

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

EDWARD MICHAEL O'BRIEN,

Plaintiff,

v.

MICROSOFT CORPORATION

and MACROMEDIA, INC.,

Defendants.

FIRST AMENDED COMPLAINT

CV 02-5261 CBM

MDL 1332

I. CAUSE OF ACTION

1. Plaintiff, Edward Michael O'Brien ["PL"], a *competitor* (developer/seller) in digital audio/video/animation markets and in charting/graphing software markets and a *consumer* in computer operating system ["OS"], digital audio/video/animation player ["DAVAP"], internet portal/search-engine ["IPSE"] and internet browser ["IB"] markets brings this action under Title 15, United States Codes, section 15 for treble the damages incurred from defendants conduct in OS, DAVAP, IPSE and IB markets which directly and proximately injured PL via intentional breach of 15 U.S.C., sec. 1, 2, 13(e) and 14; ALI Restatement (Second) of Torts, Sec. 402A, and California Business and Professions Codes, section 16700 et seq. and 17200 et seq.

2. PL complains of antitrust injury inflicted by Defendants, Microsoft Corporation ["MS"] and Macromedia, Inc. ["MM"], via (1) monopolization, (2) attempted monopolization, (3) exclusive dealing, (4) anticompetitive and/or unfair business practices and (5) sale of defective products.

A. Discrimination (Exclusion) Caused Antitrust Injury:

1. "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." [15 U.S.C., sec. 13(e)]

2. "In the past year, MSN has become the fastest-growing portal." [Money Magazine, May 2002, page 79.]

3. MSN attracts more than 270 million unique users worldwide per month. Globally available in 34 markets and 18 languages, MSN is a world leader in delivering Web services to consumers and digital marketing solutions to businesses worldwide. Many users consider MSN to be the most useful and innovative online service today. MSN brings consumers what they need from the Web to make the most of their time online. MSN is located on the Web at <http://www.msn.com/>.

MSN worldwide sites are located at
<http://www.msn.com/worldwide.ashx>.

4. "It used to be AOL, Yahoo and then us...we started the year at 4 million subscribers and ended at 8 million. We're well ahead of Yahoo. We think its going to be a two-horse race." [*Ibid.*, quoted statement by Richard Bray, Microsoft Vice President]

5. Plaintiff is the CEO of SAVIORG, a California public charity founded in 1990. SAVIORG has both non-profit and for-profit divisions. For-profit division is named SAVICOM and contains the Golf O'Brien Company ["GO"] asset and assets outside GO control. SAVIORG(SAVICOM) has been submitting numerous Uniform Resource Locators ["URL"], including its primary website [<http://www.angelfire.com/biz2/savicom>] named "SAVIORG", to the MSN portal at least quarterly since 1999. Although primary website and numerous other of SAVIORG(SAVICOM) websites are indexed in most major search engines and/or portals (and in scores of minor search engines and portals) including Yahoo.com and Google.com, to date MSN has consistently refused to index PL's primary website. One crude website, SAVIORG, created and submitted by PL to Yahoo.com and other search-engines in 1998, is indexed on MSN but is not linked to SAVIORG (SAVICOM) and is no longer viable or available for editing.

6. Unless would be visitor to an internet website knows the exact URL of a certain website, visitor must use an internet search-engine to find, by name and/or content type, website's URL link, and then depress pointing device (mouse) or strike return-key for access to website via URL link.

7. Accessible website URL has been submitted to, and indexed (established) in, search-engine(s) allowing visitor's navigation over worldwide telephone-line networks to the desired website via URL link in search-engine's directory.

8. If a popular (high marketshare) internet search-engine, one that routinely accepts URL submissions from the general public owning URLs and indexes same, free-of-charge, arbitrarily refuses to index (or otherwise display link of) a certain URL (commercial website) properly submitted to it, loss of visitor access to that website may constitute business injury (discrimination and/or exclusive dealing) inflicted by owner of the search-engine.

9. When monopolist in OS and IB markets, who has in the past (1998) used OS source-code modifications to preclude certain competitive software manufactured and sold by PL leverages its search-engine, MSN, into near, or actual, monopoly marketshare, and search-engine consistently and

long-term refuses to index primary URL owned by PL, owner of URL experiencing business discrimination from monopolist's conduct may bring an action for relief and/or damages to federal court under Title 15, United States Codes, section 15.

10. The URL is [http://www.angelfire.com/biz2/savicom] and SAVIORG(SAVICOM) is the website (sole-proprietorship and public charity) that complains of antitrust injury intentionally inflicted by MS and/or MM of the type federal and state laws were legislated and promulgated to prohibit.

11. PL estimates and avers business losses due to restraint of it's trade via defendant's discrimination and/or exclusive dealing in monopolized search-engine markets in excess of \$75,000.00

12. SAVIORG (SAVICOM) has been indexed on major search-engines including Google.com and Yahoo.com for over two years from date of this complaint. PL submitted same URL(s) to MSN and a host of other search-engines beginning 1998, and has resubmitted URL(s) at least quarterly to date. Since 1998, even though MSN has never indexed PL's website, scores of search-engines, including Google.com and Yahoo.com, have indexed PL's website.

13. PL's website is a commercially viable website currently operational and legally doing business on the internet.

14. Leveraged into, or close to, monopoly marketshare via MS monopoly power in OS, OP and IB software markets, MSN search-engine and internet-portal services are growing very rapidly despite United States Court of Appeals (District of Columbia) affirmation of MS restraint-of-trade and monopolization convictions in *United States v. Microsoft*, CV 98-1232/1233 TPJ/CKK and following case's "settlement" (sentencing) in October 2002. Absence of SAVIORG (SAVICOM)'s primary website on MSN restrains trade and produces on-going for-profit and non-profit injury.

15. Because search engines, where SAVIORG is indexed, are rapidly loosing marketshare to MSN, antitrust (or another form of) business injury to competition in search engine markets is tantamount to antitrust (or another form of) injury to companies relying on search engine indexing for e_business and/or other forms of internet sales/service.

16. PL believes MS excluded his website(s) because he filed antitrust actions against Microsoft in years 2000, 2001 and 2002. [See CV 00-01132 MLR, and CV-01-08306 MRP

(RCx): CV 02-3127 SVW (RCx)]. All three cases were filed in the Central District of California and transferred to the District of Maryland (MDL 1332).

17. PL believes MSN exclusion of his website(s) was and continues to be vindictive and malicious in nature, and that MS has intentionally inflicted antitrust injury on PL via refusal to index PL's URL on MSN, intending thereby to restrain PL's trade, commerce and bona fide litigation.

18. Measurable injury to business and non-profit corporation via MS conduct alleged above is compounded by personal injury to PL. To business and public charity injuries must be added *personal* injury sustained from MS actions/omissions in forms of mental distress and increase of PL's federally diagnosed (Veterans Administration compensated) disabilities.

19. Rhetorical Question: What would happen if MSN arbitrarily decided to exclude IBM, or another major corporation doing *e_business* on the internet, from MSN indexing? Would antitrust injury occur?

20. Probably. Same, or very similar antitrust injury from lost revenues, on a much smaller but nevertheless substantial scale, alleged in this case.

21. Although PL is, technically, not a competitor of MS in search-engine or internet-portal markets PL does compete with MS in charting/graphing software markets (PL's *Golf Coach v. MS's Excel*) and is a *purchaser* (for antitrust litigation purposes) in the internet-portal/search-engine market via bona fide and repeated efforts to submit URLs to MSN for indexing. Although MSN does not charge money for indexing URLs, PL tenders personal and corporate information to MS each time it submits URLs to MSN for indexing. Without concrete evidence at this time (but obtainable via deposition, witness and/or CID at discovery), PL has sufficient cause to make claim MS sold PL's personal and/or corporate data to commercial companies without PL's expressed or implied permission and without any form of compensation, even the compensation of free search-engine indexing.

22. MS sales of its customers' personal information without authorization has recently been questioned by European authorities. [EXHIBIT A]

23. Background: American Online ["AOL"], defendant in another antitrust case brought by PL [*O'Brien v. Time Warner, Inc., et al.* Case No. CV 00-10781R (LGB) (AJWx)],

precludes indexing and presents an indexed URL content section, where "SAVICOM" or "SAVIORG" should be included, but are not, in the same odd manner as does MSN. AOL has, like MS, received many submissions from SAVIORG(SAVICOM) since 1999 but declined to index. MS has in the past and continues to cooperate closely with AOL in media related ventures.

B. MediaPlayer Preclusion Caused Antitrust Injury:

1. When accessed via IE, Netscape Navigator ["NN"] and/or other browsers running on *Windows XP*, some audio and video files (in .wav, .aiff, .avi and/or .mov formats) developed on QuickTimePro (QuickTime, Inc.) and/or RealProducer Basic and RealProducerPro (RealMedia, Inc.) and/or Adobe Premiere (Adobe Systems, Inc.), Cakewalk Pro (Twelve Tone Systems, Inc.), Pro Tools (Digidesign, Inc.) and Final Cut Pro (Apple Computers, Inc.) are precluded from play. Preclusion occurs because files not formatted in .wmv (windows media video) and/or .wma (windows media audio) format cannot play on WindowsMediaPlayer and RealPlayer and QuickTimePlayer plug-ins are disfunctional in the version of IE that is currently integral in XP. This fact caused antitrust injury to certain internet media developers, exhibitors, distributors and sellers, including the plaintiff.

