IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JOE COMES and RILEY PAINT, INC., an Iowa corporation,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington corporation,

Defendant.

NO. CL82311

RULING ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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The above-captioned motion came before the Court for a hearing on September 5, 2003. Plaintiffs--Joe Comes, Riley Paint, Inc., and all others similarly situated--were represented by their attorneys, Roxanne Barton Conlin and Richard M. Hagstrom. Defendants were represented by their attorneys, Edward Remsburg and Charles Casper. Based on all the files, records, pleadings, submissions and arguments of counsel, the Court enters the following Ruling.

RULING

I. INTRODUCTION

Pursuant to Iowa Rule of Civil Procedure 1.261, Plaintiffs seek to certify two classes defined as follows:

1. The "Microsoft Operating Systems Software Class" consists of any person or entity who, at the time of purchase, was a citizen of Iowa who, on or after May 18, 1994 (the "Class Period"), was an indirect purchaser of Microsoft operating system software and who did not purchase Microsoft operating system software for the purpose of resale. For purposes of this Class, "Microsoft operating system software" means any full or upgrade version of Microsoft MS-DOS or Windows operating system software intended for use on Intel-compatible personal computers including, without limitation, all versions of MS-DOS, Windows 3.1, Windows for Workgroups 3.11, Windows 95, Windows 98, Windows 98 Second Edition, Windows Millennium Edition (Windows Me), Windows NT Workstation 3.5, Windows NT Workstation 4.0, Windows 2000 Professional, Windows XP Professional, Windows XP Home Edition, and Windows XP Media Center Edition operating system software.

2. The "Microsoft Applications Software Class" consists of any person or entity who, at the time of purchase, was a citizen of Iowa who, on or after May 18, 1994 (the "Class Period"), was an indirect purchaser of Microsoft applications software compatible with Microsoft operating system software and who did not purchase Microsoft applications software for the purpose of resale. For purposes of this Class "Microsoft applications software" means any full or upgrade version of Microsoft Word or Microsoft Excel, or any software in which Word or Excel is included in whole or in part, such as Microsoft Office or Microsoft Works Suite.

Just over a year ago in this case, the Iowa Supreme Court held that the Iowa Competition Law permits indirect purchaser actions such as the present lawsuit against Microsoft. In so doing, the Supreme Court stated that, "[c]onsumers in this state are best protected by permitting all injured purchasers to bring suit against those who violate our antitrust laws." *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 447 (Iowa 2002). This Court hereby **GRANTS** Plaintiffs' motion for class certification for the reasons set forth herein.

II. STATEMENT OF FACTS

The facts have been set forth previously in *Comes*, 646 N.W.2d at 441-42; and they will not be repeated here except as otherwise necessary. Plaintiffs allege that Microsoft has established, maintained, or used a monopoly to exclude competition or control, fix, or maintain prices in violation of the Iowa Competition Law, Iowa Code § 553.5. Any person injured under the Iowa Competition Law, including indirect purchasers such as Plaintiffs, may sue to "[r]ecover actual damages resulting from conduct prohibited under this chapter." Iowa Code § 553.12(2); *Comes*, 646 N.W.2d at 441.

III. OTHER MICROSOFT CLASS CERTIFICATION RULINGS

State Courts in Arizona, California, Florida, Kansas, Minnesota, New Mexico, North Dakota, South Dakota, and Wisconsin, where substantially identical indirect purchaser actions are pending against Microsoft, have certified classes similar to those

Plaintiffs seek to certify here.[1] In doing so, those Courts have rejected the arguments that Microsoft raises here in opposing the present motion. *See, e.g., In re South Dakota Microsoft Antitrust Litig.*, 657 N.W.2d at 679. Only two State Courts have denied class certification in similar indirect purchaser actions against Microsoft, and Microsoft relies on them heavily. *A & M Supply Co. v. Microsoft Corp.*, 654 N.W.2d 572 (Mich. Ct. App. 2002); *Melnick v. Microsoft Corp.*, 2001 WL 1012261 (Me. Super. Ct. Aug. 24, 2001).

IV. STANDARDS FOR CLASS CERTIFICATION

The Iowa Rules of Civil Procedure permit a Court to certify a class "if there is a question of law or fact common to a class of persons so numerous that joinder of all persons is impracticable" and the Court finds (1) that "[a] class action should be permitted for the fair and efficient adjudication of the controversy" and (2) that the class representatives will fairly and adequately protect the interests of the class. *Vos v. Farm Bureau Life Ins. Co.*, 2003 WL 21659083, at *7 (Iowa July 16, 2003) (citing Iowa R. Civ. P. 1.261 & 1.262(2)(a-c)).

