

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDWARD MICHAEL O'BRIEN,

Plaintiff,

v.

WILLIAM HENRY GATES

and MICROSOFT CORPORATION,

COMPAQ CORPORATION

and RADIO SHACK STORES, INC.,

Defendants.

ANTITRUST COMPLAINT

Case No. CV 01 - 08306 MRP (RCx)

I. CAUSE OF ACTION

1. Plaintiffs, Edward Michael O'Brien and the Golf O'Brien Company ["PL"], complain in the United States District Court in the Central District of California of antitrust injury caused by Defendants, William Henry Gates and Microsoft Corporation ["MS"], Compaq Corporation ["COM"] and Radioshack Stores ["RS"] via anticompetitive business practices and monopolized, predatory pricing.

2. This civil action is grounded on Title 15 of United States Codes, sections 1, 2, 13, 14 and 15 to recover compensatory and punitive damages trebled, and on California Business and Professions Codes: sections 16700, et.seq., requiring statute-specified exemplary and/or punitive damages for unfair business practices causing consumer and competitor injury.

3. MS combination, contracts and concerted actions with COM and RS restrained trade and commerce, and worked unfair business practices including (1) illegal monopolization, (2) exclusionary practices, (3) anticompetitive (inoperability) practices, (4) monopolistic (excessively high) pricing of operating system software ["OS"], (5) discriminatory pricing of OS licenses, (6) exploiting pre-existing, cost-plus contracts for sales of excessively priced (monopolized) software, including Windows 95, 98 and NT, and (9) restraining trade and commerce in website development ["WD"] and software development ["SD"] markets, where PL was a competitor, via OS source code intentionally written to preclude run of Sun Microsystems, Inc. ["SUN"] software, and other non-Microsoft software including software manufactured and sold by PL.

A. Exclusion, Preclusion and Foreclosure Caused Antitrust Injury

1. "Specifically, the District Court found that Microsoft took four steps to exclude Java from developing as a viable cross-platform threat: (a) designing a JVM incompatible with the one developed by Sun; (b) entering into contracts, the so-called "First Wave Agreements," requiring major ISVs to promote Microsoft's JVM exclusively; (c) deceiving Java developers about the Windows-specific nature of the tools it distributed to them; and (d) coercing Intel to stop aiding Sun in improving the Java technologies." [*United States of America v. Microsoft Corporation*, USCA (DC Cir.), Nos. 00-5212, 00-5213, (II., 5.)]

2. "Microsoft's conduct related to its Java developer tools served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive. Unsurprisingly, Microsoft offers no pro-competitive explanation for its campaign to deceive developers. Accordingly, we conclude this conduct is exclusionary, in violation of s 2 of the Sherman Act." [*Ibid.*]

3. Appellate decision quoted above makes defendants summoned *per se* liable for closely related anticompetitive acts alleged herein.

4. This complaint exposes a fifth step taken by Microsoft "to exclude Java from developing as a viable cross-platform threat" and to foreclose competition in software markets where PL was both consumer and competitor.

5. In 1998, Microsoft retaliated against SUN for a federal court injunction obtained by SUN restraining continued MS use of SUN's java software license on grounds of copyright infringement.

6. On March 24, 1998 the United States District Court in the Northern District of California ruled that MS had violated its licensing agreement with SUN by infringing on SUN's copyright to the Java computer language ["JAVA"], and, therefore, SUN was entitled to a preliminary injunction against MS stopping subsequent MS infringement. MS appealed. Court of Appeals overturned the injunction on grounds contract law, rather than copyright law, should have controlled adjudication and appellate court remanded for

further proceedings. Case was settled on January 25, 2001. [*Sun Microsystems, Inc. v. Microsoft Corporation*, 999 F. Supp 1301; 21 F. Supp. 2d 1109 (N.D. Cal. 1998); 188 F 3d 1115 (9th Cir. 1999).]

a. "The settlement is not a surprise, analysts said, because Microsoft did not appear to be in a position to win the case." [Info World, *A line in the sand*, by Tom Sullivan and Ed Scannell, January 29, 2001]

b. In settlement, MS paid SUN \$20,000,000. and agreed not to distribute java code licensed from SUN when current MS inventories are depleted. Settlement effectively admits liability for anticompetitive conduct alleged herein.

7. PL purchased a new COM computer from RS in May, 1998. Notebook computer had Windows 95 ["95"] installed as its operating system ["OS"]. Less than thirty (30) days after purchase, PL purchased Windows 98 ["98"] from same retailer, and had RS install new OS replacing 95.

8. On same computer from May, 1998 through March 1999, PL attempted to obtain a much needed development tool by downloading, setting-up and running SUN's *Java Development Kit* ["JDK"] from SUN's primary website, but was never able to run the application (*setup* always stopped when 99% complete).

9. In August thru September, 1999, PL made numerous attempts to download/setup and run JDK on a Windows NT network, but experienced the same difficulty.

10. Failure of 98 and NT to download/setup/run JDK and other SUN software violated federal and California antitrust laws, unlawfully restrained SUN's competition and caused antitrust injury to PL and many other businesses in relevant markets.

B. Windows 98 Continued Long-term OS Preclusion of *PFS: First Graphics*

1. In 1989, PL developed and began to sell *Golf Coach*, a software compilation (first of its kind) permitting acquisition, calculation, analysis and presentation of golf statistics. Compilation of programs contained a charting/graphing program entitled *PFS: First Graphics* which PL licensed in 1990 from Software Publishing Corporation ["SPC"]. License was valued in 1990 at \$1,000,000. In 1988-90, *PFS: First Graphics* was ranked internationally as the best selling charting/graphing program. *PFS: First Graphics* was in direct and vital competition with *Microsoft Excel* inter charting/graphing markets.

2. At the end of 1991, there was little market viability for *PFS: First Graphics* because Microsoft had precluded run of the application on its operating system. Consequently, commercial viability of *Golf Coach* was severely reduced.

3. Although *PFS: First Graphics* was not ported to the Windows 3.1 environment by SPC, *Golf Coach* could have run on Windows (as well as the DOS shell) with help from

any one of a host of DOS-WIN utilities...had Windows 3.1, and subsequent versions of Windows, not continued preclusion of *PFS: First Graphics*.

4. From 1991 through 2001, PL experienced greatly restricted sales of *Golf Coach* directly attributable to Microsoft's use of its OS monopoly to preclude *PFS: First Graphics* competition against *Microsoft Excel*.

5. Defendants system of distribution and sale of Windows 3.1, 95, 98, 2000 and NT caused direct and proximate antitrust injury to PL via intentionally engineered OS preclusion of competition in charting/graphing software markets where PL was a competitor. It can be reasonably assumed, prior to discovery of hard evidence via civil investigative demand, that Microsoft's 1994 Consent Decree and subsequent prosecution by the United States Department of Justice ["DOJ"] made each defendant fully and inexcusably cognizant of Microsoft's anticompetitive methodologies in 1998 thru 2001.

C. Preclusion, Discrimination and Overcharge Injured Consumers and Developers

1. In 1998, PL used a "cost-plus" credit contract to purchase a COM *Presario* notebook-computer having 95 installed from the RS store in Lihue, Kauai, Hawaii. Soon after purchase of the notebook, PL purchased 98 from RS by simply authorizing a balance increase on said cost-plus credit contract. PL, at venue of purchase, had RS manager professionally replace 95 with 98.

2. Within thirty (30) days following installation of 98, plaintiff, the Golf O'Brien Company ["GOB"], required possession and use of JDK for website and application development. Although PL's computer successfully downloaded JDK from SUN's website, JDK would not complete setup and run on 98.

3. After many attempts to download/setup and run JDK on PL's and other PC and Server systems running 95, 98 and/or NT, PL concluded 98 had been especially constructed by MS to preclude setup (run) of JDK and had, thereby, precluded PL's competition in WD and SD markets via preclusion of PL's cross-platform java program development.

4. At time of download and attempted setup and run of JDK, PL had limited experience with JDK, and had, on many occasions, deployed java code and scripts developed on JDK for website construction and/or enhancement purposes. However, PL had no knowledge or experience with java development software ["JDS"] sold by Microsoft entitled (VJ++), and preferred to avoid use of MS software for numerous reasons including the fact that PL was committed to cross-platform application development which was not fully supported by MS.

5. Preclusion of SUN's competition in markets for JDS and preclusion of PL's competition in WD and SD markets requiring programs and scripts developed on JDK, inter 98, coupled with PL's determination that 98 had been excessively priced by the MS / COM / RS conspiracy, caused PL to seek remedy and compensation from defendants via civil action.

6. PL's cause of action for treble damages and punitive damages is predicated on defendants' intentional and long-term violation of federal and state antitrust laws. Defendants precluded competition in relevant markets and injured PL and many other website (ICP) and software (ISV) developers by acting willfully and in formal combination and contracts to (1) advance unlawful retaliation by MS against SUN, (2) increase barriers to competition with MS operating systems, and (3) obtain excessive financial gain from wholesale and/or retail overcharges for 95 and 98.

D. Defendants Liable for Classic Violations of Antitrust Laws

1. William H. Gates and the Microsoft Corporation construct and maintain "trusts" composed of Original Equipment Manufacturers ["OEM"] and other software sellers just as surely as John D. Rockefeller and Standard Oil, Inc. built and maintained trusts of oil companies and oil/gasoline sellers...both monopolists were convicted and punished in federal courts under the Sherman Antitrust Act of 1897 (15 U.S.C., sec. 1 and 2). [*Standard Oil Co. v. United States*, 221 U.S. 1 (1910); *United States v. Microsoft Corp.*, United States Court of Appeals (DC Cir.), Case nos. 00-5212, 00-5213, Decided June 28, 2001.]