2. In 2001, PL was dissatisfied with .wmv and .wma formatted files for a number of personal and professional reasons, including (1) WindowsMedia-Player quality was not acceptable for certain files PL had compressed and exported in certain codecs, (2) WindowsMediaProducer did not include the Sorensen Codec preferred by many developers, (3) commercial advertisements associated with WindowsMediaPlayer were adverse to PL's interests, and (4) PL has a committment to minimize use of Microsoft products while MS is under prosecution (conviction) for antitrust crimes.

3. From 1999 through 2002, PL decided to, did, and continues to produce audio and video content in above noted formats for exhibition, distribution and/or sales on the internet and in other venues.

4. Although Windows 95/98/Me/NT/2000 did not, in PL's extensive experience, preclude .wav, .aiff, .avi or .mov formatted audio/video files, PL found Windows XP consistently declined to play certain of PL's files accessed from PL's internet site hosted at www.angelfire.com. Reason for preclusion on XP is, apparently, fact that files were not in .wmv and/or .wma format and/or compressed/exported via WindowsMediaProducer. This fact causes on-going

antitrust injury to PL's business and to a multitude of businesses in markets where PL is a competitor.

5. "Poole also disputed RealNetworks' allegations that Microsoft's new Windows XP favors Microsoft's media player even if a user indicates a preference for another product.

6. There are over 250 million users of RealNetworks' players, Poole said, and most of them use Windows.

7. 'The fact that so many users choose to use RealNetworks' media players...is evidence that RealNetworks' media players work very well on Microsoft's operating systems,' Poole testified.

8. RealNetworks vice president David Richards testified in March that when consumers try to create music CDs or play digital music, Windows XP tends to use its own media player even if the user selected the RealNetworks product as the default player." [<http://money.cnn.com/2002/05/02/technology/microsoft> -- CNN MONEY, May 2, 2002: MICROSOFT TAKES STAND]

9. Mr. Poole, like so many other executives at MS and elsewhere, did not understand (1) XP tactics regarding media players and/or (2) media players themselves.

10. Theoretically after August 2002, RealPlayer and QuicktimePlayer will be fully accessible on XP via preference selection overriding the WindowsMediaPlayer default. However, the issue in this complaint concerns website downloads via XP/IE where RealPlayer and QuicktimePlayer, even if accessible for play of files stored on harddrive, will not function as plugins inter XP/IE when above noted files are downloaded from remote website via IE.

Note: RealPlayer is not even optional for play of stored files on version of XP installed on the PC network used by PL at UCSB (personally ascertained on June 13, 2002).

11. True, some of PL's Quicktime and RealMedia files run on certain Windows operating systems, including 95/98/Me/NT/2000, but many of PL's audio and video files distributed via Compact Disk ["CD"] and/or website downloads are play precluded on Windows XP. Clients, customers and casual visitors cannot view or hear many of PL's products on their computers where XP is the only operating system.

12. The problem seems to be Microsoft's intentional preclusion of RealPlayer (a/k/a RealOnePlayer) and

QuickTimePlayer as possible default players and/or their non-operation as plug-ins in certain browsers running on XP [MS admits preclusion via "fix" of new version of XP announced recently: see EXHIBIT C]. It may be exclusively a browser problem where IE, integral in XP, has been engineered to preclude RealPlayer and QuickTimePlayer only under certain circumstances. Proof of exact form and extent of media player preclusion must be left to expert analysis of XP and/or IE code.

Note: There has been a recent move by MS to allow changes to XP defaults, but fact remains XP, as of this writing, precludes play of PL's files. [EXHIBIT B]

13. After downloading RealPlayer from the [www.real.com] website, a "Real" folder can be lodged under "Program Files" on the C:\ drive of the downloading computer. Presumably, setting up the RealPlayer.exe file included in all downloads, will allow presentation of RealOnePlayer (name of most recently released RealPlayer) and play of .wav, .aiff, .avi and/or .mov files stored on the same harddrive. However, after set up of RealOnePlayer in XP subsequent access of certain audio/video files from PL's website will not allow play of those files on RealOnePlayer. Only the default player, WindowsMediaPlayer, will allow certain multimedia files downloaded from a website to be played via IE running integrally on XP. Unless certain types of .mov/.avi/.wav/.aiff files have been produced on WindowsMediaProducer (a/k/a Microsoft Producer) they will not run inter WindowsMediaPlayer inter XP.

14. PL avers XP preclusion of PL's media files can be systematically demonstrated in a court of law.

15. "For NT users: Support for compressed QuickTime (.mov) and MPEG-1 files requires the Windows NT Service Pack 3 or higher available at Microsoft NT website. Compressed QuickTime (.mov) files created with codecs introduced in QuickTime 3.0 and 4.0 are not supported." [http://www.real.com RealMedia, Inc., accessed on May 9, 2002]

16. Most multimedia professionals, including PL, use QuicktimePro, RealProducerPro and/or WindowsMediaProducer to process and export above noted multimedia files. The Sorensen Codec (1 and 2), included in QuickTimePro 4.0 thru 6.0 and in Adobe Premiere 6.0, can be used to customize, compress and export audio and video files in .aiff/.wav/.mov/.avi formats. Sorensen does a better job of compressing and customizing video files and, although excluded from WindowsMediaProducer, is nevertheless

considered state-of-the-art and a professional necessity. Preclusion of QuickTimePro and/or RealProducerPro on XP injures developers whose only OS is XP and/or via customers precluded from use of developers files on XP.

17. Because PL has produced QuickTimePro rendered files for sale and/or exhibition on its for-profit website, MS preclusion of these files on certain NT versions and on XP caused antitrust injury to PL when would be customers, using IE supported on NT/XP to access PL's website, were prohibited from playing PL's files they had downloaded. MS software engineering and/or corporate behavior responsible for this preclusion constitutes exclusive dealing and violates sec.1 and 14 of 15 U.S.C.

C. DOS Elimination Caused Antitrust Injury:

1. On August 3, 2001 PL asked district court for certain relief.

a) "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' proprietary software and other software essential for Plaintiffs' competition." [O'Brien v. MS, Compaq, RadioShack, CV 01-08306 MRP (RCx), IX(6.) , pending at MDL 1332, District of Maryland]

2. On October 25, 2001, Microsoft released Windows XP over PL's request (complaint) for an injunction to block same. Where Windows 3.1, 95, 98, 2000 and Me phase out DOS code and/or full DOS shell exposure, XP drops the DOS shell entirely. Therefore, all programs written for DOS, not coded for Windows, do not run on XP and (probably) succeeding Windows OS.

3. "Gates said the release of XP 'marked the end of an era, the end of DOS and also the end of Windows 95.'

DOS is the text-based system that powered Windows PCs, and still lurks underneath Windows 3.1, 95, 98 and Windows Me.

Windows 95 was dismissed by Gates as an operating system whose day was done. Windows 98 and Me, which received lukewarm receptions from the tech industry but are still in wide usage, got scant mention, but Windows 2000 was touted as the rock-solid framework that XP was built on.

DOS C: prompt, the opening screen for all the text-based DOS programs, appeared on a large TV screen, and Gates typed 'Exit', the DOS command to shut down a system.

As he prepared to hit 'enter', a HAL-like robot voice pleaded with him not to shut DOS down, to which Gates responded, 'They don't call your movie 2001 for nothing', and terminated the DOS program." [Windows XP Official Launch: Oct. 25, 2001, New York: quoted from CNN article dated May, 2002]

4. PL is able to adapt all *Golf Coach* files, with the exception of *PFS: First Graphics*, for run on all Windows OS, including XP. However, *Golf Coach* is completely disfunctional without *PFS: First Graphics*, its core program. There was always some hope that Windows 3.1, 95, 98, 2000 and Me users would master their operating systems such as to buy and use *Golf Coach* on DOS shell. However, very few Windows users were willing (or able) to accomplish the feat. Today, XP makes run of *Golf Coach* quite impossible, even for clever computer literati. XP effectively eliminates *Golf Coach* along with DOS...throwing out the baby with the bathwater.

5. Because MS uses its Windows operating systems monopoly, currently judged illegal in federal courts, to leverage Windows XP, it violates antitrust law, again, by eliminating all DOS dependant programs from support on XP and (probably) succeeding Microsoft OS.

6. This fact constitutes a certain type of restraint-of-trade by the monopolizing computer software company and breaches, per se, 15 U.S.C., sec. 1 and 2.

D. Defective IE Injured PL:

1. PL's NT/2000 Server running Windows Media Player ["WMP"] and MS Office 2000 ["OFFICE"], permitted unidentified "hackers" to gain access from remote locations to (1) access Macromedia Director 8.5 in use by PL developing multimedia programs, and damaged numerous programs (.dir/.dcr files) during and following development, and (2) access PL's directory files (containing screenplays, sensitive federal court documents and valuable multimedia programs) and read and/or disfigured numerous files with Chinese letters and/or question-marks. [EXHIBIT C]

2. File loss and/or repair has been time consuming and expensive and constitutes antitrust damage to PL. Vulnerabilities in NT 4.0 and Microsoft's OP software running on NT 4.0 permitted unauthorized remote access and

damage to PL's files/applications. Failure by MS monopoly in OS markets to innovate and/or develop more effective anti-hacking source-code constitutes breach of ALI Restatement (Second) of Torts, Sec. 402A via manufacture and sales of defective products.