In analyzing whether a class action should be permitted for the fair and efficient adjudication of the controversy, a Court must consider a number of criteria. *See* Iowa R. Civ. P. 1.263(1)(a)-(m). Those criteria, set forth verbatim below, focus on accomplishing two goals: "[1] achieving judicial economy by encouraging class litigation while

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[1] *See In re South Dakota Microsoft Antitrust Litig.*, 657 N.W.2d 668 (S.D. 2003); *Howe v. Microsoft Corp.*, 656 N.W.2d 285 (N.D. 2003); *In re New Mexico Indirect Purchasers Microsoft Corp. Antitrust Litig.*, No. D-0101-CV-2000-1697 (N.M. Dist. Ct. Oct. 2, 2002); *In re Florida Microsoft Antitrust Litig.*, 2002 WL 31423632 (Fla. Cir. Ct. Aug. 26, 2002); *Bellinder v. Microsoft Corp.* 2001 WL 1397995 (Kan. Dist. Ct. Sept. 7, 2001), application for permission to take an interlocutory appeal denied, Case No. 02-88795-A (Kan. Ct. App. May 7, 2002), denial of application affirmed, Case No. 02-88795-A (Kan. July 11, 2002); *Capp v. Microsoft Corp.*, No. 00-CV-0637 (Wis. Cir. Ct., Dane Co., June 28, 2001); *Friedman v. Microsoft Corp.*, CV 2000-000722 (Consol.) (Ariz. Super. Ct., Maricopa Co., Nov. 15, 2000 & July 13, 2001); *Gordon v. Microsoft Corp.*, 2001 WL 366432 (Minn. Dist. Ct. Mar. 30, 2001), petition for discretionary review denied, No. C8-01-701 (Minn. Ct. App. May 8, 2001), *aff'd* 645 N.W.2d 393 (Minn. 2002); *Microsoft I-V Cases*, No. J.C.C.P. 4106 (Cal. Super. Ct., San Francisco Co., Aug. 29, 2000).

[2] preserving, as much as possible, the rights of litigants--both those presently in court and those who are only potential litigants." *Vos*, 2003 WL 21659083, at *7 (quoting *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 744 (Iowa 1985)).

The Iowa Supreme Court recently reaffirmed that a Trial Court enjoys "broad discretion" in deciding whether to certify a class. *Id.* at *11. A Trial Court possesses considerable discretion in assessing what weight, *if any*, to give to the criteria set forth in the Iowa Rules of Civil Procedure for certifying a class. *See Varner v. Schwan's Sales Enters., Inc.*, 433 N.W.2d 304, 305 (Iowa 1988) (citing *Vignaroli*, 360 N.W.2d at 744).

The Rules governing class certification should be construed liberally. *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167, 176 (Iowa 1977) (citations omitted). In this instance, Plaintiffs' burden is light because the facts underlying the class allegations are not speculative. *See City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 791 (Iowa 1994) (citing *Newberg* § 7.20). Indeed, many of the facts have already been established in a government action against Microsoft in which the Iowa Attorney General participated. *United States v. Microsoft Corp.*, 253 F.3d 23 (D.C. Cir. 2001) (affirming, in part, monopolization judgment).

The Iowa Supreme Court has repeatedly cautioned against inquiring into the merits of the case in determining whether to grant class certification. *See Vos*, 2003 WL 21659083, at **8, 11; *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364, 367 (Iowa 1989); *Iowa Annual Conference of Unity Methodist Church v. Bringle*, 409 N.W.2d 471, 474 (Iowa 1987); *Vignaroli*, 360 N.W.2d at 745. "The appropriate inquiry is not the strength of each class member's personal claim, but rather, whether they, as a class, have

common complaints." *Vos*, 2003 WL 21659083, at *8 (quoting *Martin*, 435 N.W.2d at 367).

The Court must be able—when necessary—to go beyond the bounds of *notice* pleadings in order to satisfy itself that it has enough information to exercise its discretion and to "form a reasonable judgment" in ruling on the motion. *See Vos*, 2003 WL 21659083, at *8 (quoted citation omitted); *see also City of Dubuque*, 519 N.W.2d at 791 (stating that "as long as the court has before it sufficient information to form a reasonable judgment on the certification issue, it need not inquire further into the facts supporting plaintiffs' petition"). Questions regarding the ultimate merits of a plaintiff's claims have no direct bearing on the issue of certification. *See Vos*, 2003 WL 21659083, at *8. The Court need not delve into the merits of Plaintiffs' case or referee the "battle of the experts" on the questions of impact and damages.

In light of the broad discretion afforded it, the Court finds that Plaintiffs have submitted information to enable it to "form a reasonable judgment" that Plaintiffs have satisfied all of the prerequisites to class certification set forth in Iowa Rules of Civil Procedure 1.261-1.263 and that class certification is warranted and appropriate here. *See Stone*, 497 N.W.2d at 846.

V. DISCUSSION

A. Rule 1.261(1): Numerosity

The parties do not dispute that each proposed class is so numerous that joinder is impracticable. *See* Iowa R. Civ. P. 1.261(1). Each class likely includes tens or even hundreds of thousands of individuals and businesses dispersed throughout Iowa. The two classes are so numerous that joinder of all Iowa indirect purchasers during the Class

Period would be impracticable. The requirements of Iowa Rule of Civil Procedure 1.261(1) are satisfied here.