2. MS induced, bribed and/or compelled certain OEMs, including COM, into "Frontline Agreements" and other agreements using discriminatory pricing for OS and office productivity ["OPS"] software. "Frontline Agreements" were tantamount to combinations and contracts referred to in 15 U.S.C., sec. 1., and violated not only sec. 1 and 2, but sec. 13, and 14 of Title 15.

3. Much publicized (and prima facie evidenced) MS / COM combination and conspiracy to break antitrust laws vertically included certain retailers, including RS, via retailers combination and contracts with COM and contracts with MS.

E. "Indirect Purchaser" Not Barred from Suing Defendants for Pricing Injury

1. In 1998, virtually all website development, software development, and internet software provision companies using 95 in personal computers, including GOB, had inelastic demand for 98 immediately and continuously after its release.

2. Among WD and SD companies having inelastic demand for 98, those, including PL, that had previously used the RS credit card for purchase of Compaq PC(s) installed with 95, had pre-existing, cost-plus contract(s) with RS for purchase of 98. The current MS OS is an absolute, professional necessity for software development companies.

3. (Above stated "cost-plus" factor equates with "retail price" charged by retailer RS, determined by the 98 wholesale price paid by retailer to COM or MS plus the standard RS markup, defined as a certain percentage of a given wholesale price.)

4. The purpose, intent and effect of the illegal conduct in question has been to preclude competition from MS competitors in relevant markets and to economically exploit

consumers depending on MS monopolized software and, thereby, damage international trade and commerce for the purpose of generating excessive revenues for themselves.

5. In 1998, via economic power derived from great consumer demand for its monopolized operating systems, MS subjected many directly purchasing OEMs, including COM, to its' *operating control*.

6. "[exemption to indirect purchaser bar]...where the direct purchaser is owned or controlled...[by the manufacturer]" *Illinois Brick Co. v Illinois*, 431 U.S. at 736, n. 16; 97 S.Ct. at 2070

7. "[combination, contracts, etc.]...that subject the wholesalers to the manufacturers' operating control..." *In re Brands*, 123 F3d 599 (7th Cir. 1997)

8. OEMs, including COM, had virtually no choice but to sell new computers with an MS OS installed because without same a new computer would not sell. MS grant of a license for any of its OS to an OEM, at any price remotely within reason, was the *sin qua non* of the OEM business in 1995-2001 and "operating control" exercised by MS over certain OEMs, including COM, to breach federal/state antitrust laws via cooperation in MS unfair business practices, was great.

9. MS "operating control" over COM via demand for MS OS and MS "operating control" over RS via demand for 95 and 98, in conjunction with COM "operating control" over RS via demand for COM computers gave MS sufficient "operating control" over wholesale purchases and retail sales of MS OS by RS to satisfy federal court's criteria for "operating control" sufficient to make purchase of MS OS effectively one sales transaction from manufacturer to consumer. MS "operating control" over RS regarding OS sales together with RS cost-plus contracts for OS sales makes purchases of MS software from RS *direct* purchases from MS / RS where the selling price can be accurately parsed for MS and RS components. Therefore, *Illinois Brick* bar of antitrust standing for indirect purchasers is not applicable to this case.

II. PARTIES

1. Plaintiff, Edward Michael O'Brien, following graduation from the University of California at Santa Barbara and three years commissioned service in the United States Marine Corps, became sole-proprietor of a California private business, a software and website development company named Golf O'Brien Company. GOB sells custom crafted websites and GOLF COACH, the first (1989) software compilation to allow golfers to acquire, process, analyze and present golf statistics on PC, SERVER and MAINFRAME computers. Mr. O'Brien is the author of TAX WONDERS, a well known internet book on tax-saving ideas using charitable donations. Mr. O'Brien played professional golf on the California Golden State Professional Golf Tour in 1992, and is currently a resident of Santa Barbara, California and Princeville, Hawaii.

2. Defendant, Microsoft Corporation develops, makes, licenses and supports a wide range of software products, including operating systems, server applications, business and consumer productivity applications, software development tools, and internet software and technologies. MS-Windows is the company's "flagship" PC operating system.

3. MS operating systems software run over 90% of the PCs currently in use. Its original DOS operating system gave way to Windows, a graphical user interface program run in conjunction with DOS, which made using a PC easier. Windows 98, with sales closely tied to PC shipments, was introduced in June 1998. Its predecessor Windows 95, has an installed base of more than 100 million users. Windows NT, a network operating system providing network management and administration tools, security and operating stability, also has a large and rapidly growing installed base.

4. MS entered the business applications market in the early 1990's via a line-up of strong offerings, combined with aggressive and innovative marketing and sales techniques. Its Office 97 suite, which includes the popular MS-Word (word processing), MS-Excel (spreadsheet) and MS-Powerpoint (graphics) software programs, is now by far the best selling application software package. MS-Office has currently over 90% marketshare in the office productivity suite market(s).

5. Corporate Headquarters, One Microsoft Way, Redmond, WA 98052-6399; tel 425-882-8080

6. Defendant, Compaq Computer Corp. operates the world's second largest computer company, manufacturing desktop and portable computers and PC servers. It acquired Digital Equipment Corp. in mid-1998. Compaq holds the No. 1 share in the world wide market for personal computers and servers. The company's products are sold and supported in more than 100 countries through a broad network of Compaq authorized partners, with half of its sales from outside the U.S. and Canada.

7. Under its *Presario* line, Compaq offers consumers and home office users PCs rich with multimedia capabilities. The company also has offerings in the fast-growing networking products area. The company's Internetworking Products Group includes Network Inc. (acquired in 1995), a provider of Fast Ethernet networking Products, and Thomas-Conrad Corp., a maker of networking interface cards and hubs.

8. Corporate Headquarters, 20555 SH 249, Houston, Texas 77070: tel 281-370-0670: FAX 281-514-4583

9. Defendant, Radio Shack Stores, a wholly owned subsidiary of the Tandy Corporation, sells consumer electronic products across the U.S. through its chain of retail stores. Among its products are private label electronic parts and accessories, audio/video equipment, digital satellite systems, personal computers, software, telephones, scanners, electronic toys and batteries.

10. Tandy Corp. is America's largest retailer of personal computers, telecommunications and other consumer electronics. About 75% of Tandy's 1998 revenues were derived from RadioShack, its main operating unit. As of December 31, 1998, 5,039 company-owned RadioShack stores and 1,991 RadioShack dealer/franchise units were in operation. The company's network of dealer/franchise stores which generally engage in other retail operations, are an outlet for RadioShack products in smaller communities.

11. In February 1998, Tandy, through its RadioShack division, signed an exclusive multi-year retail sales and service agreement with Compaq making Compaq the sole supplier of computers sold through all of RadioShack's company-owned stores and those RadioShack dealer/franchise outlets which choose to participate.

12. Corporate Headquarters, 100 Throckmorton Street, Suite 1800, Fort Worth, Texas 76102; tel 817-415-3700

III. JURISDICTION, VENUE AND LIMITS

1. Jurisdiction is premised on the Sherman Act of 1897 (15 U.S.C., sec. 1, 2), the Clayton Act of 1914 (15 U.S.C., sec. 14 and 15) and the Robinson-Patman Act of 1936 (15 U.S.C., sec. 13). Federal question jurisdiction and supplemental jurisdiction are claimed.

2. Venue is proper in this District, pursuant to Sections 12 of the Sherman Act, 15 U.S.C., sec. 22, and 28 U.S.C., sec. 1391(b), (c), because Defendants transact business in the Central District of California and/or the claims arose at least in part in the Central District of California. Defendants regularly and continuously conduct interstate commerce between and among the several states including California.

3. This action commences less than four (4) years after cause of action accrued.

IV. MONOPOLIZATION

1. "Conspiracies under sec. 1 and 2 of Sherman Act (15 USCS s 1 and 2) are reciprocally distinguishable from and independent of each other even though objects of conspiracies may partially overlap; conspiracy in restraint of trade may stop short of monopoly, but conspiracy to monopolize may not be content with restraint short of monopoly; therefore, one may be convicted, without violating double jeopardy clause of Fifth Amendment, of both conspiracy in restraint of trade in violation of sec. 1 of Sherman Act (15 USCS s 1) and conspiracy to monopolize trade in violation of sec. 2 of Act (15 USCS s 2)." [*American Tobacco Co. v United States (1946)*, 328 US 781, 90 L Ed 1575, 66 S Ct 1125.]

2. "Section 1 of Sherman Act (15 USCS s 1), prohibiting combinations in restraint of trade, and sec. 2 (15 USCS, s 2), prohibiting monopolies, closely overlap, and same kind of predatory practices may show violations of all." [*Maryland & Virginia Milk Producers Asso. v United States* (1960), 362 US 458, 4 L Ed 2d 880, 80 S Ct 847.]

3. "Monopolization in contravention of 15 USCS, sec. 2 occurs whenever one with monopoly power commits unreasonable restraint of trade in violation of 15 USCS, sec. 1." [*Auburn News Co. v Providence Journal Co.* (1980, DC RI), 504 F Supp 292.]

4. "An additional inference of monopoly power can be made from an overwhelming market share. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed 2d 778 (1966)." [*Ibid.*, p 303]

5. The key to Sherman Act double liability is *monopoly power*. Defendants, including MS having great monopoly power with over 90% marketshare in OS and OPS markets, combined, contracted and conspired to restrain trade and commerce by restraining SUN's competition and that of PL via OS preclusion, violating 15 U.S.C., sec. 1. Consequently, Defendants also *monopolized* in breach of 15 U.S.C., sec. 2.

Highly complex and time consuming "rule of reason" analysis and determination that Defendants conspired to monopolize by intentionally and purposefully increasing Microsoft's monopolies in OS and/or OPS markets via cooperation in predatory pricing, and other unlawful business practices, violating 15 U.S.C., sec. 2, is not necessary in this case for determination of Defendants' liability under both sections of Sherman Act.

