

2007 SEP 18 P 3 52
MULTIDISTRICT
LITIGATION

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: MICROSOFT CORP. WINDOWS OPERATING SYSTEMS ANTITRUST LITIGATION)))	MDL Docket No. 1332
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NOTICE OF POTENTIAL "TAG-ALONG ACTION"

Pursuant to the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Microsoft Corporation ("Microsoft") hereby provides notice of the following potential "tag-along action" pending against it in federal district court, which is related to the actions subject to the Judicial Panel's Transfer Order of April 25, 2000. The title of the action is:

Daisy Mountain Fire District, on behalf of itself and others similarly situated
v.
Microsoft Corporation

U.S.D.C., District of Arizona
Civil Action No. CIV 07-01767-PHX-ECV

Attached as Exhibit A is a true and correct copy of the complaint in the above action. Microsoft respectfully submits that this action should be considered a "tag-along action" for the purposes of this proceeding and should be transferred to Chief Judge J. Frederick Motz of the United States District Court for the District of Maryland for coordination or consolidation pursuant to 28 U.S.C. § 1407.

Dated: September 18, 2007

Respectfully submitted,



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11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
 12 **IN AND FOR MARICOPA COUNTY**

13 **DAISY MOUNTAIN FIRE DISTRICT, on behalf)**
 14 **of itself and others similarly situated,)**

15 **Plaintiff,)**

16 **v.)**

17 **MICROSOFT CORPORATION,)**

18 **Defendant.)**
 19)
 20)

COPY
 JUL 24 2007

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 J. BRUCE SMITH, DEPUTY CLERK

CV 2007-013118
 CASE NO. _____

COMPLAINT

**JURY TRIAL
 DEMANDED**

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

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1 **NATURE OF THE ACTION**

2 i. This action concerns Microsoft's anticompetitive and monopolistic
3 practices, specifically those acts or practices that it intended to use, did use, and
4 continues to use to prevent and destroy competition and acquire and/or maintain
5 monopoly power and raise prices to supra-competitive levels in the United States,
6 including in Arizona, in the following product markets:
7

- 8 a. The sale and/or licensing of Intel-compatible personal computer
9 operating system software;
- 10 b. The sale and/or licensing of Intel-compatible personal computer word
11 processing applications software; and
- 12 c. The sale and/or licensing of Intel-compatible personal computer
13 spreadsheet applications software.

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

16 2. Since the mid-1980s, Microsoft has dominated the operating system
17 software market. For example, in the United States its market share at times has
18 exceeded 95 percent. Beginning in the late-1980s and continuing through the present,
19 Microsoft engaged in a series of predatory acts designed to, and which did, eliminate
20 competition and prevent entry in the operating system software market. Software
21 companies offering superior operating systems and/or lower prices (namely,
22 companies such as Digital Research, Inc. ("DRI"), International Business Machines
23 ("IBM"), and Be, Inc.) were not able to compete with Microsoft because of
24 Microsoft's unlawful conduct. Microsoft has had no significant competitor in the
25 operating system software market since 1994 when DRI and IBM were eliminated as
26

1 meaningful competitors.

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

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

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

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

26

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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

1 anticompetitive terms in Microsoft's agreements with OEMs. Prohibited contract
2 provisions included per-processor license provisions, license terms exceeding one year
3 in length, provisions prohibiting or restricting OEMs from licensing or distributing
4 non-Microsoft Operating Systems, provisions conditioning an OEM's license of one
5 Microsoft operating system product upon the license of another Microsoft product or
6 upon the OEM not licensing a non-Microsoft product, minimum commitment
7 provisions, and provisions requiring royalty payments to Microsoft other than on a
8 per-copy or per-system basis.
9

10
11 11. In 1997, the United States sought to have Microsoft held in contempt for
12 violating the 1995 Final Judgment, in large part due to Microsoft's requirement that
13 OEMs license and distribute Microsoft's Internet browser (Internet Explorer) as a
14 condition of obtaining a license for Windows 95, Microsoft's latest operating system
15 at that time. Despite the court's entry of a preliminary injunction on December 11,
16 1997, Microsoft publicly announced on December 15, 1997 that any OEM that did not
17 agree to license and distribute Internet Explorer could not obtain a license to the
18 current version of Microsoft's Windows operating system.
19

20 12. Subsequent proceedings led to a renewed complaint by the United States.
21 On May 18, 1998, the DOJ, joined by twenty states and the District of Columbia, filed
22 suit against Microsoft alleging violations of Sections 1 and 2 of the Sherman Act, as
23 well as state law violations ("Microsoft II"). The DOJ and Microsoft vigorously
24 litigated the merits of DOJ's allegations for eighteen months. On November 5, 1999,
25 Judge Thomas Penfield Jackson released his Findings of Fact based on the extensive
26

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

2 13. Judge Jackson's Findings concluded, inter alia, that Microsoft has held
3 and continues to hold a monopoly in the market for "Intel-Compatible PC Operating
4 Systems"; that Microsoft has sustained and perpetuated this monopoly by using anti-
5 competitive and unreasonably exclusionary conduct to gain advantage; and that
6 Microsoft has leveraged its advantageous position to restrict competition in other
7 software markets.
8

9 14. On April 3, 2000, Judge Jackson issued his Conclusions of Law
10 ("Conclusions of Law") in Microsoft II, in which he found, inter alia, that "Microsoft
11 maintained its monopoly power by anticompetitive means and attempted to
12 monopolize the Web browser market, both in violation of [Section 2 of the Sherman
13 Act]. Microsoft also violated [Section 1 of the Sherman Act] by unlawfully tying its
14 Web browser to its operating system." Conclusions of Law at 2.
15

16 15. In the remedy stage of Microsoft II, proposals submitted to the court by
17 the DOJ asked the court to split Microsoft into two different companies -- with one
18 company retaining the Windows operating system business and the other taking the
19 rest of Microsoft's business, including software applications and Internet browser
20 software.
21

22 16. The DOJ reorganization plan was recommended, in large part, to restrict
23 Microsoft's wrongful exercise of its combined monopoly power over operating
24 systems and applications software, and to prevent it from continuing to leverage its
25 monopoly power in the operating system software market to exert control over, and
26

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

3
4 17. On June 6, 2000, the Microsoft II court approved the DOJ proposal and
5 directed that Microsoft be split into two separate companies. On June 28, 2001, the
6 Court of Appeals for the District of Columbia Circuit reversed the imposition of the
7 DOJ reorganization plan, but upheld the trial Court's judgment that Microsoft had
8 violated the Sherman Act in numerous respects, affirming the following Findings of
9 Fact and Conclusions of Law:

- 10
11 a. That Microsoft possesses monopoly power in a properly-defined relevant
12 market for Intel-compatible PC operating systems;
- 13
14 b. That Microsoft unlawfully maintained its operating systems monopoly by
15 thwarting distribution of competing browsers and imposing restrictive
16 contract terms on OEMs instead of competing on the merits;
- 17
18 c. That Microsoft unlawfully "welded" Internet Explorer to Windows for
19 the sole purpose of protecting its operating system monopoly and
20 preventing competition on the merits;
- 21
22 d. That Microsoft entered unlawful exclusive deals with Internet Access
23 Providers ("IAPs") in order to thwart Netscape Navigator and thereby
24 protect Microsoft's operating system monopoly;
- 25
26 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;

- 1 f. That Microsoft unlawfully forced Apple to exclusively promote Internet
2 Explorer by threatening to halt development of Microsoft Office for the
3 McIntosh, thereby hindering the distribution of rival browsers that would
4 have promoted competition in the operating system market;
5
6 g. That Microsoft unlawfully thwarted the Java threat to its operating
7 system monopoly by imposing on ISVs a requirement that they use
8 Microsoft's incompatible version of the Java Virtual Machine as a
9 condition of receiving needed technical support;
10
11 h. That Microsoft intentionally deceived ISVs into using Microsoft's
12 "polluted" [Microsoft's term] incompatible version of Java development
13 tools, thereby protecting Microsoft's operating system monopoly from
14 the competition that would have arisen from cross-platform Java; and
15
16 i. That Microsoft threatened and ultimately coerced Intel to halt Intel's
17 technical initiatives to support Java.

18 18. Though the case was remanded to the District Court for further
19 proceedings regarding the appropriate remedy for Microsoft's antitrust violations, the
20 Court of Appeals specifically noted that private actions are an important complement
21 to governmental enforcement actions because "the threat of private damage actions . . .
22 deter[s] those firms inclined to test the limits of the law." *United States v. Microsoft*,
23 253 F.3d 34, 49 (D.C. Cir. 2001).
24

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

1 certain conduct.

2 20. Subsequently, the Fourth Circuit Court of Appeals explained that “[t]he
3 D.C. Circuit held that Microsoft illegally maintained a monopoly in the market of
4 ‘licensing of all Intel-compatible PC operating systems worldwide’ through 12
5 specified acts of anticompetitive conduct” and held that “Microsoft may be precluded
6 from relitigating the facts necessary to this judgment under the doctrine of offensive
7 collateral estoppel.” *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 328 (4th Cir.
8 2004).