3. Loss of creative development content (multimedia files) has been irreversible and expensive (in excess of \$500,000.) and constitutes antitrust injury to PL.

4. "Other security problems continue, despite Microsoft Chairman Bill Gates' call earlier this year that the company put more emphasis on making software secure than adding new features.

5. In March, Microsoft issued a pair of patches for Internet Explorer security holes. February and April security holes potentially opened Office for the Mac to hackers. Also in April, Microsoft issued fixes for about 10 security holes affecting three versions of Internet Information Server." [*Ibid.*]

6. "(IDG) -- Microsoft has released a patch that addresses six security vulnerabilities in its Internet Explorer browser, including a critical flaw that could allow an attacker to run code on a client machine. The patch is intended for Internet Explorer 5.01, Internet Explorer 5.5, and Internet Explorer 6.0.

7. Among the changes that are provided by the patch is a fix that closes a vulnerability in one of Internet Explorer's local HTML resources. One of the HTML files shipped with Internet Explorer contains a cross-site scripting vulnerability that could allow an attacker to execute a script on a user's computer, Microsoft said in a security bulletin issued Wednesday." ["Microsoft plugs six more security holes in IE", May 17, 2002 Posted: 8:24 a.m. EDT (1224 GMT), By Sumner Lemon: "Gates: Hello XP, Goodbye DOS", CNN article, May 17, 2002, By Michelle Delio]

8. "Scripting vulnerability" noted above refers to Macromedia Inc.'s Flash.ocx file in the FlashPlayer directory.

9. "In a reversal of its previous advice, Microsoft is warning that a security flaw in its Internet Explorer browser could enable a malicious Website or e-mail message to automatically download and run a dangerous program on victims' computers. The flaw, the exploitation of which requires that Microsoft's Windows Media Player be installed, is one of six security bugs corrected by a patch released

Wednesday by Microsoft." [*Windows Media Player Exposes IE Users To Attack*, By Brian McWilliams, Newsbytes, May 17 2002 5:25AM]

10. Presumably patch will eliminate above noted vulnerabilities in computer systems owned by those consumers astute enough to (1) read one of the relatively few articles noticing the problem, and (2) download and install MS software "patch". Astute fixers of Microsoft software are in a distinct minority. Millions of others, compelled to own MS OS and/or OP software monopolistically installed on their new computers, continue to experience antitrust injury from (1) hacker intrusion, data destruction and the cost of repair, (2) the cost of increasing computer security, and (3) anxiety that comes from continued vulnerability to unauthorized remote access.

E. Secondary Damage:

1. Although computer security experts agree that a certain length of time (about 30 days minimum) is needed to "patch" security flaws in most software programs, MS has not corrected flaws, within reasonable time limits, in certain programs distributed via OEMs inter MS OS and/or OP monopolies. PL complains of antitrust and products liability injury directly attributable to Microsoft's omission of certain security duties required of the monopolist.

2. Certain security vulnerabilities in IE (especially IE integral with XP), relative to IE's Flash Player (plug-in), make multimedia produced on *Macromedia Flash 5* less valuable and, in fact, quite dangerous for users. This fact injures PL and many other developers who sell multimedia developed on *Macromedia Flash 5*. MS did not remedy this problem within a reasonable time frame, and, therefore, failed to discharge its responsibilities to users and/or developers/sellers of software compelled by its OS and/or OP monopolies to rely on IE and other vulnerable programs.

3. Certain security vulnerabilities in IE (especially IE integral with Windows Millennium, 98/2000/NT4.0):

"REDMOND, Washington (AP) -- Microsoft Corp. disclosed a security flaw of 'critical' severity in most versions of its popular Windows operating system.

In its 65th security bulletin of the year, Microsoft on Wednesday urged users of Windows 2000, Millennium, 98 and NT 4.0 to download a software patch from the company's security Web site. Microsoft's newest version, Windows XP, does not have the problem.

Attackers could exploit a vulnerability in the software that underlies many database functions and take over the user's computer.

Issued in simpler format The security bulletin is the first to be issued in a simpler format, which Microsoft adopted due to complaints that its bulletins were overly detailed and confusing. The technically detailed bulletins were geared more for developers or system administrators, rather than everyday users, Steve Lipner, Microsoft's security assurance director, wrote in an e-mail to customers." [Microsoft: Yet another security flaw Thursday, November 21, 2002 Posted: 10:58 AM EST (1558 GMT): <http://www.cnn.com>]

4. *Systems administration* sophisticated developers...

5. Microsoft remains relatively popular, even after conviction of antitrust crimes, because Windows and MSN preclude relatively few enemies (competitors) and defective IE only jeopardizes computers (files) containing valuable information. Hackers do not waste time with systems that do not contain artistic, financial, political, or military value. If most recent revelation re IE vulnerability has only minimally injured PL it is because he has learned from past injuries, and taken inordinate, expensive precautions. Expensive and sophisticated security measures (beyond the capability of average consumers/users) will not be necessary when Microsoft's monopoly in the browser market gives way to innovative competition.

6. PL can prove direct, proximate antitrust injury from IE defects resulting prior to Microsoft's recent announcements of "patch available".

F. Note on Software Gross Margins (Microsoft Software):

1. "Software requires tremendous up-front research-and-development costs, but once a program begins shipping, additional copies can be produced for nickels (a blank CD, some cardboard and shrink wrap) or even less (pre-installed on a computer or delivered via the Web). As a result, Microsoft's gross margins (revenues minus the cost of goods sold) top 90% most years -- an astounding figure. Add in the facts that Windows ships pre-installed on 92% of all desktop computers today and that its Office applications (*Word, Excel, PowerPoint, Outlook* and the like) account for 96% of all business productivity suite software sold, and it's clear why Microsoft has been a darling of investors." [Ibid., page 76]

2. Pl asserts when software gross margins "top 90%" it means manufacturer's total cost to produce that software is less than 10% of revenues derived from sales of that software.

3. If MS receives \$1.0 billion a month in software revenues, it banks more than \$900,000,000. In fact, these figures are close to reality. [*Supra.*, *Money Magazine*]

4. And you might add the fact that Windows NT is now being installed in more than 50% of all server-computer systems, worldwide. Another monopoly was in the offing even while Judge Kollar-Kotelly deliberated on "remedies" for convicted monopolist whose anticompetitive conduct has yet to be effectively restrained.

II. PARTIES

1. 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. Windows is the company's "flagship" PC operating system. Corporate Offices:
One Microsoft Way, Redmond, WA 98052-6399; tel 425-882-8080

2. MACROMEDIA, INC. develops, markets and supports an integrated line of multimedia and graphic arts software tools for designing, authoring and producing multimedia and digital arts products on Windows and Macintosh platforms. Among numerous applications sold by Macromedia, *Macromedia Flash* is a tool for creating and animating vector-based, resolution-independent graphics for the web. The company's www.shockwave.com site is a free online entertainment service and a showcase of the company's internet technologies and tools. Corporate Offices: 600 Townsend St., San Francisco, CA 94103, tel 415-252-2000, fax 415-626-0554.

3. EDWARD MICHAEL O'BRIEN, is a graduate of the University of California at Santa Barbara and a former Captain in the United States Marine Corps (air traffic control specialist: Spirit of America Honor Medal, 1966). Mr. O'Brien is the founder of SAVIORG, a California public charity [Title 26 U.S.C., sec. 501(c)3 / 509(a)2] and sole-proprietor of the Golf O'Brien Company (a/k/a SAVICOM), a software and website development company established in California in 1990. GO sells custom crafted, multimedia websites, motion picture

scripts, CD-ROM shockwave movies and *GOLF COACH*, the first (copyrighted, 1989) software application to allow golfers to acquire, process, analyze and present golf statistics on PC, SERVER and MAINFRAME computers. Stats processing copyright, alone, is worth more than \$1,000,000.

4. Recently, Mr. O'Brien donated a partial (50%) interest in GO to SAVIORG (Public Charity). The Plaintiff is also author of *GIVENGET*, a well known 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. Corporate Office: P.O. 91003, Santa Barbara, CA 93190, fax 202-521-3786

III. JURISDICTION

1. This civil action is grounded on (1) Title 15 of United States Codes, sections 1, 2, 13(e) and 15, and is brought to the United States District Court in the Central District of California to recover trebled compensatory and punitive damages, and (2) California Business and Professions Codes: sections 16700, et seq. and 17200 et seq., requiring statute-specified exemplary and/or punitive damages in amount(s) consistent with twice the pecuniary gain defendants derived from proven illegal activity, including exclusionary practices and monopolization causing consumer and competitor injury.