6. PL possesses credible evidence indicating Defendants violated sec. 1 and 2 under both *per se* and Rule of Reason analysis.

A. Maintenance of Monopoly Power Through Anticompetitive Means

1. Defendants, in combination, contractually and in concerted action, illegally monopolized and violated (15 U.S.C., sec. 2) because they willfully and intentionally acquired and/or maintained monopoly power for MS by selling 98 which precluded competition in JDS markets and, thereby, increased barriers to competition in OS markets while injuring PL and many other companies competing in WD, SD and/or ISV markets.

2. "Section 2 of the Sherman Act makes it unlawful for a firm to 'monopolize'. 15 U.S.C. s 2. The offense of monopolization has two elements: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.' *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The District Court [in *U.S. v Microsoft*] applied this test and found that Microsoft possesses monopoly power in the market for Intel-compatible PC operating systems...the court also found that Microsoft maintained its power not through competition on the merits, but through unlawful means. Microsoft challenge(d) both

conclusions." [*United States of America v. Microsoft Corporation*, United States Court of Appeals (DC Cir.), Case Nos. 00-5212, 00-5213, Decision of June 28, 2001, II., p 9]

3. " We begin by considering whether Microsoft possesses monopoly power, see *infra* Section II.A, and finding that it does, we turn to the question whether it maintained this power through anticompetitive means. Agreeing with the District Court that the company behaved anti-competitively, see *infra* Section II.B, and that these actions contributed to the maintenance of its monopoly power, see *infra* Section II.C, we affirm the court's finding of liability for monopolization." [*Ibid.*]

4. Defendants monopolized and caused antitrust injury to PL and others by exercising proven monopoly power to control prices and exclude competition. Therefore, PL complains of *per se* violation of sec. 2.

5. "While merely possessing monopoly power is not itself an antitrust violation, see *Northeastern Tel. Co. v. AT & T*, 651 F.2d 76, 84-85 (2d Cir. 1981), it is a necessary element of a monopolization charge, see *Grinnell*, 384 U.S. at 570. The Supreme Court defines monopoly power as 'the power to control prices or exclude competition.' *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. 2A Phillip E. Areeda et al., *Antitrust Law* p 501, at 85 (1995); cf. *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986) (defining market power as 'the ability to cut back the market's total output and so raise price')." [*Ibid.*, II. A]

6. Defendants raised the price for 98 well above a "competitive level" and thereby injured PL, professionally compelled to buy it. MS attempted to, and in fact did, increase its monopolies in OS markets and office productivity software ["OPS"] markets by selling OS and OPS licenses to certain OEMs, including COM, at special prices well below the prices paid by other wholesale purchasers, including RS. Discrimination in pricing allowed certain OEMs to charge \$X. for 98 when regular MS wholesale prices charged non-OEMs, including RS, compelled retailers to sell 98 at prices far above \$X. in order to realize a profit from the sale. MS price discrimination violates 15 U.S.C., sec. 13. and California Business and Professions Codes, sec. 16755, and injured PL financially and competitively.

7. "Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear." [*Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); see also *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (using direct proof to show market power in Sherman Act s 1 unreasonable restraint of trade action).]

8. Defendants monopolized, violating sec. 2, and caused antitrust injury to PL and others by abusing MS dominance in relevant markets.

9. "Because such direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power. [2A Areeda et al., Antitrust Law p 531a, at 156; see also, e.g., Grinnell, 384 U.S. at 571.]

10. Microsoft had monopoly power in relevant market(s) for OS at time of cause of action.

11. "The District Court considered these structural factors and concluded that Microsoft possesses monopoly power in a relevant market. Defining the market as Intel-compatible PC operating systems, the District Court found that Microsoft has a greater than 95% share. It also found the company's market position protected by a substantial entry barrier. Conclusions of Law, at 36." [*Ibid.*, II. A.]

PL would add to district court's determination above claim that MS, at time of cause of action, had monopoly power in Intel-compatible *and* non-Intel-compatible Server operating systems.

12. " Microsoft argues that the District Court incorrectly defined the relevant market. It also claims that there is no barrier to entry in that market. Alternatively, Microsoft argues that because the software industry is uniquely dynamic, direct proof, rather than circumstantial evidence, more appropriately indicates whether it possesses monopoly power. Rejecting each argument, we uphold the District Court's finding of monopoly power in its entirety." [*Ibid.*, II. A.]

B. Product Markets in California, Hawaii, Oklahoma and Worldwide Were Impacted By Defendants Monopolization (Relevant Markets)

"When one gets down to brass tacks, or an other specific product, almost all products have substitutes: even buses, skywriters and road signs compete with newspapers for advertising. Antitrust law, however, is only concerned with products reasonably interchangeable with one another, in other words, products for which there is some cross elasticity of demand. *Brown Shoe Co. v. United States*, 370 U.S. 294." [*Supra*, Auburn News Co., p 302.]

1. Defendants monopolized and injured PL and others in the following markets.
2. Markets for licensing of all Intel-compatible and non-Intel-compatible PC and Server operating systems worldwide.

Cross elasticity of demand for Windows 3.1/95/98/NT exists for operating systems named Rhapsody, BeOS, OS2, and a new generation of powerful free operating systems, such as Linux or FreeBSD, which are rapidly maturing as alternatives.

3. Markets for sale of all Intel-compatible and non-Intel-compatible PC and Server computers, worldwide.

Cross elasticity of demand for PC and Server computers manufactured by IBM exists for PC's and Servers made by Compaq, Dell, Gateway, and many other OEMs.

Cross elasticity of demand for PC computers sold by retailer, Radio Shack Stores, exists for PCs sold at Circuit City, Sears and many other stores.

4. Markets for licensing and distribution of java language development software, worldwide.

Cross elasticity of demand for JDS sold by Microsoft exists for JDS sold by Sun Microsystems, IBM, Borland, WebGain, Macromedia and many other companies.

5. Markets for Website Development and for Statistical Presentation Software, where websites and software incorporate significant amounts of java language source code.

Cross elasticity of demand for website development products sold by Golf O'Brien Company exists for same sold by IBM, Silverscape Technologies, Trinity and a multiplicity of companies listed under "website development" on the internet and elsewhere.

Cross elasticity of demand for statistical presentation software products sold by Golf O'Brien Company exists for same sold by Microsoft, Lotus, Stata and many other companies.

6. "Having thus properly defined the relevant market, the District Court found that Windows accounts for a greater than 95% share [of OS markets]. Findings of Fact p 35. The court also found that even if Mac OS were included, Microsoft's share would exceed 80%." [*Ibid.*, II. A (1) b.]

7. "Microsoft challenges neither finding, nor does it argue that such a market share is not predominant. Cf. Grinnell, 384 U.S. at 571 (87% is predominant); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481 (1992) (80%); du Pont, 351 U.S. at 379, 391 (75%). Instead, Microsoft claims that even a predominant market share does not by itself indicate monopoly power." [*Ibid.*, II. A (1) b.]

8. "Although the 'existence of [monopoly] power ordinarily may be inferred from the predominant share of the market,' Grinnell, 384 U.S. at 571, we agree with Microsoft that because of the possibility of competition from new entrants, see Ball Mem'l Hosp., Inc., 784 F.2d at 1336, looking to current market share alone can be 'misleading.' Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980); see also Ball Mem'l Hosp., Inc., 784 F.2d at 1336 ('Market share reflects current sales, but today's sales do not always indicate power over sales and price tomorrow.') " [*Ibid.*, II. A (1) b.]

9. " In this case, however, the District Court was not misled. Considering the possibility of new rivals, the court focused not only on Microsoft's present market share, but also on the structural barrier that protects the company's future position. Conclusions of Law, at

36. That barrier--the 'applications barrier to entry' -- stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. See Findings of Fact p p 30, 36. " [*Ibid.*, II. A (1) b]

10. " This 'chicken-and-egg' situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems. Id." [*Ibid.*, II. A (1) b.]

11. " Challenging the existence of the applications barrier to entry, Microsoft observes that software developers do write applications for other operating systems, pointing out that at its peak IBM's OS/2 supported approximately 2,500 applications. Id. p 46. This misses the point. That some developers write applications for other operating systems is not at all inconsistent with the finding that the applications barrier to entry discourages many from writing for these less popular platforms. Indeed, the District Court found that IBM's difficulty in attracting a larger number of software developers to write for its platform seriously impeded OS/2's success. Id. p 46." [*Ibid.*, II. A (1) b.]

12. " Microsoft does not dispute that Windows supports many more applications than any other operating system. It argues instead that '[i]t defies common sense' to suggest that an operating system must support as many applications as Windows does (more than 70,000, according to the District Court, id. p 40) to be competitive. Appellant's Opening Br. at 96. " [*Ibid.*, II. A (1) b.]

13. " Consumers, Microsoft points out, can only use a very small percentage of these applications. Id. As the District Court explained, however, the applications barrier to entry gives consumers reason to prefer the dominant operating system even if they have no need to use all applications written for it: " [*Ibid.*, II. A (1) b.]

14. " Thus, despite the limited success of its rivals, Microsoft benefits from the applications barrier to entry. " [*Ibid.*, II. A (1) b.]

15. In the spirit of barring competition, MS did not hesitate to exercise its immense power to bar SUN's competition in JAVA markets in retaliation for SUN's "betrayal" of MS in district court. MS business practice of using code in monopolized OS to bar software developers seriously and unlawfully damaged markets where SUN and PL were competitors and, thereby, seriously and unlawfully injured SUN and PL.

16. "It is certainly true that Windows may have gained its initial dominance in the operating system market competitively--through superior foresight or quality. But this case is not about Microsoft's initial acquisition of monopoly power. It is about Microsoft's efforts to maintain this position through means other than competition on the merits. " [*Ibid.*, II. A (1) b.]

17. Microsoft, using Compaq and Radioshack as distribution channel nodes, sought not only to gouge consumers for an essential resource but to maintain monopoly at the expense of SUN and those depending on SUN's technology.