9
10 **PRIOR CLASS ACTION**

11
12 21. On January 12, 2000, Charles I. Friedman, P.C. and The Power P.E.O.
13 Inc., filed a proposed class action against Microsoft on behalf of indirect purchasers,
14 including Plaintiff, for claims under the Arizona Antitrust Act based upon the essential
15 conduct at issue here.

16
17 22. On November 15, 2000, the court in *Friedman v. Microsoft*, CV2000-
18 722 (Sup. Ariz. Maricopa County) certified a class defined as “All end user licensees
19 of Windows 98 residing in the State of Arizona as to whom Microsoft has an
20 electronic mail address that is computer-accessible by Microsoft.”

21 23. On January 6, 2005, the court in the consolidated action, *Friedman v.*
22 *Microsoft*, No. CV2000-722 (Sup. Ariz., Maricopa County), approved a settlement of
23 certain claims, including certifying a Settlement Class. The terms of that settlement
24 specifically excluded from the Settlement Class “government entities” defined as “any
25 federal, state, or local government, or any of its subdivisions (agencies, bureaus,
26

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

5
6 24. Plaintiff and members of the class that Plaintiff seeks to represent were
7 not members of the Settlement Class in *Friedman v. Microsoft*.

8 **PARTIES**

9
10 25. Plaintiff Daisy Mountain Fire District is a “government entity” as that
11 term is defined in the Settlement Agreement in *Friedman et al. v. Microsoft*. See ¶ 19.
12 Plaintiff has been an indirect purchaser of Microsoft operating systems, word
13 processing and spreadsheet applications software.

14
15 26. Plaintiff Daisy Mountain Fire District is a political subdivision of the
16 state so as to fall under the exemption of A.R.S. §12-510.

17
18 27. Microsoft is a corporation organized and existing under the laws of the
19 State of Washington, with its principal place of business in Redmond, Washington.
20 Microsoft is the world’s largest supplier of operating system software and applications
21 software for personal computers. In its fiscal year 2006, Microsoft had revenues of
22 approximately \$44.3 billion and net income of approximately \$12.6 billion.

23 **A.R.S. § 12-510**

24
25 28. Proposed Class members are state entities for the purpose of A.R.S. §
26 12-510.

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1 **MICROSOFT'S MONOPOLY POWER IN THE RELEVANT MARKETS**

2 **The Relevant Product Markets**

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

- 5 a. The sale and/or licensing of Intel-compatible personal computer operating
6 systems software;
7
8 b. The sale and/or licensing of word processing applications software compatible
9 with Windows; and
10 c. The sale and/or licensing of spreadsheet software compatible with Windows.

11 **The Relevant Geographic Market**

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

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

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

19
20 32. The inability of server operating systems, non-Intel compatible PC
21 operating systems, information appliances, network computers, server-based
22 computing and middleware generally to provide a reasonable substitute for Microsoft's
23 operating systems, or to discipline its monopoly power, is set forth in Judge Jackson's
24 Findings at ¶¶ 19-32. It would be prohibitively expensive and take years for a new
25 Intel-compatible operating system to attract enough developers and consumers to
26

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

2 33. Throughout the relevant period, Microsoft has had monopoly power in
3 the relevant market for operating systems. Findings at ¶ 33. Microsoft can and has
4 exercised this power by charging a price for its Intel-compatible PC operating system
5 software that is substantially above that which could be charged in a competitive
6 market, and it can and has done so for a significant period of time without losing
7 business to competitors.
8

9 **The Relevant Market For Word Processing Applications**

10 34. Microsoft has possessed a dominant, persistent and increasing share of
11 the United States market for word processing software for Windows through its
12 Microsoft Word and Microsoft office products. Microsoft's share of this market is at
13 least 90 percent.
14

15 35. It would be prohibitively expensive for new Windows-compatible word
16 processing applications software to attract enough consumers to become a viable
17 alternative to a dominant incumbent in less than a few years.
18

19 36. Throughout the relevant period, Microsoft has had monopoly power in
20 the relevant market for word processing software. Microsoft can and has exercised
21 this power by charging a price for its Windows-compatible versions of Word that is
22 substantially above that which could be charged in a competitive market, and it can
23 and has done so for a significant period of time without losing business to competitors.
24
25
26

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

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

13 41. During the relevant time period, Class members purchased Microsoft
14 operating systems software and word processing and spreadsheet applications software
15 from third parties, such as OEMs. Each Class is believed to number in the hundreds.
16 The Classes are therefore so numerous that joinder is impracticable. Ariz. R. Civ. P.
17 23(a)(1).

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

- 20 a. whether Microsoft engaged in anticompetitive conduct which
21 renders it liable to members of each Class under Arizona's
22 antitrust laws;
- 23 b. whether Microsoft possesses monopoly power within the relevant
24 geographic and product markets;
- 25 c. whether Microsoft acquired or maintained monopoly power within
26 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

1 have paid for Microsoft Covered Products.

2 43. These common questions and others predominate over questions, if any,
3 that affect only individual members of the Classes. Ariz. R. Civ. P. 23(a)(2) and
4 23(b)(3).

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

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

16 46. A class action is superior to other methods for the fair and efficient
17 resolution of this controversy. The damages suffered by many individual Class
18 members may be small. In view of the burden and expense of individual prosecution
19 of the complex and extensive litigation necessitated by Microsoft's unlawful conduct,
20 it would be virtually impossible for most, if not all, Class members individually to
21 redress the wrongs done to them. Moreover, even if the Class members themselves
22 could afford such individual litigation, the class action device presents fewer
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1 management difficulties, and provides the benefit of a single adjudication, economies
2 of scale, and comprehensive supervision by a single court. Ariz. R. Civ. P. 23(b)(3).

3 47. Whatever difficulties may exist in the management of this case as a class
4 action will be greatly outweighed by the advantages of class treatment of the claims of
5 Plaintiff and other Class members, including, but not limited to, providing Class
6 members with a superior method for assessing the redress of claims that may not
7 otherwise warrant individual litigation.
8

9 **THE APPLICATIONS BARRIER TO ENTRY**

10 48. There is a barrier to entry into the operating system market known as the
11 "applications barrier to entry," which Microsoft has predatorily used as a key
12 mechanism for maintaining its operating system monopoly. Microsoft went to great
13 lengths, as alleged below, to destroy the competitive position of any software product
14 that threatened to weaken or eliminate that barrier.
15

16 49. The applications barrier to entry results from the nature of the demand
17 for PC operating systems. Consumer interest in an operating system derives primarily
18 from the ability of that system to run software applications. The fact that a vastly
19 larger number of applications have been written to run on Microsoft operating systems
20 than on other PC operating systems has attracted consumers to Microsoft's operating
21 system; they can be confident that their interests in applications will be met as long as
22 they use Microsoft's product.
23

24 50. Software development is characterized by substantial economies of
25 scale. The fixed costs of producing software, including applications, are very high.
26

1 By contrast, marginal costs are very low. Moreover, much of the cost of developing
2 software is "sunk" - once expended, such resources cannot be used for another
3 purpose. The result of economies of scale and sunk costs is that developers write their
4 applications only to those operating systems that have a large enough installed base to
5 generate sufficient sales to justify the developers' development costs.
6

7 51. An application that is written for one PC operating system will operate
8 on another PC operating system only if it is converted to run on that system.
9 Converting applications is both time-consuming and expensive, especially since the
10 process typically involves using the same programmers who originally developed a
11 program and otherwise would be working on the next version of that program.
12 Therefore, applications developers tend to write first to the operating system software
13 with the most users. Developers might then convert their applications to other
14 operating systems, but only to the extent that the added sales justify the costs of
15 conversion, including opportunity costs. In order to recover those costs, ISVs that do
16 go to the effort of converting applications frequently set the price of the converted
17 application considerably higher than that of the original version.
18
19

20 52. The applications barrier to entry also results from the positive network
21 effect associated with computer software. In other words, software's attractiveness
22 increases with the number of people using it. Thus, the multitude of people using
23 Windows makes the products more attractive to consumers. In turn, the size of the
24 Windows installed base impels ISVs to write applications first and foremost to run on
25 those operating systems, thereby ensuring a large body of applications. The large
26

1 body of applications thus reinforces and has reinforced demand for Windows,
2 augmenting Microsoft's dominant position and perpetuating ISV incentives to write
3 applications principally for Windows. This self-reinforcing cycle is often referred to
4 as a "positive feedback loop."
5

6 53. The small or non-existent market share of an aspiring competitor makes
7 it prohibitively expensive for the aspirant to develop its PC operating system into an
8 acceptable substitute for Windows. To provide a viable substitute for Windows,
9 another PC operating system would need a large and varied base of compatible
10 applications that was comparable to Microsoft's installed base in size and variety.
11 Even if the contender attracted several thousand compatible applications, it would still
12 look like a gamble from the consumer's perspective next to Windows, which supports
13 over 70,000 applications. The amount it would cost an operating system software
14 vendor to make that many applications available is prohibitively large.
15

16
17 54. In deciding whether to develop an application for new operating system
18 software, an ISV's first consideration is the number of users it expects the operating
19 system software to attract. Out of this focus arises a collective-action problem: each
20 ISV realizes that the new operating system software could attract a significant number
21 of users if enough ISVs developed applications for it, but few ISVs are willing to sink
22 resources into developing for the system until it becomes established. Because
23 everyone is waiting for someone else to bear the risk of early adoption, the new
24 operating system has difficulty attracting enough applications to generate a positive
25 feedback loop. The vendor of a new operating system cannot effectively solve this
26

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

3
4 55. While the applications barrier to entry has been formidable, it is not
5 necessarily insurmountable or permanent. Middleware products appeared in the
6 market in the late 1980s and 1990s that threatened to eliminate the barrier (as set forth
7 below). Microsoft, however, was vigilant and successfully undertook anticompetitive
8 acts and practices to forestall and eliminate such threats.

