 claims have led to overcharge of Iowa consumers for  
4 the applications market at some point. We don't need  
5 to get into it because of lack of viability.

6 First of all, Your Honor, as stated in our  
7 brief, these claims have already been rejected by  
8 Judge Motz in the federal civil multidistrict  
9 litigation. There was over five dozen cases  
10 consolidated. He granted Microsoft's partial motion  
11 for summary judgment on the essential facilities and  
12 monopoly leveraging claims, virtually identical set  
13 of facts and circumstances. And you can find that at  
14 274 F.Supp. 743.

15 Judge Motz's view was in accord with and  
16 really anticipated the United States Supreme Court  
17 decision in a case entitled Verizon Communications v.  
18 Law Office of Curtis V. Trinko, which sharply limited  
19 the essential facilities doctrine and never  
20 recognized a cause of action for monopoly leveraging.

21 Your Honor, I'm going to hand just you up a  
22 Westlaw copy of Trinko, and I've highlighted just the  
23 headnotes on the first page.

24 THE COURT: Thank you.

25 MR. GREEN: The next point which is

1 relevant to this, Your Honor, to this whole -- so we  
2 now feel we have established that with Judge Motz's  
3 ruling and with the Trinko case that under these set  
4 of circumstances with regard to the essential  
5 facilities claim and probably under any set of  
6 circumstances with regard to the monopoly leveraging  
7 claim, that these are not viable claims under the  
8 federal antitrust scheme.

9           However, as we all know, this cause of  
10 action is under the Iowa Competition Law, and so the  
11 issue is, you know, just because the federal courts  
12 have done that, should this Court follow it in this  
13 case? And our answer is that Your Honor should. The  
14 Iowa Competition Law within the act itself says that  
15 it shall be construed to complement and be harmonized  
16 with federal antitrust law.

17           So it's our position this Court should not  
18 permit the plaintiffs to assert essential facilities  
19 and monopoly leveraging claims here as they are  
20 barred by the federal law and the state law, the Iowa  
21 Competition Law.

22           And as the Court might recall, the Iowa  
23 Realty case, which was discussed ad nauseam at our  
24 last session, we feel that -- assuming that the Court  
25 agrees with us, that the federal law, the federal

1 antitrust body of law and our briefs are replete with  
2 other cases other than Trinko and Judge Motz's  
3 decision, that the essential facilities claim should  
4 not apply here and the monopoly leveraging claim is  
5 for all practical purposes wiped out as an  
6 independent cause of action by the Trinko decision.  
7 Then if the harmonization goal of the Iowa  
8 Competition Law is followed, it should apply to this  
9 case also; and, thus, the plaintiffs should be barred  
10 by our motion for summary judgment.

11 The reasons for those decisions and its  
12 applicability to this case, Your Honor, is that  
13 requiring, as the plaintiffs assert, a legitimate  
14 required monopolist to provide intellectual property  
15 to competitors would chill innovation and, in fact,  
16 would go against the goal of an antitrust law, i.e.,  
17 to encourage competition, and Judge Motz noted that  
18 in his decision.

19 Further, as Judge Motz found, the internals  
20 of the Microsoft operating system is not essential  
21 for meaningful competition because Microsoft's  
22 competitors have had significant sales in the  
23 applications market. And this is verified by  
24 plaintiffs' own expert Noll in his report which was  
25 referenced in our brief and in our exhibits.

1           On a monopoly leveraging claim, again, Your  
2 Honor, it does not provide an independent basis for  
3 liability in Trinko. And in the leading treatise by  
4 Areeda & Hovenkamp -- Hovenkamp is a professor down  
5 at the University of Iowa, as the Court may recall --  
6 they basically have said Trinko has killed a cause of  
7 action for monopoly leveraging.

8           Some of the undisputed facts, Your Honor,  
9 which support this motion are that the record is  
10 clear that the independent software vendors do not  
11 need access to the technical specifications of the  
12 Microsoft operating system to write applications to  
13 those systems. That is verified by the plaintiffs'  
14 own expert MacKie Mason, which is Exhibit C to my  
15 affidavit, and also a finding in the government case  
16 where it was established that the Microsoft operating  
17 system supports over 70,000 applications.

18           So it's not essential and the record has  
19 established that, and that is necessary under the  
20 essential facilities doctrine which is being urged by  
21 the plaintiffs.

22           The record is also undisputed that  
23 Microsoft provided vast quantities of information to  
24 independent software vendors, including the  
25 application interface programs, the APIs, regarding

1 MS-DOS and Windows, as is undisputed by Microsoft's  
2 witnesses, all of which are attached as exhibits to  
3 my affidavit.

4 According to the plaintiffs' own witnesses,  
5 at worst or at best, however you want to view it, the  
6 information regarding the internals of Microsoft's  
7 operating system only gave Microsoft's own  
8 application developers an advantage over competitors,  
9 and that comes from the opinion of plaintiffs' expert  
10 Mackie Mason and Alepin as referenced at page 9 of  
11 our memo in support of this motion.

12 Dr. Noll, another one of plaintiffs'  
13 experts, says that this information gave Microsoft  
14 only a, quote, temporary advantage which is verified  
15 by the fact that Microsoft competitors had a  
16 significant share of the at-issue applications market  
17 during the relevant time period. In other words,  
18 again, Your Honor, even if you go on what their own  
19 experts say, this technical information, this source  
20 code information, was not essential for there to be  
21 competition, and that's what Judge Motz found and,  
22 therefore, it does not fit within the essential  
23 facilities claim that the plaintiffs are asserting.

24 As a matter of fact, in one instance, the  
25 competitors Samna was able to develop an applications

1 product before Microsoft was able to produce a  
2 similar applications product without any access to  
3 the claimed essential information regarding the  
4 Microsoft operating system. That is, if you look at  
5 page 10 and 11 of our memo, we refer to the  
6 deposition testimony of Mr. Mohammadioun, who I think  
7 was the CEO at one time of Samna; and also we laid  
8 out the testimony of Mr. Mohammadioun who was the  
9 president of Samna. And I think the questions and  
10 answers as laid out in the brief of his deposition, I  
11 think, are particularly telling.

12 "Question: Now, is it also true that  
13 you were developing this Windows product" --

14 I will start over:

15 "Now, is it also true as you were  
16 developing this Windows product, your team  
17 did not have access to source code, did it?"

18 "Answer: We did not.

19 "Question: Notwithstanding the fact  
20 that you didn't have source code, you were  
21 able to develop an excellent product?"

22 "Answer: That's normal:

23 "Question: What do you mean that's  
24 normal?"

25 "Answer: I mean, that's the way it

1 works in general practice. We -- as  
2 applications developers, we never have  
3 access to the source code or the environment.

4 "We didn't have the source code to DIS  
5 or -- I don't believe we had the source code  
6 to Unix or Macintosh."

7 So not only does it not only just give a  
8 temporary advantage, according to their own expert  
9 witnesses, but at least in this case, it wasn't even  
10 necessary for the development of an application at  
11 all.

12 Now I want to turn to something. I'm not  
13 going to belabor it, Your Honor, because you have  
14 been here on eight previous arguments.

15 The summary judgment standard in Iowa and  
16 whether you can have partial summary judgment on,  
17 quote, claims or whether they need to be on whole  
18 causes of action.

19 I just want to point out in this motion the  
20 particular law we feel is applicable is Judge Motz's  
21 decision in Trinko, and, of course, summary judgment  
22 could be granted because it's a matter of law or  
23 because it's an undisputed fact or a combination  
24 thereof.

25 Now, we got this whole issue about whether

1 partial summary judgment can even be granted in this  
2 case because it's only going to both claims and not  
3 causes of action.

4 We heard from Ms. Conlin, who broke into  
5 the argument at the last hearing we had, to advise us  
6 all how this case would be submitted to a jury. And  
7 she said that these claims that we're talking about  
8 here would simply be marshalling elements for a  
9 general submission of, yes or no, did the defendant  
10 violate the different sections of the Iowa  
11 Competition Act.

12 Well, number one, that just isn't the case  
13 in an antitrust case. Maybe I haven't tried as many  
14 cases as Ms. Conlin, but I have tried an antitrust  
15 case to a jury verdict in this state in federal  
16 court, not the state court, and that is not the way  
17 it is done. You have to -- antitrust cases are  
18 complicated and specific special interrogatories have  
19 to be asked of the jury in order for there to be a  
20 record on appeal to see what was determined. It just  
21 isn't a case of asking some general questions. It's  
22 not a general verdict matter, and, you know, we have  
23 special interrogatories on product liability cases, I  
24 mean, all sorts of cases in this state, and certainly  
25 we would have them in this case.

1           And the point is that these claims will  
2           undoubtedly be the subject of individual special  
3           interrogatories to the jury if the Court allows them  
4           to go forward. The purpose of the motions for  
5           summary judgment in this case and it's particularly  
6           applicable in antitrust cases as we've cited in our  
7           brief to the federal cases in that regard is for the  
8           Court to weed out those claims that should not be  
9           submitted to the jury in order, one, to shorten the  
10          trial or to make the trial go smoother with the  
11          Court, but also not to waste a jury's time on claims  
12          that are not viable, and they are very appropriate  
13          for motions for summary judgment and partial motions  
14          for summary judgment.

15                 In fact, the Iowa rule requires the Court,  
16          you know, if you get somebody that files -- and I'm  
17          sure you've it had, Judge -- somebody that will file  
18          a big general motion for summary judgment and there  
19          will be several elements to it and you might take a  
20          look at it and say, "Well, you know, complete summary  
21          judgment isn't going to be granted, but you got a  
22          couple of things here which are not viable claims and  
23          shouldn't go to the jury. And right inside the rule  
24          itself it says if you find that, you throw out part  
25          of the case but keep part of the case.

1           Now I'm going to show you -- and this is  
2           just by way of example. I do not claim at all, Your  
3           Honor, that this is -- what we would do in this case  
4           or even if this case I'm going to give you, has  
5           any -- it was a competitor case. Frankly, it was  
6           just a case I can find last night on the F.Supp.  
7           which attaches a whole set of instructions in an  
8           antitrust case. And this is the SCM Corporation v.  
9           Xerox Corporation, 463 F.Supp. 983, District of  
10          Connecticut, United States District Court, District  
11          of Colombia 1978.

12          And the only thing I'm going to give you is  
13          the appendix which outlined the instructions just to  
14          give you an example of how it was done in that case.  
15          And in there they asked -- I counted them, but it  
16          looks like over 70 interrogatories that were  
17          submitted to the jury. There were claims within  
18          claims that were submitted to the jury, and my guess  
19          is that this case is more complicated than that case.

20          As Mr. Neuhaus commented to me in the  
21          office, he cannot imagine that anything would be more  
22          complicated than this case. But in any event, I just  
23          want to give you an example of why Ms. Conlin is just  
24          totally misapprehending how an antitrust case is  
25          submitted and how it should be submitted and that is

1 why these motions for summary judgment are proper and  
2 should be addressed now if the Court agrees with us  
3 that they are -- either as a matter of law these  
4 particularized claims of the plaintiffs should fall  
5 or because the record shows us undisputed facts which  
6 would make them nonviable.

7 I'm not going to talk anything more about  
8 an antitrust -- about motions for summary judgment  
9 standards because Your Honor has probably handled a  
10 lot more of those than any of us, and you know when  
11 and when you cannot grant a motion for summary  
12 judgment under Iowa law.

13 Just by way of summary of the substantive  
14 points, Your Honor, Iowa Competition Law must be read  
15 in our opinion in accord with the federal court's  
16 interpretation of the federal antitrust law. The  
17 plaintiffs' claim on the alleged nondisclosure of  
18 proprietary technical information should be dismissed  
19 for two reasons:

20 First, a monopolist is not required to  
21 share his technical information with his competitors,  
22 and I would direct the Court to pages 15 through 18  
23 of our opening brief in that regard. For instance,  
24 in *Berkey*, it was stated: "A monopolist, no less  
25 than any other competitor, is permitted and indeed

1 encouraged to compete aggressively on its merits.  
2 All firms, even those of monopoly power, are  
3 encouraged to 'compete aggressively' and are assured  
4 that they will retain the fruits of 'any success  
5 achieved through the process of invention and  
6 innovation.'"

7 Again, to hold otherwise, Your Honor, would  
8 chill innovation by everybody.

9 In the case of Olympia Equipment Leasing,  
10 the Seventh Circuit said, although a monopolist,  
11 quote, like the rest of us, quote, can be expected to  
12 act selfishly, and in some cases consumers will be  
13 hurt, in the long run they will be hurt more if  
14 juries are allowed to burden a monopolist with a  
15 positive duty of assisting competitors. And that's  
16 what the plaintiffs are saying we should have done  
17 here.

18 I won't read any of the other quotes from  
19 that part, but it's all laid out in those sections of  
20 the brief that I've cited to Your Honor.

21 The second reason that the essential  
22 facilities claims should be dismissed is -- well,  
23 that the plaintiffs' claim we had to assist our  
24 competitors with our technical proprietary  
25 information claim must fall. The plaintiffs cannot

1 revive this claim by this essential facilities  
2 doctrine, which is a very limited exception to the  
3 general rule, that you don't have to aid competitors.

4 First of all, this doctrine has never  
5 really been recognized by the United States Supreme  
6 Court, and it is particularly not applicable here.

7 First, the essential facilities doctrine  
8 does not apply in this case, such as this, involving  
9 proprietary information about a software product that  
10 requires a monopolist to disclose its intellectual  
11 property to a competitor which significantly chills  
12 innovation.

13 And, two, as I've stated before, the  
14 internals of Microsoft's operating system was not  
15 essential because access to such information was not  
16 necessary for meaningful competition because there,  
17 in fact, was significant competition in this market,  
18 in the applications market and, in fact, an  
19 independent software vendor was able to develop the  
20 application without any access to the source code  
21 before Microsoft was able to do so.

22 Other reasons why the essential facilities  
23 doctrine would not apply is it shouldn't apply to  
24 cases involving proprietary technical information,  
25 and we've laid out several cases that would support

1 that from pages 20 to 21.

