EXHIBIT A

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR MARICOPA COUNTY

DAISY MOUNTAIN FIRE DISTRICT, on behalf of itself and others similarly situated, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	CV 2007-013118 CASE NO. _____ **COMPLAINT** JURY TRIAL DEMANDED

Plaintiff on behalf of itself and similarly situated government entities, agencies and political subdivisions of the State of Arizona who have purchased Microsoft software, by and through counsel, brings this action against Defendant Microsoft Corporation ("Microsoft"), for damages under the antitrust laws of the state of Arizona, A.R.S. §§ 44-1401 et seq., and demands a trial by jury, complaining and alleging as follows:

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NATURE OF THE ACTION

1. This action concerns Microsoft's anticompetitive and monopolistic practices, specifically those acts or practices that it intended to use, did use, and continues to use to prevent and destroy competition and acquire and/or maintain monopoly power and raise prices to supra-competitive levels in the United States, including in Arizona, in the following product markets:

a. The sale and/or licensing of Intel-compatible personal computer operating system software;

b. The sale and/or licensing of Intel-compatible personal computer word processing applications software; and

c. The sale and/or licensing of Intel-compatible personal computer spreadsheet applications software.

The software referenced in sub-paragraphs a through c are collectively referred to as the "Covered Products."

2. Since the mid-1980s, Microsoft has dominated the operating system software market. For example, in the United States its market share at times has exceeded 95 percent. Beginning in the late-1980s and continuing through the present, Microsoft engaged in a series of predatory acts designed to, and which did, eliminate competition and prevent entry in the operating system software market. Software companies offering superior operating systems and/or lower prices (namely, companies such as Digital Research, Inc. ("DRI"), International Business Machines ("IBM"), and Be, Inc.) were not able to compete with Microsoft because of Microsoft's unlawful conduct. Microsoft has had no significant competitor in the operating system software market since 1994 when DRI and IBM were eliminated as

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meaningful competitors.

3. Microsoft also directed its exclusionary conduct at complementary software products, often of a type known as middleware. Although middleware targets did not directly compete with Microsoft's operating system, Microsoft understood that they had the potential to become direct competitors and/or to greatly strengthen the competitive position of actual or potential competitors.

4. Microsoft also directed its exclusionary conduct at certain office productivity applications, particularly word processing and spreadsheets, to dominate these markets and because their cross-platform possibilities threatened Microsoft's operating system monopoly. As a result of its unlawful conduct, Microsoft has dominated these applications markets since at least the mid-1990s, achieving market shares in each exceeding 90 percent.

5. Microsoft has used its monopoly power over operating systems, word processing and spreadsheet applications software to injure consumers of its products, including Plaintiff, primarily by charging supra-competitive prices for its operating system software and for its word processing and spreadsheet applications software (both as stand-alone products and as part of the Microsoft office suite).

6. Plaintiff seeks to recover for damages sustained as result of this conduct, primarily the overpayments made to Microsoft for its operating system, word processing and spreadsheet applications software. Plaintiff also seeks treble damages and costs, including an award of reasonable attorneys' fees.

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JURISDICTION AND VENUE

7. Pursuant to A.R.S. §44-1408, this action is for damages and other relief for violation of the Arizona Antitrust Act. This Court has jurisdiction over this civil action pursuant to A.R.S. §44-1405.

8. Venue is proper in this district because: (i) Microsoft transacts business, committed an illegal or tortious act, and/or is found within this district; and (ii) a substantial portion of the affected trade and commerce described below has been carried out in this district.

GOVERNMENT ACTION

9. The United States Department of Justice ("DOJ") complained of and investigated, among other things, Microsoft's illegal and anticompetitive practices in the operating system market in United States v. Microsoft, Civil No. 94-1564 (D.D.C. Petition filed July 15, 1994) ("Microsoft I"). The anticompetitive practices complained of included, among others, inducing original equipment manufacturers ("OEMs") to enter into per-processor license agreements with Microsoft, which required the OEM to pay a royalty to Microsoft on every machine the OEM shipped regardless of whether the machine contained Microsoft's operating system (MS-DOS), another operating system, or no operating system. Thus, an OEM could only use a competing operating system if it was willing to pay twice - once to Microsoft and once to Microsoft's competitor.

10. The United States District Court for the District of Columbia entered a Final Judgment in Microsoft I on August 21, 1995, which barred several

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anticompetitive terms in Microsoft's agreements with OEMs. Prohibited contract provisions included per-processor license provisions, license terms exceeding one year in length, provisions prohibiting or restricting OEMs from licensing or distributing non-Microsoft Operating Systems, provisions conditioning an OEM's license of one Microsoft operating system product upon the license of another Microsoft product or upon the OEM not licensing a non-Microsoft product, minimum commitment provisions, and provisions requiring royalty payments to Microsoft other than on a per-copy or per-system basis.

11. In 1997, the United States sought to have Microsoft held in contempt for violating the 1995 Final Judgment, in large part due to Microsoft's requirement that OEMs license and distribute Microsoft's Internet browser (Internet Explorer) as a condition of obtaining a license for Windows 95, Microsoft's latest operating system at that time. Despite the court's entry of a preliminary injunction on December 11, 1997, Microsoft publicly announced on December 15, 1997 that any OEM that did not agree to license and distribute Internet Explorer could not obtain a license to the current version of Microsoft's Windows operating system.

12. Subsequent proceedings led to a renewed complaint by the United States. On May 18, 1998, the DOJ, joined by twenty states and the District of Columbia, filed suit against Microsoft alleging violations of Sections 1 and 2 of the Sherman Act, as well as state law violations ("Microsoft II"). The DOJ and Microsoft vigorously litigated the merits of DOJ's allegations for eighteen months. On November 5, 1999, Judge Thomas Penfield Jackson released his Findings of Fact based on the extensive

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evidence presented during the bench trial ("Findings").

13. Judge Jackson's Findings concluded, inter alia, that Microsoft has held and continues to hold a monopoly in the market for "Intel-Compatible PC Operating Systems"; that Microsoft has sustained and perpetuated this monopoly by using anti-competitive and unreasonably exclusionary conduct to gain advantage; and that Microsoft has leveraged its advantageous position to restrict competition in other software markets.

14. On April 3, 2000, Judge Jackson issued his Conclusions of Law ("Conclusions of Law") in Microsoft II, in which he found, inter alia, that "Microsoft maintained its monopoly power by anticompetitive means and attempted to monopolize the Web browser market, both in violation of [Section 2 of the Sherman Act]. Microsoft also violated [Section 1 of the Sherman Act] by unlawfully tying its Web browser to its operating system." Conclusions of Law at 2.

15. In the remedy stage of Microsoft II, proposals submitted to the court by the DOJ asked the court to split Microsoft into two different companies -- with one company retaining the Windows operating system business and the other taking the rest of Microsoft's business, including software applications and Internet browser software.

16. The DOJ reorganization plan was recommended, in large part, to restrict Microsoft's wrongful exercise of its combined monopoly power over operating systems and applications software, and to prevent it from continuing to leverage its monopoly power in the operating system software market to exert control over, and

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raise barriers to entry in, the software applications markets, and thereby to stifle competition and charge supra-competitive prices in the applications markets.

17. On June 6, 2000, the Microsoft II court approved the DOJ proposal and directed that Microsoft be split into two separate companies. On June 28, 2001, the Court of Appeals for the District of Columbia Circuit reversed the imposition of the DOJ reorganization plan, but upheld the trial Court's judgment that Microsoft had violated the Sherman Act in numerous respects, affirming the following Findings of Fact and Conclusions of Law:

a. That Microsoft possesses monopoly power in a properly-defined relevant market for Intel-compatible PC operating systems;

b. That Microsoft unlawfully maintained its operating systems monopoly by thwarting distribution of competing browsers and imposing restrictive contract terms on OEMs instead of competing on the merits;

c. That Microsoft unlawfully "welded" Internet Explorer to Windows for the sole purpose of protecting its operating system monopoly and preventing competition on the merits;

d. That Microsoft entered unlawful exclusive deals with Internet Access Providers ("IAPs") in order to thwart Netscape Navigator and thereby protect Microsoft's operating system monopoly;

e. That Microsoft entered into unlawful agreements with ISVs mandating the use of Internet Explorer, for the purpose of thwarting the Netscape Navigator threat to Microsoft's operating system monopoly;

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f. That Microsoft unlawfully forced Apple to exclusively promote Internet Explorer by threatening to halt development of Microsoft Office for the McIntosh, thereby hindering the distribution of rival browsers that would have promoted competition in the operating system market;

g. That Microsoft unlawfully thwarted the Java threat to its operating system monopoly by imposing on ISVs a requirement that they use Microsoft's incompatible version of the Java Virtual Machine as a condition of receiving needed technical support;

h. That Microsoft intentionally deceived ISVs into using Microsoft's "polluted" [Microsoft's term] incompatible version of Java development tools, thereby protecting Microsoft's operating system monopoly from the competition that would have arisen from cross-platform Java; and

i. That Microsoft threatened and ultimately coerced Intel to halt Intel's technical initiatives to support Java.

18. Though the case was remanded to the District Court for further proceedings regarding the appropriate remedy for Microsoft's antitrust violations, the Court of Appeals specifically noted that private actions are an important complement to governmental enforcement actions because "the threat of private damage actions . . . deter[s] those firms inclined to test the limits of the law." *United States v. Microsoft*, 253 F.3d 34, 49 (D.C. Cir. 2001).

19. On November 12, 2002, the District Court entered a Final Judgment that imposed various obligations on Microsoft and prohibited Microsoft from engaging in

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certain conduct.

20. Subsequently, the Fourth Circuit Court of Appeals explained that "[t]he D.C. Circuit held that Microsoft illegally maintained a monopoly in the market of 'licensing of all Intel-compatible PC operating systems worldwide' through 12 specified acts of anticompetitive conduct" and held that "Microsoft may be precluded from relitigating the facts necessary to this judgment under the doctrine of offensive collateral estoppel." *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 328 (4th Cir. 2004).

PRIOR CLASS ACTION

21. On January 12, 2000, Charles I. Friedman, P.C. and The Power P.E.O. Inc., filed a proposed class action against Microsoft on behalf of indirect purchasers, including Plaintiff, for claims under the Arizona Antitrust Act based upon the essential conduct at issue here.

22. On November 15, 2000, the court in Friedman v. Microsoft, CV2000-722 (Sup. Ariz. Maricopa County) certified a class defined as "All end user licensees of Windows 98 residing in the State of Arizona as to whom Microsoft ahs an electronic mail address that is computer-accessible by Microsoft."

23. On January 6, 2005, the court in the consolidated action, Friedman v. Microsoft, No. CV2000-722 (Sup. Ariz., Maricopa County), approved a settlement of certain claims, including certifying a Settlement Class. The terms of that settlement specifically excluded from the Settlement Class "government entities" defined as "any federal, state, or local government, or any of its subdivisions (agencies, bureaus,

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departments, divisions, offices etc.), or any entity that is created by constitution, statute, code or administrative rule and that derives at least 66% of its funding from one or more of the aforementioned entities, including without limitation public schools."

24. Plaintiff and members of the class that Plaintiff seeks to represent were not members of the Settlement Class in *Friedman v. Microsoft.*

PARTIES

25. Plaintiff Daisy Mountain Fire District is a "government entity" as that term is defined in the Settlement Agreement in *Friedman et al. v. Microsoft.* See ¶ 19. Plaintiff has been an indirect purchaser of Microsoft operating systems, word processing and spreadsheet applications software.

26. Plaintiff Daisy Mountain Fire District is a political subdivision of the state so as to fall under the exemption of A.R.S. §12-510.

27. Microsoft is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Redmond, Washington. Microsoft is the world's largest supplier of operating system software and applications software for personal computers. In its fiscal year 2006, Microsoft had revenues of approximately $44.3 billion and net income of approximately $12.6 billion.

A.R.S. § 12-510

28. Proposed Class members are state entities for the purpose of A.R.S. § 12-510.

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MICROSOFT'S MONOPOLY POWER IN THE RELEVANT MARKETS

The Relevant Product Markets

29. At all material times, Microsoft has had monopoly power in the following product markets:

a. The sale and/or licensing of Intel-compatible personal computer operating systems software;

b. The sale and/or licensing of word processing applications software compatible with Windows; and

c. The sale and/or licensing of spreadsheet software compatible with Windows.

The Relevant Geographic Market

30. At all material times, the relevant geographic market for the claims asserted by Plaintiff has been the United States.

Microsoft's Monopoly Power In The Relevant Market For Operating Systems

31. Microsoft has possessed a dominant and persistent share of the United States market for Intel-compatible PC operating system software. During most of the relevant period, Microsoft's share of this market has exceeded 90 percent, reaching 93 percent in 2003 and forecasted to be over 95 percent in 2006.

32. The inability of server operating systems, non-Intel compatible PC operating systems, information appliances, network computers, server-based computing and middleware generally to provide a reasonable substitute for Microsoft's operating systems, or to discipline its monopoly power, is set forth in Judge Jackson's Findings at ¶¶ 19-32. It would be prohibitively expensive and take years for a new Intel-compatible operating system to attract enough developers and consumers to

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become a viable alternative to a dominant incumbent. Findings at ¶ 31.

33. Throughout the relevant period, Microsoft has had monopoly power in the relevant market for operating systems. Findings at ¶ 33. Microsoft can and has exercised this power by charging a price for its Intel-compatible PC operating system software that is substantially above that which could be charged in a competitive market, and it can and has done so for a significant period of time without losing business to competitors.

The Relevant Market For Word Processing Applications

34. Microsoft has possessed a dominant, persistent and increasing share of the United States market for word processing software for Windows through its Microsoft Word and Microsoft office products. Microsoft's share of this market is at least 90 percent.

35. It would be prohibitively expensive for new Windows-compatible word processing applications software to attract enough consumers to become a viable alternative to a dominant incumbent in less than a few years.

36. Throughout the relevant period, Microsoft has had monopoly power in the relevant market for word processing software. Microsoft can and has exercised this power by charging a price for its Windows-compatible versions of Word that is substantially above that which could be charged in a competitive market, and it can and has done so for a significant period of time without losing business to competitors.

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The Relevant Market For Spreadsheet Applications

37. Microsoft has possessed a dominant, persistent and increasing share of the United States market for Windows-compatible spreadsheet applications software through its Microsoft Excel and Microsoft Office products. Microsoft's share of this market is at least 90 percent.

38. It would be prohibitively expensive for new Windows-compatible spreadsheet applications software to attract enough consumers to become a viable alternative to a dominant incumbent in less than a few years.

39. Throughout the relevant period, Microsoft has had monopoly power in the relevant market for spreadsheet applications software. Microsoft can and has exercised this power by charging a price for its Windows-compatible spreadsheet applications software that is substantially above that which could be charged in a competitive market, and it can and has done so for a significant period of time without losing business to competitors.

CLASS ALLEGATIONS

40. Plaintiff brings this action on its own behalf and on behalf of the Classes defined below. This action may properly be maintained as a class action under Rule 23(b)(3) of the Arizona Rules of Civil Procedure. The Classes are defined as:

> Any Arizona state, or local government, or any of its subdivisions (agencies, bureaus, departments, divisions, offices etc.), or any entity that is created by constitution, statute, code or administrative rule and that derives at least 66% of its funding from one or more of the aforementioned entities, including without limitation public schools who acquired indirectly from Microsoft a license in the United States for

Microsoft single-user operating system software, including upgrades, compatible with x86 personal computers at any time during the Class Period ("Operating Systems Software Class");

Any Arizona state, or local government, or any of its subdivisions (agencies, bureaus, departments, divisions, offices etc.), or any entity that is created by constitution, statute, code or administrative rule and that derives at least 66% of its funding from one or more of the aforementioned entities, including without limitation public schools who acquired indirectly from Microsoft a license in the United States for Microsoft Word, Excel or Office software, including upgrades, compatible with x86 personal computers at any time during the Class Period ("Office Applications Software Class").

41. During the relevant time period, Class members purchased Microsoft operating systems software and word processing and spreadsheet applications software from third parties, such as OEMs. Each Class is believed to number in the hundreds. The Classes are therefore so numerous that joinder is impracticable. Ariz. R. Civ. P. 23(a)(1).

42. There are questions of law and fact common to the Classes, including, but not limited to:

a. whether Microsoft engaged in anticompetitive conduct which renders it liable to members of each Class under Arizona's antitrust laws;

b. whether Microsoft possesses monopoly power within the relevant geographic and product markets;

c. whether Microsoft acquired or maintained monopoly power within the relevant geographic and product markets through anticompetitive and/or unlawful activity; and

d. whether Microsoft's unlawful conduct has caused legally cognizable injury to Plaintiff and members of the Classes by unlawfully increasing, maintaining or stabilizing above competitive levels the prices that Plaintiff and the Class members

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have paid for Microsoft Covered Products.

43. These common questions and others predominate over questions, if any, that affect only individual members of the Classes. Ariz. R. Civ. P. 23(a)(2) and 23(b)(3).

44. Plaintiff's claims are typical of the claims of the other Class members. All Class members suffered similar injury caused by the same unlawful conduct of Defendant, and their claims are based on the same legal theories. In advancing its claims, Plaintiff also therefore will advance the claims of all members of the Classes. Ariz. R. Civ. P. 23(a)(3).

45. Plaintiff and its counsel will fairly and adequately protect the interests of absent Class members. There are no material conflicts between Plaintiff's claims and those of absent Class members that would make class certification inappropriate. Counsel for Plaintiff are experienced in complex class action litigation, including litigation involving antitrust allegations, and will vigorously assert Plaintiff's claims and those of absent Class members. Ariz. R. Civ. P. 23(a)(4).

46. A class action is superior to other methods for the fair and efficient resolution of this controversy. The damages suffered by many individual Class members may be small. In view of the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Microsoft's unlawful conduct, it would be virtually impossible for most, if not all, Class members individually to redress the wrongs done to them. Moreover, even if the Class members themselves could afford such individual litigation, the class action device presents fewer

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management difficulties, and provides the benefit of a single adjudication, economies of scale, and comprehensive supervision by a single court. Ariz. R. Civ. P. 23(b)(3).

47. Whatever difficulties may exist in the management of this case as a class action will be greatly outweighed by the advantages of class treatment of the claims of Plaintiff and other Class members, including, but not limited to, providing Class members with a superior method for assessing the redress of claims that may not otherwise warrant individual litigation.

THE APPLICATIONS BARRIER TO ENTRY

48. There is a barrier to entry into the operating system market known as the "applications barrier to entry," which Microsoft has predatorily used as a key mechanism for maintaining its operating system monopoly. Microsoft went to great lengths, as alleged below, to destroy the competitive position of any software product that threatened to weaken or eliminate that barrier.

49. The applications barrier to entry results from the nature of the demand for PC operating systems. Consumer interest in an operating system derives primarily from the ability of that system to run software applications. The fact that a vastly larger number of applications have been written to run on Microsoft operating systems than on other PC operating systems has attracted consumers to Microsoft's operating system; they can be confident that their interests in applications will be met as long as they use Microsoft's product.