9
10 **MICROSOFT'S ANTICOMPETITIVE ACTIVITIES**
11 **IN THE OPERATING SYSTEM MARKET**

12 **Overview**

13 56. Through exclusionary conduct, Microsoft successfully fended off three
14 types of challenges to its operating system monopoly. One type came from two
15 competing operating systems, DRI's DR DOS and IBM's OS/2. Both were positioned
16 to compete vigorously against MS-DOS. Through a series of exclusionary acts from
17 1988 through 1994, however, Microsoft essentially eliminated both DR DOS and OS/2
18 from the market.

19
20 57. The next type of challenge to Microsoft's monopoly was by several
21 middleware products, which from 1988 to the present have threatened to weaken or
22 circumvent the applications barrier to entry that insulated Microsoft from competition.
23 Microsoft has responded to this threat with additional exclusionary conduct designed
24 to keep the applications barrier and Microsoft's monopoly intact.

25
26 58. The next challenge came from rival applications products, particularly
word processing and spreadsheet products ("office productivity applications"). As the

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

5
6 59. In 1981, Microsoft became a significant supplier of PC operating system
7 software when it contracted with IBM to design and develop operating system
8 software for the IBM personal computer. By the mid-1980s, Microsoft's operating
9 system, called MS-DOS, had become entrenched as the standard for Intel-compatible
10 personal computers.

11
12 60. By 1987, several OEMs, whose computers were sold with operating
13 systems pre-installed, approached DRI, a Microsoft competitor, about developing a
14 better operating system than MS-DOS. In 1988, DRI released its operating system
15 software under the name DR DOS. Given the relative lack of complexity of MS-DOS
16 at that time, DRI was readily able to clone that software, i.e., DR DOS could support
17 the same applications software as MS-DOS supported. In addition, DR DOS included
18 features that MS-DOS lacked. DR DOS received numerous industry awards and was
19 sold at a lower price than MS-DOS.

20
21 61. Unable or unwilling to legitimately compete with DR DOS by
22 attempting to offer a better or lower-priced product, Microsoft instead embarked on a
23 series of unlawful exclusionary acts designed to drive DRI from the market. These
24 exclusionary acts focused largely on the OEM channel, which distributed the vast
25 majority of operating system software by pre-installing it on computers. By
26

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

5
6 62. Microsoft realized by the mid-1980s that MS-DOS was becoming
7 obsolete and began working with IBM to develop the next generation operating
8 system. The first version of Microsoft and IBM's joint efforts was released in 1987
9 under the name OS/2. By 1990, Microsoft's Windows software, which contained
10 some of the graphical user interface ("GUI") elements that Microsoft had developed
11 for OS/2, was gaining popularity, and Microsoft decided to focus its efforts on
12 Windows to the exclusion of OS/2. IBM took over exclusive development of OS/2.
13 The GUI model that IBM developed for OS/2 is still the model for all GUIs today. In
14 fact, the second generation of OS/2 won over many Window 3.x users because of its
15 superior performance.
16

17
18 63. Again, unable or unwilling to compete on the merits, Microsoft resorted
19 to a course of anticompetitive conduct directed at OS/2. By the end of 1994,
20 Microsoft's exclusionary conduct had the desired effect of eliminating OS/2 as a
21 significant competitor. Microsoft's anticompetitive acts, many of which were the
22 same as or similar to those targeted at DR DOS, are set forth below.
23

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

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

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

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

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

21 68. The Micrographx and Borland threats were followed in the mid-1990s
22 by a string of middleware products that threatened to diminish the applications barrier
23
24
25
26

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1 to entry, namely: (1) a software product called Notes, distributed first by Lotus and
2 then by IBM; (2) Netscape's Navigator, an Internet browser; (3) Java technologies, a
3 programming language and related software developed by Sun Microsystems; (4)
4 Intel's Native Signal Processing software; and (5) Apple's and RealNetworks's
5 multimedia playback technologies.
6

7 69. Microsoft understood that each of these products facilitated the
8 development of applications programs that would be indifferent to the identity of the
9 underlying operating system. Microsoft responded anticompetitively to each such
10 product, as set forth below.
11

12 Exclusion of DR DOS

13 70. In 1981, Microsoft contracted with IBM to design and develop the
14 operating system software for the IBM PC. Microsoft acquired rights from another
15 company for a product called "QDOS," which borrowed heavily from an operating
16 system developed by DRI called CP/M. Microsoft changed the name to MS-DOS and
17 licensed it to IBM and others.
18

19 71. By the mid-1980s, MS-DOS had become entrenched as the standard in
20 the Intel-compatible PC operating systems market. Microsoft raised the price of MS-
21 DOS in the OEM channel from \$2-\$5 per copy in the 1981-1982 period to \$25-\$28 per
22 copy by 1988.
23

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

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

4
5 73. The result of DRI's efforts was a product designated as DR DOS 3.31,
6 introduced in 1988, followed by an enhanced DR DOS 5.0 in 1990 and DR DOS 6.0 in
7 1991. These DOS versions were significantly superior to then-existing versions of
8 MS-DOS in many areas, receiving numerous industry awards and enthusiastic reviews.
9 DR DOS was offered at prices below the inflated price levels of MS-DOS products.

10
11 74. Microsoft responded to the DR DOS threat with a number of
12 anticompetitive practices, including:

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

22
23 b. Entering into long term "take or pay" minimum commitment licenses.
24 Even though the life cycle of a DOS release was somewhat less than two
25 years, Microsoft pushed for agreements of two or three years in duration.
26

1 This was a key part of the "Strategy Against DRP" presented in June
2 1991 to the Microsoft OEM sales force;

- 3 c. Requiring prepaid balances from OEMs, tying them to Microsoft through
4 the threat that they would forfeit any prepaid amount not used during a
5 contract period unless a new license was signed;
6
7 d. Implementing a "DOS clone check" in 1989 on foreign versions of
8 Windows, as evidenced by this message from the Microsoft Korean
9 subsidiary:

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

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

- 20 e. Making false, misleading and premature announcements such as the one
21 in June 1990, within a week of DRI's announcement of DR DOS 5.0,
22 that Microsoft intended to release by September 1990 MS-DOS 5.0,
23 which would have all the technical advantages of DR DOS 5.0. MS-
24 DOS 5.0 in fact was not released until June 1991, over one year after
25 Microsoft's announcement, without the promised features. Microsoft
26

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1 made similar preemptive "vaporware" announcements of MS-DOS 6.0,
2 MS-DOS 7.0 (which never came to market as a stand-alone product) and
3 Windows 95, in direct response to DR DOS 6.0 and Novell DOS 7.0.
4 (Novell acquired DRI in 1991.) Microsoft knew these announcements
5 were false and misleading when made;
6

- 7 f. Engaging in merger discussions with Novell immediately after Novell's
8 acquisition of DRI, and insisting as a part of the proposed merger that
9 Novell divest DRI, with the ulterior purpose of causing Novell to slow
10 down its integration of DR DOS. When Microsoft's merger discussions
11 broke down in 1992, DR DOS was wounded as a competitor;
12
13 g. Announcing in the Fall of 1991 that DR DOS would not be
14 compatible with the next release of Windows, scheduled for release in
15 April 1992. To reinforce the impression of incompatibility, Microsoft
16 released test or so-called "beta" versions of Windows containing code
17 that generated misleading error messages when Windows ran on top of
18 DR DOS;
19
20 h. Creating deliberate incompatibilities between Windows and DR DOS, so
21 that Windows would not run properly on DR DOS ;
22
23 i. Unleashing a "FUD" campaign to create "fear, uncertainty and doubt" in
24 the OEM and retail channel regarding the use of DR DOS. In May 1991,
25 Sergio Pineda of Microsoft circulated to all OEM account managers the
26 following regarding the theme of the campaign:

- 1 Any degree of incompatibility is enough to create fear, uncertainty &
2 doubt among end users when it comes time to buy new systems -- this
3 suggests that PC OEMs will take on a big risk if they ship DR DOS with
4 their systems.
- 5 j. We recommend that we "informally" plant the bug of FUD in their ears.
6 Reporting supposed flaws in DR DOS to the media as crippling "bugs,"
7 while not mentioning to the media that MS-DOS releases had such
8 severe bugs that Microsoft was required immediately to release "patches"
9 to cure them. A July 1991 memo from a Microsoft executive states: "We
10 are engaged in a FUD campaign to let the press know about some of the
11 bugs. We'll provide info a few bugs at a time to stretch it out";
- 12 k. Putting Novell on a "beta blacklist," i.e., refusing to provide a Windows
13 3.1 beta to Novell's DR DOS development team, thereby hampering
14 Novell's ability to offer a Windows 3.1-compatible release of DR DOS;
- 15 l. Inserting secret, encrypted code into the final Windows 3.1 beta that
16 triggered a false error message whenever a computer was running DR
17 DOS with Windows. This AARD Code had the intended effect of
18 creating concern among OEMs about DR DOS. The code was removed
19 from the final (non-beta) version of Windows 3.1;
- 20 m. Informing certain OEMs that they could not obtain Windows or be given
21 access to essential information, including product support and service, if
22 they did not purchase and ship MS-DOS to the exclusion of DR DOS;
- 23 n. Retaliating against industry participants who supported DR DOS. For
24 example, when Z-Nix Inc. bundled DR DOS 6.0 and Microsoft Windows
25
26