2. This complaint is brought under federal statute authority: Title 15, Section 15 of the United States Codes.

3. This action is within time limits. The United States District Court for the District of Columbia entered a Final Judgment in *United States v. Microsoft* on August 21, 1995, which barred certain of defendants' anticompetitive practices, including licensing agreements conditioning an OEMs license of a Microsoft OS on the licensing of another Microsoft product or upon the OEM not licensing a non-Microsoft product. The decision was appealed; affirmed in part and remanded part. Subsequent and directly related actions re [*United States v. Microsoft* : CV-98-1232/1233 TPJ/CKK] are currently pending. "Pursuant to 15 U.S.C., section 16(i), the statute of limitations has been suspended as a result of *United States v. Microsoft*." [*Caldera, Inc. v. Microsoft Corp.*, 72 F.Supp. 2d 1295]

4. "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or

punish violations of any of the antitrust laws, but not including an action under section 4A [15 USCS, sec. 15a], the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereafter:" [Title 15 U.S.C., sec. 16(i)]

5. "Any action to enforce any cause of action under section 4, 4A, or 4C [15 USCS, sec. 15, 15a, 15c] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act." [Title 15 U.S.C., sec. 15(b)]

6. Pursuant to Title 15 U.S.C., sec. 15(b) and/or 16(i), this complaint is filed within time limits because it is commenced within four years after the alleged cause of action accrued and/or pending federal actions cited toll limits for this action.

7. At time of cause of action, each corporation named as a defendant transacted business, did business, was found, or resided in the Central District of California.

IV. TRADE AND COMMERCE

1. Activities of the defendants that are the subject of this complaint are within the flow of and substantially affect interstate commerce. A not insubstantial volume of trade and commerce was involved and affected by the violations alleged in this complaint. Damages claimed by PL exceed \$75,000.00.

2. Substantial quantities of MS and MM products are shipped worldwide and throughout USA interstate commerce.

3. The manufacture, marketing, and/or distribution of MS and MM products in the United States occurs, at least in part, through use of various channels of interstate transportation and communication.

V. RELEVANT MARKETS

A. Markets Relevant to Cause-of-Action:

1. Internet Portals/Search Engines:

(a) Term Internet "portal" refers to a "main guide" website that includes a search engine and additional content (such as current news, weather, chat, finance, shopping, calendars, mobile communications, entertainment info, etc.) designed to keep visitors attenuating and/or interactive as long as possible at the portal. Examples of leading portals include MSN, Yahoo, Netscape's Netcenter, CNN, and AOL. It seems lately every viable Search-engine, Access provider or Information network wants to become a "portal".

(b) Definition of the term portal may be extended to include meta search engines that allow visitors to combine results from other searchable sites and certain commercial "superstores". An example would be Shopper.com (by CNet) which allows visitors to search multiple online computer hardware shops, and provides useful tables of info concerning which online shops sell what products, their phone numbers, items in stock, item availability and price, and related info.

(c) Another example of a "superstore" is Addall.com which allows visitors to conduct searches for particular books; calculates which online book shops will charge the best price for the book sought, and provides shipping data.

2. Computer Operating Systems:

(a) The market for personal computer operating systems consists of operating systems written for the Intel or AMD x86/Pentium class of microprocessors. These microprocessors perform central processing unit ("CPU") functions for the vast majority of personal computers, and their operating systems manage the interaction between the CPU and the various pieces of hardware, such as a monitor or printer, attached to such computers. Operating systems also control and direct the interaction between applications, such as word processing or spreadsheet programs, and the CPU. No other product duplicates or fully substitutes for the operating system.

(b) Because of the complex interactions among operating system software, applications software, and PC related hardware, an operating system written for one class of microprocessors typically will not work on another class of microprocessors without significant modification. Thus, OEMs and PC users do not consider an operating system that runs a non-Intel/AMD-based personal computer to be an effective substitute for an operating system that runs an Intel/AMD-based personal computer.

(c) Microsoft markets a variety of PC operating systems, including MS-DOS, Windows 3.11, Windows For Workgroups, Windows NT Workstation, Windows 95/98/2000 and XP.

(d) Microsoft has maintained a monopoly market share (in excess of 90%) in the PC operating system market over an extended period of time from 1992 to date. The durability of Microsoft's market power in part reflects the fact that the PC operating system market is characterized by certain economies of scale in production and by significant "network effects." In other words, the PC operating system for which there are the greatest number, variety, and quality of applications will be selected by the large majority of PC users, and in turn writers of applications will write their programs to work with the most commonly used operating system, in order to appeal to as many potential customers as possible. Economies of scale and network effects, which reinforce one another, result in high barriers to entry.

(e) The primary channel through which Microsoft distributes its operating systems is pre-installation on new PCs by Original Equipment Manufacturers ("OEM"). Because a PC can perform virtually no useful task without an operating system, OEMs consider it a commercial necessity to preinstall an operating system on nearly all of the PCs they sell. And because consumer installations go wrong and because there are no viable competitive alternatives to the Windows operating system for Intel/AMD-based computers, OEMs consider it a commercial necessity to preinstall Windows on nearly all of their PCs. Both OEMs and Microsoft recognize that OEMs have no commercially viable substitute for Windows, and that they cannot preinstall Windows on their PCs without a license from Microsoft. For example:

(f) Packard Bell executive Mel Ransom testified that there were no commercially feasible alternative operating systems to Windows 98 (M. Ransom 3/19/98 Tr. 19-20); [*U.S. v. Microsoft*, CV 1232/1233 TPJ/CKK]

(g) Hewlett Packard executive John Romano testified that "absolutely there's no choice" except to install Windows on HP's PCs (J. Romano Tr. 49-50); [*Ibid.*] and

(h) Gateway executive James Von Holle testified that Gateway had to install Windows because "We don't have a choice." (J. Von Holle Tr. 37-41; GW 26521-27). Mr. Von Holle has testified that if there were competition to Windows he believed such competition "would drive prices lower" and promote innovation [*Ibid.*].

(i) When Windows 98 was released, it quickly succeeded to Windows 95's monopoly position because, among other things, applications written for Windows 95 run on Windows 98 and most consumers who purchase PCs want and expect their PCs to have the latest Microsoft operating system. Windows 2000, NT, Millennium, and XP have followed suit in due course. OEMs ship most of their new PCs, particularly for non-corporate users, with the latest version of Microsoft's operating system as soon as it is released.

3. Internet Browsers:

(a) Internet browsers are specialized software programs that allow PC users to locate, access, display, and manipulate content and applications located on the world-wide-web ("www"). Internet browsers are essential for quick, easy, and efficient use of the web and have been instrumental in building the Internet's popularity. No other product duplicates or fully substitutes for the functionality of Internet browsers.

(b) The first Internet browser widely used by the general public was Netscape Navigator, which was introduced to the market in 1994.

(c) Microsoft responded by introducing its own Internet browser, which it called Internet Explorer. Microsoft released the initial version of Internet Explorer (version 1.0) in or around July 1995. Microsoft has since released subsequent versions (2.0, 3.0, 4.0, 5.0 and 6.0), in each case adding features and functionality to the product.

(d) Internet Explorer is, and always has been, viewed by Microsoft and by the market as an Internet "browser" -- a separate software program that allows computer users to efficiently locate, access, display, and manipulate content displayed on the World Wide Web. Microsoft and other industry participants carefully track Internet browser market share, and Microsoft has frequently and unequivocally stated that increasing its Internet browser share is its "number one" corporate goal. Internet browsers have product requirements, market usage, demand, distributors, and suppliers distinct from other products, including PC operating systems. Microsoft plans to continue to distribute and upgrade stand-alone versions of its Internet Explorer browser, and it has distributed (and plans to continue to distribute) versions of Internet Explorer for use on the Apple Macintosh, Sun Solaris, and other non-Windows operating systems.

(e) Microsoft's share of the Internet browser market has grown steadily from less than 5% in early 1996 to approximately 90% or more today. Without doubt, Microsoft enjoys a monopoly in the Internet Browser market today.

(f) With the growth of the Internet and the World Wide Web, consumer demand for Internet browsers has increased dramatically. Indeed, because of the extraordinary growth and importance of the Internet, the Internet browser market is itself a substantial source of profits to any company that might achieve a durable position. For Microsoft, the ability to charge monopoly prices for the efficient use of the Internet is a tremendous economic advantage. The importance of the Internet and the significant public benefits resulting from its use, make benefits to monopolist restricting supply and innovation while charging top dollar, and the economic and social cost of monopolization in this market, very high.

(g) Internet browsers that OEMs and/or consumers might substitute for IE:

(1) NeoPlanet: Manufacturer claims, "Designed to be fun and easy to use; The NeoPlanet Browser puts the best of the Web at your fingertips.

Control your Internet experience by customizing content Channels with favorite websites. Select your interests from the Preference Center to instantly import content of choice. Take advantage of powerful E-mail, Download Management, and QuickSearch features. Don't forget to express your own sense of Internet style with over 500 different skins!"

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(2) NetCaptor: Manufactured by Stilessoft Inc., [www.netcaptor.com], this innovative browser is focused on improving the multipage viewing experience. NetCaptor (\$29.95) makes use of convenient status-displaying tabs. When you open a group of sites using NetCaptor, simultaneously users see how each download is progressing and are able to avoid clicking on pages that haven't arrived.

(3) Webhopper: This new browser from IKV Technologies, Berlin Germany is the integration of the Grasshopper Agent Platform and the World Wide Web using the servlet technology. It upgrades a webserver by adding the functionality of an agent execution environment and provides

the capability to control the Agency via WWW and to 'browse' agents over the web.

3. Digital Audio/Video/Animation Players :

(a) Software/hardware devices necessary for media content (files and streams), accessed inter computer system or downloaded from network, primarily for the audio/video experience of human persons:

(b) There are over 300 million digital audio/video players registered in the world and this number is growing. The potential audience available to experience digital audio/video media is limited only by world population. RealNetworks, Inc. holds at least 51% of marketshare in DAVP market(s).