18. " Because the applications barrier to entry protects a dominant operating system irrespective of quality, it gives Microsoft power to stave off even superior new rivals. The barrier is thus a characteristic of the operating system market, not of Microsoft's popularity, or, as asserted by a Microsoft witness, the company's efficiency. See Direct Testimony of Richard Schmalensee p 115, reprinted in 25 J.A. at 16153-14." [*Ibid.*, II. A (1) b.]

C. Anticompetitive Conduct

1. Defendants engaged in a variety of exclusionary acts to maintain MS dominance in relevant markets by (1) precluding competition in WD, SD and ISP markets by preventing the effective distribution and use of JDK and other software threatening MS monopoly in OS markets, (2) precluding competition against MS in JDS markets, and (3) restraining competition in WD and SD markets

2. "As discussed above, having a monopoly does not by itself violate s 2. A firm violates s 2 only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct 'as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.' Grinnell, 384 U.S. at 571; see also *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.) ('The successful competitor, having been urged to compete, must not be turned upon when he wins.')." [*Ibid.*, II. B.]

3. "But there are also technological strategies for predation, such as those concerned with Interoperability. These too have many parallels with other monopolies.

In high tech markets, it is often the case that products must interoperate with each other. AT&T tried to limit the ability of competitors products to interoperate with the AT&T telephone network, by withholding technical information, using proprietary technologies, or by changing standards to create incompatibilities of rivals products. IBM did this. Intel is doing this now. Microsoft has done this for a long time, going back to the days when programmers coined the phrase, "DOS isn't done until Lotus won't run," referring to Microsoft's introduction of minor changes in DOS that created problems with Lotus 123, the spreadsheet program that is a competitor to Microsoft's Excel. If Microsoft can't make its own products look better by taking advantage of technical back doors, it can make a rivals products perform badly, or it can make its own products technically essential, as it is trying to do with the browser. " [*Microsoft's Ambitions and Antitrust Policy Remarks at the April 20, Monday, Cato Institution Policy Forum on Antitrust and Microsoft* published by Ralph Nader and James Love:
<http://www.corpwatch.org/trac/feature/microsoft/monopoly/catoapril20.html>]

4. When Microsoft precluded *Lotus 1-2-3* it also precluded *PFS: FIRST GRAPHICS*. Later in the Windows OS (including DOS shell), Microsoft precluded Lotus' *SMARTSUITE* and *NOTES* as well as *1-2-3*, while continuing preclusion of *GOLF COACH*.

5. Microsoft turned on its business associate, Sun Microsystems, and attacked SUN with an exclusionary weapon (source code inter 98) via co-conspirators named defendants herein. Conspiracy against SUN directly and proximately restrained competition in WD and SD markets where PL was a competitor.

6. "In this case, after concluding that Microsoft had monopoly power, the District Court held that Microsoft had violated s 2 by engaging in a variety of exclusionary acts... to maintain its monopoly by preventing the effective distribution and use of products that might threaten that monopoly." [*Ibid.*, II. B.]

7. It is hard to find a more authoritative statement that the one above to more clearly affirm PL's claim(s).

D. Liability For Antitrust Injury to ISP, WD and SD Companies via Exclusionary Conduct

1. "Specifically, the District Court held Microsoft liable for: (1) the way in which it integrated IE into Windows; (2) its various dealings with Original Equipment Manufacturers ("OEMs"), Internet Access Providers ("IAPs"), Internet Content Providers ("ICPs"), Independent Software Vendors ("ISVs"), and Apple Computer; (3) its efforts to contain and to subvert Java technologies; and (4) its course of conduct as a whole. Microsoft [said] that it did not engage in any exclusionary conduct." [*Ibid.*, II. B.]

2. PL is an ISV. MS has been convicted of injuring ISVs. MS conviction for subverting Java technologies, and associated businesses including PL, upheld by Court of Appeals because MS did not and can not offer sufficient pro-competitive justification.

3. "From a century of case law on monopolization under s 2, however, several principles do emerge. First, to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice. 'The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.' *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993); see also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ('Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws....')." [*Ibid.*, II. B.]

4. Defendants destroyed the competitive process itself injuring PL and a vast number of (1) other companies trying to compete in website and software development markets, and (2) consumers worldwide.

5. "Second, the plaintiff, on whom the burden of proof of course rests, see, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984); see also *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n.5 (1967), over-ruled on other grounds, *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. See generally *Brooke Group*, 509 U.S. at 225-26. In a case brought by a private plaintiff, the plaintiff must show that its injury is 'of the type that the statute was intended to forestall,' *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977) (quoting *Wyandotte Transp. v. United States*, 389 U.S. 191, 202 (1967)); no less in a case brought by the Government, it must demonstrate that the monopolist's conduct harmed competition, not just a competitor." [*Ibid.*, II. B.]

6. MS, COM and RS were willing agents of harm to competition and, thereby, caused antitrust injury to PL.

7. There can be no serious question that PL has alleged injury of the type antitrust statutes are intended to forestall. At discovery PL will *demonstrate* what has been clearly required by appellate court, " that the monopolist's conduct harmed competition, not just a competitor."

E. Anticompetitive Detriment Versus Pro-competitive Benefit

1. Defendants' proven anticompetitive conduct outweighs all pro-competitive benefits that have been or can be alleged.

2. "Third, if a plaintiff successfully establishes a prima facie case under s 2 by demonstrating anticompetitive effect, then the monopolist may proffer a 'pro-competitive justification' for its conduct. See *Eastman Kodak*, 504 U.S. at 483. If the monopolist asserts a pro-competitive justification--[] claiming that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal--then the burden shifts back to the plaintiff to rebut that claim. Cf. *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993)." [*Ibid.*, II. B.]

3. MS offered little or no claim(s) for pro-competitive justification in *U.S. v Microsoft*, and cannot do so re this complaint.

4. "Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of s 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct. See, e.g., *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ('knowledge of intent may help the court to interpret facts and to predict consequences'); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985)."

5. MS breached sec. 2 and other laws and is liable to PL for damages with or without proven intent to injure PL.

6. "In sum, we hold that with the exception of the one restriction prohibiting automatically launched alternative interfaces, all the OEM license restrictions at issue represent uses of Microsoft's market power to protect its monopoly, unredeemed by any legitimate justification. The restrictions therefore violate s 2 of the Sherman Act." [*Ibid.*, II. B (1) b.]

F. Anticompetitive Effect of Code in 98

1. The following excerpts from the appellate review of *U.S. v. Microsoft* serve to complement PL's assertion that changes in 98 relating to JDK preclusion were anticompetitive and without countervailing pro-competitive benefit and clearly violated 15 U.S.C., sec. 2. and supplementary California laws.

2. "As a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes. See, e.g., *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544-45 (9th Cir. 1983)." [*Ibid.*, II. B (2) a.]

3. "In a competitive market, firms routinely innovate in the hope of appealing to consumers, sometimes in the process making their products incompatible with those of rivals; the imposition of liability when a monopolist does the same thing will inevitably deter a certain amount of innovation. This is all the more true in a market, such as this one, in which the product itself is rapidly changing. See Findings of Fact p 59."

4. "Judicial deference to product innovation, however, does not mean that a monopolist's product design decisions are per se lawful. See *Foremost Pro Color*, 703 F.2d at 545; see also *Cal. Computer Prods.*, 613 F.2d at 739, 744; *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 1007-08 (N.D. Cal. 1979)."

5. In fact, Microsoft "design changes" equating with source code changes in 98, are, according to the recent ruling by the United States Court of Appeals for the District of Columbia, *per se* unlawful.

6. "The District Court first condemned as anticompetitive Microsoft's decision to exclude IE from the "Add/Remove Programs" utility in Windows 98. Findings of Fact p 170. Microsoft had included IE in the Add/Remove Programs utility in Windows 95, see *id.* p p 175-76, but when it modified Windows 95 to produce Windows 98, it took IE out of the Add/Remove Programs utility. This change reduces the usage share of rival browsers not by making Microsoft's own browser more attractive to consumers but, rather, by discouraging OEMs from distributing rival products. See *id.* p 159."

7. "Because Microsoft's conduct, through something other than competition on the merits, has the effect of significantly reducing usage of rivals' products and hence

protecting its own operating system monopoly, it is anticompetitive; we defer for the moment the question whether it is nonetheless justified."

8. "Second, the District Court found that Microsoft designed Windows 98 'so that using Navigator on Windows 98 would have unpleasant consequences for users' by, in some circumstances, overriding the user's choice of a browser other than IE as his or her default browser. *Id.* p p 171-72. Plaintiffs argue that this override harms the competitive process by deterring consumers from using a browser other than IE even though they might prefer to do so, thereby reducing rival browsers' usage share and, hence, the ability of rival browsers to draw developer attention away from the APIs exposed by Windows."

9. "Microsoft does not deny, of course, that overriding the user's preference prevents some people from using other browsers. Because the override reduces rivals' usage share and protects Microsoft's monopoly, it too is anticompetitive."

10. "Finally, the District Court condemned Microsoft's decision to bind IE to Windows 98 'by placing code specific to Web browsing in the same files as code that provided operating system functions.' *Id.* p 161; see also *id.* p p 174, 192."

11. "Putting code supplying browsing functionality into a file with code supplying operating system functionality 'ensure[s] that the deletion of any file containing browsing-specific routines would also delete vital operating system routines and thus cripple Windows....' *Id.* p 164. As noted above, preventing an OEM from removing IE deters it from installing a second browser because doing so increases the OEM's product testing and support costs; by contrast, had OEMs been able to remove IE, they might have chosen to pre-install Navigator alone. See *id.* p 159."

12. PL contends, and will prove at trial with expert witness(es), similar MS code construction(s) used to preclude JDK download/setup inter 98.