1 3.I, proclaiming no incompatibilities, Microsoft's Brad Silverberg wrote:
2 "look what znix is doing! cut those f*****s off." Within three weeks,
3 Microsoft demanded an audit of Z-Nix's entire business and then
4 commenced a copyright and trademark infringement action. Z-Nix was
5 forced to file for bankruptcy in or around 1995.
6

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

11 76. In September 1994, as a result of Microsoft's anticompetitive conduct,
12 Novell announced that it would cease the marketing and development of DR DOS.
13 After this announcement, the price of Windows increased. Microsoft had succeeded in
14 eliminating the one competitor that, because its DOS program had the same original
15 source as Microsoft, was not affected by the applications barrier to entry.
16

17
18 Virtual Elimination of OS/2

19 77. In the mid-1980s, Microsoft and IBM decided to collaborate on a new
20 operating system that would replace MS-DOS. The product, which was later sold
21 under the name OS/2, was intended to be a state-of-the-art, GUI-based operating
22 system. However, as Microsoft's Windows software became more successful and as
23 Microsoft further extended its monopoly position by obtaining per-processor licenses
24 and engaging in other exclusionary tactics, the company lost interest in collaborating
25 with IBM. In 1991, IBM and Microsoft terminated their joint development agreement,
26

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1 leaving IBM to continue developing OS/2 alone.

2 78. After Microsoft's relationship with IBM ended, Microsoft launched an
3 exclusionary campaign to drive OS/2 from the market. It pursued a course of conduct
4 very similar to the one it used to exclude DR DOS from the market. Thus, Microsoft
5 relied on restrictive OEM licenses that effectively cut off IBM from the critical OEM
6 channel; it made false and misleading vaporware announcements and pre-
7 announcements; it refused to write its applications to run on OS/2; it engaged in FUD
8 campaigns and product disparagement in an effort to devalue OS/2 in the minds of
9 applications developers, OEMs and consumers; and it created deliberate
10 incompatibilities between Windows and OS/2.
11

12 79. In addition, as alleged below, Microsoft engaged in exclusionary conduct
13 to drive from the market developer tools that enabled applications originally written to
14 run on Microsoft's operating system to be ported to OS/2.
15

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

18 80. By 1994, Microsoft had destroyed its two competitors in the operating
19 system market. Moreover, by 1994 Microsoft was secure that it would not encounter
20 new competition from another clone operating system like DR DOS. By then,
21 Windows was simply too complex to be cloned. Only a non-clone, therefore, could
22 potentially enter the operating system market. However, the applications barrier to
23 entry made entry by a non-clone prohibitively expensive.
24

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

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1 particular being forbidden to use per processor licenses and minimum commitments.
2 Undeterred, Microsoft instead instituted its "per system" licenses, imposed upon
3 OEMs just as per processor licenses had previously been employed. Through these
4 licenses Microsoft imposed the same double tax on OEMs considering shipping
5 products with rival operating systems as had existed under per processor licenses.
6 Microsoft continued to use these licenses despite the Department of Justice's
7 recognition that they "could be used by Microsoft to accomplish anticompetitive ends
8 similar to 'per processor' licenses." Microsoft also circumvented the federal court's
9 1995 injunction forbidding its use of minimum commitment licenses through its
10 "Market Development Agreements." ("MDAs"). As Steve Balmer, CEO of Microsoft,
11 stated "We have always given better prices to customers who work with us to make
12 the market. Those used to take the form of commits which we do not do anymore as a
13 result of the [court's] decree but we still believe in rewarding people who help us
14 create demand. Hence the MDA." As a senior Gateway executive stated, "Given the
15 substantial nature of these discounts, participation in the MDA, as a practical matter, is
16 not optional. In other words, not receiving these discounts would put Gateway at a
17 substantial competitive disadvantage, and Gateway has communicated that self-
18 evident proposition to Microsoft."
19
20
21
22

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

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

3
4 83. Another potential rival operating system developed by Go for pen-based
5 computing attracted the attention of Intel which offered to provide Go with substantial
6 financing and critical endorsement of its technology. . Microsoft's CEO, Bill Gates
7 personally approached Intel and demanded that Intel withdraw its support of Go.
8 Microsoft also improperly appropriated trade secrets from Go and falsely persuaded
9 the market that Microsoft was introducing its own pen based system to undercut
10 demand for Go's system. As a result, Microsoft put Go out of business.

11
12 84. In addition to exclusionary conduct intended to drive DR DOS, OS/2 and
13 other operating systems from the market, Microsoft's unlawful conduct also consisted
14 of exclusionary responses to the introduction or growing popularity of software
15 products that threatened to weaken or eliminate the applications barrier to entry. A
16 succession of such products appeared in the market between 1988 and 2001 which
17 were met with rapid, strong and exclusionary responses by Microsoft. Microsoft
18 engaged in continuing violations of the Sherman Act by means of such exclusionary,
19 predatory conduct and other conduct with the specific intent to create market
20 conditions in which end-users were forced to purchase Microsoft products and were
21 deprived of competitive substitutes for them.

22
23
24 **Microsoft's Predatory Response To Micrografx's Mirrors**

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

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

3 86. Microsoft induced Micrografx to share its confidential intellectual
4 property on the representation that Microsoft was interested in licensing Mirrors for its
5 applications programmers, and Microsoft signed a non-disclosure agreement.
6 However, Microsoft then stopped pursuing such a license and eventually designed
7 developer tools similar to Mirrors that it incorporated into its operating system,
8 essentially eliminating demand for Mirrors as a stand-alone product.
9

10 87. Promptly after Microsoft declined to license Mirrors, Micrografx
11 sought to license the product to IBM. To avoid the prospect that IBM would obtain
12 the Mirrors technology and be able to port Windows applications to run on OS/2,
13 Microsoft took exclusionary actions that were designed to, and did, prevent that result.
14

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

16
17 88. In the early 1990s, Borland's C++ was the most popular programming
18 language among PC applications developers. Borland's C++ had an ObjectWindows
19 Library (OWL) that enabled programmers to write applications that were platform
20 independent, i.e., the applications could be written to OWL's APIs instead of the
21 operating system's APIs. Eventually, Borland innovated OWL to the point where it
22 could be used to write applications that could be ported to Windows, OS/2, Macintosh
23 and Unix with virtually no conversion effort.
24

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

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

4
5 90. Furthermore, Microsoft refused to renew the license for its software
6 developer kit ("SDK") to Borland unless Borland's C++ also carried and supported
7 MFC, which was Microsoft's counterpart to OWL. Borland literally could not sell
8 C++ without SDK; on the other hand, if it shipped MFC in addition to OWL,
9 developers would choose MFC as it would be the only library available as part of both
10 the Borland and Microsoft developer tools. Borland had no choice but to choose the
11 latter option. Microsoft's developer tools soon became dominant and its MFC, which
12 carried the Windows API's, perpetuated the applications barrier to entry.

13
14 **Microsoft's Exclusionary Response To Intel's Native Signal Processing**

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

18
19 92. In 1995, Intel had developed NSP software, which promised to "endow
20 Intel microprocessors with substantially enhanced video and graphics performance."
21 Findings at ¶ 95. But because NSP had the potential to serve as a platform on which
22 applications could be developed, Microsoft forced Intel to cease NSP development,
23 flatly precluding that innovation from reaching consumers. Findings at ¶¶ 94-103.
24
25 The Court found that "as late as the end of 1998 . . . Microsoft still had not
26 implemented key capabilities that Intel had been poised to offer consumers in 1995."