(c) The all-in-one media player has been successfully implemented on a small scale by Yahoo, but the RealOne Player (.rm files) marks a dramatic shift at RealNetworks. Until now, the Seattle, Washington, company has only delivered stand-alone audio and video players.

(d) In fact, RealNetworks had been one of the few companies to promote the notion that consumers wanted to watch video files with one player and listen to audio files with another.

(e) Microsoft's Windows Media player has long had the capability of playing audio and video together (.wma and wmv files). Yahoo's Finance Vision, a streaming show about money and the stock market, is webcast through a three-frame system. And the video component of the RealOne Player has the look and feel of the Macintosh QuickTime player (.mov and .avi files).

(f) The Musicmatch audio player (.au, aiff, .wav files), which offers personalized music services, has been closing the gap between RealNetworks and Microsoft's Windows Media. In the first quarter of this year, Musicmatch increased its customer base by nearly 30 percent, according to Jupiter Media Metrix.

(g) Today, Microsoft's Windows Media is threatening RealNetwork's dominance. Over the last year Windows Media has added 6.9 million home users, according to Jupiter Media Metrix.

(h) While RealNetworks continues to maintain a wide edge in consumer usage, clearly it had to change its philosophy

if it was to continue to stay one step ahead of the competition. But the RealOne Player is not merely a cobbled-together version of its competition; the new player has new features entirely its own.

(i) The RealOne Player will be the first to offer access to all of the major audio and video formats -- Microsoft, Real and MP3s (.mp3 files) -- so consumers no longer have to worry that a file they have downloaded won't play.

(j) Shockwave Player:

(1) Defendant MM has monopoly marketshare (market power) in low-end (>\$1200. retail) animation authoring and animation creation markets. No software seriously challenges MM's *Director* and *Flash* monopolies.

(2) Over 300 million Web users have installed Macromedia Shockwave Player (.dcr files). These people now have access to some of the best authored animation the Web has to offer - including dazzling 3D games and entertainment, interactive product demonstrations, and online learning applications. Shockwave Player displays Web content that has been created by Macromedia Director Shockwave Studio. Shockwave Player can be downloaded freely from [www.macromedia.com] and is included in many new computer systems as a browser plugin.

(k) Over 474 million Internet users now use Macromedia Flash Player (.swf files) to seamlessly view multimedia animations created with Macromedia Flash, the solution for developing rich Internet content and applications. Flash Player can be downloaded from [www.macromedia.com] and is included in most new computer systems as a browser plugin.

4. Charting/Graphing Software:

(a) Software designed for PC use that generates simple (conventional) charts, graphs and limited text presentations based on raw statistical data:

(b) As stated, Plaintiff's software named Golf Coach is a compilation which includes PFS: First Graphics, a charting program licensed from Software Publishing Corporation. Microsoft's MS-Excel has a charting/graphing program that is competitive with Golf Coach/PFS: First Graphics.

(c) Although MS-Excel dominates the charting/graphing software market with over 90% marketshare, competitors do exist. A sampling of market competitors would include:

(1) GraphPad InStat and GraphPad StatMate from GraphPad Software, Inc., San Diego, CA 92121:

(2) DeltaGraph and Clementine from SPSS Science, Inc., 233 S. Wacker Drive, Chicago, Il 60606-6307:

(3) KaleidaGraph from Synergy Software, 2457 Perkiomen Ave., Reading, PA 19606:

VI. MONOPOLIZATION

1. The court of appeals in Microsoft affirmed the district court's finding that Microsoft unlawfully maintained its PC operating systems monopoly by quashing the "middleware threat." *United States v. Microsoft Corp.*, 253 F.3d 34, 53-54 (D.C. Cir.) (en banc) (per curiam), cert. denied, 122 S. Ct. 350 (2001). Sustaining the claim of monopoly maintenance required neither the delineation of a middleware market nor the inclusion of middleware in the operating systems market.

2. "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.]

3. "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]

4. The key to Sherman Act liability is *monopoly power*. MS having great monopoly power with over 90% marketshare in operating-system (Windows 95/98/2000/XP), office-productivity (MS-Excel) and internet-browser (IE) markets, restrained trade and commerce by restraining PL's competition in multimedia markets via MSN search-engine exclusion and defective, monopolized software. Because MS's questioned practices were in context of its on-going monopolization, MS conduct was *per se* violation of 15 U.S.C., sec. 1 and 2.

5. Macromedia Inc. has monopoly power in markets for low-end (> \$1200. retail) computer animation authoring and creation via *Director* and *Flash* because respective marketshares exceed 90%. "Over 97.8% of all web users have the Macromedia Flash Player". [<http://www.macromedia.com:homepage>]

6. PL possesses credible evidence indicating both Defendants, severally and in collusion, used monopoly power to violate sec. 1 and 2 under both *per se* and Rule of Reason analysis.

7. "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* , CV 98-1232/1233 TPJ/CKK] 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]

8. " 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.*]

9. Defendants illegally increased their monopolies and caused antitrust injury to PL and others by exercising proven monopoly power to control prices, restrain trade and exclude competition. Therefore, PL complains of *per se* violations of sec. 1 and 2.

10. "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]

11. To the Supreme Court definition of monopoly power quoted above we can add, "power to arbitrarily inflict antitrust injury". Although allegations in this case do not aver PL's injury from excessive pricing or exclusion from direct competition, allegations do claim intentional injury to PL from (1) arbitrary exclusion from a widely used business forum (MSN) controlled with MS monopoly power, and (2) preclusion of certain media players in monopolized system software market(s) via Windows XP and (3) sale of defective software.

12. Thus, MS restrained PL's competition in multimedia markets worldwide via exclusionary practice, monopolization and defective products.

VII. SPECIFICATION

1. In 1989, Mr. O'Brien created, developed, manufactured, marketed and sold GOLF COACH, a computer software compilation that acquires and processes golf game data (statistics) obtained on Mr. O'Brien's copyrighted cards (golf-data-cards); calculated on Mr. O'Brien's copyrighted spreadsheet (golf-data-mastersheets), and printed as graphics, charts and instructional text. GOLF COACH was the first processor/graphical-presenter of athletic event data on PC, Server and/or mainframe computers.

2. Mr. O'Brien founded the Golf O'Brien Company in Lompoc, California in 1990 primarily to manufacture and sell GOLF COACH. From 1990 to 1993, Mr. O'Brien studied and worked at California State Polytechnic University (CalPoly) in San Luis Obispo, California, and rendered several upgrades of GOLF COACH while maintaining fulltime student status in the field of Environmental Engineering. Mr. O'Brien played professional golf on the Golden State Tour to increase his ability to better serve all golfers via *Golf Coach* upgrades reflecting professional experience/insight.

3. From August 1993 to December 1994, Mr. O'Brien studied fulltime at Oral Roberts University (ORU) in the Motion Picture and T.V. Department (concentration in MIDI music and multimedia development), and worked (independently) on GOLF COACH marketing and sales. GO was registered with taxing authorities in Oklahoma, as well as California.

4. In 1994, Mr. O'Brien was awarded the President's Academic Scholarship at ORU for the highest grade point average in major (3.67). GOLF COACH was sold to the ORU golf team, and Mr. O'Brien consulted extensively with ORU coaches and players in further development of the software product.

5. In 1995, with sales of GOLF COACH almost nil due to preclusion of GO competition via source code preclusion of core program PFS: First Graphics on Windows 95, Mr. O'Brien established a business office and software development facility in Solvang, California. GO began (with formal contracts, facilities, newly purchased equipment, materials, etc.) to develop a new "multi-media" version of GOLF COACH using Mr. O'Brien's recently acquired multi-media skills and state-of-the-art statistical presentation concepts.

6. In 1995-1998, a multi-media version of GOLF COACH had significant potential for circumvention of MS code preclusion and competition in relevant market(s). However, development of a new version was halted almost before it began by (1) continued resistance from investors and investment counselors ubiquitously biased toward Microsoft, (2) comprehensive saturation/monopolization of markets by Microsoft and Macromedia and their co-conspirators selling similar products, (3) suppression of Intel Corporation's Native Signal Processing (NSP) technology by Microsoft, and (4) monopolistic pricing of essential software by Adobe Systems, Inc. (a Microsoft partner deriving about 60% of its revenues from joint ventures) and Macromedia, Inc. of multimedia software (Adobe Premiere, Adobe Photoshop, Adobe Illustrator, Macromedia Director, Macromedia Flash, etc.).

7. In 1998, GO began developing multimedia augmentation of GOLF COACH via .wav/.gif/.jpg files and JAVA scripts and applets. However, preclusion of Sun Microsystems, Inc. downloads from its website precluded GO development of cross-platform scripts, applets and applications that were designed to augment GO's products and services.

8. In 1999, PL enrolled in the Mulitmedia Department at Santa Barbara City College (Santa Barbara, CA) and began to acquire and use skills in multimedia authoring via *Macromedia Director* and *Macromedia Flash* programs supported on a large Windows NT/2000 network. In year 2002, PL has an inventory of over fifty "shockwave movies" that have significant commerical value.
[http://www.angelfire.com/biz2/savicom/ssd_shockwave.html]

9. In 2002, Mr. O'Brien has written two feature film screenplays that are considered by film industry insiders to

be adequate for the production of at least one feature film in near future. [*Ibid.*]

10. Refusal by MSN to support URLs where screenplays are published, hacker destruction of PL's audio/video files and MS preclusion of video products has been injurious and especially problematic for PL. MS preclusion of video clips depicting script scenes (ideas) for network transfer to prospective producers/directors restrained trade/commerce and has recently been especially difficult for GO/PL to endure.