13. "Microsoft denies, as a factual matter, that it commingled browsing and non-browsing code, and it maintains the District Court's findings to the contrary are clearly erroneous. According to Microsoft, its expert 'testified without contradiction that '[t]he very same code in Windows 98 that provides Web browsing functionality' also performs essential operating system functions--not code in the same files, but the very same software code.' Appellant's Opening Br. at 79 (citing 5 J.A. 3291-92)."

14. "Microsoft's expert did not testify to that effect 'without contradiction,' however. A Government expert, Glenn Weadock, testified that Microsoft 'design[ed] [IE] so that some of the code that it uses co-resides in the same library files as other code needed for Windows.' Direct Testimony p 30. Another Government expert likewise testified that one library file, SHDOCVW.DLL, 'is really a bundle of separate functions. It contains some functions that have to do specifically with Web browsing, and it contains some general user interface functions as well.' 12/14/98 am Tr. at 60-61 (trial testimony of Edward Felten), reprinted in 11 J.A. at 6953-54. One of Microsoft's own documents suggests as much. See Plaintiffs' Proposed Findings of Fact p 131.2.vii (citing GX 1686 (under seal))

(Microsoft document indicating some functions in SHDOCVW.DLL can be described as "IE only," others can be described as "shell only" and still others can be described as providing both "IE" and "shell" functions))."

15. PL contends that modified downloading and/or setup functions were in SHDOCVW.DLL or similar file(s), inter 98.

"Second, as to the placement of code in Windows 98 files (see Opinion 38; FF 174), Microsoft offers only a selective review of evidence already considered by the Court. Its proposed reweighing of that evidence is insufficient to establish a need for rehearing. " [United States v. Microsoft Corp., USCA (DC Cir.), case nos. 00-5212, 00-5213, Appellees' Response To Petition For Rehearing, p. 2]

16. "In view of the contradictory testimony in the record, some of which supports the District Court's finding that Microsoft commingled browsing and non-browsing code, we cannot conclude that the finding was clearly erroneous. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ('If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.')

17. "Accordingly, we reject Microsoft's argument that we should vacate Finding of Fact 159 as it relates to the commingling of code, and we conclude that such commingling has an anticompetitive effect; as noted above, the commingling deters OEMs from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the API set exposed by Microsoft's operating system." [Ibid.]

F. Foreclosure of SUN's Software Increased Barriers To Entry

1. There is a causal link between Microsoft's anticompetitive conduct in regard to the distribution of JDK and the maintenance of Microsoft's operating system monopoly.

2. Preclusion of JDK and other software available on SUN's website from download/setup/run on 98 not only injured SUN's business and that of PL, it also injured OS competitors worldwide by restricting access to Application Programming Interfaces ["API"] and thus increasing barriers to entry into OS competition. This fact is no longer debatable in federal court.

3. "As a final parry, Microsoft urges this court to reverse on the monopoly maintenance claim, because plaintiff never established a causal link between Microsoft's anti-competitive distribution channels, and the maintenance of Microsoft's operating system monopoly. See Findings of Fact p 411." [Ibid., II. (C), p 39]

4. "In short, causation affords Microsoft no defense to liability for its unlawful actions undertaken to maintain its monopoly in the operating system market." [Ibid., II.(C), p 41]

5. Microsoft's appellate brief admits to the preclusion of java development software, but argues that preclusion has not been directly linked to monopolization. The Court of Appeals ruled otherwise and upheld District Court's determination of MS liability not only for software preclusion but for the effects of preclusion on maintenance of the OS monopoly. Defendants caused direct and indirect antitrust injury to PL via intentional breach of 15 U.S.C., sec. 2.

V. CAUSE OF ACTION WITH SPECIFICITY

A. Microsoft Enjoys High Profit Margins

1. "High profit margins might appear to be the benign and necessary recovery of legitimate investment returns ..., but they might represent exploitation of customer lock-in and monopoly power when viewed through the lens of network economics..." [*United States of America v. Microsoft Corporation*, USCA, (DC Cir.), Case Nos. 00-5212, 00-5213, Introduction, p. 13]

2. Microsoft enjoyed excessively high profit margins long after amortizing its software development costs for 95 and 98. Defendants monopolistic profits from pricing alleged injurious in this complaint, represent "exploitation of consumer lock-in and monopoly power". A great many consumers and businesses, including PL's class, were locked-in to the purchase of 98 and/or the use of JDS. PL experienced absolute purchase "lock-in" due to the professional requirements for website and software development companies.

B. Defendants Conspired To Restrain Trade

1. 15 U.S.C., section 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction therefore, shall be punished by fine not exceeding \$10,000,000. if a corporation, or, if any other person, \$350,000. or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

2. "In conspiracy, two different types of intent are generally required -- basic intent to agree, which is necessary to establish existence of conspiracy, and more traditional intent to effectuate object of conspiracy; general rule that intent is indispensable element of criminal offense is as true in sophisticated criminal antitrust case as in one involving any other criminal offense." [*United States v United States Gypsum Co. (1978)*, 438 US 422, 57 L Ed 2d 854, 98 S Ct 2864]

3. "Thus, this is a case in which the alleged section 1 and section 2 conspiracies are entirely coterminous with one another. With the possible exception of the per-processor licensing fees and long-term distribution contracts that expired near the beginning of the

class period, plaintiffs allege no actual or intended restraint of trade short to monopolization." [*Ibid.*]

4. "Accordingly, the sufficiency of plaintiffs' allegations must be gauged by the elements of a section 2 claim. Otherwise, plaintiffs could circumvent the requirements of a conspiracy to monopolize claim, including the requirement that a defendant be shown to have acted with the specific intent to monopolize, simply by characterizing their claim as one arising under section 1, whose elements of proof are not as stringent." [*Ibid.*]

5. "Of course, in most cases (where plaintiffs allege a restraint of trade that may or may not be sufficiently effective to threaten or result in monopolization), section 1 and 2 conspiracy claims can be separately pursued without plaintiffs being required to plead and prove section 2 elements as part of their section 1 claims. However, the "threshold showing" in such cases for both the section 1 and section 2 claims are the same. See e.g. *Weit v. Con'l Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457, 458 (7th Cir. 1981) (addressing conspiracy charges pursued under both sections); see also *United States v. Griffith*, 334 U.S. 100, 106 (1948) (exploring the relationship between section 1 and section 2 claims), overruled on other grounds, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 763 n.8 (1984); cf. *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991) (noting common "threshold showing" required by the two sections); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1460 n.35 (11th Cir. 1991) (same); *Wagner v. Magellan Health Servs. Inc.*, 121 F. Supp.2d 673, 679 & n.1 (N.D. Ill. 2000) (same). However, since the section 2 claim has a higher intent requirement than does the section 1 claim, plaintiffs might prevail on the latter claim while losing on the former. *Wagner*, 121 F. Supp.2d at 681 ('A conspiracy to monopolize under Section 2 is somewhat different from its Section 1 counterpart because of its heightened intent element.') In the present case, that is not so, given the nature of plaintiffs' allegations and the admittedly fierce competition in the market in which the OEM defendants compete. The section 1 and 2 claims necessarily rise and fall together since the only unlawful intent alleged is the intent to preserve Microsoft's monopolies. Cf. 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, (1996) ('[I]n those instances where power is a prerequisite to holding an agreement to be an unreasonable restraint of trade [under section 1]...it would make no sense to hold the same agreement offensive to sec. 2 without proof of power.') " [*In Re Microsoft Corp. Antitrust Litigation*, MDL No. 1332, *Opinion*, p. 3-5]

a. MS used per-processor licensing fees or *de facto* per-processor licensing fees among numerous other "incentives" to extract conspiratorial cooperation from COM. (see abundance of evidence in *U.S. v. Microsoft*)

b. MS and COM brought RS into their combination via long-term wholesale contracts for software and hardware.

c. MS built trusts of OEMs and other companies, like RS, just as surely as Standard Oil, Inc. built trusts of oil producers and other companies.

C. MS Used Price Discrimination and Overcharging To Monopolize Markets and Maximize Revenues

1. MS attempted to, and in fact did, illegally increase its revenues and preclude competition in OS, OPS and other software markets by selling licenses to certain favored OEMs at super-wholesale prices well below those paid by non-favored OEMs and all other retailers, including RS. MS price discrimination (conspiracy) allowed favored OEMs, for profitability, to charge \$X. for MS-Windows 98, \$Y. for MS-Office and \$Z. for MS-Works when wholesale prices charged non-OEMs, including RS, required, for profitability, sales of same software at prices well above \$X., \$Y., and \$Z., respectively.

D. Indirect Purchaser(s) Were Measurably Injured by Each Defendant

1. MS affiliation with COM and/or RS (20% or more equity via direct or indirect stock ownership), effective operating control of COM and/or RS, and certain pre-existing contracts (1) for MS software contracted for directly and/or indirectly by RS and (2) pre-existing, cost-plus contracts between RS and consumers make purchasers of MS software from RS *direct* purchasers of software from MS for purposes of antitrust litigation.

2. Pre-existing, cost-plus contracts allow simple, accurate calculation of the amount of manufacturer's super-wholesale charge(s) passed on by the chain of distribution via wholesale and retail prices charged. Thereby, the exact amount of *direct* MS injury to consumers making purchases from RS can be accurately determined and proven. Therefore, PL, technically an indirect purchaser, can allege direct, monopolistic pricing injury inflicted by MS.

3. In April 1998, plaintiff did not own or have qualification for a VISA / MASTERCARD type credit card. When plaintiff acquired a COMPAQ "Presario" notebook computer installed with WINDOWS 95, and other MS software, from RS in Lihue, Kauai he contracted to make payments to a friend who also did not have use of a standard credit card but did have the RS credit-card and was able to make purchase(s) of computer / software with the RS credit-card requiring regular monthly cash payments (with plaintiff's money) of at least \$10.00 or 2.4% of balance whichever was less at time of payment. Friend got free use of computer, positive payments history (for credit rating purposes), instructional benefits and certain other intangible benefits in exchange for making the purchase.