1 Findings at ¶ 101. Even after quashing the threat of Intel's NSP software, Bill Gates
2 told Intel at a meeting in August 1995 that Intel could not count on Microsoft to
3 support Intel's next generation of microprocessors if Intel was developing platform-
4 level software that competed with Windows.
5

6 **Microsoft's Exclusionary Response To Netscape's Navigator**

7 93. Microsoft II focused on actions taken by Microsoft to maintain its
8 monopoly power after it had eliminated threats from DR DOS and OS/2. In particular,
9 the case focused on Microsoft's misconduct directed at Netscape's Web browser,
10 Netscape Navigator.
11

12 94. Netscape Navigator possessed middleware attributes that gave it the
13 potential to diminish Microsoft's applications barrier to entry. First, it was a
14 complement to, not a substitute for, Windows, and therefore could gain widespread
15 use. Second, it could serve as a platform for other software, particularly network-
16 centric applications that work in association with Web pages. Third, Navigator has
17 been ported to more than fifteen different operating systems. If a developer writes an
18 application that relies on the APIs exposed by Navigator, that application will, without
19 any porting of its own, run on many different operating systems.
20

21 95. Navigator began to enjoy tremendous public acceptance shortly after its
22 release in December 1994. Microsoft soon thereafter recognized the damage
23 Navigator could cause its operating system monopoly. In a May 1995 memo, Bill
24 Gates described Netscape as a "new competitor 'born' on the Internet." He warned
25 that Netscape was "pursuing a multi-platform strategy where they move the key API
26

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

4
5 96. Microsoft launched a campaign to eliminate the Netscape threat. This
6 campaign involved many anticompetitive acts, including:

- 7 a. Attempting to convince Netscape, before Microsoft launched its own
8 browser in July 1995, to enter into an agreement dividing the market.
9 Microsoft requested that Netscape not compete in operating system
10 software or the production of browsers for Windows 95 in return for
11 Microsoft’s agreement not to compete in browser applications or the
12 production of browsers for platforms other than Windows 95. Because
13 of their pernicious effect on competition, such market division
14 agreements are per se illegal under the antitrust laws. Netscape rejected
15 the Microsoft proposal;
16
17 b. Withholding crucial technical information. At a meeting in June 1995,
18 Netscape representatives requested technical information from Microsoft.
19 A Microsoft representative indicated that Netscape’s response to
20 Microsoft’s offer of a “special relationship” would determine whether
21 Netscape received this information immediately or in three months.
22 Subsequently, despite Netscape’s repeated requests for this information,
23 Microsoft withheld it until late October, more than three months later.
24
25 The delay forced Netscape to postpone the release of its Windows 95
26

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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

- 1 manufacturers for distributing, marketing or promoting the ICP content;
2 (ii) not to promote any other browser; (iii) not to allow any other browser
3 to promote the ICP channel content; and (iv) to design the ICP Web sites
4 using Microsoft-specific programming extensions so that the sites looked
5 better with Internet Explorer than with a competing browser;
6
7 f. Imposing license restrictions that prevented OEMs from altering the
8 Windows 95 boot-up sequence. These restrictions increased Microsoft's
9 ability to require preferential treatment for Internet Explorer from ISPs
10 and ICPs in return for access to the Windows desktop. These restrictions
11 also limited an OEM's ability to substitute or feature a non-Microsoft
12 browser or other application;
13
14 g. Bundling Internet Explorer with Windows 95 in licensing agreements
15 with OEMs, in order to foreclose choice by OEMs;
16
17 h. Tying, both contractually and technically, Internet Explorer to Windows
18 98. There is a demand for browsers that is separate and apart from the
19 demand from operating system software. Findings at ¶ 154. Microsoft
20 itself recognized this by offering Internet Explorer separate and apart
21 from Windows. Even users of Windows 95 could "de-install" Internet
22 Explorer. However, Microsoft also recognized that it could not compete
23 on the merits with Netscape. As Microsoft's Christian Wilfeuer wrote in
24 February, 1997, Microsoft had concluded that it would "be very hard to
25 increase browser share on the merits of [Internet Explorer] alone. It will
26

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

10
11
12 97. Microsoft launched a campaign to eliminate the Netscape threat. The
13 result of Microsoft's campaign against Netscape Navigator was a dramatic reversal in
14 market share for Internet browsers. Netscape Navigator's market share fell from
15 above 80 percent in January 1996 to 55 percent in November 1997 while Internet
16 Explorer's market share rose from 5 percent to 36 percent over the same period.
17 Internet Explorer's market share by the latter part of 1998 was approximately 50
18 percent and steadily rising as Windows 95 users converted to Windows 98.

19
20 **Microsoft's Exclusionary Response To Sun Microsystem's Java Technologies**

21 98. Sun Microsystems, Inc. ("Sun") announced in May 1995 that it had
22 developed the Java programming language. The inventors of Java intended the
23 technology to enable applications written in the Java language to run on a variety of
24 platforms with minimal porting. This was a significant development because the
25 easier it is for developers to port their applications to different operating systems, the
26

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

2 99. Microsoft executives almost immediately became deeply worried about
3 the potential of Sun's Java technologies to diminish the applications barrier to entry
4 protecting Microsoft's operating system monopoly. In May 1995, Netscape agreed to
5 include a copy of Sun's Java runtime environment with every copy of Navigator, and
6 Navigator quickly became the principal vehicle by which Sun placed copies of Java on
7 the PC systems of Windows users.
8

9 100. In 1996, senior executives at Microsoft became aware that the number of
10 developers writing network-centric applications in the Java programming language
11 had become significant and that Java was likely to increase in popularity among
12 developers. Microsoft therefore became interested in maximizing the difficulty with
13 which applications written in Java could be ported from Windows to other platforms
14 and vice versa. Microsoft engaged in various anticompetitive acts to accomplish this
15 purpose, including:
16

- 17
- 18 a. Microsoft licensed and then corrupted Java, by creating Microsoft-
19 specific Java development tools and a Windows-compatible Java runtime
20 environment that made porting more difficult than with the Sun version
21 of Java;
 - 22 b. Microsoft discouraged business allies, such as Intel, from cooperating
23 with Sun, threatening that cooperation would jeopardize the business
24 relationship between Microsoft and the ally;
 - 25 c. Microsoft discouraged developers from using Java. In 1997, Sun added a
26

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

13
14
15 d. In agreements signed with ISVs in 1997 and 1998, Microsoft conditioned
16 early Windows 98 and Windows NT betas, other technical information,
17 and the right to use certain Microsoft seals of approval, on the agreement
18 of those ISVs to use Microsoft's version of the Windows Java as the
19 "default." Microsoft entered into an agreement with at least one ISV that
20 explicitly required it to redistribute Microsoft's Java to the exclusion of
21 any other version.
22

23
24 101. In 1996, senior executives at Microsoft became aware that Microsoft's
25 anticompetitive attacks upon Java, coupled with its limitation of a primary distribution
26 vehicle, Netscape Navigator, effectively eliminated the threat to the applications

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1 barrier.

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

4
5 102. In 1995 Real Networks ("RN") became the first company to
6 commercially offer Internet streaming media players and servers to deliver audio and
7 video content over networks like the Internet.

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

13
14 104. Microsoft used a panoply of tactics like those used against previous
15 potential platform rivals, including other middleware producers, against RN. These
16 included product bundling, technical tie-ins, technical lock-outs, restrictive licenses,
17 exclusive dealing, predatory pricing, refusals to sell unbundled services,
18 discriminatory disclosure of information need to interoperate with Microsoft operating
19 systems, and withholding of information required to interoperate with Microsoft
20 operating systems.

21
22 105. Since May of 1999 Microsoft has bundled its unsuccessful stand-alone
23 NetShow media player, renamed Windows Media Player, with the Windows operating
24 system. This is despite the fact that these products have well-established separate
25 identities and that firms have found it efficient to supply operating systems and media
26

1 players separately.

2 106. Despite having spent about \$500 million developing its media player
3 products, Microsoft gave its Windows Media Player product away for free and
4 actively encouraged, through the payment of financial incentives to PC makers, the
5 installation of Windows Media Player on PCs. This below-cost pricing is intended to,
6 and does, unlawfully maintain Microsoft's PC operating system monopoly.
7

8 107. Microsoft has refused to provide, or only provided after significant
9 delay, technical information required for RN to interoperate fully with Microsoft's
10 Windows, even though identical information has been provided to other software
11 producers who do not pose the same threat to Microsoft's platform monopoly. For
12 example Microsoft refused to provide RN with information required to identify the
13 RealOne Player by name to allow users to select RN's products as their default digital
14 media player, or to prevent Microsoft products from overriding a consumer's choice of
15 default player. Microsoft also refused to provide, or delayed disclosing, the APIs and
16 other technical information required to allow RN to make use of the Secure Audio
17 pathway.
18
19

20 **Microsoft's Exclusionary Response To Personal Productivity Applications**

21 108. As alleged above, Microsoft engaged in a prolonged series of
22 exclusionary acts to preserve its operating system monopoly. At the same time,
23 Microsoft abused and leveraged that monopoly power, and engaged in other
24 exclusionary conduct, to gain unfair advantages in various applications software
25 markets, including the markets for word processing and spreadsheets. For example,
26

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

4
5 109. Apart from a desire to achieve and exploit monopoly power in these
6 applications markets, Microsoft also sought to repress the development of rival
7 applications because they threatened Microsoft's monopoly position in the market for
8 operating systems. As one Microsoft executive stated:

9
10 If we own the key 'franchises' built on top of the operating system, we
11 dramatically widen the 'moat' that protects the operating system
12 business. ... We hope to make a lot of money off these franchises, but
13 even more important is that they should protect our Windows royalty
14 per PC. ... And success in those businesses will help increase the
15 opportunity for future price discretion.

16
17 **MICROSOFT'S ANTICOMPETITIVE ACTIVITIES**
18 **IN THE APPLICATIONS MARKETS**

19 **Overview**

20
21 110. As alleged above, Microsoft engaged in a prolonged series of
22 exclusionary acts to preserve its operating system monopoly. At the same time,
23 Microsoft abused and leveraged that monopoly power, and engaged in other
24 exclusionary conduct, to gain unfair advantages in various applications software
25 markets, including the markets for word processing and spreadsheets. For example,
26 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

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

4
5 112. Similarly, Microsoft displaced the dominant word processing program
6 (WordPerfect) by engaging in a calculated effort to convince WordPerfect Corporation
7 to write its next word processing program to run on OS/2 without disclosing that
8 Microsoft had already decided to abandon OS/2 in favor of Windows.