VIII. CHARGES

1. Defendant Microsoft Corporation is formally charged with violations of the Sherman Antitrust Act [15 U.S.C., sec. 1 and 2] because MS used its OS monopoly to leverage attempts to monopolize digital audio/video player markets via OS source code exclusion of competitors' players.

2. Defendant Microsoft Corporation is formally charged with Discrimination in violation of the Robinson-Patman Act [15 U.S.C., sec. 13(e)] because it furnished Plaintiff O'Brien's competitors display of URL links on its MSN search-engine(s), free of charge, but denied same to PL. Therefore, MS conduct "constituted discrimination among competing *purchasers* as contemplated by such subsection" and effect of such discrimination "...was to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition as contemplated by subsection (a)...". [*Ludwig v. American Greetings Corp.*, 282 F2d 917,918 (1960, CA6 Ohio)]

3. Defendant Microsoft Corporation is formally charged with restraint of trade and violation of the Sherman Antitrust Act [15 U.S.C., sec. 1] because it used its monopoly power in computer operating system markets to establish computer operating systems (including XP) that unreasonably restrains trade and commerce in certain software markets (OP, charting/graphing, DAVP, etc.).

4. Defendants Microsoft Corporation and Macromedia, Inc. are formally charged with defective products liability for violation of the Restatement (Second) of Torts, Sec. 402A [American Law Institute (1965, 1996)] because they sold software product(s) in a defective condition that were (are) unreasonably dangerous to consumers, users, or their property. And, once product(s) were discovered to be

dangerous, did not immediately correct and/or warn consumers of the danger within a reasonable period of time.

IX. SUPPORT FOR CHARGE

a) "The vulnerability affects the Flash.ocx ActiveX component of the Flash player version 6 revision 23, and may affect earlier versions as well... eEye said in its alert. The Flash.ocx component is installed with Internet Explorer, as well as with the Flash player, eEye said. [Sam Costello, IDG News Service\Boston Bureau May 03, 2002, 06:30:

<http://www.idg.net/idgns/2002/05/03/SecurityHoleInFlashPlayerCould.shtml>]

b) A buffer overflow in Flash.ocx could allow an attacker to run code of their choice on a vulnerable system when a user reads an HTML-formatted e-mail containing attack code, visits a Web site with attack code in it or uses Internet Explorer to display any other third party HTML, eEye said." [Ibid.]

c) Not only did Microsoft and Macromedia jeopardize and/or injure millions of consumers, including PL, who used IE's FlashPlayer (plugin installed in IE by MS) to play Flash movies, MS also restrained trade and competition from PL's business that develops and sells *Macromedia Director* authored movies rendered with Flash movies imported.

d) Not only did MS use it's illegal monopoly in OS and/or OP markets to tie IE, thereby attempting to illegally monopolize internet browser markets and violating sections 1, 2 and 14 of 15 U.S.C., but MS tie exposed consumers to injury via one or more defect(s) in Macromedia's FlashPlayer, as licensed by MS and made integral in IE, itself integral in XP as licensed to OEMs and sold to consumers.

e) "In order to state a cause of action for strict products liability..., the plaintiff must show that: 1) an injury resulted from the condition of the product; 2) the condition of the product was unreasonably dangerous; and 3) the condition existed at the time that the product left the manufacturer's control. *Hunt v. Blazius*, 384 N.E.2d 368, 372

(Ill. 1979) (citing *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1965))." [United States Court of Appeals For the Seventh Circuit, Case No. 97-2074, *MARTHA HADDIX v. PLAYTEX FAMILY PRODUCTS CORPORATION*, Appealed from the United States District Court for the Central District of Illinois. Case No. 93 C 2004--Michael M. Mihm, Chief Judge, DECIDED MARCH 6, 1998]

f) Macromedia's Flashplayer, installed by MS in IE was defective at the time IE left the control of MS, and was, at that time, unreasonably dangerous to consumers. Product defect caused antitrust injury to many consumers including measurable antitrust injury to PL (destruction of multimedia files, curtailed product sales, breach in security and diminished business credibility).

g) The defect in Flash.ocx was known to Macromedia, Inc. long before May 3, 2002 when it first came to the attention of this consumer/developer via article cited above. Notice of the problem did not appear before May 2002 in leading computer magazines and trade journals surveyed by PL. Presumably, the FlashPlayer vulnerability was made known to MS, at least by its vendor Macromedia, Inc., long before new version of FlashPlayer (ver 6/29, with fixed Flash.ocx file) was made available as a free download on the Macromedia website.

h) PL's review of the Macromedia website on May 18, 2002 revealed no mention of the FlashPlayer defect in question. Newest version was available for free download. Presumably, neither Macromedia nor Microsoft ever mentioned the defect on respective websites or nationally significant press. It was discovered and noticed by a third party. To date Microsoft has not noticed "owners" of IE/XP of the FlashPlayer problem. Only salvation for consumers, if/when they become aware of the problem, remains free download of FlashPlayer upgrade available at Macromedia's website.

i) Is the court aware that only a fraction of IE users know how, or are comfortable with, accessing Macromedia's website, download/setup/test new version of FlashPlayer and then replacing old version plug-in with new version plug-in?

j) According to above cited article the vulnerability is not only in Macromedia's Flash.ocx file but in IE code, as well.

k) Today, literally millions of consumers using IE are made vulnerable and injured, or placed in real possibility of injury, from unauthorized remote access and/or hacker file read/destruction of their data due to aforesaid product(s)

defect(s). MS and Macromedia warnings have not reached a majority of users, or even a significant number of users, who use versions of IE installed with defective FlashPlayer plug-in.

l) "Under the Restatement approach to strict liability, a product is considered unreasonably dangerous when it is 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'" *Id.* (quoting Restatement sec. 402A, (other citations omitted). This test has come to be known as the 'consumer contemplation' test. *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1406 (7th Cir.) (en banc), cert. denied, 513 U.S. 947 (1994)."

m) "Under the Restatement, the consumer contemplation test was the only standard authorized for determining whether a product was unreasonably dangerous. It was perceived by critics to be too restrictive on manufacturers' liability, however, and soon another test also evolved: the 'risk-utility test.'/2 *Todd*, 21 F.3d at 1409. Announced by the California Supreme Court in *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 573 P.2d 443 (Cal. 1978)"

n) Risk-Utility Test:

(1) "A plaintiff may demonstrate that a product is defective in design, so as to subject a retailer and a manufacturer to strict liability for resulting injuries, in one of two ways: (1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs." [563 N.E.2d at 457 (citing *Palmer v. Avco Distributing Corp.*, 412 N.E.2d 959 (Ill. 1980) and *Barker*, 573 P.2d at 453)."]

o) Plaintiff O'Brien is prepared to introduce evidence proving claims (1) Microsoft and Macromedia products failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, (2) Microsoft and Macromedia products (in both design and implementation) proximately caused measurable antitrust injury to PL and (3) defendants have, heretofore, failed to prove that on balance the benefits of the challenged design and/or implementation of said products outweigh the risk of

danger to consumers inherent in such designs and/or implementations.

p) "Manufacturer is strictly liable in tort when article he places on market, knowing that it is to be used without inspection for defects, proves to have defect that causes injury to human being." [*Price v. Shell Oil Co.*, 466 P.2d 722, 85 Cal.Rptr. 178; *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 27 Cal.Rptr. 697; *Grinnell v. Charles Pfizer & Co.*, 79 Cal. Rptr. 369, 274 C.A.2d 424]

q) "A manufacturer is strictly liable in tort when an article he places on market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to human being, and a retailer is likewise strictly liable in tort." [*Erickson v. Sears, Roebuck & Co.*, 50 Cal.Rptr. 143, 240 C.A.2d 793]

r) Microsoft was (is) both manufacturer and retailer (directly via website and indirectly via OEMs and retail stores) of Internet Explorer, MS Office, and Windows 98, 2000, NT, and XP which caused antitrust injury to many human beings, including PL, via distribution of the Flash.ocx defect.

s) Macromedia is manufacturer, licensor, sellor and distributor of the version of FlashPlayer that contains the defective Flash.ocx file which caused antitrust injury to many persons, including PL.

1. Because FlashPlayer, installed as a plugin in current versions of IE, can make entire PC and/or Server computer systems significantly more vulnerable to hackers, many responsible consumers either consciously or non-consciously avoid purchase or free download of multimedia content that includes Flash movies. Why jeopardize your family or business for a little more entertainment ?

2. Because MS and/or MM learned of IE's vulnerability via FlashPlayer many months before trying to remedy consumer vulnerability with a downloadable "patch" or "fix", MS is liable to multimedia developers of content that includes Flash movies because their sales (of products and/or services) have been curtailed by MS and/or MM omission(s).

3. MS and/or MM also liable to those persons who obtained and played Flash movies on IE after MS learned of IE's vulnerability via FlashPlayer and before MS and/or MM warned most consumers of the danger.