2 Again, as Judge Motz says, "requiring a  
3 company to provide its intellectual property to a  
4 competitor would 'significantly chill innovation,'  
5 and that determining what information had to be  
6 disclosed in the software industry would be difficult  
7 and would 'strangulate' the development process."

8 In order to invoke that doctrine, they have  
9 to show that the internals of the operating system  
10 was essential, not just helpful, or an advantage, but  
11 literally essential for competition. And ipso facto  
12 they cannot do that, according even to their own  
13 experts, because there was significant competition in  
14 the applications market.

15 This is verified by Areeda & Hovenkamp  
16 again. It says: "Obviously, a resource is not  
17 essential if the competitor can compete effectively  
18 without it. To prove that a facility is essential,  
19 plaintiffs must show more than inconvenience, or even  
20 some economic loss. They must show that an  
21 alternative to the facility is not feasible."

22 And the record here shows that that is just  
23 not the case with regard to the technical information  
24 about Microsoft's operating system and the ability of  
25 independent software developers in the applications

1 market.

2           There's even logic that plaintiffs' claim  
3 is basically illogical. The plaintiffs say, "Okay.  
4 These -- by not giving this information, they  
5 foreclose independent software vendors from access to  
6 the applications interfaces. They need to write the  
7 applications program."

8           As Judge Motz noted, this argument was,  
9 "logically flawed" because Microsoft had in fact --  
10 if Microsoft had in fact withheld such information  
11 from the independent software vendors, it would have  
12 greatly endangered its monopoly in the PC operating  
13 system market which 'depends upon Microsoft  
14 encouraging ISVs to choose the Windows operating  
15 system. So the argument doesn't even have any  
16 logical base, much less any basis in fact or law.

17           Lastly, Your Honor, and as we've stated on  
18 this monopoly leveraging claim, it does not provide  
19 an independent basis for liability. I think Trinko  
20 makes that clear. And the Supreme Court has  
21 repeatedly said that the Sherman Act limits causes of  
22 action for single-firm conduct. That's what you're  
23 talking here. You're not talking about a Section 1  
24 claim. We're talking about there's no contract,  
25 combination or conspiracy here to two claims, actual

1 or attempted monopolization, as set forth in the  
2 statute.

3 Monopoly leveraging claims do not fit  
4 within either one of those, and that is the same as  
5 under the Iowa Competition Act.

6 Again, in the Areeda & Hovenkamp treatise,  
7 it states: "Trinko makes clear 'that a monopoly  
8 leveraging can exist only where the requirements for  
9 the attempt to monopolize the offenses have been  
10 satisfied, which is simply to say that there no  
11 longer exists a freestanding monopoly leveraging  
12 claim."

13 Your Honor, for the reasons I've stated  
14 and, in particular, the opinion by Judge Motz and the  
15 opinion in the Trinko case, we feel that these are  
16 claims that are not viable as a matter of law and  
17 particularly on the undisputed factual record made in  
18 this matter, and that in order to alleviate this --  
19 the plaintiffs are really approaching a mishmash of  
20 claims, frankly, in an apparent attempt just to  
21 confuse the issues for everyone, but more  
22 importantly, for the jury. That this is an  
23 opportunity to take the claims which should not be in  
24 their broth and throw them out so that we can have a  
25 clean bowl of soup to feed to the jury.

1           So we would ask that our motion for summary  
2 judgment on these two claims be granted, Your Honor.

3           THE COURT: Thank you, Mr. Green.  
4           Response.

5           MR. HAGSTROM: Good morning, Your Honor.

6           THE COURT: Good morning.

7           MR. HAGSTROM: What is curious about this  
8 motion for summary judgment is that there is no cause  
9 of action stated in our petition for monopoly  
10 leveraging or essential facilities. So Microsoft  
11 brings this motion for partial summary judgment to  
12 get partial summary judgment on some claims, but  
13 we're not sure what those claims they are seeking  
14 judgment on happens to be.

15           Microsoft did this very -- brought this  
16 very same motion in Minnesota, and Judge Peterson  
17 rejected it. I think some of the reasoning Judge  
18 Peterson is particularly helpful, and I've got some  
19 excerpts from that decision, if I can hand them up.

20           THE COURT: Thank you.

21           MR. HAGSTROM: You're welcome.

22           If you take a look at the first one as to  
23 Microsoft's similar argument regarding monopoly  
24 leveraging in Minnesota, the Court stated similar  
25 reasoning applies to plaintiffs' monopoly leveraging

1 theory. There is no separate monopoly leveraging  
2 claim, but at paragraphs 139 through 142 of the  
3 second amended complaint, plaintiffs made  
4 wide-ranging allegations about how Microsoft used its  
5 operating system monopoly to pursue monopolization of  
6 the applications market.

7 Microsoft has identified no case excluding  
8 evidence of a monopolist's use of market power as a  
9 part of a predatory scheme to monopolize another  
10 market. Paraphrasing of Areeda & Hovenkamp,  
11 Microsoft's own brief states: "Antitrust laws do not  
12 prevent a company from using market power in one  
13 market and pursuing business in other markets unless  
14 the conduct rises to the level of monopolization or  
15 attempted monopolization."

16 That is exactly what plaintiffs say in this  
17 case about how Microsoft's monopoly power was used,  
18 and plaintiffs expert Roger Noll's report provides at  
19 least some evidence of it. Even Judge Motz, who  
20 dismissed the separate claim of monopoly  
21 leveraging -- I think there's a word missing here --  
22 acknowledged that or recognized that the concept of  
23 monopoly leveraging could be relevant to a  
24 monopolization claim.

25 So given plaintiffs' theory here, a case

1 law presented to the Court simply does not support  
2 the comprehensive evidentiary bar which Microsoft  
3 seeks.

4 So, in other words, what Microsoft is  
5 arguing for is an evidentiary ruling to take away any  
6 theory of anticompetitive conduct based upon the  
7 leveraging of Microsoft's monopoly power in the  
8 operating systems market to leverage a monopoly into  
9 the applications market.

10 Now, Judge Motz in the case before him, the  
11 MDL plaintiffs' case, there were multiple separate  
12 causes of action. Two of those causes of action --  
13 one was monopoly leveraging, second was essential  
14 facilities. So there, there was stated separate  
15 causes of action.

16 And so Judge Motz recognized in his MDL  
17 ruling when he dismissed those separately stated  
18 causes of action, that "the concept that Microsoft  
19 leveraged its monopoly power in the operating system  
20 market to obtain an increased power in applications  
21 software markets may well be relevant to the claims  
22 for monopolization and attempted monopolization that  
23 plaintiffs assert elsewhere in their complaint."

24 That is precisely what Judge Peterson  
25 found, so Judge Peterson is consistent with Judge

1 Motz and we have not stated separate causes of action  
2 for essential facilities or monopoly leveraging;  
3 rather, in our complaint -- in fact, when you look at  
4 Microsoft's brief and look at the allegations quoted  
5 in the brief from our petition, you'll see that there  
6 are -- there is no time the word "essential  
7 facilities" is even used.

8 The idea is that certain information is  
9 essential for competitors to compete with Microsoft  
10 in the applications market. I'm unclear as to  
11 whether or not when Microsoft argues that, "Well,  
12 this wasn't really" -- "this information isn't really  
13 essential; it's just critical," are we supposed to  
14 change the word in our petition to say "critical"  
15 instead of "essential"? That doesn't make any sense  
16 to me.

17 The point is and Professor Roger Noll  
18 states in his report that the use of the leveraging  
19 process by Microsoft is in and of itself  
20 anticompetitive; it's anticompetitive leveraging.  
21 And when you look at the Trinko decision, the Trinko  
22 decision said nothing about leveraging is not a  
23 claim. It said nothing about essential facilities  
24 not being a claim.

25 If you take a look -- in fact, in the

1 Trinko decision itself, the Court stated that this is  
2 a refusal to deal case. It's not an essential  
3 facilities case, and it wasn't a monopoly leveraging  
4 case. It was a refusal to deal case, and the essence  
5 of the case revolved around the application of the  
6 Telecommunications Act of 1996.

7         And what happened there was that a class  
8 action was brought for purposes of trying to claim  
9 damages and injunctive relief because Verizon was not  
10 granting sufficient access, the plaintiffs allege, to  
11 the interchange that Verizon controlled; but the U.S.  
12 Supreme Court said that the issue of access is  
13 decided in a regulatory scheme.

14         It says, "The 1996 acts extensive provision  
15 for access makes it unnecessary to impose a judicial  
16 doctrine of course to access." So, in other words,  
17 you had a controlling regulatory scheme there so the  
18 Court didn't address essential facilities and, in  
19 fact, we find no reason to address it, is what the  
20 Court said.

21         Additionally, on monopoly leveraging, the  
22 Court said it didn't apply here because there was not  
23 an unlawful refusal to deal. And the reason there  
24 wasn't an unlawful refusal to deal is because the  
25 interchange, the access that Verizon was granting was

1 decided by the New York State PSC and by the FCC. So  
2 these two agencies were regulating the access. Here  
3 we have no regulator regulating access to Microsoft's  
4 APIs and other information.

5 And just an aside on that, in Microsoft's  
6 brief they use the words "internals" and "source  
7 code."

8 The internals, if they are referring to  
9 internal APIs, is something different than the APIs  
10 that are subject of our petition and, in fact, the  
11 discussion in Roger Noll's report. Internal APIs are  
12 simply connections between the programming within the  
13 operating system itself. What you might call  
14 "external APIs" are the sockets that applications  
15 will plug into, and it's those sockets that Microsoft  
16 has not provided sufficient information to its  
17 competitors in the applications market.

18 Now, antitrust law says that a company can  
19 unilaterally refuse to deal if and only if it is not  
20 anticompetitive and if it is uniform. So here we  
21 have expert opinion that describes the discriminatory  
22 basis that Microsoft has provided information about  
23 its APIs and other information, and the fact that it  
24 has not just simply withheld it altogether takes it  
25 outside of the so-called "immunity" that Microsoft

1 would like to apply.

2 Let me just turn for a moment back to the  
3 other sheet that I provided Your Honor. Judge  
4 Peterson went through the very same analysis with  
5 regard to the essential facilities claims. He noted,  
6 again, that plaintiffs, like the plaintiffs here, are  
7 not seeking a separate cause of action or bringing a  
8 separate cause of action on essential facilities. He  
9 noted, as Your Honor can see, that the goal here as  
10 explained by Microsoft counsel "was to exclude  
11 evidence about Microsoft's use of information about  
12 its operating systems APIs."

13 It is apparent, then, that granting  
14 Microsoft's motion would deprive the jury of a full  
15 picture of this general scheme. Given how  
16 Microsoft's control over its APIs fits into the  
17 monopolization scheme advanced by plaintiffs, the  
18 Court is satisfied that no legal or policy reasons  
19 justified excluding this evidence. This is true even  
20 if Judge Motz is correct that nondisclosure of APIs  
21 could not on its own support a separate antitrust  
22 violation.

23 So what is going on here is Microsoft is  
24 attempting to exclude evidence of its anticompetitive  
25 conduct. Conduct that Professor Roger Noll has

1 identified as anticompetitive as we've set forth in  
2 our brief. And, in fact, Judge Peterson in his  
3 decision at 203 Westlaw 23105551 goes through in  
4 detail analyzing Professor Noll's report and noting  
5 how his opinions demonstrate there is a general issue  
6 of disputed material fact.

7 And Professor Roger Noll's report has been  
8 provided to Your Honor in exhibits that we have  
9 provided in our resistance to Microsoft's motion, and  
10 we have provided citations in our brief to basically  
11 all of the same opinions that were recited by Judge  
12 Peterson in his opinion.

13 If I could provide Your Honor with one  
14 other piece?

15 Now, this particular handout, Your Honor,  
16 shows relevant language from the Iowa Competition  
17 Law, Minnesota Antitrust Law and the federal Sherman  
18 Act. And one thing of note here is that both the  
19 Iowa and Minnesota acts when they were recodified in  
20 the '70s, codified the concept of leveraging.

21 Both of these statutes have the word "use,"  
22 so what the statutes -- what the legislature was  
23 saying, that it's illegal to use monopoly power over  
24 any part of trade or commerce. You don't see that  
25 similar language in the Sherman Act. So the whole

1 concept of leveraging, as you may see from  
2 Microsoft's arguments and ours, there's two --  
3 there's two basic ways to look at it among the  
4 federal circumstances. One is out of the Berkey  
5 photo case that Mr. Green referred to, and that  
6 concept is if the monopoly power in one market is  
7 used to gain a competitive advantage in the second  
8 market, that can be illegal. There's the other line  
9 of cases that say if you have a monopoly in the first  
10 market, you have to successfully attempt to  
11 monopolize or monopolize the second market.

12 Now, as Judge Peterson noted, the  
13 difference in the line of cases is really unimportant  
14 for purposes of this case because here plaintiffs  
15 will prove that Microsoft has attempted to and has  
16 successfully monopolized the applications market. So  
17 under either line of cases, our allegations  
18 concerning monopoly leveraging as part of its  
19 Section 2 claim meet both standards. And, in fact,  
20 when Mr. Green cited Your Honor to the piece in the  
21 Trinko decision and also then he subsequently cited  
22 to Areeda & Hovenkamp, the Court in Trinko referred  
23 to the one line of cases where you have to have  
24 either an attempt to monopolize or monopolization  
25 from the second market. Well, that's precisely what

1 we've got here.

2 The reason I pointed out the particular  
3 state statutes and the words "use of" is that under  
4 the state laws, the state legislators are following  
5 the Berkey line of reasoning, i.e., a competitive  
6 advantage. So what we have here is clearly that  
7 Microsoft is attempting to exclude evidence of  
8 anticompetitive conduct, which as Judge Motz has  
9 recognized and as Judge Peterson has recognized, is  
10 important and is part and parcel of the entire  
11 Section 2 analysis. And Judge Peterson and Judge  
12 Motz refused to exclude the evidence. All Judge Motz  
13 did was grant summary judgment on a separately stated  
14 cause of action for essential facilities and monopoly  
15 leveraging.