B. Rule 1.261(2): Commonality

Next, a Court must ascertain whether "a question of law or fact common to the class" exists. *See* Iowa R. Civ. P. 1.261(2). "It is not necessary that the individual claims be carbon copies of each other." *Vignaroli*, 360 N.W.2d at 745. Despite variations of individual claims, a class action may nevertheless proceed where the theories include common issues of fact or law. *Id.* The "commonality requirement is satisfied if the class shares even one common question of law or fact." 5 *Moore Federal Practice* § 23.23(2). The sole inquiry under the commonality element is whether there exists at least one common question of fact *or* law, not whether individual claims predominate over the class claims. The fact that a potential class action might involve individual damages questions does not preclude class certification when issues of liability are common to the class. *Vignaroli*, 360 N.W.2d at 745; Newberg on Class Actions § 18.05 at 18-15 to 18-21 (3d ed. 1992) ("The antitrust plaintiff can normally satisfy the requirement [of commonality] in the complaint.... An allegation of... monopolization... will be viewed as a central or single overriding issue or a common nucleus of operative fact and will establish a common question").

Plaintiffs argue that, for both classes, there are questions of law or fact common to its members, including:

- the definition of the relevant markets in which Microsoft operating systems and applications software are sold;
- whether Microsoft has, at all relevant times, possessed monopoly power in the relevant software markets;

- whether Microsoft unlawfully and willfully maintained its monopoly power in the relevant markets by anti-competitive and exclusionary conduct;
- whether the alleged conduct by Microsoft violates the Iowa Competition Law, Chapter 553, Code of Iowa, 1997;
- whether Microsoft's unlawful conduct has caused legally cognizable injury to the classes;
- whether Plaintiffs and class members are entitled to damages based on the difference between competitive prices and the monopoly prices that they paid.

Microsoft does not contest the existence of common questions of law or fact. The Court finds that the requirements of Rule 1.261(2) are satisfied as to both classes.

C. Rule 1.262(2): Fair and Efficient Means of Adjudication

A plaintiff seeking certification of a class must also convince the Court that a class action would be a fair and efficient method of adjudicating this controversy. *See* Iowa R. Civ. P. 1.262(2). In analyzing the plaintiff's showing, a Court must consider and, in its discretion, give appropriate weight (if any) to a multitude of factors outlined in Iowa R. Civ. P. 1.263(1)(a)-(m). These criteria are designed to "achiev[e] judicial economy by encouraging class litigation while preserving, as much as possible, the rights of the litigants – both those presently in court and those who are only potential litigants." *Vignaroli*, 360 N.W.2d at 744 (cited in *Vos*, 2003 WL 21659083, at *7). Each factor is discussed in detail below.

Microsoft's principal argument against class certification is that common questions do not predominate over individual questions regarding proof of impact to the class and the amount of damages and, consequently, proceeding as a class action (1) will not be a fair and efficient means of litigating this case and (2) will pose insurmountable manageability issues. *See* Iowa R. Civ. P. 1.263(1)(e), (l).

The Court has "weigh[ed] and consider[ed]" all of these factors. *See Vos*, 2003 WL 21659083, at *7. For the reasons explained below, the Court rejects Microsoft's arguments and finds that certification of the two proposed classes should be permitted for the fair and efficient adjudication of this matter.

1. Rule 1.263(1)(a): Class Representatives

The proper focus under Iowa R. Civ. P. 1.263(1)(a) is whether the representative plaintiffs' interests are aligned with the class members' interests, thereby ensuring that the legal theories raised by the representative plaintiffs do not conflict with the class members' claims. *See Baby Neal ex. rel. Lanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994) (discussing typicality element to federal rule for class certification); *see also Vos*, 2003 WL 21659083, at *7 (Rules 1.261 to 1.263 "closely resemble" Fed. R. Civ. P. 23; therefore, Court may rely on federal authorities construing similar provisions in Rule 23).

Microsoft argues Riley Paint would not be an adequate representative based on responses given by James S. Jennison during his recent deposition on behalf of Plaintiff corporation. The Court disagrees and finds, based on the entirety of Mr. Jennison's testimony, that Riley Paint understands its obligations as a class representative and that it takes those obligations seriously.

Microsoft has asserted that Mr. Comes is not a member of either class based on his deposition testimony. Mr. Comes is a member of both classes. These matters can be examined by Microsoft at the time of the trial; but for current purposes, the Court finds the parties to be members of the class.

The representative Plaintiffs in this case and members of the proposed classes share a joint and common interest in resolving the common legal and factual questions

presented and in receiving compensation for any overcharges imposed as a result of Microsoft's allegedly unlawful anti-competitive conduct. This factor, therefore, weighs in favor of certification.

2. Rule 1.263(1)(b): Possibility of Inconsistent Judgments

Iowa R. Civ. P. 1.263(1)(b) requires a Court to examine "whether inconsistent judgments in separate suits would place the party opposing the class in the position of being unable to comply with one judgment without violating the terms of another judgment." 5 *Moore's Federal Practice* § 23.41(2)(1). Separate litigation by class members against Microsoft may create a risk of inconsistent adjudications; however, because money damages (rather than affirmative relief) are being sought, this factor neither supports nor weighs against class certification. *See Varner*, 433 N.W.2d at 305 (Court possesses discretion in assessing what weight, if any, to give the specific criteria).