50. Software development is characterized by substantial economies of scale. The fixed costs of producing software, including applications, are very high.

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By contrast, marginal costs are very low. Moreover, much of the cost of developing software is "sunk" - once expended, such resources cannot be used for another purpose. The result of economies of scale and sunk costs is that developers write their applications only to those operating systems that have a large enough installed base to generate sufficient sales to justify the developers' development costs.

51. An application that is written for one PC operating system will operate on another PC operating system only if it is converted to run on that system. Converting applications is both time-consuming and expensive, especially since the process typically involves using the same programmers who originally developed a program and otherwise would be working on the next version of that program. Therefore, applications developers tend to write first to the operating system software with the most users. Developers might then convert their applications to other operating systems, but only to the extent that the added sales justify the costs of conversion, including opportunity costs. In order to recover those costs, ISVs that do go to the effort of converting applications frequently set the price of the converted application considerably higher than that of the original version.

52. The applications barrier to entry also results from the positive network effect associated with computer software. In other words, software's attractiveness increases with the number of people using it. Thus, the multitude of people using Windows makes the products more attractive to consumers. In turn, the size of the Windows installed base impels ISVs to write applications first and foremost to run on those operating systems, thereby ensuring a large body of applications. The large

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body of applications thus reinforces and has reinforced demand for Windows, augmenting Microsoft's dominant position and perpetuating ISV incentives to write applications principally for Windows. This self-reinforcing cycle is often referred to as a "positive feedback loop."

53. The small or non-existent market share of an aspiring competitor makes it prohibitively expensive for the aspirant to develop its PC operating system into an acceptable substitute for Windows. To provide a viable substitute for Windows, another PC operating system would need a large and varied base of compatible applications that was comparable to Microsoft's installed base in size and variety. Even if the contender attracted several thousand compatible applications, it would still look like a gamble from the consumer's perspective next to Windows, which supports over 70,000 applications. The amount it would cost an operating system software vendor to make that many applications available is prohibitively large.

54. In deciding whether to develop an application for new operating system software, an ISV's first consideration is the number of users it expects the operating system software to attract. Out of this focus arises a collective-action problem: each ISV realizes that the new operating system software could attract a significant number of users if enough ISVs developed applications for it, but few ISVs are willing to sink resources into developing for the system until it becomes established. Because everyone is waiting for someone else to bear the risk of early adoption, the new operating system has difficulty attracting enough applications to generate a positive feedback loop. The vendor of a new operating system cannot effectively solve this

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problem by paying the necessary number of ISVs to write for its operating system, because the cost of doing so would dwarf the expected return.

55. While the applications barrier to entry has been formidable, it is not necessarily insurmountable or permanent. Middleware products appeared in the market in the late 1980s and 1990s that threatened to eliminate the barrier (as set forth below). Microsoft, however, was vigilant and successfully undertook anticompetitive acts and practices to forestall and eliminate such threats.

MICROSOFT'S ANTICOMPETITIVE ACTIVITIES IN THE OPERATING SYSTEM MARKET

Overview

56. Through exclusionary conduct, Microsoft successfully fended off three types of challenges to its operating system monopoly. One type came from two competing operating systems, DRI's DR DOS and IBM's OS/2. Both were positioned to compete vigorously against MS-DOS. Through a series of exclusionary acts from 1988 through 1994, however, Microsoft essentially eliminated both DR DOS and OS/2 from the market.

57. The next type of challenge to Microsoft's monopoly was by several middleware products, which from 1988 to the present have threatened to weaken or circumvent the applications barrier to entry that insulated Microsoft from competition. Microsoft has responded to this threat with additional exclusionary conduct designed to keep the applications barrier and Microsoft's monopoly intact.

58. The next challenge came from rival applications products, particularly word processing and spreadsheet products ("office productivity applications"). As the

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most widely used applications, these products were critical to the existence of the applications barrier to entry. Microsoft recognized that it had to control these office productivity applications to fend off the threat of cross-platform applications to its operating system monopoly.

59. In 1981, Microsoft became a significant supplier of PC operating system software when it contracted with IBM to design and develop operating system software for the IBM personal computer. By the mid-1980s, Microsoft's operating system, called MS-DOS, had become entrenched as the standard for Intel-compatible personal computers.

60. By 1987, several OEMs, whose computers were sold with operating systems pre-installed, approached DRI, a Microsoft competitor, about developing a better operating system than MS-DOS. In 1988, DRI released its operating system software under the name DR DOS. Given the relative lack of complexity of MS-DOS at that time, DRI was readily able to clone that software, i.e., DR DOS could support the same applications software as MS-DOS supported. In addition, DR DOS included features that MS-DOS lacked. DR DOS received numerous industry awards and was sold at a lower price than MS-DOS.

61. Unable or unwilling to legitimately compete with DR DOS by attempting to offer a better or lower-priced product, Microsoft instead embarked on a series of unlawful exclusionary acts designed to drive DRI from the market. These exclusionary acts focused largely on the OEM channel, which distributed the vast majority of operating system software by pre-installing it on computers. By

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controlling this critical distribution channel to the exclusion of DR DOS, Microsoft made DRI's competitive position untenable; by 1994, DRI was forced to exit the market. A more complete description of Microsoft's exclusionary acts directed at DR DOS is set forth below.

62. Microsoft realized by the mid-1980s that MS-DOS was becoming obsolete and began working with IBM to develop the next generation operating system. The first version of Microsoft and IBM's joint efforts was released in 1987 under the name OS/2. By 1990, Microsoft's Windows software, which contained some of the graphical user interface ("GUI") elements that Microsoft had developed for OS/2, was gaining popularity, and Microsoft decided to focus its efforts on Windows to the exclusion of OS/2. IBM took over exclusive development of OS/2. The GUI model that IBM developed for OS/2 is still the model for all GUIs today. In fact, the second generation of OS/2 won over many Window 3.x users because of its superior performance.

63. Again, unable or unwilling to compete on the merits, Microsoft resorted to a course of anticompetitive conduct directed at OS/2. By the end of 1994, Microsoft's exclusionary conduct had the desired effect of eliminating OS/2 as a significant competitor. Microsoft's anticompetitive acts, many of which were the same as or similar to those targeted at DR DOS, are set forth below.

64. By the end of 1994, with Microsoft's two competitors essentially out of the market, any challenge to Microsoft's monopoly could only come from a new entrant. But any potential competitor faced the applications barrier to entry.

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Moreover, by 1994, a new competitor could not circumvent the barrier by cloning Windows, as that software had become much too complex to be cloned.

65. Since at least the late 1980s, part of Microsoft's strategy has been to protect its operating system monopoly by unlawfully maintaining the applications barrier. The threat to the applications barrier has come from middleware, which exposes application programming interfaces ("APIs") (or their equivalent) that can substitute for or enhance some of the functionality of the operating system; applications written to middleware APIs, therefore, can run on any of several operating systems. Thus, middleware has the capacity to weaken or eliminate the applications barrier to entry by, as Bill Gates, the chairman and CEO of Microsoft, stated, "commoditizing" the operating system. When middleware has threatened to undermine or eliminate the barrier, Microsoft's response has been swift and exclusionary.

66. An early threat came from Mirrors, Micrographx's software developer tool that allowed applications designed to run on MS-DOS to also run on OS/2. Microsoft's exclusionary conduct, set out below, drove Mirrors from the market.

67. Like Mirrors, Borland International, Inc.'s developer tools, which were the market leader in the early 1990s, allowed software developers to easily convert applications from one operating system to another. Microsoft engaged in anticompetitive conduct, described below, that essentially eliminated Borland's products from the market.

68. The Micrographx and Borland threats were followed in the mid-1990s by a string of middleware products that threatened to diminish the applications barrier

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to entry, namely: (1) a software product called Notes, distributed first by Lotus and then by IBM; (2) Netscape's Navigator, an Internet browser; (3) Java technologies, a programming language and related software developed by Sun Microsystems; (4) Intel's Native Signal Processing software; and (5) Apple's and RealNetworks's multimedia playback technologies.

69. Microsoft understood that each of these products facilitated the development of applications programs that would be indifferent to the identity of the underlying operating system. Microsoft responded anticompetitively to each such product, as set forth below.

Exclusion of DR DOS

70. In 1981, Microsoft contracted with IBM to design and develop the operating system software for the IBM PC. Microsoft acquired rights from another company for a product called "QDOS," which borrowed heavily from an operating system developed by DRI called CP/M. Microsoft changed the name to MS-DOS and licensed it to IBM and others.

71. By the mid-1980s, MS-DOS had become entrenched as the standard in the Intel-compatible PC operating systems market. Microsoft raised the price of MS-DOS in the OEM channel from $2-$5 per copy in the 1981-1982 period to $25-$28 per copy by 1988.

72. Because of Microsoft's apparent decision not to innovate or extend the capabilities of MS-DOS, a number of OEMs approached DRI to develop an improved version of DOS. In addition, a number of OEMs that simply could not get Microsoft

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to deal with them expressed an interest in DRI as an alternative DOS software supplier. Accordingly, in 1987, DRI began planning a new version of DOS, to be called DR DOS.

73. The result of DRI's efforts was a product designated as DR DOS 3.31, introduced in 1988, followed by an enhanced DR DOS 5.0 in 1990 and DR DOS 6.0 in 1991. These DOS versions were significantly superior to then-existing versions of MS-DOS in many areas, receiving numerous industry awards and enthusiastic reviews. DR DOS was offered at prices below the inflated price levels of MS-DOS products.

74. Microsoft responded to the DR DOS threat with a number of anticompetitive practices, including:

a. Constructing a wall of per-processor licenses beginning in 1988 when DR DOS was released. Microsoft OEM status reports contained repeated references to these practices, such as: "Opus agreement has finally been signed by Redmond. Another DRI prospect bites the dust with a per processor DOS agreement," or "DRI visited Hyundai executives and pricing issue was raised again. The new license is a per processor deal, which allowed us to completely kick out DRI." One OEM, U.S. Micro Express, stated with respect to a per processor license that "We were not given the option of licensing MS-DOS on any other basis";

b. Entering into long term "take or pay" minimum commitment licenses. Even though the life cycle of a DOS release was somewhat less than two years, Microsoft pushed for agreements of two or three years in duration.

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This was a key part of the "Strategy Against DRI" presented in June 1991 to the Microsoft OEM sales force;

c. Requiring prepaid balances from OEMs, tying them to Microsoft through the threat that they would forfeit any prepaid amount not used during a contract period unless a new license was signed;

d. Implementing a "DOS clone check" in 1989 on foreign versions of Windows, as evidenced by this message from the Microsoft Korean subsidiary:

> Bill Gates ordered to all application business units to include checking routines of operating environments and if it is Microsoft DOS, nothing will happen. But if it is non MS-DOS (such as DR DOS), application will display messages saying that "This application has been developed and tested for MICROSOFT MS-DOS. Since you use different environment, this application may not work correctly . . . ."

A similar DR DOS detection and warning was implemented in Microsoft's QuickPascal, with a message that warned that use of the product with another operating system "may void valuable warranty protection by Microsoft. . . .";

e. Making false, misleading and premature announcements such as the one in June 1990, within a week of DRI's announcement of DR DOS 5.0, that Microsoft intended to release by September 1990 MS-DOS 5.0, which would have all the technical advantages of DR DOS 5.0. MS-DOS 5.0 in fact was not released until June 1991, over one year after Microsoft's announcement, without the promised features. Microsoft

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made similar preemptive "vaporware" announcements of MS-DOS 6.0, MS-DOS 7.0 (which never came to market as a stand-alone product) and Windows 95, in direct response to DR DOS 6.0 and Novell DOS 7.0. (Novell acquired DRI in 1991.) Microsoft knew these announcements were false and misleading when made;

f. Engaging in merger discussions with Novell immediately after Novell's acquisition of DRI, and insisting as a part of the proposed merger that Novell divest DRI, with the ulterior purpose of causing Novell to slow down its integration of DR DOS. When Microsoft's merger discussions broke down in 1992, DR DOS was wounded as a competitor;

g. Announcing in the Fall of 1991 that DR DOS would not be compatible with the next release of Windows, scheduled for release in April 1992. To reinforce the impression of incompatibility, Microsoft released test or so-called "beta" versions of Windows containing code that generated misleading error messages when Windows ran on top of DR DOS;

h. Creating deliberate incompatibilities between Windows and DR DOS, so that Windows would not run properly on DR DOS ;

i. Unleashing a "FUD" campaign to create "fear, uncertainty and doubt" in the OEM and retail channel regarding the use of DR DOS. In May 1991, Sergio Pineda of Microsoft circulated to all OEM account managers the following regarding the theme of the campaign:

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Any degree of incompatibility is enough to create fear, uncertainty & doubt among end users when it comes time to buy new systems -- this suggests that PC OEMs will take on a big risk if they ship DR DOS with their systems.

We recommend that we "informally" plant the bug of FUD in their ears.

j. Reporting supposed flaws in DR DOS to the media as crippling "bugs," while not mentioning to the media that MS-DOS releases had such severe bugs that Microsoft was required immediately to release "patches" to cure them. A July 1991 memo from a Microsoft executive states: "We are engaged in a FUD campaign to let the press know about some of the bugs. We'll provide info a few bugs at a time to stretch it out";

k. Putting Novell on a "beta blacklist," i.e., refusing to provide a Windows 3.1 beta to Novell's DR DOS development team, thereby hampering Novell's ability to offer a Windows 3.1-compatible release of DR DOS;

l. Inserting secret, encrypted code into the final Windows 3.1 beta that triggered a false error message whenever a computer was running DR DOS with Windows. This AARD Code had the intended effect of creating concern among OEMs about DR DOS. The code was removed from the final (non-beta) version of Windows 3.1;

m. Informing certain OEMs that they could not obtain Windows or be given access to essential information, including product support and service, if they did not purchase and ship MS-DOS to the exclusion of DR DOS;

n. Retaliating against industry participants who supported DR DOS. For example, when Z-Nix Inc. bundled DR DOS 6.0 and Microsoft Windows

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3.1, proclaiming no incompatibilities, Microsoft's Brad Silverberg wrote: "look what znix is doing! cut those f*****s off." Within three weeks, Microsoft demanded an audit of Z-Nix's entire business and then commenced a copyright and trademark infringement action. Z-Nix was forced to file for bankruptcy in or around 1995.

75. Establishing a pricing structure for Windows that made it prohibitively expensive to buy that product without also buying MS-DOS. Microsoft often instructed its OEM account managers to inform their OEMs that the price for Windows alone would be higher than the price of Windows and MS-DOS combined.

76. In September 1994, as a result of Microsoft's anticompetitive conduct, Novell announced that it would cease the marketing and development of DR DOS. After this announcement, the price of Windows increased. Microsoft had succeeded in eliminating the one competitor that, because its DOS program had the same original source as Microsoft, was not affected by the applications barrier to entry.

Virtual Elimination of OS/2

77. In the mid-1980s, Microsoft and IBM decided to collaborate on a new operating system that would replace MS-DOS. The product, which was later sold under the name OS/2, was intended to be a state-of-the-art, GUI-based operating system. However, as Microsoft's Windows software became more successful and as Microsoft further extended its monopoly position by obtaining per-processor licenses and engaging in other exclusionary tactics, the company lost interest in collaborating with IBM. In 1991, IBM and Microsoft terminated their joint development agreement,

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leaving IBM to continue developing OS/2 alone.

78. After Microsoft's relationship with IBM ended, Microsoft launched an exclusionary campaign to drive OS/2 from the market. It pursued a course of conduct very similar to the one it used to exclude DR DOS from the market. Thus, Microsoft relied on restrictive OEM licenses that effectively cut off IBM from the critical OEM channel; it made false and misleading vaporware announcements and pre-announcements; it refused to write its applications to run on OS/2; it engaged in FUD campaigns and product disparagement in an effort to devalue OS/2 in the minds of applications developers, OEMs and consumers; and it created deliberate incompatibilities between Windows and OS/2.

79. In addition, as alleged below, Microsoft engaged in exclusionary conduct to drive from the market developer tools that enabled applications originally written to run on Microsoft's operating system to be ported to OS/2.

Microsoft's Anticompetitive Maintenance of the Applications Barriers to Entry And Tactics Aimed At Other Operating Systems

80. By 1994, Microsoft had destroyed its two competitors in the operating system market. Moreover, by 1994 Microsoft was secure that it would not encounter new competition from another clone operating system like DR DOS. By then, Windows was simply too complex to be cloned. Only a non-clone, therefore, could potentially enter the operating system market. However, the applications barrier to entry made entry by a non-clone prohibitively expensive.

81. In 1995, Microsoft was enjoined from continuing many of the exclusionary tactics it had previously used to exclude competitor operating system, in

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particular being forbidden to use per processor licenses and minimum commitments. Undeterred, Microsoft instead instituted its "per system" licenses, imposed upon OEMs just as per processor licenses had previously been employed. Through these licenses Microsoft imposed the same double tax on OEMs considering shipping products with rival operating systems as had existed under per processor licenses. Microsoft continued to use these licenses despite the Department of Justice's recognition that they "could be used by Microsoft to accomplish anticompetitive ends similar to 'per processor' licenses." Microsoft also circumvented the federal court's 1995 injunction forbidding its use of minimum commitment licenses through its "Market Development Agreements." ("MDAs"). As Steve Balmer, CEO of Microsoft, stated "We have always given better prices to customers who work with us to make the market. Those used to take the form of commits which we do not do anymore as a result of the [court's] decree but we still believe in rewarding people who help us create demand. Hence the MDA." As a senior Gateway executive stated, "Given the substantial nature of these discounts, participation in the MDA, as a practical matter, is not optional. In other words, not receiving these discounts would put Gateway at a substantial competitive disadvantage, and Gateway has communicated that self-evident proposition to Microsoft."

82. Faced with potential competition from the Be operating system, which operating system attempted to circumvent the applications barrier to entry by use of a "dual boot" strategy whereby the OEM would have its computers load both Microsoft's operating system and Be's operating system, Microsoft forced OEMs to

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agree to provisions that made the dual boot option impossible. As a result, Be was forced from the market.

83. Another potential rival operating system developed by Go for pen-based computing attracted the attention of Intel which offered to provide Go with substantial financing and critical endorsement of its technology. Microsoft's CEO, Bill Gates personally approached Intel and demanded that Intel withdraw its support of Go. Microsoft also improperly appropriated trade secrets from Go and falsely persuaded the market that Microsoft was introducing its own pen based system to undercut demand for Go's system. As a result, Microsoft put Go out of business.

84. In addition to exclusionary conduct intended to drive DR DOS, OS/2 and other operating systems from the market, Microsoft's unlawful conduct also consisted of exclusionary responses to the introduction or growing popularity of software products that threatened to weaken or eliminate the applications barrier to entry. A succession of such products appeared in the market between 1988 and 2001 which were met with rapid, strong and exclusionary responses by Microsoft. Microsoft engaged in continuing violations of the Sherman Act by means of such exclusionary, predatory conduct and other conduct with the specific intent to create market conditions in which end-users were forced to purchase Microsoft products and were deprived of competitive substitutes for them.