16 Now, of course, there are a number of  
17 issues of fact with regard to these issues as well  
18 that would preclude summary judgment. Whether or not  
19 information to competitors was critical or essential,  
20 important, necessary, whatever term you want, did  
21 Microsoft use the discriminatory denial of access to  
22 that information as an anticompetitive weapon to  
23 preclude competition?

24 Microsoft discussed in its brief several of  
25 the APIs that we addressed in our brief. Microsoft

1 comes back with its arguments about whether or not  
2 they had any anticompetitive effect. Well, all of  
3 those issues are questions of fact for the jury.  
4 Like, in one instance, Microsoft said it would  
5 take -- you know, there wasn't anything critical here  
6 because it would only take between 7 and 11  
7 developers to address this issue, but actually what  
8 we said and the evidence shows was it was between 7  
9 and 11.5 developer years to address the issue of the  
10 lack of information.

11           So just the fact of whether or not access  
12 to these APIs and other information was  
13 discriminatory is in itself a question of fact.

14           Now, our petition doesn't just limit the  
15 issue to certain APIs. There is an abundance of  
16 anticompetitive conduct that Microsoft engaged in.  
17 For instance, Microsoft failed to timely disclose  
18 these APIs for MS-DOS and Windows to software  
19 developers, and let me emphasize the timely  
20 disclosure.

21           I think Your Honor has heard throughout  
22 some of these motions that at some point in time  
23 information was ultimately released, and Your Honor  
24 may recall from the collateral estoppel hearing on  
25 the findings of fact by Judge Jackson that the delay

1 in providing information to Netscape caused Netscape  
2 to be put at a severe disadvantage. So the fact  
3 that, you know, sometimes information is later  
4 provided, that time to market element is absolutely  
5 critical and so the timing of providing the  
6 information is absolutely critical.

7 Microsoft impeded competing ISV development  
8 efforts by providing them with incomplete code,  
9 forcing them to accept restrictive licenses barring  
10 them from attending supposedly open software  
11 developer conferences. Microsoft impeded competing  
12 ISVs development efforts by denying promised  
13 promotional and marketing support forcing  
14 distributors and dealers to exclude ISVs from the  
15 promotions and denying ISV promise to access Windows  
16 user's mailing lists.

17 Microsoft intentionally made its operating  
18 system incompatible with or difficult to operate with  
19 competitors' applications software. Microsoft  
20 threatened OEMs that they would receive a license for  
21 Windows only if they agreed not to offer competitors  
22 non-Microsoft applications software. Microsoft  
23 threatened OEMs it would increase the price for its  
24 operating systems if the OEMs distributed  
25 non-Microsoft applications, and we can keep on going.

1 But there's a whole series of conduct that is part  
2 and parcel of the petition.

3 Another type of conduct -- and you've heard  
4 about this -- was the maintaining the beta blacklist  
5 that Microsoft competitors from whom Microsoft  
6 selectively withheld its beta versions of its next  
7 release so as to impede competitors from modifying  
8 their software so as to retain capability with  
9 Windows.

10 And then Bill Gates acknowledged in  
11 internal e-mails that Microsoft would keep changing  
12 these technical details so that the competitors would  
13 keep on a treadmill. They would have to keep trying  
14 to catch up with the changes that Microsoft was  
15 making all the while Microsoft's own applications  
16 developers had access to those details while  
17 competitors did not.

18 Now, Your Honor has heard about the  
19 Continental Ore decision previously, and what I hear  
20 Microsoft trying to do here is to take and pull out  
21 some causes, some wording in our petition, some  
22 allegations of our opinions by experts. We're not  
23 entirely sure which ones, but Continental Ore is  
24 applied to both Section 1 and Section 2 cases, so  
25 monopolization cases. And the Court held, quoting:

1 "In cases such as this, plaintiff should be given the  
2 full benefit of their proof without tightly  
3 compartmentalizing the various factual components and  
4 wiping the slate clean after scrutiny of each."

5 In other words, there's a synergy to all of  
6 the facts together. You can't look at some event in  
7 isolation and determine, "Well, okay, that one seems  
8 to be okay," and then look at another fact when, in  
9 fact, all of these facts together are part of a  
10 course of conduct -- part of a course of exclusionary  
11 conduct for close competition.

12 Now, the Eighth Circuit has consistently  
13 applied to Continental Ore to make sure the  
14 plaintiffs are given the full benefit of their  
15 evidence in a variety of cases from traditional  
16 antitrust claims under Section 1 and 2 to even sexual  
17 discrimination claims.

18 I think we provided a few of these cases in  
19 our brief. One is Alexander v. National Farmers  
20 Organization, 687 F.2d 1173 jump cite of 1208, where  
21 the Eighth Circuit Judge Haney writing the decision  
22 specifically noted that "While the defendants tried  
23 to isolate each of the individual acts, that that's  
24 improper because the plaintiff is entitled to the sum  
25 of its proof, that there are synergy between these

1 individual acts, and it provides a jury or the trier  
2 of fact with the full view of the full course of  
3 conduct."

4 And the Aspen Highlands case, which is  
5 actually cited in the Trinko case, also applied  
6 Continental Ore in the -- it was applied in the Tenth  
7 Circuit decision. There again, you had Aspen Skiing  
8 Corp. trying to dissect its conduct and saying that  
9 while Aspen Hylands can't prove each of these  
10 instances of conduct isn't of itself a Section 2  
11 violation. But, of course, the Tenth Circuit looked  
12 at all of the conduct together and concluded, yes,  
13 the jury did properly examine all of this evidence  
14 and did properly conclude that there was a violation  
15 of Section 2. And by the way, Your Honor, that was a  
16 unilateral refusal to deal, just as we've got here.

17 And in LePage's v. 3M, a Third Circuit  
18 decision, the Court wrote: "The relevant inquiry is  
19 the anticompetitive effect of 3M's exclusionary  
20 practices considered together as the Supreme Court  
21 recognized in Continental Ore the courts must look to  
22 the monopolist's conduct taken as a whole rather than  
23 considering each aspect in isolation. It would not  
24 be proper to focus on individual acts of an accused  
25 monopolist while refusing to consider their overall

1 combined effect. We are dealing with what has been  
2 called the synergistic effect of the mixture of the  
3 elements, the effect of 3M's conduct in strengthening  
4 its monopoly position by destroying competition by  
5 LePage's in the second-tier tape market is most  
6 apparent when 3M's various activities are considered  
7 as a whole."

8           So there you had a refusal to deal, and 3M  
9 was attempting to leverage its monopoly on basically  
10 Scotch tape into a second market and the Third  
11 Circuit found that you look at all of that conduct  
12 together and 3M had no immunity because of its  
13 proprietary patents and so forth on the Scotch-brand  
14 tape.

15           And in the Caldera decision, another one  
16 that Your Honor has heard about with regard to  
17 several of Microsoft's motions, in that same decision  
18 by Judge Benson in the federal court in Utah, he  
19 similarly relied on Continental Ore and refused to  
20 fragment plaintiffs' claims. He said, "To allow  
21 defendant to carve plaintiffs' complaint into several  
22 distinct claims that plaintiff never intended to  
23 allege as independent claims not only appears to have  
24 been the purpose behind Section 2 but also turns  
25 basic civil procedure principles on their head."

1           The latter statement he was referring to  
2           Rule 56 under the federal rules. You can pursue  
3           summary judgment on an entire cause of action with  
4           regard to a particular party, but you cannot get  
5           summary judgment on a small piece or partial piece of  
6           evidence of a cause of action.

7           And, of course, Rule 1.981 similarly only  
8           permits summary judgment on an entire cause of  
9           action.

10          Now, as I mentioned, the Trinko case was a  
11          refusal to deal case, but there was no illegal  
12          refusal to deal because of the regulatory requirement  
13          of access. So there was, in fact, dealing under the  
14          direction of both the FCC and the New York State PSC.

15          Now, there's a whole line of cases, Your  
16          Honor, that deal with refusal to deal by a monopolist  
17          and each one of them says that if the refusal is done  
18          for an anticompetitive purpose, that defendant faces  
19          potential liability under Section 2 of the Sherman  
20          Act and, of course, in these federal cases and of  
21          course, under the applicable provision of the Iowa  
22          Competition Law.

23          As the U.S. Supreme Court said in the  
24          Aspen Highlands case, "The high value that we have  
25          placed on the right to refuse to deal with other

1 firms does not mean that that right is unqualified."  
2 And the courts go on in several cases to point out  
3 that anticompetitive conduct when it is in the nature  
4 of a refusal to deal -- even if it's with regard to  
5 technical information proprietary to the monopolist,  
6 the courts say you look to was there an  
7 anticompetitive purpose or effect as a result of that  
8 refusal to deal. That, Your Honor, is an issue of  
9 fact. If there was an anticompetitive purpose or  
10 effect, of course, the defendant can say, "Look, here  
11 is our legitimate competitive reason for doing so,"  
12 and that's the balancing that goes on.

13 And as Your Honor may recall from the D.C.  
14 Circuit and the decision in the Microsoft case, the  
15 D.C. Circuit applied that analysis when it went  
16 through and looked at the conduct. Has the  
17 government made a prima facie showing of  
18 anticompetitive effect? Has Microsoft come forth  
19 with a nonpretextual pro-competitive justification?

20 And once that balancing was done, if it was  
21 anticompetitive, the Court said, yes, it was  
22 anticompetitive; and in some of the circumstances the  
23 Court did find that Microsoft had showed a  
24 procompetitive justification. But in most of the  
25 situations, the Court determined that the conduct

1 was, indeed, anticompetitive and that Microsoft's  
2 excuse was not valid.

3 Now, of course, the judges -- Judge Jackson  
4 sat as the trier of fact and the court of appeals  
5 was, of course, the reviewing court. Here the  
6 weighing is for the jury.

7 Now, Mr. Green also suggests that there's  
8 some chilling innovation argument. I'm not sure if  
9 he's suggesting there's some immunity there, but  
10 there's certainly not any immunity. And in September  
11 1998 Judge Jackson denied summary judgment to a  
12 similar argument by Microsoft, and he wrote,  
13 "Copyright law does not give Microsoft blanket  
14 authority to license or refuse to license its  
15 intellectual property as it sees fit."

16 He added that, "even if lawful intellectual  
17 property monopolists may not withhold technical  
18 information or commit other acts designed to 'prevent  
19 the development and use of inoperable programs by  
20 competitors.'" That's at 1998 Westlaw 614483. The  
21 jump cite is 13.

22 Judge Benson in Caldera made a similar  
23 ruling with regard to blacklisting. In the  
24 government case, Judge Jackson made a number of  
25 findings; for instance, Findings 90, 91, 92, 116 and

1 122, where he found that the denial of critical  
2 technical information ultimately was the basis for  
3 finding anticompetitive conduct.

4 And Microsoft, again, presented that  
5 chilling innovation argument and suggested that the  
6 antitrust law should not apply to technology firms  
7 like Microsoft. The D.C. Circuit rejected that  
8 argument and wrote. "Microsoft's primary copyright  
9 argument borders upon the frivolous. That is no more  
10 correct than the proposition that use of one's  
11 personal property, such as a baseball bat, cannot  
12 give rise to tort liability." That is at 253  
13 F.Supp.3d at 63.

14 And Judge Kollar-Kotelly in the final  
15 judgment in November 2002 mandated that, "Microsoft  
16 shall disclose to ISVs" -- OEMs and many others --  
17 "for the sole purpose of interoperating with the  
18 Windows operating system product, the APIs and  
19 related documentation that are used by Microsoft  
20 middleware to interoperate with the Windows operating  
21 system product." That's at 224 F.Supp.2d 76. The  
22 jump cite is 173.

23 And the reason for Judge Kollar-Kotelly  
24 doing that was her "sole concern," "to craft an  
25 effective remedy to redraft Microsoft's antitrust

1 violations and restore competition to the monopolized  
2 market." Jump cite on that is 179.

3           And there are a number of rulings, Your  
4 Honor, on this refusal to deal with. Even where a  
5 monopolist has monopoly power in one market lawfully,  
6 if it uses that lawful monopoly power to  
7 anticompetitively reach into another market, there  
8 can be a violation of Section 2. What we have here  
9 is the additional factor that Microsoft has  
10 unlawfully maintained a monopoly in the first market,  
11 the operating systems market, and is unlawfully and  
12 anticompetitively seeking to gain an attempt to  
13 monopolize and monopolize a second market. The U.S.  
14 Supreme Court's decision in Eastman Kodak v.  
15 Technology Services, 504 U.S. 541, you know,  
16 specifically made that conclusion. That was a  
17 monopoly leveraging case. The Court said that power  
18 gained through some natural and legal advantage such  
19 as a patent, copyright, or business acumen can give  
20 rise to liability if the seller exploits his dominant  
21 position in one market to expand his empire into the  
22 next." That's at page 479 of that decision, footnote  
23 29.

24           Footnote 32 of that decision also notes  
25 that leveraging is part and parcel of the Section 2

1 monopolization or attempt to monopolize claim.

2 Bear with me a minute, Your Honor. I'm

3 just about finished here.

4 The one thing I also wanted to mention

5 about the Minnesota action, as I pointed out to you,

6 Your Honor, Judge Peterson denied this very same

7 motion by Microsoft. Microsoft sought

8 reconsideration. That was denied, and Microsoft, I

9 think, through -- it was either through -- I'm pretty

10 sure it was three additional motions -- either

11 motions in limine, motions brought during trial to

12 preclude evidence -- each one of those motions -- I

13 think it was five total times -- tried to get Judge

14 Peterson to preclude this evidence and every single

15 time Judge Peterson denied it. He said his decision

16 was correct. He was not going to deny the jury the

17 opportunity to hear this evidence and despite

18 Microsoft's refuted attempts, they never prevailed on

19 this theory.