9
10 113. Furthermore, Microsoft's anticompetitive efforts beginning in 1995 to
11 take market share from Navigator were designed to protect Microsoft's monopoly in
12 the applications software markets (in addition to protecting Microsoft's operating
13 system monopoly). Microsoft understood that the growth in e-mail's popularity as a
14 means of communication within and between businesses and other organizations
15 greatly diminished such organizations' interest in word processing programs such as
16 Word and (by extension) office suites such as Microsoft Office. Microsoft also feared
17 that the browser and the Java virtual machine would become a platform for
18 development of Java-based applications that provided at least some of the functionality
19 of Word and Excel. Microsoft's unlawful attack on Navigator and Sun's
20 implementation of the Java technologies thus not only unlawfully maintained
21 Microsoft's monopoly in the operating system market, but in the word processing and
22 spreadsheet markets as well.

23
24
25 **Microsoft's Operating System As an Essential Facility**

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

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

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

5
6 116. By unreasonably refusing, limiting and manipulating its actual and
7 potential competitors' access to the specifications while preferentially or freely
8 granting itself such access, and through its other unlawful acts alleged herein,
9 Microsoft unreasonably and unfairly advantaged itself in the relevant applications
10 software markets, acquired and maintained monopolies in those markets, and
11 unlawfully inflated the prices it charged for the relevant applications software.

12
13 117. Implicitly recognizing both that its operating system interface
14 information and communication protocols were an essential facility and that it had the
15 ability to abuse its control over that information, Microsoft claimed (falsely) until
16 1991 that it had created a "Chinese wall" that prevented its own applications software
17 developers from having special access to its operating system interface information
18 and communication protocols or to the employees working on its operating system.

19
20 118. Microsoft's essential facilities are the accepted, worldwide standards for
21 operating systems for Intel-compatible PCs, and without fair access to them by ISVs,
22 licensees, purchasers, distributors and/or OEMs would be deprived of the benefits of
23 meaningful competition in the applications software markets where timely access to
24 the Microsoft's operating system interface information and communication protocols
25 is imperative.
26

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

4
5 120. Microsoft could have easily provided timely and complete access to its
6 operating system specifications to competing software vendors and others in the
7 normal course of business, but chose instead to preclude, limit, or delay such access in
8 order to acquire and maintain monopoly power in the relevant applications software
9 markets.

10
11 121. Microsoft has exploited unlawfully its control over these essential
12 facilities to acquire and perpetuate its monopolies in the relevant applications software
13 markets.

14
15 122. Microsoft, through its control over these essential facilities and through
16 monopolies in the relevant markets, has forced Plaintiff and others to pay supra-
17 competitive prices for the relevant applications software products.

18 **Abusing and Leveraging Monopoly Power From the Operating Systems Market**

19 123. Microsoft has pursued a strategy of using its power in the market for
20 Intel-compatible PC operating systems as leverage, through anticompetitive acts and
21 marketing and technical links, to acquire and/or maintain monopoly power in certain
22 applications software markets. The anticompetitive acts used by Microsoft to acquire
23 and/or maintain its monopoly power in the operating system market also have allowed
24 Microsoft to target and monopolize the applications software markets for Intel-
25 compatible PC word processing, spreadsheet and office suite software.
26

1 124. Microsoft has obtained power in the applications markets by, among
2 other things, giving its own applications software developers early and complete
3 access to the revised code developed in successive versions of its operating system.
4 To compete with Microsoft's applications software, non-Microsoft developers must
5 have timely access to Microsoft's operating system APIs, as well as to other operating
6 system information.
7

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

- 11
- 12 a. failed to timely and completely disclose the APIs for Windows to
13 software developers who needed such information to timely create
14 competitive applications software compatible with Microsoft's operating
15 system;
 - 16 b. retracted documentation of its browsing extensions and ripped out
17 programming interfaces shortly before the release of Windows 95,
18 forcing competitors to redesign their applications, then re-documented
19 the interfaces, forcing competitors to redesign once again;
 - 20 c. refused to publish the APIs that were used to place items on the
21 Windows Clipboard, forcing competitors to forego this functionality;
 - 22 d. misrepresented that Windows 95 would be a "32-bit" system when in
23 fact it was planned as a "16-bit" system, forcing competitors to redesign
24 their applications;
 - 25
 - 26

- 1 e. misdirected competitors into delaying the development and shipment of
2 products that could have implemented an inter-application
3 communication technology called OpenDoc; Microsoft discussed with
4 these competitors collectively refining an alternative industry standard
5 originally developed by Microsoft called object linking and embedding
6 ("OLE"); while the competitors worked on OLE with Microsoft instead
7 of implementing the OpenDoc standard, Microsoft released its own
8 version of OLE in Excel;
9
10 f. provided competitors with OLE specifications that were incompatible
11 with the OLE implementation Microsoft shipped with its products,
12 causing OLE technology in competing applications not to interoperate
13 properly with Word and Excel;
14
15 g. revised OLE pursuant to requests from its Excel developers without
16 timely releasing those revisions to competing developers. As a result,
17 Excel had the opportunity for input and early knowledge of the resulting
18 modifications that were unavailable to Microsoft's competitors. These
19 competitors, particularly Lotus 1-2-3, suffered delays of many months as
20 they were forced to rewrite their own applications to make them perform
21 under the OLE revisions;
22
23 h. made certification of an application's compatibility with Windows 95
24 contingent on OLE compatibility, after first announcing that OpenDoc
25 would be deemed OLE-compatible;
26

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- 1 i. withheld specifications and final, debugged versions of OLE until after it
- 2 had released its own applications;
- 3 j. opposed the implementation of the OpenDoc standards by ISVs. Such
- 4 open standards would have freed developers from Microsoft's attempts
- 5 to dictate the way applications software was developed. Microsoft
- 6 punished competitors who supported the open standards. Among other
- 7 things, such persons would receive "special" versions of the beta
- 8 software that lacked key information necessary for development of
- 9 software products running on Windows;
- 10 k. entered into non-disclosure agreements with ISVs preventing ISV
- 11 employees who worked on OpenDoc from receiving Windows 95 beta
- 12 versions or specifications;
- 13 l. required ISVs with a Windows 95 beta version to agree not to work on
- 14 OpenDoc for two years (a requirement that it later dropped);
- 15 m. reduced compatibility between files created by Microsoft's applications
- 16 and files created by competitors' applications, to increase file conversion
- 17 costs and magnify the network effects enjoyed by Microsoft's dominant
- 18 applications products;
- 19 n. forced software developers to sign non-disclosure agreements that barred
- 20 them from receiving information on Windows 95 if they did not support
- 21 Microsoft's OLE;
- 22 o. impeded competing ISVs' development efforts by denying promised
- 23
- 24
- 25
- 26

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

4
5 p. made certification of an application's compatibility with Windows 95
6 contingent on compatibility with the dissimilar Windows NT operating
7 system;

8
9 q. unilaterally made Microsoft Word's Rich Text Format ("RTF") the
10 standard file format for Windows, but then withheld specifications from
11 its competitors;

12
13 r. changed RTF whenever Word's own format changed, requiring ISVs to
14 continually redevelop their applications;

15
16 s. declared Word's "toolbar" to be the Windows standard, despite
17 WordPerfect's superior "button bar,"

18
19 t. prevented its competitors from presenting their own features, such as
20 WordPerfect's QuickFinder, on the Windows desktop;

21
22 u. refused to disclose specifications or provide technical support to
23 overcome the "64k memory limitation," an operating system flaw, and
24 declined to document its Dialog Box Manager ("DBM") feature, which
25 solved this flaw for dialog boxes;

26
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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- 1 w. threatened to stop developing its own applications for the Macintosh if
- 2 Apple bundled its desktop computers with rivals' applications;
- 3 x. did not resolve Windows-related bugs affecting its competitors'
- 4 applications as aggressively as it resolved bugs affecting its own
- 5 applications;
- 6
- 7 y. excluded rival developers from technical conferences and porting labs,
- 8 which were opportunities to debug applications, resulting in a greater
- 9 incidence of malfunctions, often caused by Windows itself;
- 10
- 11 z. refused to provide a simple remedy for "DLL Hell," a problem caused by
- 12 Microsoft's practice of changing functions of Dynamic Link Libraries
- 13 ("DLLs") without changing documentation to ISVs, which could have
- 14 been solved simply by documenting version information;
- 15 aa. threatened OEMs that they would receive a license for Windows only if
- 16 they agreed not to offer competitors' applications software;
- 17
- 18 bb. threatened OEMs that Microsoft would increase the price for its
- 19 operating systems if the OEMs distributed non-Microsoft applications
- 20 software;
- 21 cc. threatened to withhold from OEMs market development funds if the
- 22 OEMs distributed non-Microsoft applications software;
- 23
- 24 dd. threatened OEMs that Microsoft would withhold technical support from
- 25 the OEMs for Microsoft's operating systems, including Windows, if the
- 26 OEMs offered competitors' applications software;

- 1 ee. raised the price of Windows to non-Tier One OEMs in consideration for
2 Tier One OEMs' agreement to offer only Microsoft applications
3 software;
4
5 ff. provided substantial inducements to OEMs to license Office on a per-
6 processor instead of a per-copy basis, resulting in many OEMs paying for
7 Office whether or not Office was installed on their computers;
8
9 gg. locked OEMs into successive licenses for applications and other
10 Microsoft software by basing payment terms on minimum commitments
11 and accumulating any overpayments as a "prepaid balance" that would
12 not be refunded but could be credited against a renewed license; and
13
14 hh. required distributors to provide detailed sales reports on sales of rival
15 applications, intimidating and burdening distributors who chose to sell its
16 competitors' applications.