Microsoft's Predatory Response To Micrografx's Mirrors

85. In the late 1980s, Micrographx offered a developer tool called Mirrors that allowed Windows applications to be ported readily to OS/2 and vice versa.

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Mirrors, therefore, had the capacity to substantially weaken the applications barrier to entry. Microsoft engaged in anticompetitive acts to eliminate the Mirrors threat.

86. Microsoft induced Micrografx to share its confidential intellectual property on the representation that Microsoft was interested in licensing Mirrors for its applications programmers, and Microsoft signed a non-disclosure agreement. However, Microsoft then stopped pursuing such a license and eventually designed developer tools similar to Mirrors that it incorporated into its operating system, essentially eliminating demand for Mirrors as a stand-alone product.

87. Promptly after Microsoft declined to license Mirrors, Micrographx sought to license the product to IBM. To avoid the prospect that IBM would obtain the Mirrors technology and be able to port Windows applications to run on OS/2, Microsoft took exclusionary actions that were designed to, and did, prevent that result.

Microsoft's Predatory Response To Borland's C++

88. In the early 1990s, Borland's C++ was the most popular programming language among PC applications developers. Borland's C++ had an ObjectWindows Library (OWL) that enabled programmers to write applications that were platform independent, i.e., the applications could be written to OWL's APIs instead of the operating system's APIs. Eventually, Borland innovated OWL to the point where it could be used to write applications that could be ported to Windows, OS/2, Macintosh and Unix with virtually no conversion effort.

89. Seeing the threat that OWL posed to the applications barrier to entry, Microsoft embarked on a campaign to cripple Borland's C++. Microsoft prematurely

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announced the release of new versions of its competing developer tools and made false "vaporware" claims to deprive Borland of the advantages of being the first mover and having the superior product.

90. Furthermore, Microsoft refused to renew the license for its software developer kit ("SDK") to Borland unless Borland's C++ also carried and supported MFC, which was Microsoft's counterpart to OWL. Borland literally could not sell C++ without SDK; on the other hand, if it shipped MFC in addition to OWL, developers would choose MFC as it would be the only library available as part of both the Borland and Microsoft developer tools. Borland had no choice but to choose the latter option. Microsoft's developer tools soon became dominant and its MFC, which carried the Windows API's, perpetuated the applications barrier to entry.

Microsoft's Exclusionary Response To Intel's Native Signal Processing

91. Microsoft's quashing of Intel's Native Signal Processing ("NSP") is yet another example of Microsoft's relentless campaign to eliminate all threats to its operating system monopoly.

92. In 1995, Intel had developed NSP software, which promised to "endow Intel microprocessors with substantially enhanced video and graphics performance." Findings at ¶ 95. But because NSP had the potential to serve as a platform on which applications could be developed, Microsoft forced Intel to cease NSP development, flatly precluding that innovation from reaching consumers. Findings at ¶¶ 94-103. The Court found that "as late as the end of 1998 . . . Microsoft still had not implemented key capabilities that Intel had been poised to offer consumers in 1995."

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Findings at ¶ 101. Even after quashing the threat of Intel's NSP software, Bill Gates told Intel at a meeting in August 1995 that Intel could not count on Microsoft to support Intel's next generation of microprocessors if Intel was developing platform-level software that competed with Windows.

Microsoft's Exclusionary Response To Netscape's Navigator

93. Microsoft II focused on actions taken by Microsoft to maintain its monopoly power after it had eliminated threats from DR DOS and OS/2. In particular, the case focused on Microsoft's misconduct directed at Netscape's Web browser, Netscape Navigator.

94. Netscape Navigator possessed middleware attributes that gave it the potential to diminish Microsoft's applications barrier to entry. First, it was a complement to, not a substitute for, Windows, and therefore could gain widespread use. Second, it could serve as a platform for other software, particularly network-centric applications that work in association with Web pages. Third, Navigator has been ported to more than fifteen different operating systems. If a developer writes an application that relies on the APIs exposed by Navigator, that application will, without any porting of its own, run on many different operating systems.

95. Navigator began to enjoy tremendous public acceptance shortly after its release in December 1994. Microsoft soon thereafter recognized the damage Navigator could cause its operating system monopoly. In a May 1995 memo, Bill Gates described Netscape as a "new competitor 'born' on the Internet." He warned that Netscape was "pursuing a multi-platform strategy where they move the key API

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into the client to commoditize the underlying operating system." That is, browsers threatened to reduce or eliminate the key barrier to entry that protected Microsoft's monopoly share of the operating software market.

96. Microsoft launched a campaign to eliminate the Netscape threat. This campaign involved many anticompetitive acts, including:

a. Attempting to convince Netscape, before Microsoft launched its own browser in July 1995, to enter into an agreement dividing the market. Microsoft requested that Netscape not compete in operating system software or the production of browsers for Windows 95 in return for Microsoft's agreement not to compete in browser applications or the production of browsers for platforms other than Windows 95. Because of their pernicious effect on competition, such market division agreements are per se illegal under the antitrust laws. Netscape rejected the Microsoft proposal;

b. Withholding crucial technical information. At a meeting in June 1995, Netscape representatives requested technical information from Microsoft. A Microsoft representative indicated that Netscape's response to Microsoft's offer of a "special relationship" would determine whether Netscape received this information immediately or in three months. Subsequently, despite Netscape's repeated requests for this information, Microsoft withheld it until late October, more than three months later. The delay forced Netscape to postpone the release of its Windows 95

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browser, causing it to miss most of the holiday selling season;

c. Withholding a scripting tool that Netscape needed to make its browser compatible with certain internet service providers ("ISPs"). In mid-August 1995, a Microsoft representative informed Netscape that Microsoft was linking the grant of a license for the scripting tool to the resolution of all open issues. Netscape never received the license and, as a result, was unable for a time to do business with certain ISPs;

d. Conditioning the placement of an ISP on the "Internet Connection Wizard" screens or in the Online Services folder in Windows 95 on the ISP's agreement to deny most or all of its subscribers a choice of Internet browser. Approximately one-third of Internet browser users obtain their browsers from their service provider, so Microsoft's exclusionary agreements with these firms had a substantial foreclosure effect on Netscape Navigator and other browsers;

e. Entering into exclusionary agreements with Internet Content Providers ("ICPs") such as Disney, Hollywood Online, and CBS Sports Line, which provide news, entertainment, and other information from sites on the Web. In order to achieve priority placement on the Windows desktop screen after installation of Internet Explorer, Microsoft required ICPs to agree: (i) not to compensate manufacturers of "other browsers" (defined as either of the two leading non-Microsoft browsers) either by distributing their browsers or by payments to the other browser

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manufacturers for distributing, marketing or promoting the ICP content; (ii) not to promote any other browser; (iii) not to allow any other browser to promote the ICP channel content; and (iv) to design the ICP Web sites using Microsoft-specific programming extensions so that the sites looked better with Internet Explorer than with a competing browser;

f. Imposing license restrictions that prevented OEMs from altering the Windows 95 boot-up sequence. These restrictions increased Microsoft's ability to require preferential treatment for Internet Explorer from ISPs and ICPs in return for access to the Windows desktop. These restrictions also limited an OEM's ability to substitute or feature a non-Microsoft browser or other application;

g. Bundling Internet Explorer with Windows 95 in licensing agreements with OEMs, in order to foreclose choice by OEMs;

h. Tying, both contractually and technically, Internet Explorer to Windows 98. There is a demand for browsers that is separate and apart from the demand from operating system software. Findings at ¶ 154. Microsoft itself recognized this by offering Internet Explorer separate and apart from Windows. Even users of Windows 95 could "de-install" Internet Explorer. However, Microsoft also recognized that it could not compete on the merits with Netscape. As Microsoft's Christian Wilfeuer wrote in February, 1997, Microsoft had concluded that it would "be very hard to increase browser share on the merits of [Internet Explorer] alone. It will

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be more important to leverage the [operating system] asset to make people use [Internet Explorer] instead of Navigator." To leverage its operating system, Microsoft tied the implementation of Windows 98 with Internet Explorer, so that it could not be simply "de-installed." Moreover, even if Netscape Navigator is chosen as a default browser, Windows 98 is written to override the user's choice in certain circumstances. As Brad Chase of Microsoft wrote to his superiors near the end of 1995, "We will bind the shell to the Internet Explorer, so that running any other browser is a jolting experience."

97. Microsoft launched a campaign to eliminate the Netscape threat. The result of Microsoft's campaign against Netscape Navigator was a dramatic reversal in market share for Internet browsers. Netscape Navigator's market share fell from above 80 percent in January 1996 to 55 percent in November 1997 while Internet Explorer's market share rose from 5 percent to 36 percent over the same period. Internet Explorer's market share by the latter part of 1998 was approximately 50 percent and steadily rising as Windows 95 users converted to Windows 98.

Microsoft's Exclusionary Response To Sun Microsystem's Java Technologies

98. Sun Microsystems, Inc. ("Sun") announced in May 1995 that it had developed the Java programming language. The inventors of Java intended the technology to enable applications written in the Java language to run on a variety of platforms with minimal porting. This was a significant development because the easier it is for developers to port their applications to different operating systems, the

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more applications will be written for operating systems other than Windows.

99. Microsoft executives almost immediately became deeply worried about the potential of Sun's Java technologies to diminish the applications barrier to entry protecting Microsoft's operating system monopoly. In May 1995, Netscape agreed to include a copy of Sun's Java runtime environment with every copy of Navigator, and Navigator quickly became the principal vehicle by which Sun placed copies of Java on the PC systems of Windows users.

100. In 1996, senior executives at Microsoft became aware that the number of developers writing network-centric applications in the Java programming language had become significant and that Java was likely to increase in popularity among developers. Microsoft therefore became interested in maximizing the difficulty with which applications written in Java could be ported from Windows to other platforms and vice versa. Microsoft engaged in various anticompetitive acts to accomplish this purpose, including:

a. Microsoft licensed and then corrupted Java, by creating Microsoft-specific Java development tools and a Windows-compatible Java runtime environment that made porting more difficult than with the Sun version of Java;

b. Microsoft discouraged business allies, such as Intel, from cooperating with Sun, threatening that cooperation would jeopardize the business relationship between Microsoft and the ally;

c. Microsoft discouraged developers from using Java. In 1997, Sun added a

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class library called Remote Method Invocation, or "RMI," which allowed Java applications written upon it to communicate with each other in certain useful ways. Microsoft's license agreement with Sun required Microsoft to offer RMI. However, because this would allow Java developers to make applications more portable, Microsoft took action to prevent access to RMI. Microsoft buried the RMI link in an obscure location and neglected to include an entry for it in the site's index. Referring to Java developers who might access Microsoft's site looking for RMI, a Microsoft employee wrote to his approving manager "They'll have to stumble across it to know it's there. . . . I'd say it's pretty buried." Microsoft continued to refuse to implement Sun's RMI method until ordered by a court to do so in November 1998;

d. In agreements signed with ISVs in 1997 and 1998, Microsoft conditioned early Windows 98 and Windows NT betas, other technical information, and the right to use certain Microsoft seals of approval, on the agreement of those ISVs to use Microsoft's version of the Windows Java as the "default." Microsoft entered into an agreement with at least one ISV that explicitly required it to redistribute Microsoft's Java to the exclusion of any other version.

101. In 1996, senior executives at Microsoft became aware that Microsoft's anticompetitive attacks upon Java, coupled with its limitation of a primary distribution vehicle, Netscape Navigator, effectively eliminated the threat to the applications

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barrier.

Microsoft's Exclusionary Response To Real Networks's Digital and Streaming Media Technology

102. In 1995 Real Networks ("RN") became the first company to commercially offer Internet streaming media players and servers to deliver audio and video content over networks like the Internet.

103. Microsoft rapidly saw RN's success as a threat because RN's software could serve as a platform for software developers to create applications. Because RN's software worked on operating systems other than Microsoft's, RN's middleware capabilities would empower customers to choose operating systems other than those developed by Microsoft.

104. Microsoft used a panoply of tactics like those used against previous potential platform rivals, including other middleware producers, against RN. These included product bundling, technical tie-ins, technical lock-outs, restrictive licenses, exclusive dealing, predatory pricing, refusals to sell unbundled services, discriminatory disclosure of information need to interoperate with Microsoft operating systems, and withholding of information required to interoperate with Microsoft operating systems.

105. Since May of 1999 Microsoft has bundled its unsuccessful stand-alone NetShow media player, renamed Windows Media Player, with the Windows operating system. This is despite the fact that these products have well-established separate identities and that firms have found it efficient to supply operating systems and media

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players separately.

106. Despite having spent about $500 million developing its media player products, Microsoft gave its Windows Media Player product away for free and actively encouraged, through the payment of financial incentives to PC makers, the installation of Windows Media Player on PCs. This below-cost pricing is intended to, and does, unlawfully maintain Microsoft's PC operating system monopoly.

107. Microsoft has refused to provide, or only provided after significant delay, technical information required for RN to interoperate fully with Microsoft's Windows, even though identical information has been provided to other software producers who do not pose the same threat to Microsoft's platform monopoly. For example Microsoft refused to provide RN with information required to identify the RealOne Player by name to allow users to select RN's products as their default digital media player, or to prevent Microsoft products from overriding a consumer's choice of default player. Microsoft also refused to provide, or delayed disclosing, the APIs and other technical information required to allow RN to make use of the Secure Audio pathway.

Microsoft's Exclusionary Response To Personal Productivity Applications

108. As alleged above, Microsoft engaged in a prolonged series of exclusionary acts to preserve its operating system monopoly. At the same time, Microsoft abused and leveraged that monopoly power, and engaged in other exclusionary conduct, to gain unfair advantages in various applications software markets, including the markets for word processing and spreadsheets. For example,

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Microsoft refused to give competing applications software developers timely, full and fair access to its operating system interfaces and communication protocols, which access was necessary to develop competitive application programs.

109. Apart from a desire to achieve and exploit monopoly power in these applications markets, Microsoft also sought to repress the development of rival applications because they threatened Microsoft's monopoly position in the market for operating systems. As one Microsoft executive stated:

> If we own the key 'franchises' built on top of the operating system, we dramatically widen the 'moat' that protects the operating system business. ... We hope to make a lot of money off these franchises, but even more important is that they should protect our Windows royalty per PC. ... And success in those businesses will help increase the opportunity for future price discretion.

MICROSOFT'S ANTICOMPETITIVE ACTIVITIES IN THE APPLICATIONS MARKETS

Overview

110. As alleged above, Microsoft engaged in a prolonged series of exclusionary acts to preserve its operating system monopoly. At the same time, Microsoft abused and leveraged that monopoly power, and engaged in other exclusionary conduct, to gain unfair advantages in various applications software markets, including the markets for word processing and spreadsheets. For example, Microsoft refused to give competing applications software developers timely, full and fair access to its operating system interfaces and communication protocols, which access was necessary to develop competitive application programs.

111. In addition, Microsoft displaced the dominant spreadsheet program

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(Lotus 1-2-3) by engaging in a calculated effort beginning in 1989 to convince Lotus Development Corporation to write its next spreadsheet version to run on OS/2 without disclosing that Microsoft had already decided to abandon OS/2 in favor of Windows.

112. Similarly, Microsoft displaced the dominant word processing program (WordPerfect) by engaging in a calculated effort to convince WordPerfect Corporation to write its next word processing program to run on OS/2 without disclosing that Microsoft had already decided to abandon OS/2 in favor of Windows.

113. Furthermore, Microsoft's anticompetitive efforts beginning in 1995 to take market share from Navigator were designed to protect Microsoft's monopoly in the applications software markets (in addition to protecting Microsoft's operating system monopoly). Microsoft understood that the growth in e-mail's popularity as a means of communication within and between businesses and other organizations greatly diminished such organizations' interest in word processing programs such as Word and (by extension) office suites such as Microsoft Office. Microsoft also feared that the browser and the Java virtual machine would become a platform for development of Java-based applications that provided at least some of the functionality of Word and Excel. Microsoft's unlawful attack on Navigator and Sun's implementation of the Java technologies thus not only unlawfully maintained Microsoft's monopoly in the operating system market, but in the word processing and spreadsheet markets as well.

Microsoft's Operating System As an Essential Facility

114. By virtue of its unlawful acts, Microsoft developed and maintained

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control of facilities essential to competition in the markets for Windows-compatible applications software, namely, word processing and spreadsheet software.

115. Such essential facilities include, among other things, the specifications for Windows.

116. By unreasonably refusing, limiting and manipulating its actual and potential competitors' access to the specifications while preferentially or freely granting itself such access, and through its other unlawful acts alleged herein, Microsoft unreasonably and unfairly advantaged itself in the relevant applications software markets, acquired and maintained monopolies in those markets, and unlawfully inflated the prices it charged for the relevant applications software.

117. Implicitly recognizing both that its operating system interface information and communication protocols were an essential facility and that it had the ability to abuse its control over that information, Microsoft claimed (falsely) until 1991 that it had created a "Chinese wall" that prevented its own applications software developers from having special access to its operating system interface information and communication protocols or to the employees working on its operating system.

118. Microsoft's essential facilities are the accepted, worldwide standards for operating systems for Intel-compatible PCs, and without fair access to them by ISVs, licensees, purchasers, distributors and/or OEMs would be deprived of the benefits of meaningful competition in the applications software markets where timely access to the Microsoft's operating system interface information and communication protocols is imperative.

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119. ISVs could not practically or economically have duplicated these essential facilities in light of the lengthy development time, required sunk costs, the applications barrier to entry, and other impediments.

120. Microsoft could have easily provided timely and complete access to its operating system specifications to competing software vendors and others in the normal course of business, but chose instead to preclude, limit, or delay such access in order to acquire and maintain monopoly power in the relevant applications software markets.

121. Microsoft has exploited unlawfully its control over these essential facilities to acquire and perpetuate its monopolies in the relevant applications software markets.

122. Microsoft, through its control over these essential facilities and through monopolies in the relevant markets, has forced Plaintiff and others to pay supra-competitive prices for the relevant applications software products.

Abusing and Leveraging Monopoly Power From the Operating Systems Market

123. Microsoft has pursued a strategy of using its power in the market for Intel-compatible PC operating systems as leverage, through anticompetitive acts and marketing and technical links, to acquire and/or maintain monopoly power in certain applications software markets. The anticompetitive acts used by Microsoft to acquire and/or maintain its monopoly power in the operating system market also have allowed Microsoft to target and monopolize the applications software markets for Intel-compatible PC word processing, spreadsheet and office suite software.

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124. Microsoft has obtained power in the applications markets by, among other things, giving its own applications software developers early and complete access to the revised code developed in successive versions of its operating system. To compete with Microsoft's applications software, non-Microsoft developers must have timely access to Microsoft's operating system APIs, as well as to other operating system information.