20 The one thing that I find interesting about

21 this particular argument -- and we're at No. 8 out of

22 the 9 -- and if Your Honor may recall, back on No. 1,

23 that was the original statute of limitations

24 argument. And Microsoft argued that we didn't make a

25 claim with regard to applications and, therefore, you

1 know, applications should be cut off based upon the  
2 filing of -- I think it was the second amended  
3 petition which was a few years down the line.

4 Your Honor may also recall that I pointed  
5 out in paragraph 39 of that original petition the  
6 allegations concerned monopoly leveraging, the very  
7 issue that Microsoft is bringing a motion for summary  
8 judgment motion on as it pertains to applications.

9 So I think the two should be looked at together, and  
10 it's clear that Microsoft is taking an inconsistent  
11 position as between the two.

12 That's, I believe, all I have, Your Honor.

13 I just want to check one other thing here.

14 With regard to the harmonization argument,  
15 as I pointed out to Your Honor, the Iowa and  
16 Minnesota statutes are actually different than the  
17 federal Sherman Act. And as the Iowa Supreme Court  
18 noted in the Comes decision, the original one  
19 granting standing, they have cited to Section 553.2  
20 and said -- and that statute says, "This construction  
21 shall not be made in such a way as to constitute a  
22 delegation of state authority to the federal  
23 government."

24 Well, of course, there the Iowa Supreme  
25 Court rejected the Illinois Brick rule of the federal

1 courts and adopted its own rule of indirect purchaser  
2 standard. And here, of course, the statute is  
3 different because of the term "use." Use of a  
4 monopoly to impact any part of trade or commerce,  
5 which, of course, would include use of an operating  
6 system monopoly to monopolize or attempt to  
7 monopolize an applications market.

8 Now, Mr. Green said that the purpose of  
9 this motion is to weed out claims, and as I think I  
10 made pretty clear, Judge Peterson wasn't allowing  
11 weeding out of evidence. Judge Motz didn't allow  
12 weeding out of evidence. Judge Benson didn't allow  
13 weeding out of evidence. All of the evidence against  
14 Microsoft was permitted; in other words, the  
15 refusal-to-deal type evidence was allowed.

16 That's it, Your Honor.

17 Based upon the facts that we do not have a  
18 separately stated cause of action for leveraging and  
19 essential facilities means this motion really just  
20 creates a straw man or a red herring. There are no  
21 causes of action here for which to grant summary  
22 judgment.

23 The case law is quite clear that unilateral  
24 refusals to deal by a monopolist that have an  
25 anticompetitive purpose or effect are actionable

1 under Section 2.

2 The allegations in our petition  
3 sufficiently demonstrate and state causes of action  
4 under Section 2.

5 Our experts, such as Professor Roger Noll,  
6 sufficiently state facts sufficient to support those  
7 claims.

8 And, of course, the expert opinions of  
9 Professor Noll on these issues are unrefuted; and,  
10 therefore, there is a clear genuine issue of material  
11 fact.

12 So we request, Your Honor that the motion  
13 be denied.

14 THE COURT: Thank you. Before we move on,  
15 I will allow the court reporter a 15-minute recess.

16 (A short recess was taken.)

17 THE COURT: Rebuttal.

18 MR. GREEN: Mr. Hagstrom has plead with me  
19 he wants to make one point, even though I thought  
20 he's gone on sufficiently long at this time, I agree.  
21 But you can disagree with both of us.

22 THE COURT: I could disagree with both,  
23 couldn't I? It's kind of like Congress. You waive  
24 the balance of your time.

25 Go ahead.

1 MR. HAGSTROM: There's one very quick  
2 additional point, Your Honor. I think Chris said it  
3 was the SCM case on special interrogatories and --

4 THE COURT: SCM vs. Xerox?

5 MR. HAGSTROM: Right, right.

6 With regard to special interrogatories.  
7 For instance, Judge Peterson when we were talking  
8 about this was looking at the overarching violation  
9 of Section 1, Section 2. And so, true, like this,  
10 SCM has questions about whether or not there's a  
11 relevant market and so on and so forth, but  
12 ultimately there's going to be not separating out,  
13 you know, was this per processor license illegal?  
14 Was their intentional incompatibilities? I mean,  
15 you're dealing with an overarching claim as Judge  
16 Peterson noted. If you've got the monopoly and  
17 you're illegally maintaining it, whether or not one  
18 piece illegally maintained it versus another really  
19 becomes unimportant in the minds of the jury; but the  
20 question is whether or not the jury finds that there  
21 is anticompetitive conduct and there has been  
22 monopolization.

23 THE COURT: I'm going to ask the same  
24 question I asked last week then. You're not going to  
25 have any jury instruction that is going to request a

1 claim on leveraging or the things Mr. Green has been  
2 talking about here today; is that right? Essential  
3 facilities.

4 MR. HAGSTROM: Right. Our view is that you  
5 at most have -- well, for instance, on relevant  
6 market, we've already got that from the government  
7 case; but there would be, you know, relevant market,  
8 for instance, on applications. And the other general  
9 question would be: Did plaintiffs prove an attempt  
10 to monopolize? Did plaintiffs prove monopolization?  
11 There's no need to, you know, go through and say was  
12 there anticompetitive effects from per processor  
13 licensing or was there unlawful leveraging, things of  
14 that nature.

15 THE COURT: So you envision that one or two  
16 questions to the jury?

17 MR. HAGSTROM: I think there will be more  
18 than just a couple. You know, you ultimately could  
19 do that; but I think ultimately when we get to that  
20 point, I foresee that we will have more than just a  
21 couple of questions. In other words, you know, at a  
22 minimum, we obviously have damages questions, but you  
23 obviously would have questions leading up to that.  
24 Did plaintiffs prove that Microsoft unreasonably  
25 restrained trade in the operating system market?

1 THE COURT: Okay.

2 MR. HAGSTROM: You know, things of that  
3 nature.

4 THE COURT: But specifically you don't  
5 anticipate since you're not saying that this is a  
6 claim -- this is part of your evidence, not a claim,  
7 you're not going to have any specific question on  
8 leveraging or essential facility?

9 MR. HAGSTROM: Correct. Our view is all we  
10 need are the questions with regard to the causes of  
11 action; you know, Section 1, Section 2. I mean,  
12 obviously, we always use Section 1 and Section 2 kind  
13 of referring to the Sherman Act. I guess that's sort  
14 a way to think of it.

15 THE COURT: I understand.

16 MR. HAGSTROM: But the contract  
17 combination, conspiracy cause of action, attempt to  
18 monopolize monopolization cause of action.

19 THE COURT: Anything else, Mr. Hagstrom?

20 MR. HAGSTROM: That's it, Your Honor.

21 THE COURT: Now you get rebuttal,  
22 Mr. Green.

23 MR. GREEN: Thank you.

24 First of all, just to address that last  
25 point. I don't see how this case can be submitted

1 without special interrogatories for purposes of  
2 making a record. Sure, they would like to have a  
3 general verdict; but if you've got to keep these --  
4 and I will get to that issue, these, quote, claims --  
5 I think that we're going to have the jury determine  
6 -- whether yes or no this was a violation of --  
7 whether it was anticompetitive or however we're going  
8 to phrase it in order to have a record on appeal.  
9 But if I was on the plaintiffs' side of the table, I  
10 would want a nice, big, old general verdict with a  
11 bunch -- with just a few questions which would in my  
12 opinion completely confuse the jury and they then  
13 would be coming to the Court with questions during  
14 their deliberations ad nauseam, but that is an issue  
15 we will talk about down the road, Your Honor.

16 I don't think it can be done the way they  
17 say it, nor do I think it should be done the way they  
18 say nor do I truly believe that's the way they think  
19 it should be done, to be honest with you, except with  
20 the exception of Roxanne who apparently has not tried  
21 any antitrust cases.

22 We did lay out these claims in their  
23 petition in our brief. They are, in fact, claims --  
24 you know, this business about, well, they are not  
25 distinct claims like under Gordon or whatever, you

1 can't dismiss them because they are not a separate  
2 claim. You know, if that was a rule, Your Honor, any  
3 plaintiff in the world could draft a petition and  
4 hide a whole bunch of causes of action under one part  
5 of it, under a count or whatever you want to call it,  
6 and then come in and say, "Well, you know, I didn't  
7 enumerate that as a separate cause of action and  
8 therefore you can't give partial summary judgment on  
9 it." Well, that simply would, in essence, do away  
10 with the whole concept of partial summary judgment  
11 which we know was not done away with and it would  
12 just be a way to avoid that by what I would call  
13 "pleading methods," which would be inappropriate.

14 In the Gordon case, they cite -- they cite  
15 the Gordon case support for their, "You can't get  
16 partial summary judgment," but their reliance on  
17 Judge Peterson is misplaced. Judge Peterson  
18 expressly reserved judgment on a question of "whether  
19 a motion for summary judgment can apply to a theory  
20 of liability," which is exactly what we are doing  
21 here.

22 I don't know -- you know, there's a lot of  
23 jump shifting going on here by the plaintiffs. They  
24 now are saying, "Well, no, what we really are talking  
25 about is a refusal to deal case as opposed to a

1 essential facilities and/or market leveraging case,  
2 and that's really what Trinko was.

3 But, number one, Trinko was about market  
4 leveraging and essential facilities, and the opinion  
5 itself, which the Court can read, is replete with  
6 those concepts. But if they are saying that this is  
7 a refusal to deal case, none of the refusal to deal  
8 cases that have ever been decided by any antitrust  
9 court in anyplace had anything to do with this case  
10 because they all deal with marketable products,  
11 products that are out of the market, like Swift  
12 tickets. They are available to the general public.

13 Here the information that was allegedly  
14 refused was not information Microsoft was selling to  
15 anybody. I mean, this source code, they didn't have  
16 that for sale for anybody. It was strictly technical  
17 internal information, and so the refusal to deal  
18 case, the Aspen case, the Otter case, none of those  
19 cases have anything to do with the facts of this  
20 case, nor has any Court ever said -- in a refusal to  
21 deal, they would like you to believe that the refusal  
22 to deal is automatically illegal but for certain  
23 exceptions.

24 The truth is refusal to deal is a very  
25 little sliver of a line of antitrust cases, very

1 rarely invoked as to cause any liability by any  
2 defendant and practically -- I mean, I've researched  
3 that thing for plaintiffs a lot. It's practically  
4 dead in the water for all practical purposes.

5 So if what they are saying is there is a  
6 no-risk refusal to deal case, then there's even less  
7 grounds for it to go forward.

8 And the last thing I'm going to say, we  
9 will go to the market leveraging claim, Your Honor.  
10 We want to make clear we're not attempting here to  
11 exclude evidence. We want these claims thrown out.  
12 We think that are disguised but they are stated in  
13 their petition, and we think -- and this business  
14 between the difference between these statutes, the  
15 use -- Sherman 2 always had or use in it by case law  
16 just because it's not under the statute. It has  
17 always been there. It's been there over the years,  
18 and so that's a distinction without a difference and,  
19 you know, it was developed by case law. It's not  
20 just in the statute.

21 Mr. Hagstrom talked about some untimeliness  
22 in providing this information had caused problems,  
23 for instance, to Netscape, but it's clear that  
24 assuming that their pleading an essential facilities  
25 claim, which if you read what was cited, it appears

1 untimeliness is not enough to establish an essential  
2 facilities claim, and the cases make that clear that  
3 we've cited.

4       This business about the copyright law and  
5 that not being a defense in a government case, it's  
6 not applicable to what Judge Motz said when he  
7 dismissed these very claims in the MDL action. He  
8 was talking about forcing one to give your  
9 intellectual information to competitors would have a  
10 chilling effect, and that was the reason for it. It  
11 wasn't that it had anything to do with a copyright or  
12 anything like that. It was just if you develop a  
13 better way to make the mousetrap, you don't have to  
14 give it to your competitors so they can copy it.

15       Mr. Hagstrom failed to -- we're talking  
16 about Judge Jackson's findings. He failed to note  
17 that, in fact, Judge Jackson dismissed the state's  
18 claims in that federal matter for monopoly leveraging  
19 and he made a finding that no such claim existed  
20 under federal law.

21       So I think that's all I have, Your Honor.  
22 I just wanted to make a few comments about  
23 Mr. Hagstrom's argument; and, again, we urge you to  
24 give careful consideration to and grant the motion  
25 for summary judgment on these claims.

1 Thank you.

2 THE COURT: Thank you, Mr. Green.

3 Proceed now to the plaintiffs' motion for  
4 partial summary judgment.

5 MR. JACOBS: Good morning, Your Honor.

6 THE COURT: Good morning, sir.

7 MR. JACOBS: This will be the last motion  
8 we have up in this line of nine, and actually one of  
9 them was brought by the plaintiffs here.

10 This is plaintiffs' motion for partial  
11 summary judgment, and in this motion plaintiffs are  
12 asking this Court to grant partial summary judgment  
13 under Iowa Rule 1.981(3) that Microsoft's conduct was  
14 found to be illegal in the government action and to  
15 which this case has granted preclusive effect -- to  
16 which this Court has granted preclusive effect in  
17 this case, that that conduct established a violation  
18 of the Iowa Competition Law.

19 Now, the plaintiffs in Gordon, the  
20 Minnesota case, brought a similar motion against  
21 Microsoft. And Judge Peterson in Gordon granted that  
22 motion in October of 2003, and that ruling by Judge  
23 Peterson is attached as Exhibit 1 to Mr. Hagstrom's  
24 affidavit that we submitted along with our reply memo  
25 on this motion.

1           And basically that ruling does what we're  
2 asking this Court to do, and that is to find that  
3 Microsoft's conduct that was adjudicated to be  
4 illegal in the government case was a violation of the  
5 Iowa Competition Law here, just like Judge Peterson  
6 found that that conduct was a violation of Minnesota  
7 antitrust law.

8           Now, this Court has already found that 140  
9 some odd findings from the federal case are binding  
10 in this action. Those findings deal with issues of  
11 definition of the relevant market, the market for  
12 licensing of Intel-compatible PC operating systems  
13 worldwide. Those findings deal with Microsoft's  
14 market power in that relevant market, the fact that  
15 Microsoft had 90 percent-plus market share during the  
16 entire time period at issue combined with high  
17 barriers to entry, being an indicator of Microsoft's  
18 monopoly power, power to raise prices or restrict  
19 output.