3. Rule 1.263(1)(c): Prejudicial Effect of Separate Litigation

Iowa R. Civ. P. 1.263(1)(c) "seeks to protect [members of the putative class] against situations in which they would be prejudiced by separate litigation." 5 *Moore's Federal Practice* § 23.42(1). This factor generally only comes into play in situations "in which any recovery will come from a fixed pool of assets that is or may be insufficient to satisfy all the claims against the fund," and is intended "to preserve a limited fund for the benefit of the entire class, against individual claims of class members that could exhaust the fund and leave subsequent claimant with no remedy." *Id.* at § 23.43(2)(a). There is no evidence that Plaintiffs' sole source of recovery will come from such a fund, so this factor does not weigh for or against certification.

4. Rule 1.263(1)(d): Injunctive Relief and Opposing Parties

Rule 1.263(1)(d) speaks to situations in which injunctive or declaratory relief are sought. Because Plaintiffs are seeking only damages, not injunctive relief, in this action, this factor is inapplicable to this inquiry.

5. Rule 1.263(1)(e): Predominance

Microsoft's opposition to class certification concentrates heavily on the predominance question. Although the question "whether common issues of fact or law predominate over those affecting only individuals is a fairly complex one," *Vignaroli*, 360 N.W.2d at 744, and demands a "'close look' at "the difficulties likely to be encountered in the management of a class action," *Vos*, 2003 WL 21659083, at *8, it bears repeating that, at this stage of the proceedings, a plaintiff's burden is relatively light. *See City of Dubuque*, 519 N.W.2d at 791. Indeed, the predominance test is readily met in antitrust cases. *See AmChem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *see also Newberg on Class Actions* § 18.26 at 18-83 (3d ed. 1992) ("In antitrust suits, the [liability] issues of conspiracy, monopolization, and conspiracy to monopolize have been viewed as central issues which satisfy the predominance requirement"). "The individual claims need not be carbon copies of each other," *Vos*, 2003 WL 21659083, at *8. Even the possibility of "differing damages" does not render a class uncertifiable: "The fact that a potential class action involves individual damage claims does not preclude certification when liability issues are common to the class," *City of Dubuque*, 519 N.W.2d at 792 (citing *Vignaroli*, 360 N.W.2d at 745).

"'Predominate' should not be automatically equated with 'determinative' or 'significant.'" *Vos*, 2003 WL 21659083, at *8 (quoting *Vignaroli*, 360 N.W.2d at 745).

By definition, the notion of predominance contemplates that individual issues will usually remain after adjudicating common issues. *See Newberg* § 4.25. A Court should not compare the time needed to adjudicate the common issues with the time needed to dispose of the individual issues, nor should it compare the importance of the common issues with the individual issues. *Id.* Thus, a claim will predominate if there is generalized evidence that proves an element of the claim "'on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.'" *Vos*, 2003 WL 21659083, at *8 (quoting *In re Potash*, 159 F.R.D. 682, 693 (D. Minn. 1995)).

Plaintiffs assert that questions of law or fact common to all members of both proposed classes predominate, including:

- whether Microsoft is a monopolist in the markets for operating system applications software and the definition of those markets;
- whether Microsoft engaged in anticompetitive conduct in order to unlawfully maintain or acquire its monopoly power in those markets;
- whether Microsoft's conduct violated the Iowa Competition Law;
- whether Microsoft's conduct harmed the proposed class;
- whether Plaintiffs and the putative class members are entitled to damages and the appropriate measure of such damages.

Microsoft does not dispute (and this Court agrees) that the issues of market definition, Microsoft's monopoly position with respect to those markets, and whether Microsoft's alleged acts violated the Iowa Competition Law can be determined through common proof. Such determinations are functions of the operating system and applications markets in general, and of Microsoft's business in particular. These affect all class members equally, as every member of the classes will urge the same theories of liability

and rely upon the same proofs. Thus, the issues are well-suited for class-wide determination.

Microsoft contends, however, that issues of impact and damages are individual questions and that those issues predominate over the common questions. They do not. As numerous Courts have held, given a supra-competitive price (whether the result of conspiratorial price-fixing or monopolization) a jury could "conclude that defendants' conduct caused impact or injury to each class member...." *Town of Newcastle v. Yonkers Contracting Co.*, 131 F.R.D. 38, 41 (S.D.N.Y. 1990); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969) (jury entitled to draw reasonable inference of impact "from proof of defendants' wrongful acts and their tendency to injure..."). Moreover, as the District Court in the *Potash Antitrust Litigation* observed, "antitrust plaintiffs have a *limited burden* with respect to showing that individual damages issues do not predominate." *In re Potash Antitrust Litig.*, 159 F.R.D. at 697 (emphasis added); *see also Vignaroli*, 360 N.W.2d at 744 (plaintiffs have limited burden in satisfying class certification criteria).

> Plaintiffs do not need to supply a precise damages formula at the certification stage of an antitrust action. Instead, in assessing whether to certify a class, the Court's inquiry is limited to *whether or not the proposed methodologies are so insubstantial as to amount to no method at all*.... This relaxed standard flows from the equitable notion that the wrongdoer should not be able to profit by insistence on an unattainable standard of proof.... [T]he fact that the damages calculation may involve individualized analysis is not by itself sufficient to preclude certification when liability can be determined on a class-wide basis.

In re Potash Antitrust Litig., 159 F.R.D. at 697 (emphasis added).