4. Initial cost (balance) for PL's computer / software was \$1,500.

5. Less than thirty (30) days after purchase, and just prior to making first payment, plaintiff ordered and purchased WINDOWS 98 from same retailer using same credit-card. Retailer merely increased credit-card balance by \$100., the full retail price.

6. Within time limits for escape from late charge, plaintiff made first payment: \$1600. x 2% (APR/12) = \$32. = \$1632. x 2.4% = \$39.17

7. Had plaintiff not made the second purchase, minimum first payment would have been: $\$1500. \times 2\% = \$30. = \$1530. \times 2.4\% = \36.72

8. Purchase of WINDOWS 98 cost plaintiff an additional \$2.45 per month which was so *de minis* that plaintiff did not hesitate to acquire the newly released, state-of-the-art operating system. Later, PL realized that 98 would cost over \$200. including interest charges.

9. Assuming that the MS wholesale price was an "overcharge", and RadioShack 's customers who had already used the RadioShack credit-card to purchase a computer with 95 installed had inelastic demand for 98, RadioShack could charge those customers "top dollar" (full retail price) for 98. Retailer had "no incentive to absorb any of the overcharge" in order to optimize revenues from sales of WINDOWS 98 to customers in PL's class because demand was inelastic at the RS formula price. Retailer was able to "pass on the full amount of the illegal overcharge without any loss of sales volume" to customers in PL's class. [*Jewish Hospital Ass'n v Stewart Mechanical, Etc.*, 628 F.2d 975 (1980)]

10. Manufacturer's overcharge could be, and was, passed-on entirely from retailer to consumer including retailer's fixed percentage markup. In this case, Microsoft's overcharge of \$A. can be simply and accurately determined from RadioShack's retail price, minus retailer's fixed percentage markup.

11. Considering MS operating control of COM and RS, plaintiff made a *direct* purchase from both MS and RadioShack in what was, effectively, *one sale* costing plaintiff \$A. plus \$m., where \$A. was MS "wholesale" price passed on by RS, and \$m. was RadioShack's markup for distribution, on-going services, etc. Use of credit card to pay the selling price composed of (1) RS "cost", "plus" (2) standard RS retail markup, was execution of a pre-existing, cost-plus contract.

12. "In other words, because passing on the entire amount of the overcharge cannot decrease its sales, the direct purchaser has no incentive to absorb any of the overcharge itself. This being so, the problem of tracing the overcharge to the indirect purchaser is eliminated." [*Ibid.*, p. 976]

13. There was a virtual inelasticity of demand for 98 by RadioShack's customers in PL's class having a credit-card account already used to purchase a COMPAQ computer installed with 95. There was virtual inelasticity of supply on Kauai for 98 if purchased on a special rate/availability "credit-card", like that of RadioShack. Many RS credit-card holders, like plaintiff's purchasing agent, did not have a standard (VISA, MASTERCARD, etc.) credit card with sufficient credit limit to allow purchase of a computer and peripherals costing over \$1,000. That is why the RadioShack card was (is) so popular and successful.

14. "Therefore, the middlemen had no incentive to absorb any of the wholesale (price) themselves. Because these highly inelastic short-term supply conditions made it simple to

calculate the amount of the pass-through, the Fifth Circuit found the rationale of *Illinois Brick* inapplicable and held the plaintiffs had alleged the functional equivalent of a pre-existing cost-plus contract." [*In Re Beef Industry Antitrust Litigation*, 600 F.2d at 1164-65.]

15. "When the impact of an overcharge on a middleman's pricing decisions can be so determined, the uncertainties involved in resorting to general economic theorems are avoided and the clarity of the evidence virtually eliminates the possibility of overlapping liabilities as the result of inconsistent verdicts in separate lawsuits." [*Ibid.*]

16. Even without inelasticity of demand or supply for WINDOWS 98, all customers in PL's class using the RadioShack credit-card wanting and willing to purchase 98 at some reasonable price would purchase at RadioShack's full retail price because discounting the retail price would have had very little or no impact on sales to customers with inelastic demand.

E. Competitive Injury to Website and Software Developers Via JDK Preclusion

1. PL is an ICP and ISV by appellate court's definitions.

2. "The District Court held that Microsoft engages in exclusionary conduct in its dealings with ICPs, which develop websites; ISVs, which develop software; and Apple, which is both an OEM and a software developer. See Conclusions of Law, at 42-43 (deals with ICPs, ISVs, and Apple 'supplemented Microsoft's efforts in the OEM and IAP channels')." [USCA (DC Cir.), Nos. 00-5212, 00-5213]

3. "The District Court condemned Microsoft's deals with ICPs and ISVs, stating: 'By granting ICPs and ISVs free licenses to bundle [IE] with their offerings, and by exchanging other valuable inducements for their agreement to distribute, promote, and rely on [IE] rather than Navigator, Microsoft directly induced developers to focus on its own APIs rather than ones exposed by Navigator.' *Id.* (citing Findings of Fact p p 334-35, 340)." [*Ibid.*]

4. "As for Microsoft's ISV agreements, however, the District Court did not enter a similar finding of no substantial effect. The District Court described Microsoft's deals with ISVs as follows:" [*Ibid.*]

5. "In dozens of 'First Wave' agreements signed between the fall of 1997 and the spring of 1998, Microsoft has promised to give preferential support, in the form of early Windows 98 and Windows NT betas, other technical information, and the right to use certain Microsoft seals of approval, to important ISVs that agree to certain conditions. One of these conditions is that the ISVs use Internet Explorer as the default browsing software for any software they develop with a hypertext-based user interface. Another condition is that the ISVs use Microsoft's 'HTML Help,' which is accessible only with Internet Explorer, to implement their applications' help systems. *Id.* p 339." [*Ibid.*]

6. "The District Court further found that the effect of these deals is to 'ensure [] that many of the most popular Web-centric applications will rely on browsing technologies found only in Windows,' id. p 340, and that Microsoft's deals with ISVs therefore 'increase[] the likelihood that the millions of consumers using [applications designed by ISVs that entered into agreements with Microsoft] will use Internet Explorer rather than Navigator.' Id. p 340." [*Ibid.*]

7. "The District Court did not specifically identify what share of the market for browser distribution the exclusive deals with the ISVs foreclose. Although the ISVs are a relatively small channel for browser distribution, they take on greater significance because, as discussed above, Microsoft had largely foreclosed the two primary channels to its rivals. In that light, one can tell from the record that by affecting the applications used by "millions" of consumers, Microsoft's exclusive deals with the ISVs had a substantial effect in further foreclosing rival browsers from the market. (Data introduced by Microsoft, see Direct Testimony of Cameron Myhrvold p 84, reprinted in 6 J.A. at 3922-23, and subsequently relied upon by the District Court in its findings, see, e.g., Findings of Fact p 270, indicate that over the two-year period 1997-98, when Microsoft entered into the First Wave agreements, there were 40 million new users of the internet.)" [*Ibid.*]

8. "Because, by keeping rival browsers from gaining widespread distribution (and potentially attracting the attention of developers away from the APIs in Windows), the deals have a substantial effect in preserving Microsoft's monopoly, we hold that plaintiffs have made a prima facie showing that the deals have an anticompetitive effect." [*Ibid.*]

9. "Of course, that Microsoft's exclusive deals have the anticompetitive effect of preserving Microsoft's monopoly does not, in itself, make them unlawful. A monopolist, like a competitive firm, may have a perfectly legitimate reason for wanting an exclusive arrangement with its distributors. Accordingly, Microsoft had an opportunity to, but did not, present the District Court with evidence demonstrating that the exclusivity provisions have some such pro-competitive justification. See Conclusions of Law, at 43 (citing Findings of Fact p p 339-40) ('With respect to the ISV agreements, Microsoft has put forward no pro-competitive business ends whatsoever to justify their exclusionary terms.')." [*Ibid.*]

10. "On appeal Microsoft likewise does not claim that the exclusivity required by the deals serves any legitimate purpose; instead, it states only that its ISV agreements reflect an attempt 'to persuade ISVs to utilize Internet-related system services in Windows rather than Navigator.' Appellant's Opening Br. at 114." [*Ibid.*]

11. "As we explained before, however, keeping developers focused upon Windows--that is, preserving the Windows monopoly-- is a competitively neutral goal. Microsoft having offered no pro-competitive justification for its exclusive dealing arrangements with the ISVs, we hold that those arrangements violate s 2 of the Sherman Act." [*Ibid.*]

12. "Java, a set of technologies developed by Sun Microsystems, is another type of middleware posing a potential threat to Windows' position as the ubiquitous platform for software development. Findings of Fact p 28. The Java technologies include: (1) a programming language; (2) a set of programs written in that language, called the "Java class libraries," which expose APIs; (3) a compiler, which translates code written by a developer into "bytecode"; and (4) a Java Virtual Machine ("JVM"), which translates bytecode into instructions to the operating system. Id. p 73. Programs calling upon the Java APIs will run on any machine with a "Java runtime environment," that is, Java class libraries and a JVM. Id. p p 73, 74." [*Ibid.*]

13. "In May 1995 Netscape agreed with Sun to distribute a copy of the Java runtime environment with every copy of Navigator, and 'Navigator quickly became the principal vehicle by which Sun placed copies of its Java runtime environment on the PC systems of Windows users.' Id. p 76." [*Ibid.*]

14. "Microsoft, too, agreed to promote the Java technologies--or so it seemed. For at the same time, Microsoft took steps 'to maximize the difficulty with which applications written in Java could be ported from Windows to other platforms, and vice versa.' Conclusions of Law, at 43." [*Ibid.*]

F. Outright Deception and Preclusion of Java Developers Injured PL

1. In 1998, only SUN and MS offered consumers java development software. Today, JDS is sold by Borland, WebGain, Macromedia, IBM and others.