125. To acquire and maintain its dominance over, and to impose supra-competitive prices in, the relevant applications software markets, Microsoft, among other things:

a. failed to timely and completely disclose the APIs for Windows to software developers who needed such information to timely create competitive applications software compatible with Microsoft's operating system;

b. retracted documentation of its browsing extensions and ripped out programming interfaces shortly before the release of Windows 95, forcing competitors to redesign their applications, then re-documented the interfaces, forcing competitors to redesign once again;

c. refused to publish the APIs that were used to place items on the Windows Clipboard, forcing competitors to forego this functionality;

d. misrepresented that Windows 95 would be a "32-bit" system when in fact it was planned as a "16-bit" system, forcing competitors to redesign their applications;

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e. misdirected competitors into delaying the development and shipment of products that could have implemented an inter-application communication technology called OpenDoc; Microsoft discussed with these competitors collectively refining an alternative industry standard originally developed by Microsoft called object linking and embedding ("OLE"); while the competitors worked on OLE with Microsoft instead of implementing the OpenDoc standard, Microsoft released its own version of OLE in Excel;

f. provided competitors with OLE specifications that were incompatible with the OLE implementation Microsoft shipped with its products, causing OLE technology in competing applications not to interoperate properly with Word and Excel;

g. revised OLE pursuant to requests from its Excel developers without timely releasing those revisions to competing developers. As a result, Excel had the opportunity for input and early knowledge of the resulting modifications that were unavailable to Microsoft's competitors. These competitors, particularly Lotus 1-2-3, suffered delays of many months as they were forced to rewrite their own applications to make them perform under the OLE revisions;

h. made certification of an application's compatibility with Windows 95 contingent on OLE compatibility, after first announcing that OpenDoc would be deemed OLE-compatible;

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i. withheld specifications and final, debugged versions of OLE until after it had released its own applications;

j. opposed the implementation of the OpenDoc standards by ISVs. Such open standards would have freed developers from Microsoft's attempts to dictate the way applications software was developed. Microsoft punished competitors who supported the open standards. Among other things, such persons would receive "special" versions of the beta software that lacked key information necessary for development of software products running on Windows;

k. entered into non-disclosure agreements with ISVs preventing ISV employees who worked on OpenDoc from receiving Windows 95 beta versions or specifications;

l. required ISVs with a Windows 95 beta version to agree not to work on OpenDoc for two years (a requirement that it later dropped);

m. reduced compatibility between files created by Microsoft's applications and files created by competitors' applications, to increase file conversion costs and magnify the network effects enjoyed by Microsoft's dominant applications products;

n. forced software developers to sign non-disclosure agreements that barred them from receiving information on Windows 95 if they did not support Microsoft's OLE;

o. impeded competing ISVs' development efforts by denying promised

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promotional and marketing support, forcing distributors and dealers to exclude ISVs from their promotions, and denying ISVs promised access to Windows' user mailing lists;

p. made certification of an application's compatibility with Windows 95 contingent on compatibility with the dissimilar Windows NT operating system;

q. unilaterally made Microsoft Word's Rich Text Format ("RTF") the standard file format for Windows, but then withheld specifications from its competitors;

r. changed RTF whenever Word's own format changed, requiring ISVs to continually redevelop their applications;

s. declared Word's "toolbar" to be the Windows standard, despite WordPerfect's superior "button bar;"

t. prevented its competitors from presenting their own features, such as WordPerfect's QuickFinder, on the Windows desktop;

u. refused to disclose specifications or provide technical support to overcome the "64k memory limitation," an operating system flaw, and declined to document its Dialog Box Manager ("DBM") feature, which solved this flaw for dialog boxes;

v. hid Computer-Based Training ("CBT") hooks – which were used by Microsoft's own applications developers for user training – from ISVs, making rival applications more difficult to use;

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w. threatened to stop developing its own applications for the Macintosh if Apple bundled its desktop computers with rivals' applications;

x. did not resolve Windows-related bugs affecting its competitors' applications as aggressively as it resolved bugs affecting its own applications;

y. excluded rival developers from technical conferences and porting labs, which were opportunities to debug applications, resulting in a greater incidence of malfunctions, often caused by Windows itself;

z. refused to provide a simple remedy for "DLL Hell," a problem caused by Microsoft's practice of changing functions of Dynamic Link Libraries ("DLLs") without changing documentation to ISVs, which could have been solved simply by documenting version information;

aa. threatened OEMs that they would receive a license for Windows only if they agreed not to offer competitors' applications software;

bb. threatened OEMs that Microsoft would increase the price for its operating systems if the OEMs distributed non-Microsoft applications software;

cc. threatened to withhold from OEMs market development funds if the OEMs distributed non-Microsoft applications software;

dd. threatened OEMs that Microsoft would withhold technical support from the OEMs for Microsoft's operating systems, including Windows, if the OEMs offered competitors' applications software;

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ee. raised the price of Windows to non-Tier One OEMs in consideration for Tier One OEMs' agreement to offer only Microsoft applications software;

ff. provided substantial inducements to OEMs to license Office on a per-processor instead of a per-copy basis, resulting in many OEMs paying for Office whether or not Office was installed on their computers;

gg. locked OEMs into successive licenses for applications and other Microsoft software by basing payment terms on minimum commitments and accumulating any overpayments as a "prepaid balance" that would not be refunded but could be credited against a renewed license; and

hh. required distributors to provide detailed sales reports on sales of rival applications, intimidating and burdening distributors who chose to sell its competitors' applications.

126. In his findings, Judge Jackson gave specific examples of Microsoft's anti-competitive behavior in regard to its applications software, including its attempts to preclude IBM's installation of IBM's own Lotus SmartSuite bundle of office productivity software on the PCs manufactured by IBM. Findings at ¶¶ 115-132. Specifically, Judge Jackson found that "[w]hen IBM refused to abate the promotion of those of its own products that competed with Windows and Office, Microsoft punished the IBM PC Company with higher prices, a late license for Windows 95, and the withholding of technical and marketing support." Id. at ¶ 116, see also id. at ¶¶ 118-131.

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Microsoft's Exclusionary Acts Specifically Targeted at the Spreadsheets Market

127. In the early 1990s, Lotus 1-2-3 had the dominant share of the Intel-compatible PC spreadsheet software market. In 1994, Microsoft engaged in a calculated effort to persuade Lotus to write its next version of Lotus 1-2-3 to run on OS/2 rather than MS-DOS. At the very time that Microsoft was engaged in those efforts, it had decided for itself to abandon any further development efforts for OS/2 and to focus instead on further developing Windows. Microsoft withheld this critical decision from Lotus.

128. Microsoft's deception was successful: Lotus wrote its next spreadsheet version for OS/2, thereby misdirecting huge sums of money to virtually worthless development efforts. Microsoft timely released its next Excel version to run on Windows and quickly gained a large share of the relevant spreadsheet market.

Microsoft's Exclusionary Acts Specifically Targeted at the Word Processing Market

129. Netscape's browser, as alleged, threatened to weaken the applications barrier to entry that protected Microsoft's monopoly in the operating system market. Microsoft also recognized that Navigator posed a serious threat to its applications software monopoly, particularly with respect to word processing. As one Microsoft executive wrote:

> Netscape is using their position with the browser as a foothold onto the desktop to push e-mail and collaboration as the new killer applications. Any Office Suite in the near future will have mail as its core component. As e-mail use becomes pervasive in organizations, it will replace Word (and by extension Office) as the most critical end user app in organizations. * * * Netscape is working hard to offer a compelling application development platform, which if successful, will greatly diminish corporation's interests in our Office products .

. . The threat of continued low mail client share in organizations and with consumers is that our competitors gain control of the desktop, where they can switch existing Office users to their solutions, sell upgrades, and drive server share with a cohesive client-server solution * * * In summary, we must keep our focus on browser share. This is central to the success of Windows and central to the success of Office. By focusing on IE today, we not only secure the desktop and secure future Windows sales, but also gain a user base that we can upgrade to Outlook then Office.

130. Microsoft's predatory acts directed at Navigator and Sun's Java, therefore, were designed not just to protect Microsoft's operating system monopoly, but also its monopolies in the word processing and spreadsheet markets.

MICROSOFT'S CONTINUING CONDUCT

131. Microsoft continues to engage in anticompetitive conduct to maintain its monopoly. Such continuing conduct includes failure to comply with the Final Judgment in the government action, as well as exclusionary conduct with respect to media players, work group servers, web-based applications, personal productivity applications, standards and formats, electronic mail software, and media servers, media formats, and digital rights management.

Microsoft's Continuing Failure to Comply with the Final Judgment

132. Microsoft has not been complying fully with the Final Judgment entered in the government action on November 12, 2002. That Final Judgment required Microsoft, among other things, to provide the interoperability specifications that would enable third parties to develop software that would interact with the Windows desktop operating system. In addition, it obligated Microsoft to provide a mechanism to remove its bundled middleware software so that third parties and end users might

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substitute middleware of their own choosing.

133. Despite the requirements of the Final Judgment, Microsoft has delayed producing usable specifications and its specifications have been inaccurate and incomplete. Moreover, although Microsoft was required to offer licenses to third parties, the terms of those licenses were too burdensome.

134. The Final Judgment, among other things, authorizes a Technical Committee ("TC") to monitor Microsoft's compliance with the obligations imposed by the Final Judgment. Yet as recently as January 23, 2006 – over halfway through the term of the Final Judgment – the DOJ reported to the court as follows:

a. "In the substantial majority of cases Microsoft is no longer meeting the Service Level Guidelines ('SLGs') established to measure the timeliness of its initial response to technical documentation issues submitted by the TC. . . . Since approximately mid-November, Microsoft has fallen significantly behind in responding to technical documentation issues submitted by the TC."

b. "Currently, Microsoft's inability to meet the SLGs interferes with the TC's ability to pursue its prototype implementation project and impairs the TC's ability to complete the project in a timely manner. It also means that MCPP licensees are receiving corrections or other edits to their technical documentation later than they would if Microsoft were complying with the SLGs."

c. "[T]he TC team and their monitoring equipment arrived in India one week prior to the scheduled hearing of the test run. After the TC team arrived, Microsoft informed them that Microsoft's prior description of the network infrastructure of the test labs was inaccurate. Due to the inaccurate information it had received, the TC had designed its monitoring system to use four data capture devices in that lab, instead of the six it would have used had the situation been accurately described. This matter is particularly troubling given that, as described during the last Status Conference, Microsoft has on several occasions been unable to provide accurate information regarding the setup of the India labs."

135. As of February 1, 2006, the TC had submitted over 1000 technical

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documentation issues to Microsoft, of which more than 700 had not yet been closed. The Service Level Guidelines were then revised to require Microsoft to resolve within sixty days – to the satisfaction of the TC – all issues blocking the TC's projects that the TC could not readily solve by reference to the source code or public information

136. On May 12, 2006, the DOJ reported to the court as follows:

> In February, the TC reclassified all previously submitted technical documentation issues and determined that 71 outstanding technical documentation issues should be governed by the new 60-day deadline. Microsoft's initial performance in resolving these technical documentation issues was disappointing. As described in Microsoft's monthly status report dated April 17, 2006, when the TC reviewed Microsoft's initial proposed fixes to 58 of these 71 issues, the TC found that only five of those responses completely resolved the issue. . . . As of May 8, there were 57 open technical documentation issues for which the 60-day time period has already expired and Microsoft had only closed 18 of the 60-day issues submitted by the TC.
>
> Microsoft's initial performance in resolving the remaining outstanding technical documentation issues – the so-called "non-60-day issues" – was also not very encouraging. While Microsoft has "closed" a significant number of these issues, when the TC analyzed a sample of these replies submitted earlier this year it found that slightly less than one-third of the fixes fully resolved the issues.

137. Thus, the DOJ wrote that "Microsoft's difficulty in improving the technical documentation has led Plaintiffs to conclude that a new approach is needed." The DOJ further stated that "[i]n light of the protracted delays in resolving Plaintiffs' concerns with the technical documentation, Plaintiffs are convinced that it is necessary to extend the term of the Final Judgments as they relate to communications protocol licensing."

138. On September 7, 2006, the court entered a Modified Final Judgment that extends portions of the Final Judgment for two years and incorporates an agreement

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that the plaintiffs have the right in their sole discretion to request an additional three-year extension of these portions, which request would not be opposed by Microsoft.

139. Microsoft's continuing failure to comply with the Final Judgment means that in many ways, the relevant market actually is less competitive than it was when the government brought its case in 1997, because third parties have been limited in their ability to create competitive products.

Microsoft's Continuing Exclusionary Conduct Involving Media Players

140. Microsoft's exclusionary conduct involving media players is described above, and is continuing. Although the European Commission has required Microsoft to offer versions of Windows in Europe ("N" versions) that do not include Media Player, such versions are not available in the United States.

141. Thus, in the United States, Microsoft continues to bundle its Media Player with its operating system, even though tests conducted by independent and respected laboratories have confirmed that Media Player can be easily removed from Windows without consequence.

142. In addition, Microsoft has failed to disclose interfaces between its Media Player and the Windows operating system, despite requests for this information. This prevents third parties from making their alternative media players integrate with Windows as seamlessly as Microsoft's Media Player.

143. The effect of this conduct is to make it more difficult for alternative media players to emerge as middleware products that can support their own applications on operating system platforms that compete with Microsoft Windows.

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This further raises the barrier to entry for competing operating systems.

Microsoft's Continuing Exclusionary Conduct Involving Work Group Servers

144. Microsoft continues to engage in exclusionary conduct involving work group servers, which interface with networked desktop computers ("clients"). In particular, Microsoft uses its market power with respect to desktops to gain market power with respect to servers. Then, because Microsoft's work group servers do not support competing desktop operating systems as well as they support Microsoft's own Windows desktop operating system, barriers are raised for competition by alternative operating system platforms.

145. Server networks require that client computers have their own client-side software to interface with the server operating system. Microsoft bundles its client-side software with its Windows operating system, meaning that all PCs with Windows, without any additional installation, are ready to interface with Windows servers. In order to use a competing server operating system, however, a user must separately install the client-side software for the competing system on each of the networked client computers.

146. In addition, Microsoft's server operating system includes special, undocumented interfaces used by its servers to communicate with one another when multiple servers are part of the same network. Because these interfaces are not available to Microsoft's competitors, competing server operating systems do not interact as well with Windows servers and clients.

147. On July 12, 2006, the European Commission imposed a € 280.5 million

penalty on Microsoft for failing to comply with requirements that it provide interoperability specifications needed by third parties to offer compatible products. The Commission found as follows:

> In view of the foregoing, and on the basis of the technical analysis by the Commission's experts and the Trustee, corroborated by the submissions of third parties regarding their evaluation of the Technical Documentation, it is concluded that the relevant versions of the Technical Documentation are neither complete nor accurate. . . . It is therefore concluded that Microsoft has not complied with its obligations to make Interoperability Information available to interested undertakings pursuant to Article 5(a) and (c) of the Decision.

148. On November 15, 2006, the European Commission announced that it still "has not received the complete documentation regarding all relevant protocols that is required to comply with its March 2004 Decision.".

Microsoft's Continuing Exclusionary Conduct Involving Web-Based Applications

149. Microsoft's exclusionary conduct involving Java and web-based applications is described above, and is continuing. In 2000, Microsoft released its own middleware product, .Net (pronounced "dot Net"), which copies many of Java's attractive functions. Like Java, .Net is intended to be used as a platform for developing next-generation web-based applications.

150. Unlike Java, however, Microsoft has developed .Net to be platform specific, meaning that applications developed with .Net will run only on Microsoft's operating system platforms. Thus, such applications are locked in to Windows and create a new set of obstacles for users to overcome when considering migrating from Windows clients and servers to competing platforms.

151. Moreover, Microsoft bundles .Net with Windows, and .Net applications

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use proprietary protocols and undocumented Windows interfaces to communicate between the .Net server-side elements and the .Net client-side elements of a web-based application.

152. Moreover, just as Java enabled applications to run on mobile devices such as "smartphones" and personal digital assistants, Microsoft intends for .Net to extend to these devices as well. This will raise entry barriers for competing operating systems because only the Windows operating system on the desktop will be compatible with the operating system and the applications on the mobile device.

Microsoft's Continuing Exclusionary Conduct Involving Personal Productivity Applications

153. Microsoft's exclusionary conduct involving personal productivity applications, such as word processing and spreadsheet applications, is described above, and is continuing. In particular, Microsoft continues to refuse to make its Office applications available on platforms other than Windows (except for Macintosh). This requires users of these personal productivity applications to use Windows rather than a competing operating system.

154. In addition, the applications that constitute Microsoft Office have used interfaces that are undocumented and unavailable to rival developers of personal productivity suites and applications, thereby making Microsoft's applications faster and more capable. With respect to one critical technology, Object Linking and Embedding ("OLE"), Microsoft refused to adopt a standard for inter-application operability. As a result, no personal productivity software ever has been able to match the interoperability of Microsoft's Office components because of this unique

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advantage Microsoft has given to its own applications.

155. Finally, Microsoft recently has engaged in the creation of an Office platform on which third parties and users may build applications that run on top of Office. Thus, Office has itself become a type of middleware platform. These Office-based applications are tied to Office, and as a result, to Windows, further raising the barriers to entry faced by competing operating systems, as well as competing middleware platforms and personal productivity applications.

Microsoft's Continuing Exclusionary Conduct Involving Standards and Formats

156. Microsoft has continued to engage in exclusionary conduct involving standards and formats. Microsoft's Office software products use proprietary and undocumented formats to store the contents of documents, such as ".doc" for Microsoft Word documents, ".xls" for Microsoft Excel spreadsheets, and ".ppt" for Microsoft PowerPoint presentations. Yet competing applications are not able to convert the contents of these documents because of Microsoft's failure to disclose the necessary specifications or to adopt document format standards to permit the exchange of documents between different software programs. Thus, to properly display, edit, and print documents created using Microsoft's applications, a user is required to use Microsoft software, because only Microsoft software has access to the proper specifications and formats. Because these applications run only on Microsoft Windows, Microsoft's conduct in this regard locks users in to Windows for the foreseeable future.

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157. Concerns about this conduct recently led the Commonwealth of Massachusetts to announce a policy, scheduled to go into effect in January 2007, which would require every state agency to use an open format for its documents. Nevertheless, Microsoft has announced that it will not support the industry-proposed open format.

Microsoft's Continuing Exclusionary Conduct Involving Electronic Mail Software

158. Microsoft has continued to engage in exclusionary conduct involving electronic mail ("e-mail") software. In particular, it bundles its Microsoft Outlook e-mail client software with Microsoft Office, effectively for zero cost. Also, Outlook uses undisclosed interfaces to Windows and to Exchange (Microsoft's widely used e-mail server software), making both Exchange and Outlook appear to perform better than third party e-mail servers or e-mail clients.

159. Microsoft requires that users of Exchange use Active Directory, Microsoft's directory services software, which is bundled with Windows Server and is largely built into every Windows desktop client. Outlook runs only on Windows clients, and Exchange and Active Directory run only on Windows Server, thus further raising entry barriers for competing operating systems.