20           Those findings also dealt with the  
21 anticompetitive effects of Microsoft's conduct and  
22 the fact that Microsoft was unable to proffer any  
23 procompetitive justification for that conduct. And  
24 if you'll recall, the standard set out by the D.C.  
25 Circuit in the government case that there are two

1 elements to a monopolization claim: That the  
2 defendant had monopoly power in a properly defined  
3 relevant market is element one; and, two, that the  
4 defendant illegally monopolized or illegally obtained  
5 or maintained a monopoly in that relevant market.

6 In other words, that it was -- that it was  
7 able to obtain or maintain that monopoly by conduct  
8 other than competition on its merits. And that is  
9 precisely what these acts that are subject to this  
10 courts -- that were the subject of this Court's  
11 collateral estoppel ruling established. It  
12 established in the government case that Microsoft's  
13 conduct violated the laws.

14 Now, in the government case the Federal  
15 District Court held that -- this is at 87 F.Supp.2d  
16 30. The jump cite is 54. The district court wrote  
17 that, "In their amended complaint, the plaintiffs  
18 states" -- and that included Iowa -- "assert that the  
19 same facts establishing liability under the Sherman  
20 Act mandate a finding of liability under analogous  
21 provisions in their own laws. The Court agrees. The  
22 facts proving that Microsoft unlawfully maintained  
23 its monopoly power in violation of Section 2 of the  
24 Sherman Act are sufficient to meet analogous elements  
25 of causes of action arising under the laws of each

1 plaintiff state. And the D.C. Circuit agreed with  
2 that conclusion, 253 F.3d 34, 46.

3 The D.C. Circuit wrote, "Our judgment" --  
4 and this is the judgment affirming in part the  
5 district court's monopolization conclusion --  
6 "extends to the district court's findings with  
7 respect to the state law counterparts of the  
8 plaintiff's Sherman Act claims."

9 So, in other words, we have two federal  
10 courts now that have determined that Microsoft's  
11 conduct is the conduct that is subject to the  
12 collateral estoppel ruling this Court has issued,  
13 that that conduct has violated not only the federal  
14 competition laws but also the Iowa Competition Law.

15 Now, Judge Reis in her December 2004 ruling  
16 set out a number of legal conclusions from the  
17 government case that she concluded were subject to  
18 preclusion in this case, and those legal conclusions  
19 we set out on pages 4 through 6 of our opening brief.  
20 Those conclusions deal with, again, the definition of  
21 the relevant product market, Microsoft's monopoly  
22 power in that relevant product market, and  
23 Microsoft's willful maintenance of its monopoly power  
24 by means of an anticompetitive campaign directed  
25 against rivals -- rival developers.

1           And the conduct as we went through quite a  
2 bit of detail during the collateral estoppel hearing  
3 dealt with Microsoft's conduct, for example,  
4 Microsoft illegally binding Internet Explorer to the  
5 Windows operating system; Microsoft's use of license  
6 agreements with OEMs to prevent them from removing  
7 bolder icons and the like, altering the initial boot  
8 sequence or otherwise altering the appearance of the  
9 Windows' desktop; Microsoft's use of threats and --  
10 illegal use of threats and incentives to induce  
11 especially important OEMs like Compaq and IBM,  
12 Gateway to design their distributional, promotional  
13 and technical efforts to favor IE, Internet Explorer,  
14 to the exclusion of Navigator; Microsoft entering  
15 into exclusionary agreements with major Internet  
16 access providers; Microsoft's entering into what were  
17 called "First Wave" agreements with particularly  
18 important independent software vendors, and this one  
19 actually directly relates to the motion that was just  
20 heard here on exclusionary dealing and leveraging.

21           In this case with these "First Wave"  
22 agreements, what Microsoft said to these independent  
23 software vendors was, "If you want to participate in  
24 this program and in this program we will provide you  
25 with preferential treatment, preferential disclosures

1 about technical information about the Windows  
2 operating system, you must agree to use Internet  
3 Explorer as the default browsing software for any  
4 software that uses a hypertext-based user interface,  
5 and they also had to agree to use HTML Help along  
6 with other restrictions, including some restrictions  
7 on the use of Java.

8           So here you had two federal courts, the  
9 U.S. District Court and the District of Colombia and  
10 the D.C. Circuit finding that Microsoft's use of --  
11 the means with which it disclosed technical  
12 information to ISVs was part and parcel of the  
13 illegal anticompetitive conduct. So, you know,  
14 Microsoft's argument that it has no obligation to  
15 disclose this information, really, like Judge Benson  
16 concluded in the Caldera case, is irrelevant. The  
17 question is what did Microsoft do when it was  
18 disclosing technical information and did it use it in  
19 a strategic anticompetitive way, and this is one of  
20 those conclusions, one of those areas where it did  
21 use such disclosure in a strategic and  
22 anticompetitive way and, in fact, it was adjudicated  
23 to have been anticompetitive.

24           Moving on to some of the other conclusions  
25 that were included in Judge Reis's ruling in

1 December of 2004, include Microsoft's entering into  
2 an illegal agreement with Apple Computer where you  
3 recall when Microsoft told Apple that it was going to  
4 discontinue the development of Mac Office, Word Excel  
5 and the like for the Macintosh platform unless Apple  
6 agreed to use Internet Explorer as the default  
7 browser on the Macintosh platform. That was one of  
8 the conclusions. Microsoft's illegal deception of  
9 Java developers about the Windows -- specific nature  
10 of Microsoft's Java developers tools, Microsoft's  
11 coercion of Intel to coerce Intel to stop aiding Sun  
12 Microsystems in developing the Java Virtual Machine,  
13 and finally, again, going back to the First Wave  
14 Agreement where Microsoft agreed to give independent  
15 software vendors access to Windows technical  
16 information in return for their agreement to use  
17 Microsoft's non-Sun compliant Java Virtual Machine as  
18 the default virtual machine for their browsers. So  
19 these are all of the issues that are in Judge Reis's  
20 December 2004 ruling on collateral estoppel that the  
21 Court said you got the findings of fact. This  
22 conduct was -- this is the conduct that violated --  
23 that was a violation of the Iowa Competition Law.  
24 Now, Microsoft really has -- throughout the  
25 entire collateral estoppel, the two arguments before

1 this Court and before the Iowa Supreme Court, has  
2 never really contested the conclusions of law.  
3 Microsoft has said, "Well, you know, we don't like  
4 the way plaintiffs have phrased the conclusions of  
5 law and whatnot," but they've conceded, however, that  
6 they are bound by the outcome in the government case.  
7 And this is -- these conclusions of law set forth in  
8 Judge Reis's December 2004 ruling are -- that's the  
9 outcome of the government case, what it was that  
10 Microsoft did that were violations of the Iowa  
11 Competition Law.

12 Now, nevertheless, Microsoft now asserts in  
13 its resistance that those legal conclusions, in fact,  
14 are not binding or at least it throws into question  
15 whether or not Microsoft believed that those legal  
16 conclusions are binding. So this raises the  
17 possibility, absent a ruling by this Court, of the  
18 sort that plaintiffs are now asking for, that  
19 Microsoft will assert at trial in this case just like  
20 it did in the bifurcated process followed by  
21 Judge Jackson, that even in light of these findings  
22 of fact, 140 some findings of fact that are subject  
23 to conclusions in this case, that that conduct didn't  
24 violate the antitrust laws.

25 In fact, if you'll recall, Judge Jackson

1 went through two steps after the trial in the  
2 government case. The first step was the Court asked  
3 the parties to submit a proposed findings of fact,  
4 and based on those proposed findings of fact and the  
5 evidence cited in the record, the Court reached its  
6 412 findings of fact that were issued in November of  
7 1999. There was a lag time in between the issuance  
8 of the findings of facts and the conclusions of law.

9 The Court asked the parties to brief the  
10 legal significance of these findings of fact. And as  
11 we pointed out in our collateral estoppel briefing,  
12 we included a number of the briefs that Microsoft has  
13 submitted in connection with that briefing process,  
14 the significance of those findings of fact.  
15 Microsoft said, "Even in light of these findings of  
16 fact, you cannot find that there was a violation of  
17 the Sherman Act."

18 So given Microsoft's position now, apparent  
19 position, anyway, that these conclusions of law in  
20 Judge Reis's 2004 ruling are no longer binding in  
21 this case, we're asking the Court to grant partial  
22 summary judgment on this issue.

23 Now, partial summary judgment in this case,  
24 we're asking that the Court do so under Rule  
25 1.981(3). And what is different about our request,

1 plaintiffs' request for partial summary judgment from  
2 Microsoft's request for partial summary judgment is  
3 that the rule specifically allows for this type of  
4 partial summary judgment motion.

5 Rule 1.981(3) says: "Summary judgment  
6 interlocutory in character may be rendered on the  
7 issue of liability alone, although there is a genuine  
8 issue as to the amount of damages." So that's what  
9 we're asking this Court to make a ruling on, that  
10 there was -- that there is liability here; that  
11 Microsoft has violated the Iowa Competition Law and  
12 damages remain for trial.

13 Now, Microsoft in its briefing makes a  
14 number of arguments about why there is no -- still is  
15 no liability in this case, and it argues that really  
16 there are three elements that plaintiffs must show;  
17 that they must show a violation of the law and that  
18 they must show injury and that they must show that  
19 there is some amount of damages.

20 Well, we address on pages 7 through 9 of  
21 our -- 7 through 10 of our reply brief that really  
22 this causation and injury, these elements, are  
23 essentially separate from the violation and, in fact,  
24 they are inseparable from one another, the causation  
25 and measurement of damages, that you really need to

1 look at those two together so that you can establish  
2 a violation of the antitrust laws and grant partial  
3 summary judgment on that and then leaving the  
4 question of the causation and damages for trial.

5 As a matter of fact, one of the cases that  
6 we cite is this New York v. Julius Nasso Concrete  
7 Corporation, and the cite to that is 202 F.3d 82, and  
8 that's a Second Circuit decision from 2000. And in  
9 that case the state of New York brought a damages  
10 action against several defendants based on bid  
11 rigging allegations. And the allegations were that  
12 this conduct, that this bid rigging drove up  
13 construction prices to the state.

14 Now, the Second Circuit observed that the  
15 state did need to show damages, not only that a  
16 conspiracy occurred, but also that it had an impact  
17 on plaintiffs and on the state.

18 Now, having set out the same elements as  
19 Microsoft enumerates in its briefing, the Court  
20 nevertheless granted partial summary judgment on that  
21 and said that's -- "We're giving partial summary  
22 judgment on the violation on the liability and we are  
23 leaving the damages issue for trial," and that's  
24 proper. And, in fact, if you take a look at the  
25 Nasso case, this was a case actually where collateral

1 estoppel was used to prove up the violation. So  
2 really it's almost indistinguishable from the case  
3 that we're talking about here where we have certain  
4 findings of fact that lead to a conclusion that the  
5 conduct was illegal and that conclusion can be used,  
6 then, to grant partial summary judgment in  
7 plaintiffs' favor.

8         It's also noteworthy that in this case harm  
9 has been found. Judge Motz disagreed with this and  
10 found that there wasn't any finding of overcharge.  
11 And that may be true, but whatever -- whether or not  
12 there are any findings of overcharge specifically  
13 and, in fact, there is a finding that does strongly  
14 suggest overcharge, that Microsoft could have priced  
15 its Windows operating system at \$49, but instead  
16 chose the profit maximizing price of \$89 instead; but  
17 regardless of any sort of pricing finding, there are  
18 findings of harm. There are findings that consumers  
19 have been harmed by the conduct that was found to be  
20 illegal in the government case and for which this  
21 Court has granted collateral estoppel.

22         Finding 410, for instance, which is at 84  
23 F.Supp.2d 9 at page 111, Judge Jackson wrote, "By  
24 constraining the freedom of OEMs to implement certain  
25 software programs in the Windows boot sequence,

1 Microsoft foreclosed an opportunity for OEMs to make  
2 Windows PC systems less confusing and more  
3 user-friendly as consumers desired."

4 Finding of fact -- moving on later in that  
5 finding, "By pressuring Intel to drop the development  
6 of platform level" -- this is Native Signal  
7 Processing Software that Ms. Conlin talked about  
8 extensively during the first oral argument on the  
9 innovation motion that Microsoft has brought -- "by  
10 pressuring Intel to drop the development of  
11 platform-level software and otherwise to cut back on  
12 its software development efforts, Microsoft deprived  
13 consumers of software innovation that they very well  
14 may have found valuable had the innovation been  
15 allowed to reach the marketplace."

16 Finding of Fact 412: Another finding for  
17 which conclusive effect has been given in this case.  
18 The district court wrote, "Through its conduct  
19 towards Netscape, IBM, Compaq, Intel and others,  
20 Microsoft has demonstrated that it will use its  
21 indigenous market power and immense profits to harm  
22 any firm that insists on pursuing initiation that  
23 could intensify competition against one of  
24 Microsoft's core products. The ultimate result is  
25 that some innovations that would truly benefit

1 consumers never occurred for the sole reason that  
2 they did not coincide with Microsoft's  
3 self-interest."

4 So there has been findings of harm. There  
5 has been findings of harm to consumers, to Iowa  
6 consumers. This harm is marketwide harm. There is  
7 no finding that it was limited to specific consumers.  
8 These findings were marketwide.

9 Whether or not they deal with the amount of  
10 damages is a separate question and that is an issue  
11 that Microsoft disputes, but that is also an issue  
12 that under the rules, under Rule 1.981, can be left  
13 for trial.

14 Now, one of the reasons why we're bringing  
15 this motion is to preclude Microsoft from making any  
16 sort of argument here that this conduct was a  
17 violation of the antitrust laws, the conduct that was  
18 set forth in this Court's most recent collateral  
19 estoppel ruling. And in Microsoft's briefing, as I  
20 mentioned earlier, they suggest that, in fact, it  
21 wasn't. That this conduct -- that Judge Reis's  
22 ruling with respect to the conduct in December 2004  
23 is no longer operative in this case and, therefore,  
24 that there is no preclusive effect on this conduct.