2. "Microsoft's 'Java implementation' included, in addition to a JVM, a set of software development tools it created to assist ISVs in designing Java applications. The District Court found that, not only were these tools incompatible with Sun's cross-platform aspirations for Java--no violation, to be sure-- but Microsoft deceived Java developers regarding the Windows-specific nature of the tools. Microsoft's tools included 'certain 'keywords' and 'compiler directives' that could only be executed properly by Microsoft's version of the Java runtime environment for Windows.' Id. p 394; see also Direct Testimony of James Gosling p 58, reprinted in 21 J.A. at 13959 (Microsoft added 'programming instructions ... that alter the behavior of the code.')." [*Ibid.* USCA (DC Cir.), Decision of June 28, 2001]

3. "As a result, even Java 'developers who were opting for portability over performance ... unwittingly [wrote] Java applications that [ran] only on Windows.' Conclusions of Law, at 43."

4. "That is, developers who relied upon Microsoft's public commitment to cooperate with Sun and who used Microsoft's tools to develop what Microsoft led them to believe were cross-platform applications ended up producing applications that would run only on the Windows operating system."

5. This is precisely why PL needed JDK, and incurred business injury when JDK downloads would not run on 98.

6. "When specifically accused by a PC Week reporter of fragmenting Java standards so as to prevent cross-platform uses, Microsoft denied the accusation and indicated it was only 'adding rich platform support' to what remained a cross- platform implementation. An e-mail message internal to Microsoft, written shortly after the conversation with the reporter, shows otherwise:"

7. "[O]k, i just did a follow up call.... [The reporter] liked that i kept pointing customers to w3c standards [(commonly observed internet protocols)].... [but] he accused us of being schizo with this vs. our java approach, i said he misunderstood [--] that [with Java] we are merely trying to add rich platform support to an interop layer.... this plays well.... at this point its [sic] not good to create MORE noise around our win32 java classes. instead we should just quietly grow j [(Microsoft's development tools)] share and assume that people will take more advantage of our classes without ever realizing they are building win32-only java apps. GX 1332, reprinted in 22 J.A. at 14922-23."

8. "Finally, other Microsoft documents confirm that Microsoft intended to deceive Java developers, and predicted that the effect of its actions would be to generate Windows-dependent Java applications that their developers believed would be cross-platform; these documents also indicate that Microsoft's ultimate objective was to thwart Java's threat to Microsoft's monopoly in the market for operating systems. One Microsoft document, for example, states as a strategic goal:"

9. "Kill cross-platform Java by grow[ing] the polluted Java market." GX 259, reprinted in 22 J.A. at 14514; see also *id.* ("Cross-platform capability is by far the number one reason for choosing/using Java.") (emphasis in original).

10. "Microsoft's conduct related to its Java developer tools served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive. Unsurprisingly, Microsoft offers no pro-competitive explanation for its campaign to deceive developers. Accordingly, we conclude this conduct is exclusionary, in violation of s 2 of the Sherman Act." [*Ibid.*]

11. This decision cited as *prima facie* evidence makes defendants *per se* liable when PL's claims are proven.

12. PL has antitrust standing with cause of action to sue Defendants for monopolistic overcharge because PL is exempted from *Illinois Brick* bar of litigation by indirect purchasers for reasons: (1) MS operating control and/or equity control of COM and RS makes sale to PL a *direct* sale, and (2) PL can prove exact amount of overcharge by each member of the combination in the chain of sale.

G. Each defendant inflicted direct and accurately measurable antitrust injury because:

1. MS had "operational control" of COM which gave "operational control" of RS.
2. MS had direct and/or indirect stock ownership in COM and/or RS.
3. Microsoft-Compaq-RadioShack were in contractual combination and conspired to maintain and exploit Microsoft's OS monopoly via price discrimination, software preclusion and software overcharges, and thereby sought to illegally maximize revenues.
4. Existence of pre-existing, cost-plus contracts allow precise calculation of each defendants' charge(s) in the chain of sale from manufacturer to retailer(s) to customer.
5. A software license is a "purchase", and indirect purchasers of software license(s) in PL's class of purchasers paid accurately measurable charges at each level of distribution.

VI. STANDING

1. This complaint declares Plaintiffs, Edward Michael O'Brien and the Golf O'Brien Company, likely to prevail on claims because pleadings satisfy federal court's antitrust standards.
2. Under 15 U.S.C., sec. 15(a), an action for treble damages may be brought by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Despite the broad wording of the statutory language, courts have limited the class of plaintiffs who may proceed with an antitrust action. Thus, even if a plaintiff can show harm from an antitrust violation sufficient for Article III standing requirements, the courts "must make a further determination whether the plaintiff is a proper party to the action. *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 535 n.31, 103 S.Ct. 893, 74 L.Ed2d 723 (1983)." This further determination has been referred to as "antitrust standing". [*Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1469 n.2 (9th Cir. 1985)]
3. "[D]etermination of standing is a question of law, defining the limits to which private treble damage actions may be brought for injuries caused in fact by violation of antitrust laws." *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 449 (9th Cir. 1985), cert. denied 472 U.S. 1018, 105 S.Ct. 3481, 87 L.Ed.2d 616 (1985). To determine whether a party has standing, courts analyze the facts of each case in light of the policy factors enumerated in *Associated General Contractors*, 469 U.S. at 538-45. The factors to consider are: (1) the nature of plaintiff's alleged injury--whether it was the type the antitrust laws were intended to forestall, (2) the directness of the injury, (3) the speculative nature of the harm, (4) the risk of duplicative recovery, and (5) the complexity in the apportioning of damages. *Bubar*, 752 F.2d at 449 (citing *Associated General Contractors*, 459 U.S. at 38-45). In addition, a court should consider whether more direct victims of the alleged

violations exist. Associated General Contractors, 459 U.S. at 545." [*Edward M. O'Brien v. Adobe Systems, Inc.*, CV 99-7863 AHM (RZx), Order of September 27, 1999]

4. Nature of Alleged Injury:

PL alleges that it was both a competitor with Microsoft in certain markets for software and a consumer of MS, COM and RS products well before and during time of cause of action. PL sustained injury not merely to its' person/business but to its competitive position in relevant markets noted above. PL's loss of investment, property, customers and revenues can be very conservatively estimated at \$2,000,000. per year over time of cause of action. Loss of plaintiff O'Brien's income and/or livelihood from business injury, and exacerbation of federally documented disability, is conservatively estimated at \$1,500,000. per year. Loss of investments, property, customers and revenues to the multiplicity of companies competing with PL, MS and/or COM and/or RS in relevant markets can be estimated in the billions of dollars.

5. Directness of Injury:

PL alleges that it was injured by Defendants directly and proximately.

6. Nature of Harm:

PL alleges precisely quantifiable and clearly qualifiable harm that in no wise requires speculation for its evaluation.

7. Duplicative Recovery Probability:

PL alleges unique sets of facts and circumstances in this action that have no conceivable probability of duplication by another plaintiff or class of same.

8. Complexity of Apportionment of Damages:

PL alleges damages that are precisely, clearly and simply apportioned to the plaintiff in this action.

9. PL's complaint clearly alleges that it was a "participant" in the market(s) of the alleged wrongdoers as well as their customer, and thereby asserts as a "proper party" antitrust injury and sufficient standing to bring action.

10. PL's claims are such that there exists reasonable probability that evidence can be assembled at discovery and presented at trial sufficient for proof of claims and conviction of Defendants. Therefore, PL states claims upon which relief can be granted.

VII. CHARGES

A. Defendants Restrained Trade and Commerce and Breached Sec. 1

1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000. if a corporation, or, if any other person, \$350,000., or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [Title 15, United States Codes, section 2.]

2. Microsoft, Compaq and Radio Shack combined, via contracts and concerted actions, to restrain trade and commerce throughout the United States and internationally before and after April 3, 2000 when Microsoft was convicted in district court of illegal monopolization. The conspiracy continues today to intentionally restrain competition (trade) on behalf of Microsoft and to injure businesses and consumers, including PL, by (1) overcharging for monopolized software, and (2) selling monopolized software that intentionally precludes competition, including website construction and software development competition.

B. Each Defendant Increased Microsoft's Monopoly and is Individually and Collectively Liable

1. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000. if a corporation, or, if any other person, \$350,000. or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [Title 15, United States Codes, section 1.]

2. Defendants illegally monopolized the computer operating system market and attempted to monopolize the java development market by combining, conspiring and acting to restrain trade and preclude competition among the several States and in foreign nations. The conspiracy continues today, even after Microsoft's conviction(s) for monopolization have been ordered, appealed and upheld by an appellate court, to intentionally restrain competition (trade) on behalf of Microsoft and to damage businesses and consumers, including PL, in ways stated above.

C. Defendants Individually and Collectively Caused Antitrust Injury To Plaintiff and Other Consumers and Competitors

1. "Antitrust laws were designed to prevent restraints to free competition in business and commercial transactions which tend to restrict production, raise prices, or otherwise

control [the] marketplace to detriment of purchaser or consumers of goods and services." [Lee-Moore Oil Co. v. Union Oil Co. (1977, MD NC), 441 F Supp 730, 1977-2 CCH Trade Cases-61766, 24 FR Serv 2d 928, rev'd on other grounds (1979, CA4 NC) 599 F2d 1299, 1979-1 CCH Trade Cases-62651]

2. Defendants' anticompetitive business practices and monopolized pricing schemes caused antitrust injury to PL and others in a manner that federal and state antitrust laws were enacted to prevent.

