

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDWARD MICHAEL O'BRIEN,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

FIRST AMENDED COMPLAINT

I. CAUSE OF ACTION

1. Plaintiff, Edward Michael O'Brien ["PL"], complains in United States District Court for the Central District of California of antitrust injury caused by Microsoft Corporation's ["MS"] conduct in relevant markets restraining trade, monopolizing, denying access to an essential facility, tying and dealing exclusively.

2. This civil action is grounded on Title 15 of United States Codes, sections 1, 2, 13(a)(b)(d) and 13a and is brought to this court for recovery of compensatory and punitive damages trebled. Grounds for action include supplementary state claims under California Business and Professions Codes: sections 16700, et.seq. and 17200 et seq., requiring statute specified exemplary and punitive damages for Defendant's unfair business practices that caused consumer and competitor injury, interstate.

3. Defendant Microsoft breached 15 USC, sec. 1, 2, 13(a)(b)(d)(f) and 13a when it used monopoly power to increase monopolies in the computer operating system ["OS"] market, via MS-Windows, the wordprocessing (charting/graphing/wordpad) ["CGW"] market, via MS-Excel, and the office productivity suite ["OP"] market, via MS-

Office, by (a) entering into "First Wave Agreements" with certain internet software vendors ["ISV"] and internet content providers ["ICP"] that excluded many other ISVs/ICPs from valuable business benefits, (b) causing ISVs/ICPs, and other persons buying/using Microsoft's native-code development programs, to believe they were creating java applets and applications that were cross-platform and/or fully functional in all major OS when they were not, (c) tying internet browser, Internet Explorer ["IE"], to sales of Windows 98 and/or sales of MS-Office, and (d) denying access to a unique programming facility that was essential for PL's competition in certain ISV/ICP markets. [Exhibit A]

4. Defendant's violations of federal/state antitrust laws directly and proximately injured PL, the sole-proprietor of SAVIORG (SAVICOM), Inc. ["SAV"], in a manner antitrust laws were legislated, amended, promulgated and adjudicated to prohibit.

II. PARTIES

1. Plaintiff O'Brien, after graduation from the University of California at Santa Barbara and three years commissioned service in the United States Marine Corps, became sole-proprietor of SAV, a California private business. SAV designs, manufactures and sells computer software, websites, multimedia, internet games, books and screenplays.

2. SAV's primary product, *Golf Coach*, is the first (copyrighted 1989) software compilation to allow golfers (any players) to acquire, process, analyze and present golf statistics (any sports stats) on PC, SERVER and MAINFRAME computers. SAV's other commercial products include *PlayPredict*, a play-by-email game, *Give&Get*, a book on finance, and two screenplays entitled *Most Dangerous Game* and *I Flew China*.

3. 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.

4. Defendant Microsoft Corporation develops, makes, licenses and supports a wide range of software products, including operating systems, server applications, business and consumer productivity applications, software development tools, and internet software and technologies. MS-Windows is

the company's "flagship" product, the market dominating PC operating system.

5. MS operating systems software run over 90% of PCs currently in use. The original Disk Operating System (DOS: 1984-92) gave way to Windows, a graphical user interface program that runs in conjunction with DOS and makes a PC easier to operate for most users. Windows 98, with sales closely tied to PC shipments by Original Equipment Manufacturers ["OEM"], was introduced in June 1998. Its predecessor, Windows 95, has an installed base of more than 100 million users. Windows NT, a network operating system providing network management and administration tools, security and operating stability, also has a large and rapidly growing installed base.

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

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

III. JURISDICTION, VENUE, and LIMITS

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

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

3. This action commences less than four (4) years after certain elements of alleged cause-of-action accrued and is,

therefore, within time limits, pursuant to 15 U.S.C., sec. 15b.

4. Cause-of-action (1994-1998) is not barred by antitrust time limits because *U.S. v. Microsoft* (Consent Decree: CV 94 - 01564) tolls limits through appeals (Nos. 97-5343 and 98-5012 in the United States Court of Appeals for the District of Columbia) decided June 23, 1998.

5. Cause-of-action (1998-1999) not barred by sec.15 time limits because on-going *U.S. v. Microsoft*, CV 98 - 1232/1233 TPJ/CKK, tolls limits June 23, 1998 to date.

"Running of statute of limitations as to private antitrust action is suspended pursuant to 15 USCS, sec. 16(i) by initiation of government suit against some of same defendants, arising out of same conspiracy as that complained of in private suit..." [*Chipanno v Champion International Corp.* (1983, CA9 Or), 702 F2d 827; 15 USCS, sec. 16, n 44]

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 violations of law alleged in this complaint. Damages claimed by PL exceed \$75,000.