25 Microsoft's argument, however, really is

1 inconsistent with the history of the collateral  
2 estoppel proceedings as it went from this Court,  
3 before Judge Reis initially, up to the Iowa Supreme  
4 Court and then came back before this Court.

5 In December of 2004 Judge Reis issued a  
6 collateral estoppel ruling on which Microsoft sought  
7 interlocutory review. Microsoft, however, we point  
8 out in our briefing -- let me try to get the page for  
9 you here -- yeah, we discussed this on pages 3  
10 through 5 of our briefing.

11 Microsoft, when it appealed this ruling,  
12 when it appealed Judge Reis's December 2004 ruling,  
13 the only issue that it ever raised was whether or not  
14 the findings of fact in Judge Reis's ruling were  
15 properly subject to preclusion.

16 Microsoft never mentions the conclusions of  
17 law. In fact, at the trial court level before Judge  
18 Reis, it would be hard pressed to find any assertion  
19 that conclusions of law would not be subject to  
20 preclusive effect. And, of course, the fact is that  
21 Microsoft conceded repeatedly that they are bound by  
22 the outcome of the government case. They disputed  
23 which findings of fact would be subject to  
24 preclusion.

25 And, in fact, in Microsoft's -- their brief

1 that they submitted, the petition -- the brief that  
2 they submitted to the Iowa Supreme Court which we  
3 include as Exhibit 3, selections from that brief,  
4 Exhibit 3 to our reply, here Microsoft sets out the  
5 issue for review before the Iowa Supreme Court and  
6 the issue that Microsoft set out was, did the  
7 district Court err in holding that findings of fact  
8 that merely formed the proper basis for or were  
9 related to a prior judgment are entitled to  
10 collateral estoppel effects when the correct standard  
11 for application of collateral estoppel is whether a  
12 finding was necessary and essential to the prior  
13 judgment.

14 So this is the issue that Microsoft said  
15 was set out. It was whether the findings of fact are  
16 subject to preclusion, not whether or not the  
17 conclusions of law set out in Judge Reis's December  
18 2004 ruling are subject to preclusion.

19 And, in fact, in the Iowa Supreme Court's  
20 decision, the Court notes at 709 N.W.2d 114 at page  
21 116, the Court states, "The Defendant Microsoft  
22 Corporation was granted permission to take an  
23 interlocutory appeal from the district court's ruling  
24 that collateral estoppel would apply to 352 findings  
25 of fact arising from prior federal antitrust

1 litigation."

2           So again, the issue -- the conclusions of  
3 law really never came up. It wasn't until oral  
4 argument here when Mr. Rosenfeld was arguing on  
5 behalf of Microsoft on collateral estoppel that  
6 Microsoft first raised this argument that the  
7 conclusions of law from Judge Reis's 2004 ruling were  
8 no longer binding. That was just -- it was really  
9 raised in passing during oral argument, but that was  
10 one of the reasons why we decided we needed -- we  
11 need this Court -- request this Court to issue a  
12 ruling that, in fact, the findings of fact that are  
13 subject to preclusion in this case were violations of  
14 the antitrust laws under the Iowa Competition Law and  
15 that the same conduct set out in Judge Reis's 2004,  
16 December 2004, ruling, that those conclusions of law  
17 are still binding in this case. And we think the  
18 Court can do that under Rule 1.981(3), and for that  
19 reason we would ask the Court to grant plaintiffs'  
20 motion.

21           THE COURT: Mr. Neuhaus.

22           MR. NEUHAUS: Thank you, Your Honor.

23           In this motion plaintiffs say the findings  
24 on which collateral estoppel has been granted  
25 establish liability under the competition law and

1 that's not true because the plaintiffs must show that  
2 they suffered antitrust injury to establish liability  
3 under the act and the findings in the government case  
4 do not establish that plaintiffs suffered antitrust  
5 injury.

6 Judge Motz denied summary judgment in  
7 exactly these circumstances. He held in his opinion  
8 at 232 F.Supp. 2d, page 534, that "A plaintiff" --  
9 "First, a plaintiff in a private antitrust action  
10 must prove that it suffered injury in fact caused by  
11 the asserted antitrust violation and that this injury  
12 constituted antitrust injury." And he cites the  
13 Supreme Court cases that say that.

14 "Nothing in the government case against  
15 Microsoft demonstrates that the consumer plaintiffs  
16 Be or Burst suffered any such injuries and their  
17 motion for partial summary judgment therefore clearly  
18 fail."

19 In that decision Judge Motz first granted  
20 collateral estoppel effect in that case to hundreds  
21 of findings. He was later reversed on that, but the  
22 plaintiffs in that case, just like here, also moved  
23 for partial summary judgment on liability. And Judge  
24 Motz explicitly denied that on the basis I just  
25 quoted: One, that plaintiffs in order to establish

1 liability must prove injury in fact, and that that  
2 injury constituted antitrust injury; and, two, that  
3 the government case didn't establish that.

4 Now I want to go through those two points  
5 in a little bit more detail, but first I want to step  
6 back a bit and address the difference between  
7 collateral estoppel and summary judgment.

8 Collateral estoppel establishes certain  
9 facts as a given. It can also be used to obtain  
10 collateral estoppel on legal conclusions, and there  
11 is a dispute as to exactly how the legal conclusions  
12 should be phrased that I will come to later, but in a  
13 case like this where Microsoft -- where the  
14 plaintiffs were not in the prior case, collateral  
15 estoppel does not establish that the defendant is  
16 liable to these plaintiffs. The liability is to  
17 these plaintiffs.

18 A summary judgment on liability constitutes  
19 a finding of liability to these plaintiffs. And so  
20 whether plaintiffs suffered antitrust injury is an  
21 essential element of a finding of liability and that  
22 was not at issue in the prior case. It will be at  
23 issue in this case.

24 With respect to the findings that are  
25 subject to collateral estoppel in this case, the 1995

1 to 1998 conduct involving Java and Netscape, the crux  
2 of this case will be whether that conduct led to a  
3 market structure that was different from what would  
4 have been so that these plaintiffs, in fact, suffered  
5 lack of choice or other injuries that they are  
6 claiming. So that's the crux of the case with  
7 respect to 1995 and 1998 conduct that was the subject  
8 of collateral estoppel. But in order to find  
9 liability on summary judgment as opposed to  
10 collaterally estopping issues, you've got to find  
11 that we would be liable to the plaintiffs.

12 And that is because antitrust injury is an  
13 element of standing. Plaintiffs concede that in  
14 their brief -- or it's analogous to standing. You  
15 need to show that a plaintiff actually suffered  
16 injury at the time that the antitrust laws were  
17 designed to prevent in order to be able to claim --  
18 to maintain a claim of violation of law. That's how  
19 you get into court, to claim liability, to claim  
20 somebody is liable to you.

21 Now, plaintiffs answer to this point, that  
22 is, that this is -- antitrust injury is essential to  
23 a finding of liability is contained in a footnote on  
24 page 9 of the reply brief, footnote 9. They say,  
25 "For Microsoft to raise an issue relating to standing

1 at this juncture is ludicrous." That is really all  
2 they say. They then cite a case from the Eighth  
3 Circuit, which I will come back to, called Midwest  
4 Communications for the proposition that antitrust  
5 injury is an element of standing.

6 It appears what they are saying is that  
7 that we're beyond that. It's too late or something,  
8 that we've gotten past standing, but standing is, no  
9 question about it, a preliminary question. You  
10 cannot find someone liable to a plaintiff who lacks  
11 standing, but you can't -- standing and antitrust  
12 injury are not something that you can just allege and  
13 forget about it. You have to prove it and that is  
14 why you cannot get summary judgment on liability  
15 unless you antitrust injury.

16 And Midwest Communications, that case that  
17 plaintiffs cite in that footnote illustrates this  
18 point. In that case the trial court granted  
19 judgment. There was a trial on liability and  
20 antitrust injury before the jury. The jury made  
21 findings finding in that case a violation of law and  
22 that the plaintiff was injured by that violation of  
23 law, the antitrust law, and holding damages, that  
24 the amount of the damages were to be tried in a  
25 separate trial.

1           The trial court granted judgment NOV  
2           because the plaintiffs had not proven that the harm  
3           that they suffered was due to the anticompetitive  
4           effect of the wrongful conduct, they had not proven  
5           an antitrust injury. So Midwest Communications makes  
6           clear that standing must be proved; and if it is not,  
7           then plaintiffs fail on liability. And in that case  
8           it was a judgment NOV. It could just as well have  
9           been a summary judgment motion.

10           The cases that plaintiffs cite and, again,  
11           what I'm focusing right on now is can they get  
12           summary judgment on liability without proving  
13           standing or antitrust injury and they cannot because  
14           it's an element of what it means to be liable. And  
15           that's what Rule 1.981 refers to when it says summary  
16           judgment on liability; otherwise, you're just getting  
17           summary judgment on an issue which is what collateral  
18           estoppel is about.

19           The cases they cite are not -- don't stand  
20           for the contrary.

21           In the New York v. Julius Nasso case that  
22           they cite and that Mr. Jacobs referred to just now,  
23           the court granted summary judgment on the elements --  
24           on two elements. He only said -- he said that the  
25           Court found liability and left damages to later, but

1 there were, in fact, three elements that the Court  
2 was dealing with at that time because the Court  
3 granted summary judgment on elements of whether the  
4 conspiracy occurred and the impact on the state -- he  
5 didn't tell you that -- and left damages for later.

6 So in that case and I will -- I mean, in  
7 that case the case was suing for damages that it had  
8 allegedly suffered as a result of price fixing in the  
9 construction industry.

10 In the evidence in the prior case on which  
11 there was collateral estoppel given to prior case,  
12 and the evidence in that case dealt specifically with  
13 the particular project that the state was suing on.  
14 The state says I was overcharged in building the  
15 Javits Convention Center in New York City.

16 And the prior criminal case specifically  
17 had findings that the conspiracy, the price fixing  
18 affected the -- that exact very project.

19 So as the Second Circuit said, and I'm  
20 going to quote now, "The district court, Preska, J,  
21 found that to prevail New York would have to  
22 demonstrate that, one, a bid-rigging conspiracy  
23 occurred; two, the bid-rigging conspiracy had an  
24 impact on the state; and, three, the state suffered  
25 damages by reason of that conspiracy, and there's a

1 citation, and then continuing to quote: "Judge  
2 Preska found that Salerno II" -- which is the prior  
3 criminal case -- "collaterally estopped defendants  
4 from contesting their involvement in the bid-rigging  
5 conspiracy, and the conspiracies impact on the  
6 State," and then they left the fact of damages for  
7 trial.

8           So the court -- Nasso is not like this  
9 because in this case the specific plaintiffs -- there  
10 was a finding that the plaintiff in that case, the  
11 State of New York, had been impacted by the  
12 conspiracy. And as I'm going to come to, we don't  
13 have that here, notwithstanding what Mr. Jacobs says.  
14 I will say that Mr. Jacobs didn't mention them, but  
15 they cite other cases in which partial summary  
16 judgment on liability were granted, but all those  
17 cases are per se violations of the antitrust law and  
18 in per se cases the restraint -- that the restraint  
19 actually affected competition in which the market --  
20 in which the plaintiff participation is presumed.

21           In our case the question that must be  
22 decided to find liability is whether the violation,  
23 in fact, had an actual effect on competition in the  
24 market in which the plaintiffs participated and that  
25 their injury was suffered as a result of that effect

1 on competition.

2 Now, the findings in the government case  
3 that are the subject of collateral estoppel here do  
4 not establish that plaintiffs suffered antitrust  
5 injury.

6 First, in the government case there was no  
7 need to find an actual harm to consumers. That was a  
8 case for an injunction, and I think as Your Honor is  
9 familiar, the Court of Appeals held that the only  
10 harm that needed to be proved was the potential for  
11 harm to competition. So that I'm going to read now  
12 from the Court of Appeals decision in U.S. v.  
13 Microsoft, 253 F.3d page 34, and in particular at  
14 page 79 the Court describes that in an injunction in  
15 a case seeking equitable relief, not damages, the  
16 Court's, quote, infer causation from the fact that a  
17 defendant has engaged in anticompetitive conduct  
18 that, quote, reasonably appears capable of making a  
19 significant contribution to maintaining monopoly  
20 power, close quote.

21 And then the Court discusses the law and  
22 then goes on: "Given this rather edentulous test for  
23 causation" -- we've had this word before. All of us  
24 had to go look it up. It means "toothless" -- "given  
25 this rather edentulous test for causation, the

1 question in this case is not whether Java or  
2 Navigator would actually have developed into viable  
3 platform substitutes."

4 That is the question, Your Honor, in this  
5 case, whether they actually would have developed into  
6 viable platform substitutes so as to cause harm to  
7 the plaintiff consumers; but the question in the D.C.  
8 Circuit's case, in the government case, was, quote:  
9 One, whether as a general matter, the exclusion of  
10 nascent threats is the type of conduct that is  
11 reasonably capable of contributing significantly to a  
12 defendant's continued monopoly power; and, two,  
13 whether Java and Navigator reasonably constituted  
14 nascent threats at the time Microsoft engaged in the  
15 anticompetitive conduct at issue.

16 So the D.C. Circuit -- the government case  
17 did not result in any findings of actual harm to  
18 consumers. And before I go on, I think I should just  
19 make clear what it is that antitrust injury is. An  
20 antitrust injury is defined by the Supreme Court as,  
21 "An antitrust injury is one that the antitrust laws  
22 were intended to prevent and that flows from that  
23 which makes defendant's acts unlawful."

24 And I'm reading now actually from, once  
25 again, that Midwest Communications case that

1 plaintiffs cite in its brief, and that's at 779 F.2d  
2 page 444, and at page 450 and 451 the Court lays out  
3 in this Eighth Circuit case what antitrust injury is.  
4 They go on to say, quote, we previously have noted  
5 that a mere causal connection between an antitrust  
6 violation and harm to plaintiffs cannot be the basis  
7 for antitrust compensation unless the injury is  
8 directly related to the harm the antitrust laws were  
9 designed to prevent.