In support of their class certification motion, Plaintiffs submitted two affidavits prepared by Dr. Jeffrey K. MacKie-Mason, a Professor of Economics and Public Policy, as well as a Professor of Computer and Information Science, at the University of

Michigan. Professor MacKie-Mason has opined that demonstrating both injury-in-fact and the amount of damages is susceptible to common proof on a class-wide basis. MacKie-Mason Aff. ¶¶ 14-40. Professor MacKie-Mason has testified previously on class certification in indirect purchaser cases against Microsoft in California, Massachusetts, Minnesota, and Wisconsin. MacKie-Mason Aff. ¶ 2. Among those states, classes have been certified in California, Wisconsin, and Minnesota; the motion for certification is pending in Massachusetts. In addition, Professor MacKie-Mason has filed an expert report describing in detail his completed analysis of overcharge damages for the California case, which was settled shortly before trial. With a colleague, he has filed joint expert reports describing in detail their completed analysis of overcharge damages for the Minnesota case and a similar case pending in Arizona, both of which are scheduled to commence trial early next year. MacKie-Mason Reply Aff. ¶¶ 3-5. Microsoft responded with the affidavit of its own expert, Professor Jerry Hausman, who, in essence, attempts to discredit Professor MacKie-Mason's opinions.

a. Fact of Injury

Demonstrating injury-in-fact on a class-wide basis will require Plaintiffs to establish that Microsoft's conduct increased prices paid for its operating systems and applications software by direct purchasers and that at least some amount of that overcharge was passed on to end users. Injury-in-fact does not depend on whether the entire overcharge is passed through, but whether *any part* of that overcharge is ultimately paid by class members. *See Gordon*, 2001-1 Trade Cas. (CCH) at 90,230.

The Findings of Fact in the case of *U.S. v. Microsoft*, 84 F. Supp. 2d 9 (DCC): 1999), are likely to be the subject of offensive collateral estoppel in this case. *Iowa*

Supreme Court Bd. Of Prof. Ethics & Conduct v. D.J.I., 545 N.W.2d 866 (Iowa 1996). Judge Jackson found that Microsoft was a monopolist and that it abused its monopoly power in myriad ways. Judge Jackson explicitly found that Microsoft's conduct had "harmed consumers in ways that are immediate and discernible. They have also caused less direct, but nevertheless serious and far-reaching, consumer harm by distorting competition." (Findings of Fact ¶409 at p. 110)

Professor MacKie-Mason has shown that demonstrating fact-of-injury is susceptible to class-wide proof. MacKie-Mason Aff. ¶¶ 13(c), 14-25. As an initial step, Plaintiffs will need to demonstrate that Microsoft overcharged its direct purchasers. In his affidavits, Professor MacKie-Mason testified that there exist a number of scientifically sound, commonly used economic methods of calculating overcharges to Microsoft's direct customers. MacKie-Mason Aff. ¶ 13(d). He explained that doing this requires first a showing what the market would have looked like absent Microsoft's dominance, what economists like Professor MacKie-Mason refer to as the "but for" world, meaning the world as it would have been "but for" Microsoft's misuse of its monopoly power. Professor MacKie-Mason posits three well-accepted "yardstick" or "benchmark" methodologies for estimating what Microsoft products would have cost in the "but for" world. MacKie-Mason Aff. ¶¶ 29-34. It is then a relatively simple matter to deduct the "yardstick" or "benchmark" price from the actual price Microsoft charged its direct customers to arrive at the overcharge. All of this can be done, Professor MacKie-Mason attests, on a class-wide basis using common proof for both classes. MacKie-Mason Aff. ¶ 13.

In opposition, Professor Hausman argues that, for a variety of reasons, the benchmarks Professor MacKie-Mason suggests for calculating the overcharge are inadequate. Notably, however, Professor Hausman does not dispute that there exists a common method of calculating overcharges on a class-wide basis, using common proof. *See* MacKie-Mason Reply Aff. ¶ 11(a).

Once Plaintiffs establish that Microsoft overcharged its direct purchasers, Plaintiffs will be required to demonstrate that at least some of that overcharge was passed through to class members in Iowa. To that end, Plaintiffs' expert testified:

> All class members are harmed by higher Microsoft prices. It is well established that competitive distribution firms [like sellers of the relevant Microsoft software] pass through some amount of their costs to their consumers: if they did not, they could not stay in business. Put another way, every class member purchased (licensed) Microsoft software from a distributor, and distributors paid above-competitive prices to Microsoft. If those distributors had paid lower prices to Microsoft, they would have been able to charge lower prices to the customers, who are the class members. Competition would have ensured that at least some of the cost savings would have been passed on to class members.

MacKie-Mason Aff. ¶ 19 (citations omitted).