2. Substantial quantities of MS and SAV products are shipped and/or sold worldwide and throughout USA interstate commerce.

3. Manufacture, marketing, and/or distribution of Plaintiff and Defendant's products in the United States occurs, in substantial part, through use of various channels of interstate transportation and communication.

V. CAUSE SPECIFIED

A. Classical Section 2 Analysis Criteria:

1. "...Section 2 to the Sherman Act makes it unlawful to 'monopolize, or attempt to monopolize,...any part of the

trade or commerce among the several States, or with foreign nations.' [15 U.S.C., sec. 2 (1994)] Despite the Act's absolute language, courts have not interpreted it to outlaw all interstate monopolies. Rather, the intended purpose of the statute is to prohibit the acquisition or maintenance of monopoly power through anticompetitive means.

2. "Although the provision is crafted in admittedly broad terms, the legislative history of Section 2 'makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.' [*Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978)] In *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966), the Supreme Court distilled the monopolization offense of Section 2 into 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.'"

3. "To evaluate the first element of the *Grinnell* test, courts generally rely upon the concept of monopoly power set forth in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). 'Monopoly power is the power to control prices or exclude competition.'"

4. "Such power need not be exercised; the test is satisfied if a firm merely possesses this power. [*Am. Tobacco Co v. United States*, 328 U.S. 781, 811 (1946)."

5. "To establish the existence of monopoly power, it is necessary first to identify what courts call the 'relevant market' -- the market in which an entity is alleged to be able to control prices or to restrain competition. Identifying the relevant market is important because, according to the Supreme Court, '[w]ithout a definition of that market there is no way to measure [a firm's] ability to lessen or destroy competition.' [*Walker Process Equip., Inc. v. Food Mach. & Chem Corp.*, 382 U.S. 172, 177 (1965)] In defining the relevant market, 'no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce, monopolization of which may be illegal.' [*United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. at 351] Such a conception makes sense because the possibility of consumer substitution prevents firms from engaging in anticompetitive pricing."

6. "Once the relevant market is identified, evidence of monopoly power within that market must exist. Courts rely on several types of evidence in order to assess whether a firm enjoys such power. The most widely adopted approach is that a finding of dominant market share in conjunction with substantial barriers to entry is sufficient to create the presumption of monopoly power." ["Antitrust and the Information Age: Section 2 Monopolization Analyses in the New Economy", *Harvard Law Review*, March 2001, vol. 114, pp.1623-1625]

7. "In addition to monopoly power, under the *Grinnell* formulation courts must also find that there has been a '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.' This willfulness or intent requirement is critical because it avoids punishing firms that obtain a dominant market share as a result of successful competition for their success."

8. "Distinguishing lawfully acquired and maintained monopoly power from objectionable monopoly power has been a difficult task for courts. However, the cases do reveal a common approach to evaluating market conduct under Section 2. The key question is whether the conduct of the dominant firm indicates competition on the merits (meaning competition based on product quality, marketing and distribution, and consumer choice), which naturally but only incidentally tends toward the exclusion of competitors, or whether the conduct is directly or primarily aimed at excluding competitors on a basis other than the merits. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) The latter type of conduct is variously labeled 'anticompetitive', 'exclusionary', or 'predatory'." [*Ibid.* pp.1626-1627]

9. "In making such a determination, many courts have inquired whether conduct that is seemingly irrational for a profit-maximizing firm becomes rational only in light of its adverse impact on competition. [*Olympia Equip. Leasing Co v. W. Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986)] The most common example of this type of conduct is predatory pricing, which is 'pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.' [*Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1986)]"

B. Defendant's Classical Section 2 Liability:

1. "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 applied this test and found that Microsoft possesses monopoly power in the market for Intel-compatible PC operating systems. Focusing primarily on Microsoft's efforts to suppress Netscape Navigator's threat to its operating system monopoly, the court also found that Microsoft maintained its power not through competition on the merits, but through unlawful means. Microsoft challenges both conclusions. We defer to the District Court's findings of fact, setting them aside only if clearly erroneous. Fed R. Civ. P. 52(a). We review legal questions de novo. United States ex rel. Modern Elec., Inc. v. Ideal Elec. Sec. Co., 81 F.3d 240, 244 (D.C. Cir. 1996)."

2. "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." [*United States of America v. Microsoft Corp.*, Case No. 00-5212/00-5213 in the United States Court of Appeals - District of Columbia Circuit, decided June 28, 2001, at I.(B.)]