10 I'm going to come back to this because some  
11 of the harm that they cite in their reply brief as  
12 having been found in the government case is not  
13 antitrust injury, but injury that is collateral to an  
14 anticompetitive activity.

15 Mr. Jacobs didn't even cite that here, I  
16 think properly giving way on that. But let me  
17 then -- now what I would like to do is go through the  
18 injury that they claim -- the harm they claim was  
19 found in the government case.

20 No finding of actual harm were necessary to  
21 the result in the government case, as I just read to  
22 you. They say, "Nevertheless, there are findings  
23 that Your Honor has given collateral estoppel that  
24 establish actual harm to the plaintiffs" -- "to the  
25 plaintiffs in this case, the Iowa consumers." That's

1 not true. A, those findings -- those finding were  
2 not necessary if they had made those findings, but  
3 none of the findings they point to, in fact, show  
4 antitrust injury.

5 They go through these findings on pages 13  
6 or 16 or so in their reply brief. Mr. Jacobs touched  
7 on them in his argument just now. They first go  
8 through on pages 13 to 16 this claim of lack of  
9 choice and that there was harm to the plaintiffs'  
10 choice. And Mr. Jacobs touched on that. In fact,  
11 that is the only one he argued here.

12 If you look at those findings, Your Honor,  
13 and the ones he read are included, those findings  
14 don't say that that there was, in fact, a diminution  
15 of choice to consumers, but that there was an effect  
16 that denied competitors the opportunity to bring more  
17 choice to the market. So that, for example, he read  
18 just now Finding of Fact 410 in which -- I think he  
19 read all of this, but his brief says, "By  
20 constraining the freedom of OEMs to implement certain  
21 software programs in the Windows boot sequence,  
22 Microsoft foreclosed an opportunity for OEMs to make  
23 Windows PC systems less confusing and more  
24 user-friendly, as consumers desired."

25 That is just -- that is saying that the

1 OEMs were denied the opportunity to make the system  
2 less confusing. It doesn't say that, in fact, an OEM  
3 would have made the PC system less confusing and more  
4 user-friendly and that would have made the market  
5 structure different. It's only if -- the market  
6 structure is different if Microsoft's position is not  
7 where it is now.

8           It does not have the market where it is now  
9 that prices could conceivably be affected or, in this  
10 case, that there would be greater choice on the  
11 market, only if the OEM, in fact, would do that and  
12 bring a product to market. And that question,  
13 whether any of these things that occurred actually  
14 had an effect on the end result is what this trial is  
15 going to be intensively about with respect to these  
16 questions. It's what the expert reports are all  
17 about with respect to this conduct.

18           Similarly, Mr. Jacobs read Finding 410 that  
19 said that -- I'm sorry -- later in 410 that the NSP  
20 activity deprived consumers of software innovation  
21 that they very well may have found valuable had the  
22 innovation been allowed to reach the marketplace.  
23 There's no finding and there didn't need to be any  
24 finding that that would, in fact, have occurred.

25           And, in fact, one of the findings that has

1 collateral estoppel effect here is Finding of Fact  
2 411 in which the district court in the government  
3 case found there is insufficient evidence to find  
4 that, absent Microsoft's actions, Navigator and Java  
5 already would have ignited genuine competition in the  
6 market for Intel-compatible PC operating systems.

7         So it shows very clearly, that finding  
8 shows that the D.C. Circuit -- I'm sorry -- the  
9 district court in that opinion was not making any  
10 finding that there was actual effect; that is, that  
11 consumers would have had these additional products  
12 that might have been brought to market. It was just  
13 a finding that these products -- that the opportunity  
14 to develop those products was denied.

15         In answer to that finding in their brief,  
16 they say that we ignore the very next sentence which  
17 says that, "It is clear, however, that Microsoft has  
18 retarded, and perhaps altogether extinguished, the  
19 process by which these two middleware technologies  
20 could have facilitated the introduction of  
21 competition into an important market."

22         So again, all it is saying is that  
23 Microsoft's conduct affected the ability, the  
24 opportunity, for those competing products to bring  
25 other things to market; not that, in fact, they would

1 have done so.

2 Mr. Jacobs in his argument today more or  
3 less discarded the second kind of harm that they  
4 allege in their brief, which is that in their brief  
5 they suggest that Microsoft -- that the Court  
6 actually found that Microsoft had overcharged; that  
7 the pricing would have been different in the "but  
8 for" world, and that is just completely wrong and  
9 unsupported, and as I say, he seemed to give that  
10 away today. But I will address it because it is in  
11 their briefs and in their reply brief, so this is my  
12 chance.

13 His first argument on that is -- in the  
14 reply brief is that there is a presumption of  
15 overcharge, and they cite a case called In re Folding  
16 Carton Antitrust Litigation, for the proposition that  
17 an illegal price fixing scheme presumptively impacts  
18 upon all purchasers of a product -- of a price fixed  
19 product in a conspiratorial affected market. That is  
20 a price fixing case, and in price fixing cases it was  
21 a per se violation, there is such a presumption.  
22 There is not such a presumption in a monopolization  
23 case. There are many more steps between a claim of  
24 monopolization and a claim of -- and effect on price  
25 than there are in a price fixing case. And so

1 monopolization cases are not per se cases and do not  
2 carry with them the presumption of an effect on  
3 price.

4           They also in their reply brief and  
5 Mr. Jacobs briefly referred to it -- referred to  
6 findings in the government case that deal with  
7 whether Microsoft had a monopoly, and they address --  
8 they talk about price in the sense that Microsoft  
9 was -- let me get to the thing, but they do not say  
10 that the price would have been different had  
11 Microsoft not engaged in illegal conduct because they  
12 are not dealing with illegal conduct in that stage of  
13 the opinion.

14           The opinion at that stage is dealing with  
15 establishing that Microsoft had a monopoly power, and  
16 that is whether it had obtained it or maintained it  
17 illegally. So that, for example, the reply brief  
18 cites Finding of Fact 33 which says, "Microsoft  
19 enjoys so much power in the market for  
20 Intel-compatible PC operating systems that if it  
21 wished to exercise this power solely in terms of  
22 price, it could charge a price for Windows  
23 substantially above that which could be charged in a  
24 competitive market."

25           That is certainly not a finding that

1 Microsoft, in fact, was charging a price higher than  
2 it would have charged in a market that was unaffected  
3 by illegal conduct that was found later in the  
4 opinion. It's something quite different, which is  
5 simply saying if it wished to exercise its monopoly  
6 power in terms of price, it could charge a price  
7 above what it would charge in a competitive market.

8 Mr. Jacobs also referred today in his brief  
9 to a finding relating to -- that a lower price, a \$49  
10 price for an upgrade to Windows 98 would have been  
11 profitable but the study on which it is being cited  
12 identified a higher price, \$89 as the  
13 revenue-maximizing price.

14 This is also not a finding that consumers  
15 paid a higher price for Microsoft's products as a  
16 result of illegal conduct. It's simply a finding  
17 that Microsoft could have made money charging less.  
18 That does not mean there's an overcharge. Any  
19 company that is in a market where there is less than  
20 perfect competition charges a revenue-maximizing  
21 price above its break-even point. So that finding,  
22 too, was not a finding that there was an actual  
23 overcharge. And as I say, there was no need to make  
24 that finding in that case. There were no consumers  
25 present and it was not a case for damages.

1 In his brief, but not here today at all,  
2 Mr. Jacobs argued as well that findings of harm from  
3 the bundling of Internet Explorer with Windows  
4 constituted antitrust injury and are binding and  
5 therefore he has established harm.

6 If you look at those findings, they are  
7 findings of a slower operating system or that the  
8 bundling would harm consumers because they were  
9 unable to remove the browser. Those are not claims  
10 for antitrust injury. These are claims of a product  
11 liability or breach of warranty. They don't result  
12 from the affect on competition. You can tell that  
13 because they do not depend at all on whether -- on  
14 Microsoft's market share. They would result if any  
15 operating system bundled the browser with the  
16 operating system in that way, the same harm would  
17 have resulted; and, therefore, you know, that is not  
18 antitrust injury and, in fact, Judge Jackson  
19 specifically termed that harm as, quote, collateral  
20 harm on consumers.

21 Well, collateral harm is not harm derived  
22 from the conduct that the antitrust laws is designed  
23 to prevent.

24 So none of the findings to which collateral  
25 estoppel has been granted demonstrate that plaintiffs

1 suffered antitrust injury, and that's as I said, a  
2 necessary element to establish liability as opposed  
3 to collateral estoppel.

4 Mr. Jacobs has also referred to the  
5 conclusions of law in the government case. Now, he  
6 didn't cite any conclusion of law that established  
7 harm, and there aren't any. And there is certainly  
8 no conclusion of law in Judge Reis's opinion that was  
9 drafted -- that the way that was drafted that finds  
10 actual harm, and it even suggests that. So, in fact,  
11 that whole argument doesn't make a difference. But  
12 let me just address this question of what is the  
13 status of the conclusions of law that were found in  
14 the 2004 opinion.

15 In essence, the 2004 opinion has been  
16 reversed in toto. The Supreme Court's decision  
17 doesn't qualify it, and this Court's order to date  
18 refers only to findings of fact and there is -- and  
19 the dispute relates to whether Judge Reis's  
20 characterization in drafting of the conclusions of  
21 law which she took -- and it's actually plaintiffs'  
22 draft of those that she adopted -- that took snippets  
23 from the Court of Appeals opinion and from the  
24 conclusions of law and pasted them together in a long  
25 set of supposed conclusions of law, and we dispute

1 those conclusions were necessary and essential to the  
2 judgment. We disputed that before Judge Reis -- she  
3 entered that order.

4 We challenged the applications of  
5 collateral estoppel, of the collateral estoppel  
6 standard in the Supreme Court. We sought leave on  
7 the ground that the Court misapplied the necessary  
8 and essential standard, and our brief in support of  
9 our motion for leave referred specifically to the  
10 legal conclusions at several points.

11 And since it's not in the record, I think I  
12 better put it in or at least give it to Your Honor  
13 because this argument is raised on reply. So I'm  
14 handing you the brief we submitted to the Supreme  
15 Court in support of our arguments -- our application  
16 for leave to appeal.

17 And you will see if you turn to page 15, in  
18 the middle of the page -- yeah, it's underlined --  
19 that, "Here," we said, "the district court's  
20 collateral estoppel ruling was based on an incorrect  
21 interpretation of the necessary and essential  
22 standard. The district court held that preclusion  
23 applies to all legal and factual issues that were  
24 raised and litigated in the prior proceeding and that  
25 were the proper basis for the prior tribunal's

1 determination that the elements of a claim were  
2 satisfied. This standard is strikingly different  
3 from the necessary and essential standard set forth  
4 in this court's opinion, and that was our argument.

5 We also said on the next page, page 16,  
6 that the proposition of how the court should have  
7 preceded was best demonstrated by the Minnesota  
8 court's well-reasoned collateral estoppel decision in  
9 Gordon. And back on page 9 we had specifically  
10 described the Gordon decision in which the Court had  
11 reasoned backward from the ultimate finding of  
12 illegal monopolization and concluded that the  
13 collateral estoppel effect would be given to three  
14 findings of fact on market definition, limited  
15 excerpts from the D.C. Circuit's opinion describing  
16 the barrier to entry and twelve acts held to be  
17 anticompetitive and the conclusion that Microsoft's  
18 conduct violated federal and Minnesota antitrust  
19 laws. We quoted similar language also in the brief  
20 on appeal.

21 At oral argument before the Supreme Court,  
22 Mr. Tulchin argued that the jury should be told --  
23 and this in plaintiff's exhibits, Exhibit E at pages  
24 4 and 5 -- that Microsoft violated the antitrust laws  
25 for unlawful monopoly maintenance and operating

1 systems in the period 1995 to 1998 and we urge that  
2 the Court did not need to go through everything that  
3 was done below, but needed only to articulate the  
4 proper standard and remand, which is what the Court  
5 did. So the Supreme Court then reversed Judge Reis's  
6 opinion in its entirety. It's a flat-out reversal  
7 and doesn't say the conclusions of law remain  
8 standing.

9 In this court when we came back here, the  
10 plaintiff rested on the proposition -- we say we  
11 believe it's erroneous that Microsoft raised --  
12 failed to raise the paraphrases of the conclusions of  
13 law in the 2004 opinion when it appealed and that,  
14 therefore, we continued to be bound by the phrasing  
15 that Judge Reis had picked, even though the 2004  
16 opinion was entirely reversed.

17 Plaintiffs did not present argument that  
18 those findings were necessary and proper or those  
19 conclusions were necessary and proper or met that  
20 exact standard, not necessary or essential or met the  
21 proper standard.

22 As Mr. Jacobs concedes, Microsoft in oral  
23 argument to you pointed out that we had disputed  
24 collateral estoppel -- the application of collateral  
25 estoppel in the conclusions of law as phrased in

1 Judge Reis's opinion.

2 Plaintiffs submitted a proposed order  
3 seeking collateral estoppel effect for those  
4 conclusions of law. Your Honor did not enter that  
5 order, but entered an order only with respect to the  
6 findings of fact.

7 So at this point there is no order  
8 establishing the collateral estoppel as to the  
9 conclusion that Microsoft violated the law except to  
10 the extent that that is stated in the findings of  
11 fact that we've looked at and that are in the record.

12 That doesn't mean that Microsoft is saying  
13 that there is no -- there can never be collateral  
14 estoppel effect as to conclusion of law that a  
15 violation took place, but there is not at this point  
16 an order that provides for that because of the way  
17 that proceeded. But that fact does not affect the  
18 conclusion that summary judgment is not the  
19 appropriate path.

20 So to wrap up, summary judgment is  
21 different from collateral estoppel, as I said at the  
22 outset. Summary judgment on liability means  
23 liability to these plaintiffs so that plaintiffs must  
24 show that they suffered antitrust injury. That is a  
25 standing inquiry and is an element of liability.