Microsoft raises a number of reasons it contends injury-in-fact cannot be demonstrated on a class-wide basis. The Court need not sort out those disagreements at this stage. These are matters for the jury to determine based on a full record. For the purpose of ruling on class certification, the Court concludes that Plaintiffs' proposed methods for proving injury-in-fact on a class-wide basis are based on sound and accepted economic theory, and not so "insubstantial as to amount to no method at all." *In re Potash Antitrust Litig.*, 159 F.R.D. at 697.

b. Amount of Damages

To calculate the amount of damages sustained by the classes, Plaintiffs must establish the amount by which class members were overcharged due to supra-competitive monopoly prices for the Microsoft software at issue during the Class Period. Performing this calculation entails a two-step process. First, Plaintiffs must calculate (as described above) the amounts that Microsoft overcharged its direct customers for the products at issue during the damages period. Second, Plaintiffs must then calculate the rate or rates at which Microsoft's direct customers passed through those overcharges to the class members. Ultimately, however, "the antitrust plaintiff need only present evidence from which the factfinder may make a just and reasonable estimate of the damage that is not based on speculation or guesswork." *National Farmers' Org. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1293 (8th Cir. 1988).

Professor MacKie-Mason explains that, using regression analysis techniques, the "pass on" of Microsoft's overcharges to class members can be statistically estimated, on a class-wide basis using common proof, by examining the relationship between the costs incurred by Microsoft's customers and the prices paid by the class members. MacKie-Mason Aff. ¶ 40; MacKie-Mason Reply Aff. ¶¶ 55-58.

The question here is whether Plaintiffs have come forward with a viable method for proving fact of injury and amount of damages on a class-wide basis with common proof. The Court finds that, for purposes of class certification, Professor MacKie-Mason's methodologies are viable methods for establishing the difference between the prices that Microsoft would have been able to charge for the products at issue in a competitive environment and the prices that Microsoft actually charged during the class period. The Court further finds that Professor MacKie-Mason has presented methods that

a reasonable fact finder could accept for calculating the amount of any overcharges that were passed on to the class members. Calculating the numbers themselves and evaluating those calculations are for trial and fall well beyond the scope of the class certification inquiry.

The Court concludes that common issues predominate. *See* Iowa R. Civ. P. 1.261(1)(e).

6. Rule 1.267(1)(f): Are Other Means of Adjudication Available

This is a complex antitrust lawsuit against one of the largest software developers in the world which will involve a substantial commitment of time and resources to fully litigate Microsoft's liability and the impact of Microsoft's conduct on software consumers in Iowa. By contrast, the claims of most class members here are relatively small. Given that imbalance, "most proposed class members, absent certification, have no other legal recourse at all." *Gordon*, 2001-1 Trade Cas. (CCH) at 90,234. In light of that, the Court concludes that Iowa R. Civ. P. 1.263(1)(f)-(h) all weigh in favor of certification.

Rule 1.263(1)(f) directs a Court to consider whether other means of adjudicating the claims and defenses are impracticable or inefficient. Here, the alternative to class certification is simply no action whatsoever; consequently, there are no other practical means of proceeding with this action. Therefore, Rule 1.263(1)(f) favors certification.

7. Rule 1.267(1)(g): Most Appropriate Means

The Court also considers whether a class action offers the most appropriate means of adjudicating the claims and defenses. In this instance, a class action does not simply

offer the most appropriate means of adjudicating Plaintiffs' claims, it offers the *only* means of doing so. Thus, Rule 1.263(1)(g) also favors certification.

8. Rule 1.263(1)(h): Rights of Absent Class Members

Rule 1.263(1)(h) instructs a Court to take into account whether absent class members might have a substantial interest in individually controlling the prosecution of separate actions. No member of either class would be likely to bring an action individually to recover their damages given the relative amounts involved. None have brought individual actions to date. Accordingly, members of the proposed classes have little interest in individually controlling the prosecution of the action. Again, certification is favored under Rule 1.263(1)(h).

9. Rule 1.263(1)(i): Other Proceedings

Rule 1.263(1)(i) directs a Court to consider whether the proposed class action involves a claim that is or has been the subject of a class action, government action, or other proceeding elsewhere. Many of the same issues involved in this action were at the center of the recent government action against Microsoft, as Microsoft has readily conceded. *United States v. Microsoft,* supra. Iowa was a party to those proceedings implicating the principles of colleral estoppel and issue preclusion. Moreover, nearly identical indirect purchaser claims are the subject of certified class actions in Arizona, California, Florida, Kansas, Minnesota, New Mexico, North Dakota, South Dakota, Tennessee, and Wisconsin. Since the claims in this case have been the subject of a government action *and* other class actions, this factor weighs heavily in favor of certification.

10. Rule 1.263(1)(j): Proper Forum

Rule 1.263(1)(j) calls on a Court to consider whether it is desirable to bring the class action in another forum. Because the proposed classes include Iowa indirect purchasers only and the claims involved in this action arise solely under the Iowa Competition Law, the Court concludes that the claims of these Iowa indirect purchasers are most properly heard in an Iowa forum. Thus, the Court finds that Rule 1.263(1)(j) favors certification here.

11. Rule 1.263(1)(k): Manageability

Rule 1.263(1)(k) instructs a Court to inquire into whether management of the matter as a class action poses unusual difficulties. The Court does not believe that prosecution of this case as a class action would be unmanageable. If other Courts in other states can manage this litigation, so can the Courts of Iowa. Rejecting Microsoft's complexity arguments is also consistent with other accepted antitrust case law. *See, e.g.*, *In re NASDAQ Market-Makers Antitrust Litig.* 169 F.R.D. 493, 499, 523 (S.D.N.Y. 1996) (certifying class where plaintiffs accused 33 defendants of conspiring through 492 Nasdaq market-makers, making markets in 5,393 stocks with 11 market-makers for each Nasdaq stock).