4. PL is a member of both groups injured. MS and/or MM injured PL as developer and seller of multimedia containing Flash movies, and as a player of Flash movies on computer systems operated with Windows NT/2000/XP supporting IE with FlashPlayer installed.

5. Given its very limited investigative resources, PL cannot prove precisely what avenue hackers have taken, on scores of occasions, to remotely access and destroy or disfigure PL's commercially valuable files, but it is highly probable that hackers used FlashPlayer containing defective Flash.ocx file, inter IE, to access PL's directories at least once in order to work destructive exploits.

6. In terms of DOS preclusion relative to PL's asset, *Golf Coach*, MS has not yet caused antitrust injury to PL via monopolization and/or attempted monopolization in Server OS markets. That will probably happen next year unless MS elimination of DOS from new Server OS is stopped or reversed.

7. Because PCs are often chained to Server based LANs, monopoly power in the PC OS market can be used to leverage more sales of Server OS to (1) companies wanting integrated (seamless) computer systems and (2) OEMs and/or retailers wanting to sell same companies more computers.

8. In 2002, MS used monopoly power in OS, OP and IB markets to leverage near, or actual, monopoly marketshare for NT/2000 in Server OS markets. In 2001, NT/2000 was used to operate about 41% of Server systems, second only to Novell's *NetWare* marketshare. Although NT/2000 does not eliminate DOS, it exposes a truncated DOS shell. Shell is suitable, given competent systems management enabling, for run of *Golf Coach*. However, next Server OS from Microsoft will, most probably, emulate XP elimination of DOS and thereby eliminate *Golf Coach*, and hundreds of other DOS programs and compilations, from all new Servers and PCs.

9. Except for freeing up a little memory on harddrive of installation, it does not, in the limited knowledge of PL, substantially improve Windows XP (or future NTs) to eliminate DOS. Doing so is merely Microsoft philosophy valid aversion of the old ways of doing things...like eliminating best selling charting-graphing software (1990), *PFS: First Graphics*, in favor of *MS-Excel* charting/graphing functions.

10. *PFS: First Graphics* cannot be purchased today, except inter *Golf Coach*, because Microsoft destroyed *MS-Excel's* leading competitor a decade ago. Software Publishing Corporation (*Harvard Graphics*, etc.) did not formally

complain of its product's preclusion on Windows OS because SPC had numerous Microsoft dependencies and obligations. It was left to PFS: First Graphics licensee to complain and seek relief...loud, clear and long-term.

X. DISCUSSION ON REMEDIES

1. Federal Specifications

a) As found in allegations preceding, Plaintiff sustained business injury and personal injury reasonably estimated in excess of \$75,000. Plaintiff is able to prove these losses with a cognizable legal/economic theory, expert witnesses and detailed, well documented evidence.

b) Federal antitrust statutes specify penalties and/or remedies for proven breach(s) of Title 15, United States Codes, sections 1, 2, and 13e. Many state antitrust statutes specify compensatory, exemplary and other forms of remedy for business injuries sustained via breach of Title 15, U.S.C., sec. 1, et seq., and/or State Codes (antitrust). California specifies penalties and/or remedies which are appropriate for this action.

c) Federal Penalties/Remedies:

(1) Sec. 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 one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U.S.C., sec. 1]

(2) Sec. 2: "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 one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U.S.C., sec. 2]

(3) Sec. 13e: "Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both." [15 U.S.C., sec. 13]

(4) Sec. 15: "...and person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." [15 U.S.C., sec. 15]

(5) "27 October 1997: The Justice Department files a complaint demanding a \$1-million-a-day fine against Microsoft for its alleged violation of the 1995 consent decree. The complaint claims that Microsoft overstepped its bounds by demanding PC manufacturers bundle..." [*U.S. v. Microsoft: Timeline*, Wired News Report, 2:30 p.m., Nov 5, 1999 PST: (<http://www.wired.com/news/politics/0,1283,32358,00.html>)]

(6) Checking Federal Trade Commission antitrust cases listed for review on the FTC website, circa 1997/1998, Plaintiff was unable to find the above referenced case and/or any reference to the fine. However, this news item and other notices in various newspapers give strong indication that such an action (fine) by federal court of jurisdiction was proposed as a reasonable remedy by DOJ.

2. Federal Remedy Specification Re Federal Law :

a) On its face it appears, in this private antitrust case, that the appropriate penalty/remedy for proven breach of sec.1, 2, and 13e, is:

b) For convictions on sections 1 and 2: Microsoft Corporation and/or Macromedia, Inc. must pay two-million dollars (trebled) to Plaintiff.

c) For conviction on Section 13e: Defendant(s) must pay \$5,000 (trebled) to Plaintiff.

3. State Remedy Specifications Re California Law

a) Section 16750: "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 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.

b) 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." (emphasis added) [Cal. Codes: Business and Professions: Sec. 16750 (a)]

c) Section 16755: "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 or 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."

4. Discussion: It is clearly the intent of the California Legislature to effectively punish antitrust conduct maximally, not minimally. On its face it appears in this case that the appropriate state penalty/remedy for proven

breach(s) of sections 16700 et seq. and/or section 17200, are:

a) For convictions on section 16700, et seq. and/or section 17200 et seq.: Microsoft Corporation and/or Macromedia, Inc. must pay two-million dollars (trebled), or twice the gain (net income) that MS and MM derived from breaches of federal/state antitrust laws, because defendants gain is greater than PL's loss which makes gain based penalties more "applicable" for determination of effective, exemplary damages and to fulfill the letter and spirit of sec. 16755(1)(3).

XI. COMMENT ON REMEDIES

1. Because Microsoft's antitrust conviction(s) have withstood appeal, prosecuting States' remedy demand for opening of Windows code to public scrutiny is moot.

2. "The patentee, like these other holders of an exclusive privilege granted in the furtherance of a public policy, may not claim protection of his grant by the courts where it is being used to subvert that policy." [*Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488,494]

3. "A patent owner who has misused a patent cannot sue for infringement. Common examples of misuse are violations of the antitrust laws or unethical practices. For example, if a patent owner conspired to fix the price of the patented item, this would violate antitrust laws. If the patent owner later sued for infringement, the defendant could argue that the owner is prohibited from suing because it has misused its patent rights." [*Nolo's Patents for Beginners*, 2ed (2001), by David Pressman and Richard Stim, chap. 8, sec. 8]

4. "But a patent affords no immunity for a monopoly not within the grant, *Interstate Circuit v. United States*, 306 U.S. 208, 228, 230; *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 456, and the use of it to suppress competition in the sale of an unpatented article may deprive the patentee of the aid of a court of equity to restrain an alleged infringement by one who is a competitor...*Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 510; *Carbice Corp. v. American Patents Corp.*, *supra*; *Leitch Mfg. Co. v. Barber Co.*, *supra*; *cf. United Shoe Machinery Co. v. United States*, 258 U.S. 451, 462; *International Business Machines Corp. v. United States*, 298 U.S. 131, 140." [*Supra*, p. 491, 492]

5. According to *Morton Salt* Microsoft conviction(s) for monopolization of the computer operating system market and exclusive dealing mean MS may no longer sue persons who infringe upon MS-Windows and MSN patents.

XII. CONCLUSION

A. Microsoft and Macromedia Caused Antitrust Injury to PL in Four Ways:

1. Microsoft's MSN failed to index PL's URL after repeated and long-term submission of same. In light of PL's other federal actions against MS, citing similar MS actions against Sun Microsystems in similar circumstances, it must be concluded MSN omission(s) constitute intentional discrimination against PL and restrained not only PL's trade, commerce and competition but that of many other companies and individuals likewise suffering same or similar discrimination by MSN.

2. MS preclusion of RealMediaPlayer and/or QuicktimePlayer both in direct competition with WindowsMediaPlayer constitutes restraint of trade, monopolization and/or attempted monopolization, and clearly restrained PL's competition and that of many companies in digital video and digital audio markets where competitors products were rendered in RealProducer and/or Quicktime Pro and not in WindowsMediaPro (a/k/a Microsoft Producer).

3. MS elimination of DOS in its new operating system, XP, uses monopoly power in OS, OP and IB markets to restrain the trade, commerce and competition of every business selling software requiring DOS functionality. PL is one such business so injured by loss of revenues from abridged DOS program sales.

4. MS and MM injured PL via distribution of FlashPlayer defect(s) in IE.

XIII. RELATED MATERIAL ISSUES

A. Settlement Dissatisfaction:

1. "Massachusetts' appeal to the U.S. Court of Appeals for the District of Columbia will drag out the already 4-1/2-

year-old case. But [Attorney General] Reilly said there were important principles at stake.

2. 'The [settlement] deal ignored Microsoft's ill-gotten gains, did nothing about safeguarding competition in new technologies, and was filled with loopholes and exceptions', he said. 'We believe that a remedy must send a message that breaking the law does not pay.'

3. The appeals court ruled in June 2001 that Microsoft had illegally maintained its Windows operating system monopoly, but rejected a trial court proposal to break the company in two.

4. During the remedy hearings, the attorneys for the states argued unsuccessfully that the antitrust sanctions should be designed to stop the company from using Windows to crush competition in the markets for emerging technologies such as server software and handheld computers.

5. Under the settlement, Microsoft is prohibited from retaliating -- or threatening to retaliate -- against computer makers who choose to feature non-Microsoft products. Nor can it enter into agreements that require the exclusive support of some Microsoft software.