1           The government's findings, neither the  
2 conclusions of law nor the findings of fact, do not  
3 establish that any Iowa plaintiff actually suffered  
4 any harm. Those two points were deposited for Judge  
5 Motz and they should be deposited here.

6           Thank you, Your Honor.

7           THE COURT: Thank you.

8           MR. JACOBS: Mr. Neuhaus argued towards the  
9 end of his resistance here that there is no order on  
10 Microsoft's conduct that is set out in the findings  
11 of fact that were subject to conclusion here, that  
12 those findings establish illegal violation. That's  
13 what we're asking the Court to do because that's  
14 Microsoft's -- apparently Microsoft's position now,  
15 that there is nothing out there, that Judge Reis's  
16 December 2004 ruling Microsoft says was reversed in  
17 its entirety. We disagree. But in order to resolve  
18 any confusion on this, we ask that the Court enter an  
19 order that states that the conclusions of law set  
20 forth in Judge Reis's December 2004 ruling are  
21 binding in this case.

22           Mr. Neuhaus argues that summary judgment is  
23 not the appropriate vehicle for this. Well, we  
24 believe, as we've set out, that the summary judgment  
25 standard on liability, while leaving measurement of

1 damages for trial, is a proper procedural vehicle;  
2 however, if the Court disagrees with that, the Court,  
3 as we point out in our reply, can also look at  
4 Rule 1.981(4) or Rule 1.602(3) of the Iowa code and  
5 can issue an order establishing that Microsoft's  
6 exclusionary conduct violated the Iowa Competition  
7 Law.

8         So regardless of whether or not it is done  
9 through partial summary or some other procedural  
10 vehicle, the Court can issue an order just like it  
11 issued an order saying that Microsoft could not  
12 dispute the particular findings of fact. And why do  
13 we think that is important? Because given what  
14 Microsoft in the Minnesota case -- as we pointed out  
15 to the Court during the collateral estoppel hearing,  
16 Microsoft's experts, Microsoft's witnesses contested  
17 the findings and the conclusions in the government  
18 case, and we think it is absolutely imperative that  
19 Microsoft not be allowed to relitigate issues, legal  
20 and factual issues, that were determined in the  
21 government case here.

22         Now, whether or not Microsoft did or did  
23 not contest Judge Reis's ruling with respect to the  
24 legal conclusions really is immaterial because of  
25 these other procedural vehicles available to the

1 Court. But I would point out that in the brief that  
2 Microsoft did file with the Court and with the  
3 Supreme Court and that Mr. Neuhaus provided, nowhere  
4 do you see anywhere where Microsoft directly  
5 challenges the conclusions of law.

6 You really need to kind of connect the dots  
7 all around this brief to make any argument that the  
8 legal conclusions were at issue in that appeal. And,  
9 in fact, given that Microsoft's statement of the  
10 issue -- and it only raises one issue in its brief  
11 that we pointed out -- that whether or not the  
12 findings of fact were properly given collateral  
13 estoppel effect by the trial court, that was the  
14 issue that Microsoft chose to appeal and that -- let  
15 me just for the Court's convenience, we noted that on  
16 page 4 of our reply brief, and that is in Exhibit 3,  
17 which is the Hagstrom affidavit that was submitted in  
18 connection with this reply brief.

19 Mr. Neuhaus talked a lot about antitrust  
20 injury and standing. Well, on the standing issue,  
21 the Comes court, Comes 1, already found that these  
22 plaintiffs have standing. Standing is not an issue  
23 in this case.

24 Plaintiffs have standing to pursue their  
25 monopolization and unreasonable restraint of trade

1 claims causes of action against Microsoft. They are  
2 entitled under the Iowa Competition Law to the actual  
3 damages that resulted from that conduct.

4 So standing is just -- is not an issue  
5 here.

6 Whether or not -- well, let me address  
7 Mr. Neuhaus's point that there must be findings of  
8 harm in the market in which plaintiffs participated.  
9 Well, the government case, the district court in the  
10 government case, did find structural harm in the  
11 operating systems market and the Iowa class members  
12 are participants in that operating systems market.  
13 They are consumers of Microsoft's operating system,  
14 so there has been harm in that market.

15 Finding of Fact 411 at the end of that  
16 finding of fact, this is at 84 F.Supp. 2d at 112, the  
17 Court's write, "It is clear, however, that Microsoft  
18 has retarded and perhaps altogether extinguished  
19 the process by which these two middleware  
20 technologies" -- here it's talking about Netscape and  
21 Java -- "could have facilitated the introduction of  
22 competition into an important market."

23 So the Court is finding that there was  
24 harm. There was actual, at least, delay, and, in  
25 fact, actually -- it may have actually been

1 altogether extinguishing the competition.

2 Now, whether or not Mr. Neuhaus says we  
3 must -- plaintiffs must prove that, in fact, Java and  
4 Netscape would have, in fact, developed into an  
5 alternative platform in order for plaintiffs as  
6 opposed to the government to establish causation, but  
7 that is just not true. The causation standard is not  
8 higher for plaintiffs in a consumer action like this.  
9 Causation can be reasonably inferred from illegal  
10 conduct.

11 So this notion that we must show an  
12 actual -- you know, that what would have been was  
13 some sort of precision just is not the case. You  
14 know, we've addressed this issue previously in the  
15 Zenith case, the Zenith v. Hazeltine, case that we've  
16 cited in connection with our other motions and this  
17 causation standard.

18 Microsoft wants to hold plaintiffs to a  
19 causation standard here that is not set out in any  
20 case.

21 The D.C. Circuit in terms of whether or not  
22 there was harm to consumers in any of the legal  
23 conclusions that are set out in Judge Reis's 2004  
24 ruling. I remind the court, though, that the  
25 standard set out by the D.C. Circuit as to whether or

1 not conduct in the first instance is anticompetitive  
2 is whether it harmed the competitive process and  
3 thereby harmed consumers.

4 So implicit in all of this, all of these  
5 findings is the finding that the market structure has  
6 been harmed, competition has been harmed, and  
7 consumers have been harmed. And, in fact, it's not  
8 just implicit, as we pointed out in numerous findings  
9 of fact here, where actual harm has been found.

10 In fact, we pointed out in connection with  
11 the security -- our resistance to Microsoft's motion  
12 for partial summary judgment on what it characterized  
13 as our security claim, that there has been findings  
14 by Judge Jackson that Microsoft's conduct,  
15 Microsoft's illegal binding of Internet Explorer to  
16 Windows has caused actual harm to Iowa -- to  
17 consumers, to users of the Windows operating system.

18 The only question is what was the  
19 quantification of that harm? What is the actual  
20 harm? And that is what, as Mr. Reece explained two  
21 weeks ago now, was what plaintiffs' experts have  
22 undertaken in connection with the security component  
23 of actual damages that we've set out. But there has  
24 been findings of violations, there have been findings  
25 of harm. Whether or not they are overcharged harm or

1 some other harm, they are harm.

2 Now, this notion that this is not some sort  
3 of antitrust injury, antitrust injury is that kind of  
4 injury that flows from the type of conduct that the  
5 antitrust laws are designed to prevent.

6 Well, the antitrust laws are not just  
7 designed with pricing in mind. The antitrust laws,  
8 as we pointed out in cases in connection with our  
9 security and our innovation brief, are also designed  
10 to provide higher quality, to provide faster  
11 innovation. There are other policy goals underlying  
12 the antitrust laws and simply lower prices.

13 Lower prices is an important goal of the  
14 antitrust laws, but the antitrust laws are to provide  
15 all of the benefits that would flow from innovation,  
16 that would flow from competition in a competitive  
17 market. And as our experts point out in their  
18 reports and as we argue during the first set of --  
19 first hearing on our set of motions a couple of weeks  
20 ago, this conduct that Microsoft engaged in, the  
21 illegal conduct, would not have occurred in a market  
22 that was unencumbered by Microsoft's illegal conduct.  
23 So this notion that these are security damages are  
24 just product liability damages, it's just that is not  
25 the case, as Mr. Reece has pointed out before.

1           Let me see if I have a couple more. I'm  
2 towards the end of my points here I want to make, but  
3 I want to see if there's anything else.

4           The bottom line is what we want to do is  
5 going into trial we're asking the Court to issue an  
6 order that will prevent Microsoft from being able to  
7 walk away from the outcome in the government case.  
8 We did that through collateral estoppel hearing with  
9 respect to the findings of fact, and we want to be  
10 certain, particularly now given Microsoft's apparent  
11 position, that these conclusions of law are no longer  
12 binding in this case; that, in fact, there is an  
13 order setting forth this conduct is binding on  
14 Microsoft; that the conduct that Microsoft engaged in  
15 and the conclusions that that conduct violated the  
16 law is binding in this case just as it was in the  
17 government case.

18           One final point. The conclusions of law --  
19 Microsoft throughout has never really disputed the  
20 conclusions of law. The only argument that they ever  
21 have is they don't like the way plaintiffs phrased  
22 the conclusions of law, the proposed phrasing of the  
23 conclusions of law. They say that they are snippets.

24           Well, what Microsoft was proposing that the  
25 Court adopt and what Microsoft proposed that Judge

1 Peterson in Minnesota adopt were even smaller  
2 snippets from the D.C. Circuit decision. Plaintiffs'  
3 proposed phraseology for the conclusions of law  
4 merely gave some substance to those conclusions of  
5 law and provided some context. Microsoft would just  
6 have even smaller snippets that are devoid of any  
7 sort of context and completely sanitize those  
8 conclusions. That's the only distinction we have  
9 here, that Microsoft has never, ever asserted that  
10 the conclusions of law that Judge Reis adopted were  
11 just plain wrong. They just didn't like the way that  
12 they were given some meaning and some context.

13 So in the end, again, whatever procedural  
14 vehicle the Court uses, we're simply asking for a  
15 ruling that Microsoft not be allowed to walk away  
16 from the legal conclusions in the government case.

17 Thank you.

18 THE COURT: Thank you.

19 Any other motions pending today that we're  
20 going to hear?

21 MR. JACOBS: We have one other issue that  
22 we would like to raise.

23 THE COURT: Is it set?

24 MR. NEUHAUS: It's not been set.

25 THE COURT: What is it?

1 MR. JACOBS: Nothing has been set, Your  
2 Honor, but there is an issue with respect to source  
3 code, Your Honor, that Ms. Conlin raised with  
4 Mr. Neuhaus last week and informed him that we would  
5 be raising this issue with the Court today.

6 She sent them an e-mail -- e-mails  
7 Wednesday, Thursday and Friday and on Thursday  
8 indicated we would be raising this with the Court if  
9 we didn't hear back. She didn't hear back either  
10 Thursday or Friday, and the issue, Your Honor, is  
11 basically this:

12 We have been waiting now for a long time to  
13 receive source code, complete source code that we  
14 should have received actually as far back now as July  
15 of 2005 when this Court issued its ruling stating  
16 that Microsoft would produce everything that was  
17 produced in the various competitor cases that were  
18 subject to that ruling. But in July, shortly  
19 after -- June of this year, shortly after our expert  
20 reports were submitted, about a year after the Court  
21 issued its ruling, we finally find out in fact there  
22 were source code, lots of it produced in those other  
23 competitor cases that somehow just got overlooked.

24 Well, since that time we have still been  
25 struggling and notwithstanding the Court's subsequent

1 order that Microsoft produce source code for Office  
2 XP, Windows XP and Internet Explorer 7 Beta 3, we're  
3 still waiting trying to get all of that source code  
4 that we're entitled to. And we're now six weeks from  
5 trial and we still do not seem to have all of the  
6 source code that we should have.

7 This is becoming particularly burdensome,  
8 Your Honor, because of the protected order that  
9 Microsoft has insisted upon that plaintiffs'  
10 technical experts have to travel to our offices out  
11 in San Francisco, which is about a two-hour trip each  
12 way for our technical expert from his home location.  
13 So he's been going to the San Francisco office to  
14 inspect source code only to discover in several  
15 occasions he's done this now that there are more and  
16 more components that are missing from the source  
17 code.

18 Ms. Conlin sent -- actually, if I can  
19 provide Your Honor with a set of recent  
20 correspondence here between Ms. Conlin and  
21 Mr. Neuhaus to put this into some perspective then.

22 THE COURT: I take it you're going to file  
23 some motion?

24 MR. JACOBS: I guess what we really wanted  
25 is to get some response now. Ms. Conlin inquired of

1 this last week from Microsoft and asked Mr. Neuhaus,  
2 "We want to know when are we getting the remainder of  
3 the source code," and we still have not gotten a  
4 response from Microsoft.

5 THE COURT: Then what do you want me to do?

6 MR. JACOBS: Well, we would like for the  
7 Court to order Microsoft to complete its production  
8 as it should have done.

9 THE COURT: So the Court ordered them to  
10 produce it. They haven't produced it and now you want  
11 it --

12 MR. JACOBS: Right.

13 THE COURT: You should file a motion.

14 MR. JACOBS: Well, if we file another  
15 motion, the only problem right now is a matter of  
16 timing and the fact we are coming up --

17 THE COURT: I will set it as quickly as I  
18 can.

19 MR. JACOBS: Okay.

20 THE COURT: I mean, that's the rule of  
21 procedure, isn't it?

22 MR. JACOBS: Yell --

23 THE COURT: You don't come informally and  
24 say, "Hey, Judge, they haven't done something." I  
25 never heard of that, unless I'm wrong.

1 MR. JACOBS: Well, if Your Honor wants us  
2 to follow that procedure, we will go ahead and file  
3 our motion.

4 THE COURT: Anything else?

5 MR. NEUHAUS: No, Your Honor.

6 MR. HAGSTROM: Nothing, Your Honor. Thank  
7 you.

8 (Record closed on October 3, 2006, at  
9 12:10 p.m.)

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CERTIFICATE TO TRANSCRIPT

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

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

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

Dated at Des Moines, Iowa, this 12th day of October, 2006.

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