Based on the Iowa Supreme Court's ruling on the indirect purchaser issue, it is clear that Iowa rejects Microsoft's contention that Iowa consumers are without remedy because Microsoft has created a complicated multifaceted marketing plan for its product:

> The *Illinois Brick* Court feared the determination of damages would become complicated because direct purchasers damaged by the overcharge would simply pass on the increased cost to consumers. Consequently, the damages must be apportioned among a number of parties. *Id.* At 745-47, 97 S.Ct. at 2074-75, 52 L.Ed.2d at 724-26. The Court stated litigation would grow increasingly more complicated because the determination of damages on a proportionate scale would

be very difficult. *Id.* At 732, 97 S.Ct. at 2067-68, 52 L.Ed.2d at 716-17. However, the House Report on H.R. 11942 concluded the Court overstated the potential complexity in *Illinois Brick*. Kassis, 32 Am.U.L.Rev. at 1116 (citing H.R.Rep. No. 95-1397 at 13 (1978)). Both the Senate Judiciary Committee and the Class acknowledged this is a valid concern. However, both also correctly stated we should not defeat the ends of justice simply because the litigation may be complicated. *See id.* (citing S.Rep. No. 95-934 at 6-7 (1978) (concluding the difficulty in proving pass-on damages does not justify ignoring the rights of indirect purchasers and the Courts or Legislature can resolve any management problems that may be inherent in the litigation)).

Complexity is not a foreign concept in the world of antitrust. These cases typically involve highly intricate litigation. *See Illinois Brick*, 431 U.S. at 758, 97 S.Ct. at 2081, 52 L.Ed.2d at 733 (Brennan, J., dissenting); *see also Bunker's Glass Co.*, 47 P.3d at 1125. We also note there is an absence of cases in which the Court was faced with the impossible task of apportioning damages. The situation before us is further distinguishable from *Illinois Brick* because here we are dealing with only one manufacturer. The Court in *Illinois Brick* was faced with the possibility of tracing overcharges through multiple manufacturers. Certainly, that situation presents increased difficulties that are not found in the case before us. We conclude the possibility of complex litigation is an insufficient reason for us to find indirect purchaser must be barred from bringing a state cause of action for antitrust violations. *Comes*, 646 N.W.2d at 450 – 451.

That the Court may face challenges managing this case as a class action is not a grounds for denying certification.

12. Rule 1.263(1)(l): Conflict of Laws

Rule 1.263(1)(l) directs a Court to consider whether any conflict of laws issues involved pose unusual difficulties in proceeding as a class action. Since this case arises solely under the Iowa Competition Law, no such difficulties are present. Thus, the Court determines that this factor favors certification.

13. Rule 1.263(1)(m): Individual Claims Insufficient to Support Separate Actions

Finally, Rule 1.263(1)(m) requires a Court to consider whether the claims of individual class members are insufficient, considering the complexities of the issues and expenses of the litigation, to afford significant relief to the class members. The Court

finds that individual class members are unlikely to be able to pursue this action on their own given the investment that would be required. Because indirect purchasers in either class would be left without a remedy for their injuries, this factor also weighs in favor of certification.

14. Conclusion

The Court determines that Plaintiffs have met their burden of showing that a class action would be a fair and efficient method of adjudicating this controversy. *See* Iowa R. Civ. P. 1.262(b); *Stone*, 497 N.W.2d at 846.

D. Fair and Adequate Representation

Finally, in examining whether the representative parties will fairly and adequately protect the interest of the class, a Court must find that:

> (a) the attorney for the representative parties will adequately represent the interests of the class;
>
> (b) the representative parties do not have a conflict of interest in the maintenance of the class action;
>
> (c) the representative parties have or can acquire adequate financial resources, considering Iowa Rule of Civil Procedure 1.276, to assure that the interests of the class will not be harmed.

Iowa R. Civ. P. 1.263(2)(a)-(c). "On the issue of adequate representation, each case must be judged on its own facts." *Stone*, 497 N.W.2d at 847.

1. Adequate Representation

Generally, in determining whether the representative party's attorney will adequately represent the class, the focus is on two elements: (1) whether the attorney has interests antagonistic to those of the class and (2) whether the attorney is qualified, experienced, and able to conduct the proposed litigation. 5 *Moore's Federal Practice* §

23.25(3)(a). No reason exists to suggest that Plaintiffs' co-lead counsel here, Roxanne Barton Conlin of Roxanne Conlin & Associates, P.C. and Richard M. Hagstrom of Zelle, Hofmann, Voelbel, Mason & Gette, L.L.P.[2] possess any interests antagonistic to those of either class. The Court finds that they are eminently qualified to adequately represent the classes as required by Iowa R. Civ. P. 1.263(2)(a).

2. Conflict of Interest

The next factor to consider is whether the representative parties have a conflict of interest with the maintenance of this class action. *See* Iowa Rule of Civil Procedure 1.263(2)(b). No conflict exists as to either class here.