3. PL contends MS used certain forms of monopolization, specified herein, for which it has already been convicted.

4. "First, many of the findings that Microsoft argues should not be given preclusive effect did not concern Microsoft's internal development of its own JVM but external actions it took to stifle competition...including (a) entering into "First Wave Agreements" with independent software vendors, (b) deceiving ISVs into believing that they were developing cross-platform applications, and (c) threatening Intel (ultimately with success) not to cooperate with Sun and Netscape in developing a Java runtime environment."

5. "Second, referring to many of Judge Jackson's factual findings, the Court of Appeals specifically affirmed his

conclusions that Microsoft's actions violated section 2 of the Sherman Act." [IN RE MICROSOFT CORP. ANTITRUST LITIGATION, MDL 1332: Motions Opinion, dated November 4, 2002, p.3: The Hon. J. Frederick Motz, presiding]

C. Sec. 1 and 2 Analysis Under the "essential facilities" Doctrine:

1. "It is illegal restraint of trade to foreclose the scarce facility." [*Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977)]

2. "The essential facilities doctrine imposes liability when one firm which controls an essential facility denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first." [*Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991)]

3. "The central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market." [*Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990)]

4. "...a monopolist may not abuse its monopoly power in one market to gain an improper advantage or to destroy threatened competition in an adjacent market in which it also operates." [*Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-79 (1973)]

5. "Specifically, to establish antitrust liability under the essential facilities doctrine, a party must prove four factors: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to competitors. [THE ESSENTIAL FACILITIES DOCTRINE UNDER U.S. ANTITRUST LAW, *Antitrust Law Journal* (2002), vol 70, issue 2; article by Robert Pitofsky, Donna Patterson, and Jonathan Hooks]

6. "This test for antitrust liability has been adopted by virtually every court to consider an essential facilities claim." [*Ibid.*, p. 449] [*Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356, 1357 (Fed. Cir. 1999); *Int'l Audiotext Network, Inc. v. AT&T Co.*, 893 F.Supp. 1207, 1213 (S.D.N.Y. 1994); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 761 F.Supp. 185, 192 (D.Mass, 1991)]

7. As the Ninth Circuit Court of Appeals has stated, "...a facility controlled by a single firm will be considered 'essential' only if control of the facility carries with it the power to eliminate competition..." [*City of Anaheim*, 955 F.2d at 1380 n.5 (quoting *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991); see also *American Online, Inc. v. GreatDeals.net*, 49 F.Supp. 2d 851, 862 (E.D. Va 1999) ("An 'essential facility' is one which is not merely helpful but vital to the claimant's competitive viability.")(quoting *Cyber Promotions, Inc. v. American Online, Inc.*, 948 F.Supp. 456, 463 (E.D. Pa. 1996)): *Hecht*, 570 F.2d at 992-93 ("To be 'essential' a facility need not be indispensable; it is sufficient if duplication of the facility would be economically infeasible and if denial of its use inflicts a severe handicap on potential market entrants.")]

8. As stated by the Ninth Circuit in *Alaska Airlines*, "[T]he essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first." [*Alaska Airlines*, p. 542]

9. "Though the 'classic' applications of the doctrine have related to natural monopolies, recent cases and U.S. enforcement policy demonstrate that the essential facilities doctrine applies to intellectual property no less than to tangible assets. Numerous U.S. courts have squarely held and otherwise indicated that the essential facilities doctrine applies to intellectual property and other intangibles. When essential facilities claims have been raised in the context of assets protected by intellectual property laws -- such as copyrighted data bases or software -- these courts have applied the essential facilities doctrine just as they have when the undisputed natural monopolies involved utilities, transportation facilities, or other physical assets." [*Supra.*, THE ESSENTIAL FACILITIES DOCTRINE UNDER U.S. ANTITRUST LAW, p. 452]

D. Defendant's Sec. 1 and 2 Liability Under "essential facilities" Doctrine:

1. Microsoft, with monopoly power in the OS market via Windows, itself an essential facility for software developers and many other PC computer users, denied Plaintiff O'Brien use of an essential facility (java language programming software invented by Sun Microsystems, Inc. ["SUN"] for development of java applets and

applications)critically needed for PL's competition with Microsoft.

Definition of "Java": A high-level programming language developed by Sun Microsystems. Java was originally called OAK, and was designed for handheld devices and set-top boxes. Oak was unsuccessful so in 1995 Sun changed the name to Java and modified the language to take advantage of the burgeoning World Wide Web.