17 126. In his findings, Judge Jackson gave specific examples of Microsoft's
18 anti-competitive behavior in regard to its applications software, including its attempts
19 to preclude IBM's installation of IBM's own Lotus SmartSuite bundle of office
20 productivity software on the PCs manufactured by IBM. Findings at ¶¶ 115-132.
21 Specifically, Judge Jackson found that "[w]hen IBM refused to abate the promotion of
22 those of its own products that competed with Windows and Office, Microsoft punished
23 the IBM PC Company with higher prices, a late license for Windows 95, and the
24 withholding of technical and marketing support." Id. at ¶ 116, see also id. at ¶¶ 118-
25 131.
26

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1 **Microsoft's Exclusionary Acts Specifically Targeted at the Spreadsheets Market**

2 127. In the early 1990s, Lotus 1-2-3 had the dominant share of the Intel-
3 compatible PC spreadsheet software market. In 1994, Microsoft engaged in a
4 calculated effort to persuade Lotus to write its next version of Lotus 1-2-3 to run on
5 OS/2 rather than MS-DOS. At the very time that Microsoft was engaged in those
6 efforts, it had decided for itself to abandon any further development efforts for OS/2
7 and to focus instead on further developing Windows. Microsoft withheld this critical
8 decision from Lotus.
9

10 128. Microsoft's deception was successful: Lotus wrote its next spreadsheet
11 version for OS/2, thereby misdirecting huge sums of money to virtually worthless
12 development efforts. Microsoft timely released its next Excel version to run on
13 Windows and quickly gained a large share of the relevant spreadsheet market.
14

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

17 129. Netscape's browser, as alleged, threatened to weaken the applications
18 barrier to entry that protected Microsoft's monopoly in the operating system market.
19 Microsoft also recognized that Navigator posed a serious threat to its applications
20 software monopoly, particularly with respect to word processing. As one Microsoft
21 executive wrote:
22

23 Netscape is using their position with the browser as a foothold onto the desktop
24 to push e-mail and collaboration as the new killer applications. Any Office
25 Suite in the near future will have mail as its core component. As e-mail use
26 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 .

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

9
10 130. Microsoft's predatory acts directed at Navigator and Sun's Java,
11 therefore, were designed not just to protect Microsoft's operating system monopoly,
12 but also its monopolies in the word processing and spreadsheet markets.

13 MICROSOFT'S CONTINUING CONDUCT

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

20 Microsoft's Continuing Failure to Comply with the Final Judgment

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

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1 substitute middleware of their own choosing.

2 133. Despite the requirements of the Final Judgment, Microsoft has delayed
3 producing usable specifications and its specifications have been inaccurate and
4 incomplete. Moreover, although Microsoft was required to offer licenses to third
5 parties, the terms of those licenses were too burdensome.
6

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

- 11
- 12 a. "In the substantial majority of cases Microsoft is no longer meeting the
13 Service Level Guidelines ("SLGs") established to measure the timeliness
14 of its initial response to technical documentation issues submitted by the
15 TC. . . . Since approximately mid-November, Microsoft has fallen
16 significantly behind in responding to technical documentation issues
17 submitted by the TC."
18
- 19 b. "Currently, Microsoft's inability to meet the SLGs interferes with the
20 TC's ability to pursue its prototype implementation project and impairs
21 the TC's ability to complete the project in a timely manner. It also
22 means that MCPP licensees are receiving corrections or other edits to
23 their technical documentation later than they would if Microsoft were
24 complying with the SLGs."
25
- 26 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

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

5
6 136. On May 12, 2006, the DOJ reported to the court as follows:

7 In February, the TC reclassified all previously submitted technical
8 documentation issues and determined that 71 outstanding technical
9 documentation issues should be governed by the new 60-day deadline.
10 Microsoft’s initial performance in resolving these technical documentation
11 issues was disappointing. As described in Microsoft’s monthly status report
12 dated April 17, 2006, when the TC reviewed Microsoft’s initial proposed fixes
13 to 58 of these 71 issues, the TC found that only five of those responses
14 completely resolved the issue. . . . As of May 8, there were 57 open technical
15 documentation issues for which the 60-day time period has already expired and
16 Microsoft had only closed 18 of the 60-day issues submitted by the TC.

17 Microsoft’s initial performance in resolving the remaining outstanding technical
18 documentation issues – the so-called “non-60-day issues” – was also not very
19 encouraging. While Microsoft has “closed” a significant number of these
20 issues, when the TC analyzed a sample of these replies submitted earlier this
21 year it found that slightly less than one-third of the fixes fully resolved the
22 issues.

23 137. Thus, the DOJ wrote that “Microsoft’s difficulty in improving the
24 technical documentation has led Plaintiffs to conclude that a new approach is needed.”
25 The DOJ further stated that “[i]n light of the protracted delays in resolving Plaintiffs’
26 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

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

3
4 139. Microsoft's continuing failure to comply with the Final Judgment means
5 that in many ways, the relevant market actually is less competitive than it was when
6 the government brought its case in 1997, because third parties have been limited in
7 their ability to create competitive products.

8 **Microsoft's Continuing Exclusionary Conduct Involving Media Players**

9
10 140. Microsoft's exclusionary conduct involving media players is described
11 above, and is continuing. Although the European Commission has required Microsoft
12 to offer versions of Windows in Europe ("N" versions) that do not include Media
13 Player, such versions are not available in the United States.

14
15 141. Thus, in the United States, Microsoft continues to bundle its Media
16 Player with its operating system, even though tests conducted by independent and
17 respected laboratories have confirmed that Media Player can be easily removed from
18 Windows without consequence.

19
20 142. In addition, Microsoft has failed to disclose interfaces between its Media
21 Player and the Windows operating system, despite requests for this information. This
22 prevents third parties from making their alternative media players integrate with
23 Windows as seamlessly as Microsoft's Media Player.

24
25 143. The effect of this conduct is to make it more difficult for alternative
26 media players to emerge as middleware products that can support their own
applications on operating system platforms that compete with Microsoft Windows.

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

2 **Microsoft's Continuing Exclusionary Conduct Involving Work Group Servers**

3 144. Microsoft continues to engage in exclusionary conduct involving work
4 group servers, which interface with networked desktop computers ("clients"). In
5 particular, Microsoft uses its market power with respect to desktops to gain market
6 power with respect to servers. Then, because Microsoft's work group servers do not
7 support competing desktop operating systems as well as they support Microsoft's own
8 Windows desktop operating system, barriers are raised for competition by alternative
9 operating system platforms.
10

11 145. Server networks require that client computers have their own client-side
12 software to interface with the server operating system. Microsoft bundles its client-
13 side software with its Windows operating system, meaning that all PCs with Windows,
14 without any additional installation, are ready to interface with Windows servers. In
15 order to use a competing server operating system, however, a user must separately
16 install the client-side software for the competing system on each of the networked
17 client computers.
18

19 146. In addition, Microsoft's server operating system includes special,
20 undocumented interfaces used by its servers to communicate with one another when
21 multiple servers are part of the same network. Because these interfaces are not
22 available to Microsoft's competitors, competing server operating systems do not
23 interact as well with Windows servers and clients.
24

25 147. On July 12, 2006, the European Commission imposed a € 280.5 million
26

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1 penalty on Microsoft for failing to comply with requirements that it provide
2 interoperability specifications needed by third parties to offer compatible products.

3 The Commission found as follows:

4
5 In view of the foregoing, and on the basis of the technical analysis by the
6 Commission's experts and the Trustee, corroborated by the submissions of third
7 parties regarding their evaluation of the Technical Documentation, it is
8 concluded that the relevant versions of the Technical Documentation are neither
9 complete nor accurate. . . . It is therefore concluded that Microsoft has not
10 complied with its obligations to make Interoperability Information available to
11 interested undertakings pursuant to Article 5(a) and (c) of the Decision.

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

15 **Microsoft's Continuing Exclusionary Conduct**
16 **Involving Web-Based Applications**

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

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

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

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

4
5 152. Moreover, just as Java enabled applications to run on mobile devices
6 such as "smartphones" and personal digital assistants, Microsoft intends for .Net to
7 extend to these devices as well. This will raise entry barriers for competing operating
8 systems because only the Windows operating system on the desktop will be
9 compatible with the operating system and the applications on the mobile device.