Microsoft's Continuing Exclusionary Conduct Involving Media Servers, Media Formats, and Digital Rights Management

160. Microsoft has continued to engage in exclusionary conduct involving media servers, media formats, and digital rights management. Content owners such as record labels, movie companies, television networks, and others author digital content

into digital media formats, which are suitable for viewing, streaming, and playing. As content owners, once they are assured that their rights are protected, they seek to have their content available to as many consumers as possible. Thus, it is important for content owners to choose the digital format that will reach the broadest audience. Accordingly, a media player's popularity will influence a content owner's decision about which media format to use.

161. Microsoft's conduct, however, has greatly distorted the content format decisions made by content owners, titling such decisions toward Microsoft's proprietary media formats ("WMV," "WMA," and "WMF"). It provides its content delivery software, Windows Media Server, for free by bundling it with Windows Server. Media Server runs only on Windows Server and uses proprietary and undisclosed interfaces with Windows Media Player, which – as discussed above – is bundled with and tied to the Windows desktop operating system. Thus, content created with a Windows format can be viewed, streamed, or played best only on the Windows operating system, further maintaining Microsoft's operating system monopoly.

162. Content owners further seek to secure their property using digital rights management ("DRM"). The software that implements DRM must be active at the authoring state (when the content is created), at the distribution stage (when it is transferred to the consumer), and at the playback stage (when the content is used). Microsoft promotes its own proprietary DRM standard, which further strengthens its monopoly position.

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ANTITRUST INJURY

163. Microsoft's exclusionary and restrictive practices described herein have caused significant harm to Plaintiff by increasing, maintaining or stabilizing the price it paid for Microsoft's operating system, Word, Excel, and Office software above competitive levels, virtually without regard to the price of licenses for competing software.

164. As alleged above, Microsoft continues to engage in anticompetitive conduct. In addition, Microsoft's past anticompetitive conduct has effects that continue to the present. Because Microsoft, through its exclusionary practices, eliminated its competitors from the market and has blocked entry of new competitors and expansion of existing rivals, it has been able to increase, maintain, or stabilize prices at anticompetitive levels without being constrained by these competitors.

165. Microsoft's supra-competitive prices are not the result of superior products or competition on the merits. Rather, Microsoft has been able, at the financial expense of purchasers like Plaintiff, to artificially inflate its profits by engaging in a series of exclusionary acts and restrictive practices with the purpose and effect of restraining and preventing competition and unlawfully acquiring and/or maintaining its monopoly in the relevant markets described above.

COUNT I
Arizona Antitrust Act §44-1403
Monopolization -- Operating System Market

166. Each of the above allegations is incorporated herein.

167. Microsoft possesses monopoly power in the market for Intel-compatible

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PC operating system software. Through the anticompetitive conduct described herein, Microsoft has willfully acquired and/or maintained its monopoly power in this market. Microsoft has acted with an intent to illegally acquire and/or maintain its monopoly power, and its anticompetitive conduct has enabled it do so, in violation of A.R.S. §44-1403.

168. As a result of the violation of A.R.S. §44-1403, Microsoft has charged artificially inflated prices for its operating system software and required OEMs to provide technical support or service to end users when Microsoft's operating system failed to perform or operate properly. Microsoft used its monopoly power to shift this cost to Plaintiff and other customers. Microsoft's monopolization has caused injury to the business and property of Plaintiff in an amount that will be established at trial.

COUNT II

Arizona Antitrust Act §44-1403
Monopolization – Word Processing Applications Market

169. Each of the above allegations is incorporated herein.

170. Microsoft possesses monopoly power in the market for Intel-compatible PC word processing software. Through the anticompetitive conduct described herein, Microsoft has willfully acquired and/or maintained its monopoly power in this market. Microsoft has acted with an intent to illegally acquire and/or maintain its monopoly power, and its anticompetitive conduct has enabled it do so, in violation of A.R.S. §44-1403.

171. As a result of the violation of Section 2 of the Sherman Act, Microsoft has charged artificially inflated prices for its word processing software, thereby

causing injury to the business and property of members of the Office Applications Software Class in an amount that will be established at trial.

COUNT III

Arizona Antitrust Act §44-1403
Monopolization – Spreadsheet Applications Market

172. Each of the above allegations is incorporated herein.

173. Microsoft possesses monopoly power in the market for Intel-compatible PC spreadsheet software. Through the anticompetitive conduct described herein, Microsoft has willfully acquired and/or maintained its monopoly power in this market. Microsoft has acted with an intent to illegally acquire and/or maintain its monopoly power, and its anticompetitive conduct has enabled it do so, in violation of A.R.S. §44-14032.

174. As a result of the violation of A.R.S. §44-1403, Microsoft has charged artificially inflated prices for its spreadsheet software, thereby causing injury to the business and property of members of the Office Applications Software Class in an amount that will be established at trial.

COUNT IV

Arizona Antitrust Act §44-1403
Monopoly Leveraging, Abuse of Monopoly Power and Denial of Essential Facility Word Processing Applications Market

175. Each of the above allegations is incorporated herein.

176. Microsoft has monopoly power in the Intel-compatible PC operating systems market. Through the anticompetitive conduct described herein, Microsoft has unlawfully leveraged and abused that monopoly power and denied reasonable and

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timely access to its operating system software, to foreclose competition, gain a competitive advantage, and destroy competitors in the Windows-compatible word processing applications market, resulting in tangible harm to competition and the acquisition and/or maintenance monopoly power, in violation of A.R.S. §44-14032.

177. As a result of the violation of A.R.S. §44-14032, Microsoft has charged artificially inflated prices for its word processing software, thereby causing injury to the business and property of members of the Office Applications Software Class in an amount that will be established at trial.

COUNT V

Arizona Antitrust Act §44-1403
Monopoly Leveraging, Abuse of Monopoly Power and Denial of Essential Facility Spreadsheet Applications Market

178. Each of the above allegations is incorporated herein.

179. Microsoft has monopoly power in the Intel-compatible PC operating systems market. Through the anticompetitive conduct described herein, Microsoft has unlawfully leveraged and abused that monopoly power and denied reasonable and timely access to its operating system software, to foreclose competition, gain a competitive advantage, and destroy competitors in the Windows-compatible spreadsheet applications market, resulting in tangible harm to competition and the acquisition and/or maintenance monopoly power, in violation of A.R.S. §44-14032.

180. As a result of the violation of A.R.S. §44-14032, Microsoft has charged artificially inflated prices for its spreadsheet software, thereby causing injury to the business and property of members of the Office Applications Software Class in an

amount that will be established at trial.

RELIEF REQUESTED

Wherefore, Plaintiff prays:

A. That this Court declare, adjudge and decree this action to be a proper class action pursuant to Arizona Rule of Civil Procedure 23 on behalf of the Classes defined herein;

B. That Plaintiff and the class recover their actual damages, in an amount to be determined at trial, that they have sustained and will have sustained as a result of the antitrust violations alleged herein.

C. That Plaintiff and the class recover their reasonable attorneys' fees and costs of suit; and

D. That Plaintiff and the class be granted such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury of all issues so triable in this case.

DATED this 24th day of July, 2007.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CHARLES I. FRIEDMAN, P.C., an Arizona corporation, and THE POWER P.E.O., INC., and Arizona Corporation, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

MICROSOFT CORPORATION, a Washington corporation,

Defendant.

JAKE LUCERO, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

MICROSOFT CORPORATION,

Defendants.

No. 2000-000722
Consolidated with No. CV2000-005872

CLASS ACTION

AMENDED/CONSOLIDATED CLASS ACTION COMPLAINT FOR DAMAGES

(Assigned to the Hon. Michael J. O'Melia)

Plaintiffs Jake Lucero, Charles I. Friedman, P.C., and The Power, P.E.O., Inc. ("Plaintiffs"), on behalf of themselves and all others similarly situated, allege as follows against Defendant Microsoft Corporation (Microsoft") on information and belief, formed after an inquiry reasonable under the circumstances:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to A.R.S. §§ 12-123 and 44-1405.

2. This Court has personal jurisdiction over Microsoft because it is a corporation which is authorized to conduct, and in fact does conduct, substantial business in the State of Arizona. Microsoft has sufficient minimum contacts with Arizona or otherwise intentionally avails itself of the consumer markets within Arizona through the promotion, sale, marketing and/or distribution of its products in Arizona to render the exercise of jurisdiction by the Arizona courts permissible under traditional notions of fair play and substantial justice. Microsoft has caused events to occur in Arizona out of which the subject matter of this action arises.

3. The injuries to Plaintiffs and to absent Class members do not exceed $75,000 per person, inclusive of interest, fees and costs.

4. Venue is proper in this county under A.R. S.§12-401 because the acts upon which this action is based occurred in part in Maricopa County. Numerous Class members reside in Maricopa County, and purchased Microsoft licensed Intel-compatible personal computer ("PC") operating systems and applications software and were thereby injured and subjected to

irreparable harm in this venue. Microsoft received substantial compensation and profits from sales of such products in Maricopa County, and thus its liability arose in part in this County.

PRELIMINARY STATEMENT

5. Plaintiffs bring this class action under the laws of Arizona for damages for injuries sustained as a result of Microsoft's unlawful monopolization of the market for licensing all Intel-compatible PC operating systems and application system software including word processing, spreadsheets and office suites. As described below, Plaintiffs allege that Microsoft unlawfully maintained its operating system monopoly by engaging in anti-competitive conduct that has eliminated or retarded the development of new software products that could support, or themselves become, alternative platforms to Microsoft's operating systems and has denied a competitive price and free choice among competing software products, as well as the benefit of software innovation. Microsoft's anti-competitive conduct included, among other things, arrangements tying the sale of Microsoft's Windows operating systems to other Microsoft software products, including its Internet web browser, agreements precluding computer manufacturers from distributing, promoting, buying or using products of Microsoft's competitors or potential competitors, and agreements limiting the ability of software companies to provide services or resources to Microsoft's competitors or potential competitors. As a result of Microsoft's conduct, Plaintiffs and members of the Classes have paid higher prices for Microsoft licensed Intel- compatible PC operating systems and Intel-compatible PC applications system software than they would have paid in a competitive market and have been injured in their business and property.

6. These claims are prosecuted by two classes. The first class consists of all persons or entities who indirectly acquired or purchased or obtained licenses in Arizona for their own use, and not for further selling, leasing, or licensing, any version of the following Intel-compatible PC software: Microsoft MS-DOS, Windows for Workgroups & Windows 3.xx, Microsoft Windows (95 and/or 98 and/or 2000), Windows ME, Windows NT, any other software product in which MS-DOS or Windows has been incorporated in whole or in part ("Microsoft Operating System Software") during the Class Period as defined in paragraph 58, below.

7. The second class consists of all persons or entities who indirectly acquired or purchased or obtained licenses in Arizona for their own use, and not for further selling, leasing, or licensing, any version of the following during the Class Period, as defined in paragraph 58 below: an Intel-compatible PC version of Microsoft "Word" word processing software or any upgrade of Microsoft Word, Microsoft "Excel" spreadsheet software or an upgrade of Microsoft Excel, or Microsoft Office Suite Software or any upgrade of Microsoft Office ("Microsoft Application Software").

PARTIES

8. Plaintiff Jake Lucero is a resident of Flagstaff, Arizona. In or about April 1998 Plaintiff purchased a Hewlett-Packard PC with Windows '98, an Intel-compatible PC operating system licensed by Microsoft, installed.

9. Plaintiff Charles I. Friedman, P.C. is an Arizona Professional Corporation doing business in Maricopa County, Arizona. Prior to April 22, 1999 that corporation owned a computer that had Windows 95 for its operating system. On or about April 22, 1999 the

corporation purchased for $106.98 from Software City in Maricopa County, Arizona a Windows 98 operating system CD ROM disk. Upon installing the CD ROM disk on its Intel-based personal computer, and as a pre-condition to using Windows 98, the corporation became an end user licensee of Microsoft as to Windows 98. The corporation registered its ownership of the license as Rita Beberniss Charles I Friedman, P.C. No. 79878-014-0586655-08167 with Microsoft via electronic mail and by that means gave Microsoft its electronic mail address and State of residence. Plaintiff Friedman also purchased Microsoft Word, Excel and Office applications software for his computer.

10. Plaintiff The Power, P.E.O., Inc. is an Arizona corporation doing business in Maricopa County, Arizona. On February 22, 1999 Power P.E.O., Inc. purchased 3 computers from McNeely Enterprises, Inc. in Scottsdale, Arizona. On May 7, 1999 it purchased six more computers from Technology Integration Group in Phoenix, Arizona. On November 1, 1999 it purchased four more computers from Integrated Information Systems, Inc. in Tempe, Arizona. All thirteen of the computers purchased by Power, P.E.O., Inc. came with Windows 98 pre-installed. As a pre-condition to using Windows 98, Power, P.E.O., Inc. became an end user licensee of Microsoft as to Windows 98. Power, P.E.O., Inc. registered its ownership of the licenses as The Power, P.E.O., Inc., Nos.:

VRW7F-JCCHY-2X8RW-4TB9B-FK6RB
QMQRC-M8H6X-BR8P3-K2MQM-2VGQY
WQVJH-F7B98-CG3XQ-83FH9-D6BBY
RQQR8-XWPPM-6HXQ9-XVBBQ-XPB8M
PR9VK-T9TWC-8FRKG-3WPYH-6WX9Y
FK38V-DJGBQ-F2T7R-RJ7B2-3P2GQ
F829R-PWRGH-6Q36T-F63R7-CGX01
HMXFW-4MKBX-MMGVK-3M84W-KTJP3
FT84F-MMH44-JDC3D-VYCQ7-Q89T6

JVMMD-FQT4K-9DRPY-QHPWP-2X2MY
RPFW2-93HG8-KGX4Y-HHFR8-MW4RW
XJHTK-T78TC-2K3WJ-8VCB8-RB4BT
F3QX8-PMTGB-3RW4J-8J4G9-8HVMW

with Microsoft via electronic mail and by that means gave Microsoft its electronic mail address and State of residence. Plaintiff The Power, P.E.O., Inc. also purchased Microsoft Word, Excel and Office applications software for one or more of the computers described above.

11. Microsoft is a corporation organized and existing under the laws of the State of Washington, with its principal place of business located at One Microsoft Way, Redmond Washington. Microsoft sells and licenses Intel-compatible PC operating systems, including Windows 95 and Windows 98, throughout Arizona, the United States and the world. Microsoft's revenues from the sale of its operating systems was approximately $4.92 billion, $6.28 billion, and $8.20 billion in fiscal year 1997, 1998, and 1999 respectively.

BACKGROUND

12. A "personal computer" ("PC") is a digital information processing device designed for use by one person at a time. A typical PC consists of central processing components (e.g., a microprocessor and main memory) and mass data storage (such as a hard disk). A typical PC system consists of a PC, certain peripheral input/output devices (including a monitor, a keyboard, a mouse, and a printer), and an operating system. PC systems, which include desktop and laptop models, can be distinguished from more powerful, more expensive computer systems known as "servers," which are designed to provide data, services, and functionality through a digital network to multiple users.

13. An "operating system" is a software program that controls the allocation and use of computer resources (such as central processing unit time, main memory space, disc space and input/output channels). The operating system also supports the functions of software programs, called "applications," that perform specific user orientated tasks. The operating system supports the functions of applications by exposing interfaces, called "application programming interfaces," or "APIs." These are synapses at which the developer of an application can connect to invoke pre-fabricated blocks of code in the operating system. These blocks of code in turn perform crucial tasks, such as displaying text on the computer screen. Because it supports applications, while interacting more closely with the PC system's hardware, the operating system is said to serve as a "platform."

14. An "Application" is a software program that performs specific user-oriented tasks. For example, Microsoft Word word processing software, Microsoft Excel spreadsheet software, and Microsoft Office Suite software are applications. Applications programs are typically written to run on a particular operating system and cannot run on other operating systems unless the developer develops additional code to "port" the program to the other operating system.

15. An Intel-compatible PC is one designed to function with Intel's 80x86/Pentium families of microprocessors or with compatible microprocessors manufactured by Intel or by other firms.

16. An operating system designed to run on an Intel-compatible PC will not function on a non-Intel-compatible PC, nor will an operating system designed for a non-Intel-compatible PC function on an Intel-compatible one. Similarly, an application that relies on APIs specific to

one operating system will not, generally speaking, function on another operating system unless it is first adapted or "ported" to the APIs of the other operating system.

17. In 1981, Microsoft released the first version of its Microsoft Disk Operating System, commonly known as "MS-DOS." The system had a character-based user interface, that required the user to type specific instructions at a command prompt in order to perform tasks such as launching applications and copying files. When International Business Machines Corporation("IBM") selected MS-DOS for pre-installation on its first generation of PCs, Microsoft's product became the predominant operating system sold for Intel-compatible PCs.

18. In 1985, Microsoft began shipping a software package called Windows. The product included a graphical user interface, which enabled users to perform tasks by selecting icons and words on the screen using a mouse. Although originally just a user-interface, or "shell," sitting on top of MS-DOS, Windows took on more operating-system functionality over time.

19. In 1995, Microsoft introduced a software package called Windows 95, which announced itself as the first operating system for Intel-compatible PCs that exhibited the same sort of integrated features as the Mac OS running PCs manufactured by Apple Computer, Inc. ("Apple"). Windows 95 enjoyed unprecedented popularity with consumers, and in June 1998, Microsoft released its successor, Windows '98.

20. Microsoft is the leading supplier of operating systems for PCs. The company transacts business in all fifty of the United States and in most countries around the world.

21. Microsoft licenses copies of its software programs directly to consumers. The largest part of its MS-DOS and Windows sales, however, consists of licensing the products to

manufacturers of PCs (known as "original equipment manufacturers" or "OEMs"), such as IBM, Hewlett-Packard and Compaq Computer Corporation ("Compaq"). An OEM typically installs a copy of Windows onto one of its PCs before selling the package to a consumer under a single price.

22. The Internet is a global electronic network, consisting of smaller interconnected networks, which allows millions of computers to exchange information over telephone wires, dedicated data cables, and wireless links. The Internet links PCs by means of servers, which run specialized operating systems and applications designed for servicing a network environment.

23. The World Wide Web ("the Web") is a massive collection of digital information resources stored on servers throughout the Internet. These resources are typically provided in the form of hypertext documents, commonly referred to as "Web pages," that may incorporate any combination of text, graphics, audio and video content, software programs, and other data. A user of a computer connected to the Internet can publish a page on the Web simply by copying it into a specially designated, publicly accessible directory on a Web server. Some Web resources are in the form of applications that provide functionality through a user's PC system but actually execute on a server.

24. Internet content providers ("ICPs") are the individuals and organizations that have established a presence, or "site," on the Web by publishing a collection of Web pages. Most Web pages are in the form of "hypertext"; that is, they contain annotated references, or "hyperlinks," to other Web pages. Hyperlinks can be used as cross-references within a single document, between documents on the same site, or between documents on different sites.

25. Typically, one page on each Web site is the "home page," or the first access point to the site. The home page is usually a hypertext document that presents an overview of the site and hyperlinks to the other pages comprising the site.