D. Defendants Individually and Collectively Precluded Competition in Website Development and Software Development Markets via Preclusion of SUN's Software

1. "Sec. 14. Sale, etc., on agreement not to use goods of competitor: It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

2. Defendants clearly violated section 14, as well as sec. 13, when Compaq, Radio Shack, and other software sellers received special terms and conditions from Microsoft for licensing of Windows 98 that were conditioned on acceptance of Microsoft's substantial lessening of competition in JDS markets via 98's preclusion SUN's software. It is reasonable to assume that COM and RS agreed to overcharge for 98 and to promulgate MS preclusion of SUN software on 98, following SUN's victory in the district court granting an injunction against Microsoft's continued use of JAVA.

3. Trial of PL's claims for damages from Defendants' section 13 and 14 violations is necessary and properly ordered because Microsoft's conviction under sections 13 and 14 not found in District Court's *Conclusions of Law* and *Order* of April 3, 2000.

E. Defendants Individually and Collectively Increased Barriers to Entry Into OS and JDS Competition

1. Preclusion of JDK and other software available on SUN's website from download/setup/run on 98 not only injured SUN's business and that of PL, it also injured OS competitors and software developers worldwide by restricting access to Application Programming Interfaces ["API"] in SUN's software, and thereby increasing barriers to entry into OS competition by subtracting the number of programmers willing to write

cross-platform java programs that would run on competitors platform(s). Consumers in profitable numbers will not buy an OS that does not support programs highly demanded.

2. This fact is no longer debatable in federal court, and Microsoft liability is a foregone conclusion (of law). Whether or not COM and RS directly increased barriers with their roles in the conspiracy is not realistically debatable. They did.

F. Defendants Individually and Collectively Lessened Competition via Price Discrimination

1. "Sec. 13. Discrimination in price, services, or facilities:

(a) Price; selection of customers It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

2. Microsoft's "Frontline Agreement" with Compaq and other favored OEMs discriminated in the pricing of 98 between "Frontline Agreement" OEMs and non-favored sellers of software where the effect of such discrimination was to substantially lessen competition against Microsoft (from SUN and other companies) by increasing the competitive position of "Frontline Agreement" OEMs over OEMs and others competing in office productivity suite and other software markets with non-Microsoft products (i.e., installing and/or otherwise selling *Corel's WordPerfect*, *Lotus Smartsuite*, et al.).

Arguing "volume discount" as rationale for super-competitive pricing, in face of IBM's denial of super-competitive pricing and hosts of other OEMs and software retailers denial of same, does not counter PL's charges of sec. 13 price discrimination and sec. 14 unlawful tying.

3. It can also be argued that Defendants committed a second, separate violation of sec. 14 by requiring retail consumers to accept preclusion of SUN software as a condition for licensing 98. Denial of cognition and/or claim of ignorance re said preclusion is not affirmative defense.

G. Defendants' Monopolization, Price Discrimination and/or Tying Breached California Law

1. "16727. It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State." [California Bus. & Prof. Codes: sec. 16727]

2. Defendants clearly violated section 16727 when Compaq, Radio Shack, and other software sellers paid Microsoft for licensing Windows 98 after receiving uniquely beneficial terms for same conditioned on acceptance of Microsoft's lessening of competition against Sun Microsystems via 98's preclusion of SUN's software. Preclusion injured PL, and violated California law.

H. Defendants are Individually and Collectively Liable for Payment of Damages Equal to Twice Pecuniary Gain Derived from Illegal Conduct

1. Upon conviction, not only must Defendants compensate PL for injuries alleged with payment of treble damages in the amount of \$100,000,000. , but Defendants, individually and collectively, will be liable for payment of two times the gain (gross revenues) derived from their illegal actions.

2. PL estimates total amount of California statute damages to be \$10,000,000,000. (According to *The Economist* magazine (July, 2001), Microsoft currently has \$30,000,000,000. in cash reserves with which to pay its indebtedness to society and case winning opponents.

3. "BUSINESS AND PROFESSIONS CODE SECTION 16750-16761

16750. (a) Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefore in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him or her, interest on his or her actual damages pursuant to Section 16761, and preliminary or permanent injunctive relief when and under the same conditions and principles as injunctive relief is granted by courts generally under the laws of this state and the rules governing these proceedings, and shall be awarded a reasonable attorneys' fee together with the costs of the suit.

This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant."

4. "16755. (a) Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders there under or in pursuance thereof, is punishable, as follows:

(1) If the violator is a corporation, by a fine of not more than one million dollars (\$1,000,000) or the applicable amount under paragraph (3), whichever is greater.

(2) If the violator is an individual, by imprisonment in a state prison for one, two, or three years, by imprisonment for not more than one year in a county jail, by a fine of not more than the greater of two hundred fifty thousand dollars (\$250,000), a fine of the applicable amount under paragraph (3), or by both a fine and imprisonment.

(3) If any person derives pecuniary gain from a violation of this chapter, or the violation results in pecuniary loss to a person other than the violator, the violator may be fined not more than an amount equal to the amount of the gross gain multiplied by two or an amount equal to the amount of the gross loss multiplied by two, whichever is applicable." [California Codes: Business & Professions, sec. 16755]

5. "...or the violation results in pecuniary loss to a person other than the violator...", quoted above, refers not only to PL but all persons, "other than the violator", who can prove "pecuniary loss" from Defendants' conduct.

6. Radio Shack sold anticompetitive, overpriced MS software in COM machines in more than 5,000 stores in the USA from 1998 to date. In same conspiracy, MS sold anticompetitive, overpriced software in COM machines outside Radio Shack in more than 25 countries to more than 25,000,000 indirect purchasers (via direct purchasers) from date of cause-of-action. Estimated gross revenues: \$5,000,000,000.

VIII. CONCLUSION

1. Antitrust actions against Microsoft have not been a waste of time and money as many once believed. On June 29, 2001 the seven appeals-court judges of the United States Court of Appeals for the District of Columbia unanimously ruled that Microsoft holds a monopoly in PC operating systems software, and that it repeatedly and unlawfully used its market dominance to protect that monopoly.

2. Although the court in the same ruling reversed the district court's finding that Microsoft had attempted to monopolize the market for web-browser software, it found that Microsoft's "commingling" of other software and source code with Windows was anticompetitive and clearly unlawful.

3. Microsoft-Compaq-RadioShack were in contractual combination and conspiracy to maintain and exploit Microsoft's OS monopoly via price discrimination, software preclusion and software overcharges, and thereby sought to, and in fact did, illegally maximize their revenues.

4. This case, concerning the use of anticompetitive source code in Windows (inter PC and Server systems) and unfair pricing of same, appropriately expands the scope and effect of public prosecutions of Microsoft. This action is of the type envisioned and enacted by Congress in creation of Title 15, U.S.C., sec. 15. Plaintiffs come to federal court with private perspective and interests complimenting public interests and efforts to (1) remedy software/hardware sellers' misconduct, (2) obtain monetary compensation for software/hardware sellers' damage to consumers and businesses (monetary damages historically difficult for federal prosecutors to win), and (3) ensure, by effective punitive measures, reluctance by Microsoft, et al. to commit similar acts in future.

5. "Even in those cases where forward looking remedies appear limited, the Government will continue to have an interest in defining the contours of the antitrust laws so that law-abiding firms will have a clear sense of what is permissible and what is not. And the threat of private damage actions will remain to deter those firms inclined to test the limits of the law." [*United States of America v. Microsoft*, USCA (DC Cir.), Nos. 00-5213, 00-5214, I. (B), p. 10]

6. This "private damage action" is brought to this court not only to obtain relief and compensation for defendants' antitrust law violations but also to deter Microsoft and conspirators from "testing the limits of the law" and continuing anticompetitive business practices irrevocably proven in district and appellate courts.

IX. PRAYER

1. It is fair and appropriate, in order to safeguard present and future computer software customers and software business competitors at all socio-economic levels in all countries of the world, to insure the lawful compliance of Defendants future actions (and indeed the actions of entire industries led by Defendants), and to compensate Plaintiffs for business damages, to award compensatory and punitive (exemplary) damages of a financial (pecuniary) nature.

2. Toward achievement of more equitable consumer experience in software markets and better software business atmospheres globally, PL calls this Court's attention to the issues of compensatory and punitive (exemplary) damages noted herein above, and considered fair and appropriate by all federal courts and those in the State of California. And on these criteria/precedent, Plaintiff makes request for Court's award of compensatory and punitive (exemplary) damages to be paid by Defendants, in cash or stock, according to express criteria in Title 15 and relative to Defendants' "pecuniary gain" derived from conduct, proven illegal.

3. PL's claim for award of statute law grounded compensatory and punitive (exemplary) damages based on cited criteria/precedent is the first and only such private claim made in federal and/or state courts and, therefore, upon Defendants conviction of crimes alleged herein PL is entitled to and claims twice the amount of Defendants' pecuniary gain derived from Defendants' proven illegal actions, begun or ongoing at inception of Plaintiff's cause of action, as evidenced by public and/or private financial records.
4. PL claims and prays for compensatory damages (business and personal) trebled in the amount of \$100,000,000.
5. PL claims and prays for an award of punitive (exemplary) damages in the amount of \$10,000,000,000., approximately equal to twice the *pecuniary gain* Defendants derived from *per se* illegal, antitrust actions over the time period encompassed by cause of action in this case.
6. PL claims and prays for injunctive relief in the form of a temporary injunction necessary to delay release and sales of Microsoft's latest OS, entitled *Windows XP*, thereby allowing federal authorities time to ascertain whether or not *Windows XP* will (1) continue Microsoft's illegal monopolization, conviction recently affirmed by the U.S. Court of Appeals, and (2) continue to preclude Plaintiffs' software and other software essential for Plaintiffs' competition.
7. PL claims and prays for award to plaintiff of its attorneys' fees and other costs of suit.
8. PL claims and prays for such other and further damage award and/or relief as the Court deems just and equitable.

EXECUTED and respectfully submitted this day, August 3, 2001 in Santa Barbara,
California

by _____

Edward Michael O'Brien

pro se