10
11 **Microsoft's Continuing Exclusionary Conduct**
12 **Involving Personal Productivity Applications**

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

19
20 154. In addition, the applications that constitute Microsoft Office have used
21 interfaces that are undocumented and unavailable to rival developers of personal
22 productivity suites and applications, thereby making Microsoft's applications faster
23 and more capable. With respect to one critical technology, Object Linking and
24 Embedding ("OLE"), Microsoft refused to adopt a standard for inter-application
25 operability. As a result, no personal productivity software ever has been able to match
26 the interoperability of Microsoft's Office components because of this unique

1 advantage Microsoft has given to its own applications.

2 155. Finally, Microsoft recently has engaged in the creation of an Office
3 platform on which third parties and users may build applications that run on top of
4 Office. Thus, Office has itself become a type of middleware platform. These Office-
5 based applications are tied to Office, and as a result, to Windows, further raising the
6 barriers to entry faced by competing operating systems, as well as competing
7 middleware platforms and personal productivity applications.
8

9
10 **Microsoft's Continuing Exclusionary Conduct**
Involving Standards and Formats

11 156. Microsoft has continued to engage in exclusionary conduct involving
12 standards and formats. Microsoft's Office software products use proprietary and
13 undocumented formats to store the contents of documents, such as ".doc" for
14 Microsoft Word documents, ".xls" for Microsoft Excel spreadsheets, and ".ppt" for
15 Microsoft PowerPoint presentations. Yet competing applications are not able to
16 convert the contents of these documents because of Microsoft's failure to disclose the
17 necessary specifications or to adopt document format standards to permit the exchange
18 of documents between different software programs. Thus, to properly display, edit,
19 and print documents created using Microsoft's applications, a user is required to use
20 Microsoft software, because only Microsoft software has access to the proper
21 specifications and formats. Because these applications run only on Microsoft
22 Windows, Microsoft's conduct in this regard locks users in to Windows for the
23 foreseeable future.
24
25
26

1 157. Concerns about this conduct recently led the Commonwealth of
2 Massachusetts to announce a policy, scheduled to go into effect in January 2007,
3 which would require every state agency to use an open format for its documents.
4 Nevertheless, Microsoft has announced that it will not support the industry-proposed
5 open format.
6

7 **Microsoft's Continuing Exclusionary Conduct**
8 **Involving Electronic Mail Software**

9 158. Microsoft has continued to engage in exclusionary conduct involving
10 electronic mail ("e-mail") software. In particular, it bundles its Microsoft Outlook e-
11 mail client software with Microsoft Office, effectively for zero cost. Also, Outlook
12 uses undisclosed interfaces to Windows and to Exchange (Microsoft's widely used e-
13 mail server software), making both Exchange and Outlook appear to perform better
14 than third party e-mail servers or e-mail clients.
15

16 159. Microsoft requires that users of Exchange use Active Directory,
17 Microsoft's directory services software, which is bundled with Windows Server and is
18 largely built into every Windows desktop client. Outlook runs only on Windows
19 clients, and Exchange and Active Directory run only on Windows Server, thus further
20 raising entry barriers for competing operating systems.
21

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

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

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

8 161. Microsoft's conduct, however, has greatly distorted the content format
9 decisions made by content owners, titling such decisions toward Microsoft's
10 proprietary media formats ("WMV," "WMA," and "WMF"). It provides its content
11 delivery software, Windows Media Server, for free by bundling it with Windows
12 Server. Media Server runs only on Windows Server and uses proprietary and
13 undisclosed interfaces with Windows Media Player, which – as discussed above – is
14 bundled with and tied to the Windows desktop operating system. Thus, content
15 created with a Windows format can be viewed, streamed, or played best only on the
16 Windows operating system, further maintaining Microsoft's operating system
17 monopoly.
18

20 162. Content owners further seek to secure their property using digital rights
21 management ("DRM"). The software that implements DRM must be active at the
22 authoring state (when the content is created), at the distribution stage (when it is
23 transferred to the consumer), and at the playback stage (when the content is used).
24 Microsoft promotes its own proprietary DRM standard, which further strengthens its
25 monopoly position.
26

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1 PC operating system software. Through the anticompetitive conduct described herein,
2 Microsoft has willfully acquired and/or maintained its monopoly power in this market.
3 Microsoft has acted with an intent to illegally acquire and/or maintain its monopoly
4 power, and its anticompetitive conduct has enabled it do so, in violation of A.R.S. §44-
5 1403.
6

7 168. As a result of the violation of A.R.S. §44-1403, Microsoft has charged
8 artificially inflated prices for its operating system software and required OEMs to
9 provide technical support or service to end users when Microsoft's operating system
10 failed to perform or operate properly. Microsoft used its monopoly power to shift this
11 cost to Plaintiff and other customers. Microsoft's monopolization has caused injury to
12 the business and property of Plaintiff in an amount that will be established at trial.
13

14 **COUNT II**

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

17 169. Each of the above allegations is incorporated herein.

18 170. Microsoft possesses monopoly power in the market for Intel-compatible
19 PC word processing software. Through the anticompetitive conduct described herein,
20 Microsoft has willfully acquired and/or maintained its monopoly power in this market.
21 Microsoft has acted with an intent to illegally acquire and/or maintain its monopoly
22 power, and its anticompetitive conduct has enabled it do so, in violation of A.R.S. §44-
23 1403.
24

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

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

3
4 **COUNT III**

5 **Arizona Antitrust Act §44-1403**
6 **Monopolization -- Spreadsheet Applications Market**

7 172. Each of the above allegations is incorporated herein.

8 173. Microsoft possesses monopoly power in the market for Intel-compatible
9 PC spreadsheet software. Through the anticompetitive conduct described herein,
10 Microsoft has willfully acquired and/or maintained its monopoly power in this market.
11 Microsoft has acted with an intent to illegally acquire and/or maintain its monopoly
12 power, and its anticompetitive conduct has enabled it do so, in violation of A.R.S. §44-
13 14032.

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

18
19 **COUNT IV**

20
21 **Arizona Antitrust Act §44-1403**
22 **Monopoly Leveraging, Abuse of Monopoly Power and Denial of**
23 **Essential Facility Word Processing Applications Market**

24 175. Each of the above allegations is incorporated herein.

25 176. Microsoft has monopoly power in the Intel-compatible PC operating
26 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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1 timely access to its operating system software, to foreclose competition, gain a
2 competitive advantage, and destroy competitors in the Windows-compatible word
3 processing applications market, resulting in tangible harm to competition and the
4 acquisition and/or maintenance monopoly power, in violation of A.R.S. §44-14032.
5

6 177. As a result of the violation of A.R.S. §44-14032, Microsoft has charged
7 artificially inflated prices for its word processing software, thereby causing injury to
8 the business and property of members of the Office Applications Software Class in an
9 amount that will be established at trial.
10

11 **COUNT V**

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

15 178. Each of the above allegations is incorporated herein.

16 179. Microsoft has monopoly power in the Intel-compatible PC operating
17 systems market. Through the anticompetitive conduct described herein, Microsoft has
18 unlawfully leveraged and abused that monopoly power and denied reasonable and
19 timely access to its operating system software, to foreclose competition, gain a
20 competitive advantage, and destroy competitors in the Windows-compatible
21 spreadsheet applications market, resulting in tangible harm to competition and the
22 acquisition and/or maintenance monopoly power, in violation of A.R.S. §44-14032.
23

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

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1 amount that will be established at trial.

2 **RELIEF REQUESTED**

3 Wherefore, Plaintiff prays:

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

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

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

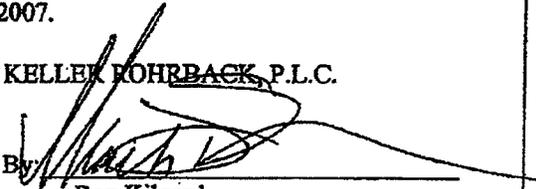
12 D. That Plaintiff and the class be granted such other and further relief as the
13 Court may deem just and proper.

14 **JURY DEMAND**

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

16 DATED this *24th* day of July, 2007.

17 KELLER ROHRBACK, P.L.C.

18 By 

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20 Gary A. Gotto
21 Mark D. Samson
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24
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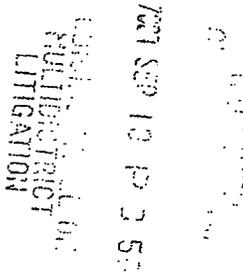
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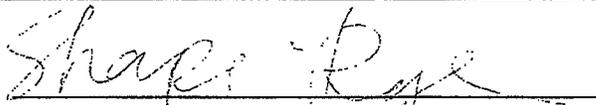
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Potential "Tag-Along Action" and this Certificate of Service were served on September 18, 2007, to the following, in the manner described below:

<p>Mark D. Samson Gary A. Gotto Ron Kilgard KELLER ROHRBACK P.L.C. 3101 North Central Avenue, Suite 1400 Phoenix, Arizona 85012-2643 E-mail:msamson@kellerrohrback.com ggotto@kellerrohrback.com rkilgard@kellerrohrback.com Counsel for Plaintiff Daisy Mountain Fire District</p>	<p>(X) By electronic mail and first class mail</p>
<p>Louis DeRoan III DEROON & SEYFFER 2929 N. 44th Street, Suite 330 Phoenix, Arizona 85018 Phone: (602) 258-2002 Fax: (602) 952-2986 Counsel for Plaintiff Daisy Mountain Fire District</p>	<p>(X) By facsimile and first class mail</p>
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 Shari Rose