26. PCs typically connect to the Internet through the services of Internet access providers ("IAPs"), which generally charge subscription fees to their customers in the United States. There are two types of IAPs. Online services ("OLSs") such as America Online ("AOL"), Prodigy, and the Microsoft Network ("MSN") offer, in addition to Internet access, various services and an array of proprietary content. Internet service provides ("ISPs") such as MindSpring and Netcom, on the other hand, offer few services apart from Internet access and relatively little of their own content.

27. A "Web client" is software that, when running on a computer connected to the Internet, sends information to and receives information from Web servers throughout the Internet. Web clients and servers transfer data using a standard known as the Hypertext Transfer Protocol ("HTTP"). A "Web browser" is a type of Web client that enables a user to select, retrieve, and perceive resources on the Web. In particular, Web browsers provide a way for a user to view hypertext documents and follow the hyperlinks that connect them, typically by moving the cursor over a link and depressing the mouse button.

28. Although certain Web browsers provided graphical user interfaces as far back as 1993, the first widely popular graphical browser distributed for profit, called Navigator, was brought to market by the Netscape Communications Corporation in December 1994. Microsoft introduced its browser, called Internet Explorer, in July 1995.

THE RELEVANT MARKET

29. The licensing of Intel-compatible PC operating systems and application software systems world-wide constitutes relevant product and geographic markets. Currently, there are no products, nor are there likely to be any in the near future, that a significant percentage of consumers world-wide could substitute for Intel-compatible PC operating systems or application software systems without incurring substantial costs. Furthermore, no firm that does not currently market Intel-compatible PC operating systems or application software systems could start doing so in a way that would, within a reasonably short period of time, present a significant percentage of consumers with a viable alternative to existing Intel-compatible PC operating or application software systems.

30. The inability of server operating, non-Intel-compatible PC operating systems, information appliances, network computers and server-based computing generally to provide reasonable substitutes for Microsoft's operating systems and discipline its monopoly power is set forth in the Findings of Fact of the United States District Court for the District of Columbia in United States v. Microsoft Corporation, Civ. No. 98-1232 (TPJ), dated November 5, 1999 (the "Findings of Fact") ¶¶19-32.

31. Middleware programs, while not operating systems themselves, do have the potential to reduce the significance and/or need for operating systems since middleware programs also expose APIs to application developers. The Netscape Web browser and Sun Microsystems, Inc's Java class libraries are examples of non-operating systems middleware. Such software is often called "middleware" because it relies on the interfaces provided by the underlying operating system while simultaneously exposing its own APIs to developers.

Currently no middleware product exposes enough APIs to allow independent software vendors ("ISVs") to profitably write full-featured personal productivity applications that rely solely on those APIs.

32. Even if middleware deployed enough APIs to support full-featured applications, it would not function on a computer without an operating system to perform tasks such as managing hardware resources and controlling peripheral devices. But to the extent the array of applications relying solely on middleware comes to satisfy all of a user's needs, the user will not care whether there exists a large number of other applications that are directly compatible with the underlying operating system. Thus, the growth of middleware-based applications could lower the costs to users of choosing a non-Intel-compatible PC operating system like the Mac OS. It remains to be seen, though, whether there will ever be a sustained stream of full-featured applications written solely to middleware APIs. In any event, it would take several years for middleware and the applications it supports to evolve from the status quo to a point at which the cost to the average consumer of choosing a non-Intel compatible PC operating system over an Intel-compatible one falls so low as to constrain the pricing of the latter systems.

MICROSOFT'S POWER IN THE RELEVANT MARKET

33. Microsoft possesses a dominant, persistent and increasing share of the world wide market for Intel-compatible PC operating systems. Every year for the last decade, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent. During most of the Class Period, the figure has been at least ninety-five percent, and analysts project that the share will climb even higher over the next few years. Even if Apple's Mac OS

were included in the relevant market, Microsoft's share would still stand well above eighty percent.

34. Microsoft also possesses a dominant, persistent, and increasing share of the world-wide market for Intel-compatible PC application software systems. Currently, Microsoft's share of the Intel-compatible PC word processing applications software market in the United States is approximately 86%. Microsoft's share of the Intel-compatible PC spreadsheet applications software market in the United States is approximately 87%, and Microsoft's share of the Intel-compatible PC office suite applications software market in the United States is approximately 89%.

THE APPLICATIONS BARRIER TO ENTRY

Description of the Applications Barrier to Entry

35. Microsoft's dominant market share is protected by the same barrier that helps define the market for Intel-compatible PC operating systems. As explained above, the applications barrier would prevent an aspiring entrant into the relevant market from drawing a significant number of customers away from a dominant incumbent even if the incumbent priced its products substantially above competitive levels for a significant period of time. Because Microsoft's market share is so dominant, the barrier has a similar effect within the market: it prevents Intel-compatible PC operating systems other than Windows from attracting significant consumer demand, and it would continue to do so even if Microsoft held its prices substantially above the competitive level.

36. Consumer interest in a PC operating system derives primarily from the ability of that system to run applications. The consumer wants an operating system that runs not only

types of applications that he knows he will want to use, but also those types in which he might develop an interest later. Also, the consumer knows that if he chooses an operating system with enough demand to support multiple applications in each product category, he will be less likely to find himself limited later by having to use an application whose features disappoint him. Finally, the average user knows that, generally speaking, applications improve through successive versions. He thus wants an operating system for which successive generations of his favorite applications will be released- and promptly at that. The fact that a vastly larger number of applications are written for Windows than for other PC operating systems attracts consumers to Windows, because it reassures them that their interests will be met so long as they use Microsoft's product.

37. Software development is characterized by substantial economics of scale. The fixed costs of producing software, including applications, is very high. By contrast, marginal costs are very low. Moreover, the costs of developing software are "sunk" – once expended to develop software, resources so devoted cannot be used for another purpose. The result of economies of scale and sunk costs is that application developers seek to sell as many copies of their applications as possible. An application that is written for one PC operating system will operate on another PC operating system only if it is ported to that system, and porting applications is both time-consuming and expensive. Therefore, application developers tend to write first to the operating system with the most users – Windows. Developers might then port their applications to other operating systems, but only to the extent that the marginal added sales justify the cost of porting. In order to recover that cost, ISVs that do go to the effort of porting

frequently set the price of ported applications considerably higher than that of the original versions written for Windows.

38. Consumer demand for Windows enjoys positive network effects. A positive network effect is a phenomenon by which the attractiveness of a product increases with the number of people using it. The fact that there is a multitude of people using Windows makes the product more attractive to consumers. The large installed base attracts corporate customers who want to use an operating system that new employees are already likely to know how to use, and it attracts academic consumers who want to use software that will allow them to share files easily with colleagues at other institutions. The main reason that demand for Windows experiences positive network effects, however, is that the size of Windows' installed base impels ISVs to write applications first and foremost for Windows, thereby ensuring a large body of applications from which consumers can choose. The large body of applications thus reinforces demand for Windows, augmenting Microsoft's dominant position and thereby perpetrating ISV incentives to write applications principally for Windows. This self-reinforcing cycle is often referred to as a "positive feedback loop."

39. What is for Microsoft a positive feedback loop is for would-be competitors a vicious cycle. For just as Microsoft's large market share creates incentives for ISVs to develop applications first and foremost for Windows, the small or non-existent market share of an aspiring competitor makes it prohibitively expensive for the aspirant to develop its PC operating system into an acceptable substitute for Windows. To provide a viable substitute for Windows, another PC operating system would need a large and varied-enough base of compatible applications to reassure consumers that their interest in variety, choice, and currency would be

met to more-or-less the same extent as if they chose Windows. Even if the contender attracted several thousand compatible applications it would still look like a gamble from the consumer's perspective next to Windows, which supports over 70,000 applications. The amount it would cost an operating system vendor to create that many applications is prohibitively large. Therefore, in order to ensure availability of a set of applications comparable to that available for Windows, a potential rival would need to induce a very large number of ISVs to write to its operating system.

40. In deciding whether to develop an application for a new operating system, an ISV's first consideration is the number of users it expects the operating system to attract. Out of this focus arises a collective-action problem: Each ISV realizes that the new operating system could attract a significant number of users if enough ISVs develop applications for it; but few ISVs want to sink resources into developing for the system until it becomes established. Since everyone is waiting for everyone else to bear the risk of early adoption, the new operating system has difficulty attracting enough applications to generate a positive feedback loop. The vendor of a new operating system cannot effectively solve this problem by paying the necessary number of ISVs to write for an operating system, because the cost of doing so would dwarf the expected return.

41. Counteracting the collective-action phenomenon is another known as the "first-mover incentive." For an ISV interested in attracting users, there may be an advantage to offering the first and, for a while, only application in its category that runs on a new PC operating system. The user base of the new system may be small, but every user of that system who wants such an application will be compelled to use the ISV's offering. Moreover, if

demand for the new operating system suddenly explodes, the first mover will reap large sales before any competitors arrive. An ISV thus might be drawn to a new PC operating system as a "protected harbor." Once first-movers stake claims to the major categories of applications, however, there is a strong chance that the new operating system could stall; it would not support the most familiar applications, nor the variety and number of applications, that attract large numbers of consumers, and there would no longer exist a first-mover incentive to attract additional ISVs to the important application categories. Although the upstart operating system might find itself with enough applications support to hold a fraction of the market, the collective-action phenomenon would still prevent the system from gaining the kind of positive feedback momentum that can turn a fringe entrant into a rival that would put competitive pressure on Windows.

42. The cost to a would-be entrant of including ISVs to write applications for its operating system exceeds the cost that Microsoft itself has faced in inducing ISVs to write applications for its operating system products, for Microsoft never confronted a highly penetrated market dominated by a single competitor. Of course, the fact that it is extremely difficult for an efficient would-be rival to accumulate enough applications support to compete with Windows does not mean that sustaining its own applications support is effortless for Microsoft. In fact, if Microsoft stopped investing the hundreds of millions of dollars it spends each year inducing ISVs to write applications for Windows, it might become easier than it currently is for a competitor to develop its own positive feedback loop. But given that Windows today enjoys overwhelmingly more applications support than any other PC operating system, it would still take that competitor years to develop the necessary momentum. Plus, while

Microsoft may spend more on platform "evangelization," even in relative terms, than any other PC operating-system vendor, it is not difficult to understand why it is worthwhile for the principal beneficiary of the applications barrier to devote more resources to augmenting it than aspiring rivals are willing to expend in speculative efforts to erode it.

43. Microsoft continually releases "new and improved" versions of its PC operating system. Each time it does, Microsoft must convince ISVs to write applications that take advantage of new APIs, so that existing Windows users will have incentive to buy an upgrade. Since ISVs are usually still earning substantial revenue from applications written for the last version of Windows, Microsoft must convince them to write for the new version. Even if ISVs are slow to take advantage of the new APIs, though, no applications barrier stands in the way of consumers adopting the new system, for Microsoft ensures that successive versions of Windows retain the ability to run applications developed for earlier versions. In fact, since ISVs know that consumers do not feel locked into their old versions of Windows and that new versions have historically attracted substantial consumer demand, ISVs will generally write to new APIs as long as the interfaces enable attractive, innovative features. Microsoft supplements developers' incentives by extending various "seals of approval" – visible to consumers, investors, and industry analysts – to those ISVs that promptly develop new versions of their applications adapted to the newest version of Windows. In addition, Microsoft works closely with ISVs to help them adapt their applications to the newest version of the operating system – a process that is in any event far easier than porting an application from one vendor's PC operating system to another's. In sum, despite the substantial resources Microsoft expends inducing ISVs to develop applications for new versions of Windows, the company does not face any obstacles nearly as

imposing as the barrier to entry that vendors and would-be vendors of other PC operating systems must overcome.

44. Empirical evidence describing and confirming the strength of the applications barrier to entry is set forth in the District Court's Findings of Fact ¶¶45-67.

THE MIDDLEWARE THREATS

45. Middleware technologies, as previously noted, have the potential to weaken the applications barrier to entry. Microsoft was apprehensive that the APIs exposed by middleware technologies would attract so much developer interest, and would become so numerous and varied, that there would arise a substantial and growing number of full-featured applications that relied largely, or even wholly, on middleware APIs. The applications relying largely on middleware APIs would potentially be relatively easy to port from one operating system to another. The applications relying exclusively on middleware APIs would run, as written, on any operating system hosting the requisite middleware. So the more popular middleware became and the more APIS it exposed, the more the positive feedback loop that sustains the applications barrier to entry would dissipate. Microsoft was concerned with middleware as a category of software; each type of middleware contributed to the threat posed by the entire category. At the same time, Microsoft focused its antipathy on two incarnations of middleware that, working together, had the potential to weaken the applications barrier severely without the assistance of any other middleware. These were Netscape's Web browser and Sun's implementation of the Java technologies.

MICROSOFT'S ANTI-COMPETITIVE CONDUCT IN THE OPERATING SYSTEM MARKET

46. Faced with the threat middleware technologies posed to its operating system monopoly, Microsoft and its co-conspirators engaged in a series of anti-competitive and exclusionary acts intended to eliminate or forestall the development of competitive software programs and thereby maintain Microsoft's monopoly.

47. For example, in order to eliminate the threat posed by the emerging Netscape Navigator as an operating system platform, Microsoft and its co-conspirators, among other things:

(a) attempted to dissuade Netscape from developing Navigator as a platform;

(b) withheld crucial technical information Netscape needed in order to complete its Windows 95 version of Navigator;

(c) developed a competing web browser software product in order to diminish the likelihood that Navigator would emerge as the standard web browser, and gave its browser away for free in exchange for commitments from other firms to distribute and promote Internet Explorer at Navigator's expense; and

(d) excluded Navigator from important distribution channels including OEM distribution by:

(i) forcing OEMs to take Internet Explorer with Windows;

(ii) imposing technical restrictions that increased the cost of promoting Navigator;

(iii) offering valuable consideration to OEMs in exchange for commitments to promote Internet Explorer exclusively; and

(iv) threatening to penalize individual OEMs that insisted on pre-installing and promoting Navigator.

48. Microsoft engaged in similar conduct to deter other competitors or potential competitors, such as Intel, Apple, Real Networks and IBM from encroaching upon its operating system monopoly.

49. In response to the threat posed to Microsoft's Operating system monopoly by Sun's implementation of' Java, Microsoft and its co-conspirators, among other actions:

(a) created a Java implementation for Windows that undermined portability and was incompatible with other implementations;

(b) induced developers to use the Microsoft implementation of Java rather than Sun-compliant implementations; and

(c) thwarted the expansion of the Java Class Libraries.

50. The details of Microsoft's and its co-conspirators' conduct are set forth in the Findings of Fact ¶¶69-407.

MICROSOFT'S ANTI-COMPETITIVE CONDUCT IN THE APPLICATIONS SOFTWARE MARKET

51. As alleged above, Microsoft engaged in a broad pattern of deceptive and unfair acts to preserve its operating system monopoly. At the sane time, Microsoft abused and leveraged that monopoly power to gain unfair advantages in various applications software markets, including the markets for word processing, spreadsheets and office suites. Microsoft

refused to give competing applications software developers fair access to its operating system – an essential facility without which a computer will not operate.

52. ISVs could not practically or economically have duplicated these essential facilities in light of the lengthy development time, required sunk costs, the applications barriers to entry, and other impediments.

53. Microsoft easily could have provided timely access to its operating system specifications to competing software vendors and others in the normal course of business, but chose instead to preclude, limit or delay such access in order to deceive competitors in the relevant applications software market.

55. For example, in order to maintain its dominance over, and supra-competitive prices in, the applications software market, Microsoft, among other things:

(a) concealed the APIs for MS-DOS and Windows from software developers who needed such information to create applications software compatible with Microsoft's operating system;

(b) opposed alternative standards called "OpenDoc" that were open standards for developing new applications. Such open standards would have freed developers from Microsoft's attempts to dictate the way applications software was developed. Microsoft punished competitors who supported the open standards. Among other things, such persons would receive "special" versions of the beta software that lacked key information necessary for development of software products running on Windows;

(c) created a new standard OLE (object linking and embedding) for data transfer, which Microsoft subsequently revised pursuant to requests from its Excel developers

without timely releasing those revisions to competing developers. As a result, Excel had the opportunity for input and early knowledge of the resulting modification that were unavailable to Microsoft's competitors. These competitors, particularly Lotus 1-2-3, suffered delays of many months as they were forced to rewrite their own applications to make them perform under the OLE revisions.

(d) impeded competing ISV's development efforts by deceptively providing them with incomplete operating system code, forcing them to accept restrictive licenses, and barring them from attending supposedly open software development conferences at Microsoft;

(e) impeded competing ISV's development efforts by denying promised promotional and marketing support, forcing distributors and dealers to exclude ISV's from their promotions, and denying ISV's promised access to Windows' user mailing lists; and

(f) intentionally made its operating system incompatible with or difficult to operate with competitors' application software, in part for the purpose of deceiving the public into believing that such incompatibilities were attributable to the competitors' applications software.

THE ANTI-COMPETITIVE EFFECTS OF MICROSOFT'S CONDUCT

55. The aforesaid conduct, agreements, arrangements and conspiracies among Microsoft and its co-conspirators have had the following effects, among others, which occurred throughout Arizona:

(a) competition between actual and potential competitors in the market for Intel-compatible PC operating systems and applications software has been restrained, eliminated and foreclosed;

(b) actual and potential competitors in the relevant market have been injured in their business and their property;

(c) purchasers, including indirect purchasers, in the relevant market have been deprived of the benefits of a free, competitive, innovative, and unrestrained market;

(d) purchasers, including indirect purchasers, in the relevant market have had to pay artificially high and non-competitive prices; and

(e) in place of a free, open and competitive market, a monopoly in the relevant market has been maintained.

56. Among other things, Microsoft has exploited its unlawful monopoly power to charge non-competitive prices for its operating systems and applications software. For example, Microsoft could have profitably charged $49 for an upgrade to its Windows 98 product (the operating Systems product Microsoft sells to existing users of Windows 95). Microsoft instead charged a revenue-maximizing price of $89 per upgrade. See Findings of Fact ¶63. As a result of Microsoft's conduct, plaintiff and members of the Class have paid higher prices for Microsoft licensed Intel-compatible PC operating systems than they would have paid in a competitive market and have been injured in their business and property.

TOLLING OF APPLICABLE STATUTES OF LIMITATION

57. Any applicable statutes of limitation have been equitably tolled by Microsoft's affirmative acts of fraudulent concealment, suppression, and denial of the true facts regarding the existence of the monopolistic and anti-competitive practices at issue herein. Such acts of fraudulent concealment included intentionally covering up and refusing to publicly disclose critical internal memoranda, product development plans and other reports of anti-competitive

practices. Through such acts of fraudulent concealment, Microsoft was able to actively conceal from the public for years the truth about Microsoft's anti-competitive practices, thereby tolling the running of any applicable statutes of limitation. Moreover, Microsoft still refuses to this day to take full responsibility for its actions, vigorously denying all liability or even the existence of monopolistic conduct.