The central issues in this lawsuit—the presence of Microsoft's monopoly power in the relevant markets and its abuse of that power—are common to the claims of the named Plaintiffs and to the other members of the classes. Moreover, because the named Plaintiffs are members of the operating systems and applications classes, their incentives are properly aligned to vigorously prosecute the claims on behalf of both classes. Therefore, given Plaintiffs' common interest with the putative class members, this Court finds that neither Plaintiff has a conflict of interest in the maintenance of the class action.

3. Financial Resources

Finally, based upon their counsel's affirmative representations, the Court is satisfied that the representative parties have or can acquire adequate financial resources necessary to prosecute this action and to ensure that the interests of the classes will not be harmed. Iowa R. Civ. P. 1.263(2)(c); *see Vignaroli*, 360 N.W.2d at 747 (finding adequate

[2] Mr. Hagstrom is admitted pro hac vice in this matter.

financial resources where "it might constitute a financial strain on some, even requiring encumbering the homes of some.").[3]

Accordingly, because all three requirements have been satisfied, this Court concludes that Plaintiff will fairly and adequately protect the interests of the class.

VI. POST-DECEMBER 15, 2001 ISSUE

Microsoft argues but, in essence, means that if the Court certifies the proposed operating systems and applications classes, the Class Periods should end December 15, 2001, the date on which Microsoft claims to have begun complying with a then-proposed settlement with the Department of Justice in *United States v. Microsoft Corp.*, 98-1332 (D.D.C.). Although Microsoft's claimed compliance with the terms of the settlement may be relevant to damages issues in this case, it is not clear from the existing record what effect, if any, on Iowa indirect purchasers would have resulted from the settlement. As Judge Motz noted in denying a similar request by Microsoft to limit the Class Period in the MDL: "It is even less clear to me that these effects would have been immediate as of the date of compliance. Therefore, it seems to me that the December 15, 2001 date proposed by Microsoft may be somewhat artificial." *In re Microsoft Antitrust Litig.*, MDL 1332 (D. Md. May 27, 2003).

Plaintiffs' expert, Professor MacKie-Mason, has stated that the same proposed methodologies that apply for proving fact of injury and the amount of damages pre-December 15, 2001 are equally applicable after that date. MacKie-Mason Reply Aff. ¶¶ 104, 120-121. He notes that if, in fact, the settlement reduced or eliminated any

[3] Plaintiffs have submitted a proposed Order of Compliance with Iowa R. Civ. P. 1.276. An order on Plaintiff's satisfaction of the requirements set forth in that Rule will be issued separately.

damages to class members, his proposed methodologies for determining injury-in-fact and the amount of damages will account for those changes. MacKie-Mason Reply Aff. ¶ 122. While Microsoft contests Plaintiffs' position, the Court concludes that this issue is best left to the trier of fact. Consequently, the Class Period will be extended until the date of notice shortly before trial.

VII. CONCLUSION

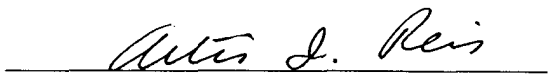
The overriding public policy of Iowa is to assume persons injured by antitrust violations are to be made whole. In *Comes v. Microsoft*, 646 N.W.2d 440, 447 (2002), the Iowa Supreme Court stated:

> "In order for us to agree with Microsoft that the harmonization statute requires us to prohibit suits by indirect consumers, we must accept the fact that real victims--those who purchase goods and pay the overcharge--cannot recover. This result would overwhelmingly defeat the purpose of the Iowa Competition Law. Consumers in this state are best protected by permitting all injured purchasers to bring suit against those who violate our antitrust laws."

The reality is that without the mechanism of a class action, no Iowa consumer will receive recompense for Microsoft's violation of the Iowa Competition Law.

The Court finds that Plaintiffs have satisfied their burden of establishing that this action presents "question[s] of law or fact common to a class of persons so numerous that joinder of all persons is impracticable," that "[a] class action should be permitted for the fair and efficient adjudication of the controversy," and that the class representatives will fairly and adequately protect the interests of the class. *See* Iowa R. Civ. P. 1.261 & 1.262(2)(a)-(c); *Vos*, 2003 WL 21659083, at *7. Accordingly, Plaintiffs' motion to certify a Microsoft Operating Systems Software Class and a Microsoft Applications Software Class, as defined above, is **GRANTED**.

DATED: September 16, 2003.



ARTIS I. REIS, DISTRICT JUDGE
Fifth Judicial District of Iowa

Copy to:

Roxanne Barton Conlin
Roxanne Conlin & Associates, P.C.
319 7th Street, Suite 600
Des Moines, Iowa 50309

Richard M. Hagstrom
33 South Sixth Street
Suite 4400
Minneapolis, MN 55402

David B. Tulchin
Joseph E. Neuhaus
Sullivan & Cromwell LLP
125 Broad Street
New York, New York 10004

Charles B. Casper
Montgomery, McCracken, Walker
& Rhoads, LLP
123 South Broad Street
Philadelphia, PA 19109

Thomas W. Burt
Richard Wallis
Steven J. Aeschbacher
Microsoft Corporation
One Microsoft Way
Redmond, Washington 98052

Edward Remsburg
Ahlers & Cooney, P.C.
100 Court Avenue
Suite 600
Des Moines, Iowa 50309