6. The company still faces a series of class-action lawsuits brought on behalf of U.S. consumers, along with civil suits brought by Sun Microsystems Inc. and other competitors who claim they were victimized by the company's anticompetitive tactics.

7. The world's largest software company is also awaiting the findings of an antitrust probe by the European Commission." [www.reuters.com : "Mass. Appeals Microsoft Case Alone", Sat November 30, 2002 02:07 PM ET, By Tim Dobbyn]

8. This case, transferred from the Central District of California to the District of Maryland in October 2002, is a timely private civil suit against software "giant". Suit is intended to "...stop the company from using Windows to crush competition in the markets for emerging technologies..."; especially in the digital video/audio markets and website development/publication markets served by Plaintiff O'Brien.

9. "Under the settlement, Microsoft is prohibited from retaliating -- or threatening to retaliate -- against computer makers..."; this prohibition must be extended beyond computer makers to software and website related makers.

10. Plaintiff O'Brien is a software/internet-website developer who needs to obtain remedy and compensation of the type decreed just in District of Columbia re noted DOJ/States/MS settlement.

A. XP Preclusion Has Worked MS Intent:

1. What pragmatic (profitable) purpose is served via XP preclusion of competitors' media players? The answer to this question was not obvious to PL until June 13, 2002 when MS announced support for its WindowsMediaPlayer(Audio) in the leading chip makers (Intel, AMD, et al.) new audio chips.

2. Because federal prosecutors and/or court(s) permit Microsoft to advance illegal OS monopoly and restrain QuickTime/RealPlayer competition in audio player markets, chip makers now realize that the future of audio players is in WindowsMediaTechnology. Expediencies in the highly competitive chipset business demand that viable competitors enter dangerous, quasi-legal realms in order to stay profitable.

3. MS business advance, at the expense of competition in media player markets and at the expense of persons dependant on same, is not legitimate business practice because MS has recently been convicted of OS monopolization, and continued use of OS monopoly to restrain competition is continued breach of antitrust laws.

4. Theory: Chip makers have waited until now to support WindowsMediaPlayer(audio) because it took XP's effective preclusion of QT/Real to convince chip makers that it was in their best interests to deny powerful mp3, QT and/or Real "lobby" efforts to secure exclusive support in their chips. XP preclusion of Microsoft's competitors' products made support for WindowsMedia(audio) more profitable than what Microsoft's competitors were willing to pay for exclusive chip support. [See I.(B) 9 above.]

5. Whether or not the chip makers situation gives evidence of marginal "business justification", fact remains XP preclusion of QT/Real has grossly restrained trade and commerce in media player markets, and caused unjustified antitrust injury to PL and many other competitors in related player and media markets.

B. Remedies Outside MS Currently Available:

1. Microsoft does not allow OEMs to sell bare-box (no software installed) computers even though consumers and software developers/sellers worldwide plead for them.

2. If OEMs sold even 10% bare-boxes, trade and competition in global software markets would be greatly stimulated and increased.

3. Many developers/sellers of OS, OP, IB and other computer software, including software giant MS, would compete to fill software space in bare-box computers. This is certainly one of the key "remedies" that should be requested and fought for re *U.S. v. MS* litigation.

4. Microsoft co-opted and permanently appropriated the Graphical User Interface ["GUI"] from Apple Computers, Inc. after its license for same expired around 1990. Apple, under questionable circumstances, took the GUI from Xerox, Inc. around 1981. Xerox developed the GUI from Macintosh designs that, presumably, Mac got from God himself.

5. It would greatly stimulate competition, consumer choice and technological innovation in operating system and related software markets if MS were to release its questionably patented GUI source code to the public domain. That would be enough to stimulate development.

6. If MS does, in fact, have patent protection at this time, developers with *gratis* GUI could, nevertheless, begin creation of programs competitive with, and yet substantially (legally) dissimilar to, Windows 3.1, 95, 98, 2000, and Me when MS patents lapse. What's wrong with innovation and competition in markets for essential computer software? If strong monopoly is right so is viable competition.

7. Of course developer/seller of new OS, OP, IB and other programs would need bare-box space for consumers' placement of competing products.

8. PL would be encouraged to continue competition in software markets if OEMs were required by law (or other power to liberate from MS monopoly control) to sell x% bare-box computers because MS-Office (about \$400. retail) would be necessarily purchased as a substitute for PL's *Golf Coach* (about \$50. retail) by consumers seeking simple charting/graphing/wordpad ability on Windows OS.

9. When OEMs sell x% bare-box computers PL will certainly consider obtaining freeware/shareware programs, and/or originally authored programs, to create it's own office productivity suite to include (1) an internet browser program, (2) a spreadsheet program, (3) a wordprocessor program, (4) a graphics presentation program, (5) a media player program, and (6) other office productivity related programs. SAVIORG(SAVICOM) will then sell *BizWiz*

competitively in OP and related markets to owners of bare-box computers who install non-Windows OS.

10. Instead of the present situation where PL is precluded by MS from trade and competition via MS preclusion of PL in search-engines, mediaplayers and charting/graphing markets, PL would be able to trade and compete in OP and related markets, thus adding economy, choice, innovation and other values to software markets while obtaining sufficient revenues to survive and prosper in American free-enterprise business, the only economic system providing life, liberty and property for those who deserve it.

11. An appeals court last year upheld trial court findings that Microsoft had illegally maintained its Windows monopoly by tactics that included commingling the operating system with the IE program to fend off rival Netscape. Now it is apparent that MS engineering has not been limited to preclusion of Netscape via IE integration. Preclusion of media players other than WindowsMediaPlayer has occurred, and will continue to injure competitors in certain digital audio/video markets until this court, or some other power, stops Microsoft from breaking the law.

12. It may yet be PL's fault that MSN precludes indexing of its websites (URLs). From Microsoft's perspective, it is a fault to question MS monopolization and exclusive dealing, and retaliation against businesses or individuals filing suit(s) for relief from same is well rationalized in Redmond, Washington and in many public information sources under influence/control of Microsoft Corporation.

13. PL remembers, and asks the court to remember, when MS retaliated against Sun Microsystems, Inc. after the latter beat the former in a federal suit (copyright issue) in 1998. For a time, Sun lost its ability to offer downloads from its website into computers running Windows 98. [*O'Brien v. Microsoft, Compaq and RadioShack*, CV 01 - 08306 MRP (RCx), at I. (A) 6.]

XIV. PRAYER

1. Plaintiff Edward Michael O'Brien prays for this court's award of both compensatory and exemplary damages because power to remedy business inequities is found most pronounced in the essence of business...gain or loss of money. By law, presently and in future, Microsoft Corporation and Macromedia, Inc. must be fined twice the net income derived from their conduct proven to violate federal/state antitrust

laws and injurious to American consumers and competitors, including plaintiff.

2. Reliance exclusively on federal/state prosecutions to remedy Defendants' antitrust inequities is not sufficient because government prosecutors rarely demand sufficient financial penalty to effectively curtail monopolist(s) behavior in future. Such is the case with current prosecutions of MS by federal/state authorities. Comprehensive, sufficient and effective financial penalties are better rationalized and demanded by sec.15 litigants bringing actions from the private sector where they have suffered real (personal, family and/or business) financial damages and other forms of injury inflicted by monopolists.

3. It is fair and appropriate, in order to safeguard present and future computer software and hardware customers at all socio-economic levels in all countries of the world and to insure lawful compliance by Microsoft Corporation and Macromedia, Inc. (and, indeed, entire industries led by MS and MM) with antitrust laws, to award to PL not only compensatory damages for real and measurable injury inflicted by the Defendants, but also sufficient and effective punitive (exemplary) damages financial (pecuniary) in nature.

4. Toward the goal of better computer software and/or hardware business globally, PL calls this Court's attention to the issue of punitive (exemplary) damages demanded re convictions noted herein and considered fair and appropriate by the U.S. District Court and courts in the State of California. And on these criteria/precedent, Plaintiff makes request for Court's award of punitive (exemplary) damages to be paid by Defendants, in cash, stock or note(s), relative to Defendant's "pecuniary gain" derived from antitrust actions, proven illegal in this and other cases.

5. Plaintiff O'Brien's claim for award of federal/state statute grounded compensatory and punitive (exemplary) damages based on cited criteria/precedent is the first and only such private claim made in federal or state courts and, therefore, PL is entitled to twice Defendants' pecuniary gain derived from Defendants' proven illegal actions, ongoing at inception of Plaintiff's cause of action to date, as evidenced by authoritative public and/or private financial records.

6. Plaintiff O'Brien claims and prays for compensatory damages (business and personal) in the amount of \$3,000,000 trebled to be paid by defendants.

7. Plaintiff O'Brien claims and prays for MS reinstatement of a DOS shell in XP sufficient to run *Golf Coach*.

8. Plaintiff O'Brien 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 Microsoft and/or Macromedia derived from *per se* illegal, antitrust actions over the time period encompassed by cause(s) of action in this case.

9. Plaintiff O'Brien claims and prays for court's award of its attorneys' fees and other costs of suit.

10. Plaintiff O'Brien claims and prays for such other and further damage award and/or relief as the Court deems just and equitable.

Executed on December 2, 2002 at Santa Barbara, California

by _____

Edward Michael O'Brien, *pro se*

Victoria Court

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