CLASS ACTION ALLEGATIONS

58. Plaintiffs bring this action as a class action pursuant to Ariz. R. Civ. P. 23, on their own behalf and on behalf of all other members of the two classes (the "Classes") described below. The relevant time period for both classes is May 18, 1994 to the present ("the Class Period"). The two classes are: (a) all persons or entities in the State of Arizona who purchased or acquired for purposes other than re-sale or distribution Microsoft Operating System Software. The Class excludes Defendants and their co-conspirators, their subsidiaries, affiliates, officers, and employees, and governmental entities (the "Operating System Software Class"); and (b) all persons or entities in the State of Arizona who purchased or acquired for purposes other than re-sale or distribution, Microsoft Application Software. The Class excludes Defendants and their co-conspirators, their subsidiaries, affiliates, officers, and employees, and governmental entities (the "Application Software Class").

59. The Classes are so numerous that joinder of all members is impracticable. There are hundreds of thousands of members of the Classes who are geographically dispersed throughout Arizona.

60. Plaintiffs' claims are typical of the claims of the members of the Classes because Plaintiff and all Class members were injured by the same wrongful conduct of the Defendants alleged herein.

61. There are questions of law and fact common to the Classes which predominate over any questions affecting only individual Class member. Such common questions include:

(a) whether Microsoft is a monopolist in the market for Intel-compatible PC operating systems and application software;

(b) whether Microsoft engaged in anti-competitive conduct by which Microsoft unlawfully maintained its monopoly;

(c) whether the alleged conduct violates Ariz. Rev. Stat §§44-1401 *et seq.*; and

(d) whether Plaintiff and members of the Class are entitled to damages and the appropriate measure of such damages.

62. As the claims of the Plaintiffs are typical of the claims of the Classes, and the Plaintiffs have no interests adverse to or which irreconcilably conflict with the interests of other members of the Classes, Plaintiffs are adequate class representatives.

63. Plaintiff will fairly and adequately protect the interests of the Classes and have retained counsel experienced and competent in the prosecution of complex class action litigation.

64. A class action is superior to other available methods for the fair and efficient adjudication of the controversy and substantial benefits will derive from proceeding as a class action. Such treatment will permit a large number of similarly situated person to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of

effort and expense that numerous individual actions would engender. Class treatment also will permit the adjudication of relatively small claims by many Class members who could not afford to individually litigate such claim against large corporate defendants. There are no difficulties likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient group-wide adjudication of this controversy.

FIRST CAUSE OF ACTION

(Violation of Arizona Antitrust Law – Establishment, Maintenance, and Use of Monopoly)

65. Plaintiffs reallege and incorporate herein by reference ¶¶ 1-64 of this Complaint.

66. As more fully described above, Microsoft's manufacture, advertisement, distribution and sale of Microsoft licensed Intel-compatible PC operating systems and applications software violates Ariz. Rev. Stat. § 44-1403 which prohibits the establishment, maintenance or use of a monopoly in this state Microsoft's conduct significantly threatens or harms competition and continues to this date.

67. As a result of this violation, Plaintiffs and members of the Classes have been injured in their business and property, *see* A.R.S. § 44-1408(B), in an amount which will be established at the trial of this action but less than $75,000 per Class member.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the Classes pray for judgment and relief against Defendants as follows:

A. An order of this Court certifying this action as a proper class action and the Plaintiffs as proper Class representatives;

B. An award of actual and treble damages;

C. An award of reasonable costs of suit and attorneys' fees;

D. An award of pre- and post-judgment interest; and

E. Such other and further relief as this Court may deem necessary, proper and/or appropriate.

DATED this 2nd day of January, 2007.

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this 2nd day of January, 2007

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The Honorable Michael J. O'Melia
MARICOPA COUNTY SUPERIOR COURT
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Phoenix, Arizona 85003

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CHARLES I. FRIEDMAN, P.C., an Arizona corporation, and THE POWER P.E.O., INC., and Arizona Corporation, on behalf of themselves and all others similarly situated, Plaintiffs, vs. MICROSOFT CORPORATION, a Washington corporation, Defendant.	No. CV2000-000722 Consolidated with No. CV2000-005872 PLAINTIFFS' MOTION TO CERTIFY CLASSES AS NOW DEFINED IN THEIR AMENDED/CONSOLIDATED CLASS ACTION COMPLAINT FOR DAMAGES
JAKE LUCERO, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. MICROSOFT CORPORATION, Defendant.	(Assigned to the Hon. Michael J. O'Melia)

The Plaintiffs, Charles I. Friedman, P.C., Power P.E.O., Inc., and Jake Lucero on their own behalf and on behalf of all others similarly situated, submit this Motion to Certify Classes As Now Defined In Their Amended/Consolidated Class Action Complaint For Damages. This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES.

I. INTRODUCTION

Plaintiffs move again to certify the classes as now defined in Plaintiffs' operative complaint. This motion really is a procedural formality given that this Court has already certified a class in this case, and that Microsoft has stipulated to the filing of the Amended Consolidated Complaint which differs only in that it includes similar factual allegations related to additional operating systems and three application programs. There is absolutely no reason why the Court should not now certify these newly defined classes – classes which now most properly encompass all those who were damaged by Microsoft's anticompetitive conduct. In other states where identical classes have been sought and certified, Microsoft's arguments have not discriminated between the class already certified by this Court and the ones Plaintiffs now seek to certify. In other words, Microsoft has not made elsewhere, nor can they make here, any viable, unique arguments that relate solely to these new classes. Plaintiffs' motion should therefore be granted.

II. STANDARDS APPLICABLE TO CLASS CERTIFICATION MOTIONS

Both the propriety of and technical requirements for class certification in this action were fully briefed in Plaintiffs' initial class certification pleadings, which are expressly incorporated herein by reference. A few basic precepts of Arizona law on class actions bear re-emphasizing here. Because Arizona policy favors class actions, this Court has broad discretion regarding the propriety of class certification and any doubts concerning maintenance of a class action should be resolved *in favor* of certifying the class. *See Godbey v. Roosevelt School District*, 131 Ariz. 13, 18, 638 P.2d 235, 240 (App. 1981). This is so in large part because class actions are efficient and promote judicial economy. *See, e.g., Arizona Dept. of Revenue v. Dougherty*, 200 Ariz. 515, 518, 29 P.3d 862, 865 (2001) ("class actions provide benefits to both claiming and defending parties and serve as a practical tool for resolving multiple claims on a consistent basis at the least cost and with the least disruption to an overloaded judicial system," *quoting Arena v. Superior Court*, 163 Ariz. 423, 425, 788 P.2d 1174, 1176 (1990)). Certification is especially appropriate where, as here, Plaintiffs allege that Defendant engaged in conduct in violation of statute and where the size of the class, and therefore the potential class liability, are entirely within the control of Defendant. *See, e.g., ESI Ergonomic Solutions, Inc. v. United Artists*, 203 Ariz. 94, ¶¶ 28-30, 50 P.3d 844, 850-51 (App. 2002), *cert. denied* 2003 Ariz. LEXIS 4 (January 8, 2003).

Additionally, given the prior certification order in this case, in light of the path mapped by numerous other trial courts certifying identical or substantially similar classes,

and because Plaintiffs will utilize most of the same experts and methodologies as other plaintiffs whose classes have been certified, this Court is in the luxurious position of being able to certify Plaintiffs' expanded classes without the need for additional hearings. *See, e.g., London v. Green Acres Trust,* 159 Ariz. 136, 140, 765 P.2d 538, 542 (App. 1988) (evidentiary hearing not required prior to certification; such hearing would only be required before a court denies certification). It is against the backdrop of Arizona's broad policy in favor of class actions that this Court should consider Plaintiffs' Motion.

III. BACKGROUND

A. The Vast Majority of Other State Courts Have Certified Indirect Purchaser Actions Against Microsoft

Since this Court certified the original class in this matter on November 14, 2000, many other courts around the nation have subsequently been asked to certify classes in virtually identical cases against Microsoft.[1] By and large, the majority of these courts,

[1] As the Court may recall, at the time that Plaintiffs' first motion to certify was considered, Judge Pollak in California had already granted class certification in the California Microsoft case. There are now two important things to note about the California case. First, the classes that Judge Pollak certified are materially identical to the ones that Plaintiffs now ask to be certified. Second, the California action recently settled for $1.1 billion. The parties there were obviously able to arrive at reasonably approximate damages figures for individual licensees. Moreover, Microsoft's own experts in the California action (as well as the Federal MDL litigation) have calculated individual overcharges. See Expert Reports of Drs. Robert Hall and Michael Koehn, filed under seal in the California and Federal MDL litigation. These two facts alone in the California action (as well as the Federal MDL litigation) undermine Microsoft's argument against class certification, to wit, overcharges were not passed on and, even if they were, because Microsoft's distribution system is so complicated, overcharges cannot be determined. Both arguments fail in the face of the California settlement and Microsoft's own experts' concessions.

including state courts in New Mexico, Florida, Kansas, Minnesota, South Dakota, North Dakota, Wisconsin and Tennessee have each granted plaintiffs' motions for class certification.

For the Court's convenience, Plaintiffs will briefly discuss each of these decisions. As this Court will see, it is in well-charted waters. These decisions are further support for this Court's original class certification decision and strongly suggest that the Court should again certify the classes that are the subject of Plaintiffs' current motion. (For ease of reference, Plaintiffs submit contemporaneously herewith an Appendix containing all of the decisions and/or opinion discussed herein, in the order discussed.)

1. The North Dakota Supreme Court Affirmed the Trial Court's Certification of a Class of Indirect Purchasers of Microsoft Operating System Software

Just one week ago, on January 28, 2003, the North Dakota Supreme Court affirmed the trial court's order granting class certification in *Howe v. Microsoft Corporation*, 2003 ND 12 (January 28, 2003). (A copy of the opinion is attached at Tab A; the trial court's order is attached at Tab B, for reference.)[2] At the trial court, the parties each presented expert affidavits from economists, with each economist reaching essentially the opposite conclusion. After considering each expert's affidavit, the court

[2] The North Dakota opinion, as well as the Tennessee and New Mexico orders discussed below, are of special significance because these three decisions were rendered after the Michigan appellate court's decision reversing the granting of class certification in the Michigan Microsoft case. (Plaintiffs address the Michigan opinion in greater detail at pages 14-18, *infra*.) Neither the North Dakota Supreme Court nor the Tennessee trial

granted plaintiffs' motion for class certification. Microsoft argued on appeal that the trial court should have determined the validity of plaintiffs' expert's analysis and methodology and should have considered whether sufficient evidence existed to support his theories. 2003 ND 12 at ¶ 18.

In affirming the trial court's order, the North Dakota Supreme Court summarily rejected Microsoft's arguments and instead stressed the importance of avoiding "delving into the merits of the case" when considering a class certification motion. *Id.* at ¶ 19, *citing Eisen v. Carlisle, & Jacquelin*, 417 U.S. 156, 177-78 (1974). The Court explained:

> A motion for certification should not be treated as a motion for summary judgment, requiring plaintiffs to present admissible evidence to support each element of their claims. Nor is the certification hearing the appropriate time to engage in a full-blown examination of the validity of an expert's analysis, opinions, and methodology.

2002 ND 12 at ¶ 27. Accordingly, the North Dakota Supreme Court affirmed the trial court's determination that plaintiffs had set forth an adequate methodology to establish damages for their claims, and that certification of the class was appropriate. *Id.* at ¶ 30.

Microsoft also urged the North Dakota Supreme Court to adopt the rationale of the Michigan Court of Appeals in *A&M Supply v. Microsoft, discussed infra*, wherein the Michigan Court engaged in a "painstaking analysis" of plaintiffs' expert's theories and methodologies before concluding that plaintiffs had not demonstrated the ability to prove

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court was overly concerned with the Michigan decision, and this court should not be either.

damages on a class-wide basis. *Id.* at ¶ 31. The North Dakota Supreme Court rejected Microsoft's suggestion because, like Arizona, North Dakota affords its trial courts broad discretion in determining whether to certify a class. *Id.* at ¶ 33. The Court noted further that the Michigan appellate court's analysis "directly conflicts" with North Dakota's Rule 23, as well as U.S. Supreme Court precedent set forth in *Eisen*. *Id.* at ¶ 35. The same is true in Arizona, as will be discussed below.

2. Recently the Trial Court in Tennessee Certified a Class of Indirect Purchasers of Operating System Software

In the most recent trial court decision on the subject, Judge Walter Kurtz certified a class of operating system indirect purchasers in the Tennessee Microsoft case. (The Memorandum and Order in *Sherwood v. Microsoft Corp.*, No. 99C-3562 (Davidson County, Tenn., Dec. 27, 2002), is in the Appendix at Tab C.) In a very well-reasoned opinion, Judge Kurtz acknowledged that while there are difficulties with damages in indirect purchaser cases, the trend is "to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights." *Id.* at 9 (*citing* Justice Brennan's dissent in *Illinois Brick*). Judge Kurtz also noted that in a recent decision allowing indirect purchaser lawsuits for damages in Iowa, the Iowa Supreme Court commented that "we should not defeat the ends of justice because the litigation may be complicated" and "we note there is an absence of cases in which the court was

faced with the impossible task of apportioning damages. *Id.* at 9-10 (*citing Comes v. Microsoft*, 646 N.W.2d 440, 451 (Iowa 2002)).

At the end of his analysis, Judge Kurtz concluded that plaintiffs' expert in Tennessee had presented methods which a reasonable fact finder could accept for estimating the amount of overcharge that was passed on to indirect purchasers. *Id.* at 14. Importantly, Judge Kurtz honestly recognized the difficulty in proving the amount of pass-through, *but not the impossibility*:[3]

> Therefore, it is the opinion of the Court that the plaintiffs have made a sufficient showing for this case to go forward as a class action. "The invitation to pre-try the case through the vehicle of this motion [class certification] must be respectfully declined...." *Siegle v. Chicken Delight Inc.*, 271 F. Supp. 722, 726 (N.D. Cal. 1967).
>
> The defendant here may well prevail on the merits of this case, whether at trial or on summary judgment, and the plaintiffs [later, at trial] may fail to carry their burden on damages. Furthermore, as this case develops, the Court has discretion to decertify the Class, if appropriate, or to create subclasses, if necessary.
>
> The Court acknowledges that it is troubled by the daunting administrative task before it, as well as the question of whether the plaintiffs' theories can be transformed to real numbers from which a jury can make a reasonable decision. The Court finds this, however, to be of lesser concern than holding that complexity denies indirect purchasers an opportunity to try and prove that they were damaged by the alleged conduct, which at least one court has found to violate federal antitrust law. *See United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). The Court is convinced that it can successfully manage this case to its resolution with the aid of competent and imaginative counsel. *Id.* at 20-21.

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[3] Judge Kurtz is of the opinion that there was support for plaintiffs' expert's damages methodology in the economic community "sufficient to give his testimony the credibility necessary to sustain the plaintiffs' burden for class certification." *Id.* at 17 (noting that the discussion of this authority is set out in detail in the Florida Microsoft opinion).

3. The Trial Court in New Mexico Granted Plaintiffs' Motion to Certify a Class of Indirect Purchasers of Microsoft Operating System and Applications Software.

On July 1-2, 2002, Arizona's neighbor and sister state New Mexico conducted an extensive, two-day evidentiary hearing on plaintiffs' motion for class certification in *In re New Mexico Indirect Purchasers Microsoft Antitrust Litigation, No.* D-0101-CV-2000-1697. The classes plaintiffs sought to certify in New Mexico are materially identical to the classes plaintiffs now seek to certify here in Arizona. On September 30, 2002, Judge Sanchez issued an order certifying the classes. (Judge Sanchez's opinion granting plaintiffs' motion for class certification is in the Appendix at Tab D.)

During the evidentiary hearing, plaintiffs' expert explained to the Court's satisfaction the details regarding the economic and econometric formulas that existed and could be used to calculate the degree to which New Mexico residents were damaged by Microsoft's anticompetitive conduct. Plaintiffs' expert's analysis included detailed regression equations that will permit plaintiffs to determine the degree to which Microsoft's overcharges were "passed on" to consumers. Plaintiffs' expert also responded, to the trial court's satisfaction, to the myriad criticisms leveled against his damages analysis by Microsoft's expert, Dr. Jerry Hausman.[4]

[4] The Court may recall that Dr. Hausman is the same expert utilized by Microsoft in Arizona.

4. The Florida Court Granted Plaintiffs' Motion for Certification of a Class of Indirect Purchasers of Microsoft Operating System and Applications Software.

On August 26, 2002, Judge Bernard S. Shapiro of the Miami-Dade County Circuit Court granted plaintiffs' motion for class certification in *In re Florida Microsoft Antitrust Litigation*, No. 99-27340. (A copy of the lengthy and detailed decision is in the Appendix at Tab E.) Judge Shapiro certified the classes after a two-and-a-half day hearing at which both plaintiffs' expert and Microsoft's expert (again, Dr. Hausman), testified in person. Both experts were the subject of extensive cross-examination.

Microsoft's expert testified that plaintiffs' damages analysis was flawed and that certification was therefore inappropriate. The court disagreed. In its 31-page Order Granting Class Certification, the court found that, contrary to Dr. Hausman's testimony, plaintiffs' expert's damages methodologies were reasonable and supported class certification:

> The Court finds that Dr. Leffler has proposed reasonable methods, based on standard economic principles, for establishing with common evidence that each class member was impacted to some extent by Microsoft's alleged behavior. Microsoft has not convinced the Court that the principles upon which Dr. Leffler relies are false or unsound. As set forth below, other established economists support Dr. Leffler's assertion that Microsoft's monopolization resulted in overcharges that were passed on, at least in part, to end users. Whether a fact-finder actually should or will accept Plaintiffs' common evidence on this issue is beyond the scope of the class certification inquiry.

Order Granting Class Certification, at 33.

The Court also agreed that plaintiffs' expert's methods showed, through class-wide evidence, that Microsoft's overcharges were actually passed on to Florida consumers.

> The Court finds that Dr. Leffler has presented methods which a reasonable fact finder could accept for estimating the amount of any overcharges that were passed on to the class members.... Although Microsoft's expert [Dr. Hausman] challenged the use of regression analysis for this task, this Court is convinced that the regression methods proposed by Dr. Leffler are reasonable. Whether a fact-finder actually would accept the results of the regression analysis that Dr. Leffler proposes is not an issue for class certification.

Id. at 42 (citations omitted).

Further, the Florida court pointed out that during the *United States v. Microsoft* trial, one of Microsoft's own experts, Dr. Richard Schmalensee, conceded while he was testifying that all operating system consumers would be harmed if Microsoft engaged in monopoly overcharging. "Dr. Schmalensee admitted that a monopoly overcharge by Microsoft necessarily would cause harm to every ultimate consumer because 'OEMs pass the price of the operating system through to consumers as part of the overall price of the computer.'" *Id.* at 44 (citation omitted). Thus, according to Microsoft's own expert and consistent with plaintiffs' expert's testimony, all Florida class members were harmed by Microsoft's monopoly overcharging.

5. The Minnesota Trial Court Granted Plaintiffs' Motion to Certify a Class of Indirect Purchasers of Microsoft Operating System Software

The District Court of Minnesota granted plaintiffs' motion for class certification in *Gordon v. Microsoft Corp.*, 2001 WL 366432 (Minn. Dist. Ct.). (The Order Granting

Class Certification is in the Appendix at Tab F). After weighing the testimony of plaintiffs' expert and Dr. Hausman, the Minnesota trial court concluded that plaintiffs "have proposed a viable methodology and theory for proving the fact of class-wide injury to a jury." *Id.* at *11. The court similarly found that the pass-through formula proposed by plaintiffs' expert "would constitute a mechanical method for calculating damages" of the many class members. *Id.* at *12.

Microsoft appealed the decision. The Minnesota Court of Appeals refused to hear Microsoft's appeal, and the Minnesota Supreme Court affirmed the appellate court's decision. The case is currently set to go to trial after the trial scheduled in this action.

6. The Trial Court in Kansas Certified a Class of Indirect Purchasers of Microsoft Operating System Software.

In *Bellinder v. Microsoft Corp.*, 2001 WL 1397995 (Kans. Dist. Ct.), the trial court granted plaintiffs' motion to certify a class of Kansas indirect purchasers of Microsoft operating system software. (The decision is in the Appendix at Tab G). Microsoft appealed to the Kansas Supreme Court but was unsuccessful in its attempt to reverse the trial court's decision.

Microsoft argued in Kansas that certification was not appropriate because damages-related questions were too individualized to warrant class treatment. Again, Microsoft submitted the affidavit of Dr. Hausman to support its contention that damages could not be proved on a class-wide basis. Plaintiffs in Kansas submitted Dr. Keith

Leffler's affidavit to support their motion for class certification. The Kansas court considered the competing affidavits and held:

> Now is not the time to resolve this "battle of the experts." Whether Dr. Leffler is correct in his opinions or not is an issue for the trier of fact. Plaintiffs, at the class certification stage, are not required to prove their case. Plaintiffs need only make a "threshold showing" that antitrust violations, if proven at trial, have had a common impact on the class. The Court is persuaded that for purposes of establishing a class, Plaintiffs have made the required threshold showing. *Id.* at *7.

7. The Trial Court in South Dakota Certified a Class of Indirect Purchasers of Microsoft Operating System Software

On October 3, 2001, the Circuit Court in the Sixth Judicial Circuit of South Dakota granted plaintiffs' motion for class certification and certified a class of South Dakota indirect purchasers of Microsoft software. *Findings of Fact and Conclusions of Law, In re South Dakota Microsoft Antitrust Litigation, No.* 00-235 (S.D. Cir. Ct. 2001) (In Appendix at Tab H). In yet another Microsoft indirect purchaser case, the trial court considered the parties' expert affidavits and decided to certify the South Dakota class.

The court rejected Microsoft's expert's (again, Dr. Hausman) arguments. The South Dakota court found plaintiffs' expert's damage models "are appropriate mechanisms for discerning the level of harm suffered by consumers and for calculating the amount of damages they incurred." *Id.* at 28. With respect to plaintiffs' expert's pass-through analysis, the court found that his "theories and methodologies are both viable and plausible." *Id.* at 64.

8. The Trial Court in Wisconsin Certified a Class of Indirect Purchasers of Microsoft Operating System Software

The allegations and class definition in *Capp v. Microsoft Corp.*, No. 00-CV-0637, are similar to the original allegations made and class certified in the case pending before this Court. The Wisconsin plaintiffs moved for class certification and submitted the affidavit of Dr. Jeffrey Mackie-Mason, an economist with significant experience in antitrust cases and damage modeling and one of the plaintiffs' economic experts here in Arizona.[5] Dr. Mackie-Mason opined that plaintiffs could prove damages to the Wisconsin class by means of a damages formula common to the class. Microsoft disagreed, and submitted another affidavit by Dr. Hausman. The court agreed with plaintiffs and certified the class. (This order is in the Appendix at Tab I).

B. Off on Their Own: Michigan and Maine

In *A&M Supply Co. v. Microsoft Corp.*, 2002 WL 1974137 (Mich. Ct. App. August 27, 2002), the Michigan Court of Appeals reversed a trial court's decision certifying a class of Michigan indirect purchasers of Microsoft operating system software.[6] (Appendix at Tab J). The Michigan decision was premised upon findings

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[5] Dr. Mackie-Mason is also the California classes' damages expert. He submitted a detailed expert report in that case before the matter settled. It is the Arizona Plaintiffs' present intention to work with and rely upon Dr. Mackie-Mason and his consulting firm in this case.

[6] A trial judge in Maine also declined to certify a Microsoft case there on August 24, 2001. See Order on Plaintiffs' Motion for Class Certification in *Melnick v. Microsoft Corp.*, 2001 WL 1012261 (Superior Ct. Me.), Appendix at Tab K.

which distinguish that action from this case in Arizona. (See, e.g., Letter to The Honorable Daniel A. Sanchez, Appendix at Tab L.)

First, the court held that the Michigan Antitrust Reform Act requires individual, actual damages for all class members to be established with absolute precision. *A&M Supply Co.*, 2002 WL 1974137. This is not the law in Arizona where it has always been true that once the fact of damages has been proven the amount need be shown only with reasonable certainty, free from mere speculation or conjecture. *See, e.g., Gilmore v. Cohen*, 95 Ariz. 34, 386 P.2d 81, 11 A.L.R.3d 714 (1963); *Harris Cattle Co. v. Paradise Motors, Inc.*, 104 Ariz. 66, 448 P.2d 866 (1968). *See also Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 484 (3d Cir. 1998) ("It is not necessary to show with total certainty the amount of damages sustained, just that the antitrust violation caused the antitrust injury suffered by the plaintiff."); *In re NASDAQ Market-Makers Antitrust Litigation*, 169 F.R.D. 493, 524-26 (S.D.N.Y. 1996) (contemplating structuring the case such that aggregate damages could be awarded on a class-wide basis).

The Michigan appellate court's concept has rightly not been adopted by other courts that have certified classes of indirect purchasers of Microsoft software, as discussed above. Equally, if not more importantly, it has been rejected by the Supreme Court of the United States and prominent class certification scholars. *See, e.g., Order Granting Class Certification in In re Florida Microsoft Litigation*, Tab E at 34 ("Plaintiffs need not calculate the exact extent of each class member's damages individually") (citations omitted); Findings of Fact and Conclusions of Law in *In re South*

Dakota Microsoft Litigation, Tab H at 72 ("Plaintiffs ... need not present a method to calculate each class member's damage individually"). *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969):

> [D]amage issues in [antitrust] cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference ... that defendants' wrongful acts had caused damage to the plaintiffs ...' (citation omitted).

See generally 2 H. Newberg & A. Conte, Newberg On Class Actions, §10.05 at 10-8 (3d ed. 1992) ("Aggregate computation of class monetary relief is lawful and proper"). Thus, because Arizona class action and substantive law differs from Michigan class action and substantive law, the Michigan court's decision should have no bearing on this Court's class certification determination.

A second, independent reason why the Michigan and Maine decisions are inapposite is that the Michigan and Maine courts found that Dr. Leffler's (plaintiffs' expert in both cases) affidavits were not detailed enough. For example, the Michigan court found it significant that Dr. Leffler did not have "sufficient data to perform – or even describe in any great detail – a regression analysis or results." *A&M Supply Co.*, 2002 WL 1974137. The Maine court expressed similar concerns.[7]

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[7] The trial court in Maine denied plaintiffs' motion because it applied a heightened legal standard for indirect purchaser class certification that is not present in Arizona. The court held that plaintiffs had to do more than propose reasonable methods for proving impact and damages – which is all that the law requires. The Maine court found that prior to

While Dr. Leffler did not have very much data when he first submitted affidavits to the Michigan and Main Courts by virtue of the lack of discovery that had been completed at that time, several courts have expressly found that the damages methodologies outlined by Dr. Leffler in his original affidavit elsewhere – even given the relative dearth of actual data at that time – support class certification. *See, e.g., Bellinder v. Microsoft Corp.*, 2001 WL 1397995 (Kans. Dist. Ct.) (certifying class), *Gordon v. Microsoft Corp.*, 2001 WL 366432 (Minn. Dist. Ct.) (certifying class), *In re South Dakota Microsoft Antitrust Litigation*, No. 00-235 (S.D. Cir. Ct. 2001) (certifying class), all discussed above. This Court should also note that in the time that has elapsed since Dr. Leffler first submitted his affidavits, he has had access to a significant amount of sales data.[8] More importantly, plaintiffs' expert here in Arizona (Dr. Mackie-Mason and his consulting firm) has already collected an impressive and extensive amount of data and his damages analysis actually employs his proposed methods and calculates damages.

Accordingly, the Michigan and Main decisions are no impediments to granting the present motion for three simple and straightforward reasons:

1. Unlike Michigan and Maine, Arizona favors class certification in cases like this;

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certification, plaintiffs must have actually employed their methods to calculate class members' damages. (Tab K)

[8] As Dr. Leffler testified in New Mexico, he has since collected the necessary data and has begun to actually perform successful regression analysis.

2. According to Arizona and United States Supreme Court precedent, plaintiffs are not held to the degree of specificity with respect to damages that the Michigan and Maine courts required; and

3. One of Plaintiffs' experts here, Dr. Mackie-Mason, has already submitted a very lengthy and detailed damages report in the California action that will be submitted here at the proper time in substantially similar form. This report is so detailed that even the Michigan and Maine courts would have been satisfied.

IV. ARGUMENT

As Plaintiffs demonstrated when they briefed their original class motion, maintenance of a class action does not depend upon commonality of *all* questions of fact and law, but only upon whether such questions predominate over questions affecting individual class members. *See, e.g. Home Federal Savings and Loan Association v. Pleasants*, 23 Ariz. App. 467, 534 P.2d 275 (1975). Moreover, as this Court has already implicitly recognized, where, such as here, "it is highly unlikely that any significant number of absent class members would individually file lawsuits against [the defendant] in light of the relatively small individual recoveries," class certification is appropriate, and indeed, superior. As the Arizona Supreme Court recognized in *Lennon v. First Nat'l Bank of Arizona*, 21 Ariz. App. 306, 311-12, 518 P.2d 1230, 1235-36 (1974):

> Individual actions also may be an inferior alternative to the class action when the economics of the situation or other practical considerations make

> it impossible for the aggrieved members to vindicate their rights by separate actions. Thus a group composed of consumers or small investors typically will be unable to pursue their claims on an individual basis because the cost of doing so exceeds any recovery they might secure. When this is the case it seems appropriate to conclude that the class action "'is superior to other available methods for the fair and efficient adjudication of the controversy.' Of course, it must be recognized that the effect of making Rule 23(b)(3) available is to enable recourse to the courts in situations in which it otherwise would be unavailable. ...' (quoting 7A Wright and Miller, Federal Practice and Procedure §1779).

In this case, Plaintiffs earlier succeeded in demonstrating that class certification was appropriate for a class of consumers who purchased Windows 98 because the common issues regarding Microsoft's liability for unlawful monopolization predominates over any individual issues. *See, e.g., NASDAQ, supra*, 169 F.R.D. at 524; *Williams Corp. v. Kaiser Sand & Gravel Corp.*, 1992 U.S. Dist. LEXIS 16947 (N.D.Cal. 1992); *Hedges Enterprises, Inc. v. Continental Group, Inc.*, 81 F.R.D. 461, 475-476 (E.D.Pa. 1979); *Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation*, 78 F.R.D. 622, 626 (W.D.Wa. 1978); *Shelter Realty Corp. v. Allied Maintenance Corp.*, 75 F.R.D. 34, 37 (S.D.N.Y. 1977).

The same is true now with respect to Plaintiffs' expanded classes contained in their Amended Consolidated Complaint – that is, the same common issues predominate regarding Microsoft's liability to consumers of its other operating system and applications programs as did with respect to Windows 98. Therefore, this Court should again find that the requirements of Rule 23(a) and at least one of the requirements of

23(b) are met, and certify Plaintiffs' expanded classes contained in their operative Complaint.

CONCLUSION

For all of the above-stated reasons, Plaintiffs hereby request that:

1. the Court amend the class definition previously adopted and certify the classes as now defined in the Amended Consolidated Complaint in this action;

2. recognize the existing class representatives Charles I. Friedman, P.C. and P.E.O., Inc. as the class representatives of these classes; and

3. appoint Shughart Thompson & Kilroy, P.C. and Milberg Weiss Bershad Hynes & Lerach LLP as co-lead counsel for the classes.

DATED this 5th day of February, 2003.

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ORIGINAL filed with the Clerk
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COPY of the foregoing hand-delivered this
5th day of February, 2003, to:

The Honorable Michael J. O'Melia
MARICOPA COUNTY SUPERIOR COURT
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Phoenix, Arizona 85003

COPY of the foregoing mailed this
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EXHIBIT D

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2000-000722

05/12/2003

HON. MICHAEL J. O'MELIA

CLERK OF THE COURT
A. Beery
Deputy

FILED: 05/14/2003

CHARLES I FRIEDMAN PC, et al.

MARTY HARPER

v.

MICROSOFT CORPORATION

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JOSEPH D HOWE
JAMES P WATTS JR.
JOHN J BOUMA
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2000-000722

05/12/2003

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MINUTE ENTRY

After considering the memoranda and arguments of counsel, the Court grants the Plaintiffs' Motion to Certify Classes as Amended. The class therefore includes the operating systems and applications.

The Court sets the cut off date at December 15, 2001, which is the date of the Federal case settlement.

EXHIBIT E

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR MARICOPA COUNTY

DAISY MOUNTAIN FIRE DISTRICT, on behalf of itself and other similarly situated Arizona governmental entities, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	CV2007-013118 **CASE NO.** _____ **SUMMONS** IF YOU WANT THE ADVICE OF A LAWYER, YOU MAY WISH TO CONTACT THE LAWYER REFERRAL SERVICE AT 602-257-4434 OR ON-LINE AT WWW.LAWYERFINDERS.ORG. LRS IS SPONSORED BY THE MARICOPA COUNTY BAR ASSOCIATION

STATE OF ARIZONA TO THE DEFENDANTS:

MICROSOFT CORPORATION

YOU ARE HEREBY SUMMONED and required to appear and defend, within the time applicable, in this action in this Court. If served within Arizona, you shall appear and defend within 20 days after the service of the Summons and Complaint

upon you, exclusive of the day of service. If served outside Arizona, you shall appear and defend within 30 days after service of the Summons and Complaint upon you, exclusive of the day of service. Service upon the Arizona Motor Vehicle Superintendent or the Assistant Director for the Motor Vehicle Division is complete 30 days after filing defendant's return receipt and plaintiff's affidavit of compliance or 30 days after filing the officer's return of personal service. Where process is served upon the Arizona Director of Insurance as an insurer's attorney, the insurer shall not be required to appear, answer or plead until expiration of 40 days after date of such service upon the Director. Service by registered or certified mail outside the State of Arizona shall be deemed complete on the date of receipt. Service by publication is complete 30 days after the date of first publication. Direct service is complete when made. ARCP 4, 4.1, 4.2, and 12(a); A.R.S. §§20-222, 28-502, and 28-503.

YOU ARE HEREBY NOTIFIED that in case of your failure to appear and defend within the time applicable, judgment by default will be rendered against you for the relief demanded in the Complaint.

YOU ARE CAUTIONED THAT in order to appear and defend, you must file an Answer or other proper response in writing with the Clerk of the Superior Court, accompanied by the necessary filing fee, within the time required, and you are required to serve a copy of the Answer or response upon the attorney for plaintiff. ARCP 5 and 10(d); A.R.S. §12-311.

Requests for reasonable accommodation for persons with disabilities must be made to the division assigned to the case by parties at least three working days in advance of a scheduled court proceeding.

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JUL 24 2007

SIGNED AND SEALED this ____ day of July, 2007.

CLERK
MICHAEL K. JEANES, CLERK

By: _____
Deputy Clerk

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR MARICOPA COUNTY

DAISY MOUNTAIN FIRE DISTRICT, on behalf of itself and other similarly situated Arizona governmental entities, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	CV 2007-013118 **CASE NO.** _____ **CERTIFICATE OF ARBITRATION**

Pursuant to A.R.C.P. 72(e)(1), the undersigned certifies that he knows the dollar limits and any other limitations set forth by the local rules of practice for the applicable superior court and further certifies that this case IS NOT subject to compulsory arbitration as provided by Rules 72 through 76, A.R.C.P.

DATED this 24th day of July, 2007.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR MARICOPA COUNTY

DAISY MOUNTAIN FIRE DISTRICT, on behalf of itself and others similarly situated, Plaintiff, vs. MICROSOFT CORPORATION, an Arizona foreign corporation, Defendant.	**No. CV2007-013118** **ACCEPTANCE OF SERVICE** **(Assigned to the Honorable Pendleton Gaines)**

Without waiver of any defenses, other than insufficiency of process or service of process, as of this date, undersigned counsel hereby accepts service of the Summons and Complaint in this matter on behalf of Defendant Microsoft Corporation. A response to the Complaint will be made within sixty (60) days of the date set forth below.

DATED this 4th day of ~~August~~ Sept., 2007.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DAISY MOUNTAIN FIRE DISTRICT, on behalf of itself and others similarly situated, Plaintiff, vs. MICROSOFT CORPORATION, Defendant.	No. CV2007-013118 **NOTICE OF REMOVAL TO FEDERAL COURT** (Assigned to the Honorable Pendleton Gaines)

Pursuant to 28 U.S.C. §§ 1441 and 1446(a) and Local Rule 3.7 and the Class Action Fairness Act ("CAFA"), Pub. L. 109-2, 119 Stat. 4 (2005), codified at 28 U.S.C. § 1332(d) and § 1453, Defendant Microsoft Corporation has this date filed a Notice of Removal with the Clerk of the United States District Court for the District of Arizona. Attached hereto as Exhibit A is a copy of the Notice of Removal filed in federal court (without the accompanying exhibits, which already are on file with the Superior Court).

DATED this 14th day of September, 2007.

OSBORN MALEDON, P.A.

By 

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COPY of the foregoing hand-delivered
this 14th day of September, 2007, to:

The Honorable Pendleton Gaines
Maricopa County Superior Court
ECB-814, 101 West Jefferson
Phoenix, Arizona 85003-2205

COPY of the foregoing mailed
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EXHIBIT F

Superior Court of Arizona, Maricopa County

Case Information

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Case Information			
Case Number	CV2007-013118	Judge	Gaines
Case Type	Civil		
File Date	7/24/2007	Location	Downtown

Party Information			
Party Name	Rel	Sex	Attorney
Daisy Mountain Fire District	Plaintiff		MARK SAMSON
Microsoft Corporation	Defendant		Pro Per

Case Documents

Filing Date	Description	Docket Date	Filing Party
9/4/2007	ACS - Acceptance Of Service	9/6/2007	
	NOTE: MICROSOFT CORPORATION SERVED 9/4/07		
7/24/2007	COM - Complaint	7/27/2007	
7/24/2007	CCN - Cert Arbitration - Not Subject	7/27/2007	

Case Calendar

There are no calendar events on file

Judgments

There are no judgments on file