Java is an object-oriented language similar to C++, but simplified to eliminate language features that cause common programming errors. Java source code files (files with a .java extension) are compiled into a format called bytecode (files with a .class extension), which can then be executed by a Java interpreter. Compiled Java code can run on most computers because Java interpreters and runtime environments, known as Java Virtual Machines (VMs), exist for most operating systems, including UNIX, the Macintosh OS, and Windows. Bytecode can also be converted directly into machine language instructions by a just-in-time compiler (JIT).

Java is a general purpose programming language with a number of features that make the language well suited for use on the World Wide Web. Small Java applications are called Java applets and can be downloaded from a Web server and run on your computer by a Java-compatible Web browser, such as Netscape Navigator or Microsoft Internet Explorer.

Although java applets and applications can be easily downloaded by any PC user (from a host server where the program is lodged in directory and offered for public access via website href link) and run in any browser (when the operating system incorporates an appropriate virtual machine), java applets and applications cannot be saved by a user to his machine (harddrive). When a user session is terminated, java applets and applications automatically extinguish, pursuant to security convention.

2. PL's competition against MS in CGW markets (SAV-Golf Coach v. MS-Excel) was damaged by MS abuse of its monopoly power causing (a) restraint of SUN's competition; (b) restraint of SAV's competition, and (c) increase of MS marketshare in OS, OP, CGW and java development software ["JDS"] markets.

3. In 1998, SUN, having exclusive rights (patents) to the java computer programming language, sold and/or gave away Java Developer's Kit 1.1 [JDK] via download from its

website. Because JDK was the only program that offered thousands of interested developers (USA and worldwide) the ability to create fully functional cross-platform java applets and applications [highly demanded (lucrative) commodities] it was, quite literally, an *essential facility* for many software developers.

4. In 1998, soon after MS lost federal court battle(s) with SUN [*Sun Microsystems, Inc. v. Microsoft Corp.*, 999 F. Supp. 1301 and 21 F. Supp. 2d 1109 (N.D. Cal. 1998)], MS released a version of Windows 98 that precluded run of JDK and, thereby, breached 15 U.S.C., sec. 1 and 2 and related state laws concerned with restraint of trade in the java development software market and monopolization and/or attempted monopolization in CGW, OS and OP markets. Preclusion of JDK via Windows 98 source code breached sec. 1 and 2 in especially malicious fashion because it not only sought to injure SUN vindictively it also displayed reckless disregard for the interests (businesses and livelihoods) of software developers worldwide by the greatest company in the software development industry.

5. Microsoft's anticompetitive denial of access to a facility (java programming interface), that was essential for economically feasible competition against Microsoft in CGW and related markets, significantly injured PL and numerous other developers via restraint of their trade/commerce.

6. JDK was essential to PL's competition because, without upgrades of SAV-Golf Coach that included state-of-the-art java applets and applications, SAV-Golf Coach was not able to sustain competition with MS-Excel, Wordperfect (Corel), Smartsuite (IBM) and other competitors in CGW markets. SAV-Golf Coach had to be a novel and low-cost statistics presentation program (charts, graphs and instructional text) in order to supercede excellent but conventional charting/graphing modes in MS-Excel (with about 90% marketshare in CGW markets) and noted other competitors' programs (about 7% marketshare) and, thereby, gain sufficient consumer interest and marketshare (at least 1%) for business survival in 1998 and beyond.

7. MS control of JDK's download/setup/run and sustained functionality via control of source code rendering Windows 98 on which JDK had to run (ISP/ICP development must be current version of Windows compliant to be economically viable) "carried with it the power to eliminate competition" in the Java Development software market.

8. Perhaps we should be thankful. MS could have become the only company to own a copy of JDK that ran on Windows 98. With specially crafted source code adaptations to make JDK (a) setup/run on 98 and (b) produce applets/applications fully functional on 98, Microsoft, and/or co-conspirators, could have cornered development markets and become the only company(s) able to produce/sell highly profitable java applets and applications for Windows users worldwide! Bet they could just kick themselves for missing that opportunity.

9. In retrospect, download, setup and run of JDK on another OS would have permitted PL to develop cross-platform applets and applications compliant with that OS, but, in years 1998 thru 2002, PL was not economically, logistically or intellectually capable of purchasing, installing and using a second or third operating system for creation of java applets and applications that had to be fully functional (tested) on Windows 98 as well as on source operating systems.

10. There were no substitutes for JDK's cross-platform functionality that would run on Windows 98 in 1998-1999. In fact, to PL's knowledge there are no substitutes today.

11. Denial of access to JDK severely handicapped Plaintiff O'Brien's business life as proven by SAV's business records for 1998-2003.

E. Market Power Confirmed:

1. "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'). Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear. See *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); see also *FTC v. Indiana Fed'n of*

Dentists, 476 U.S. 447, 460-61 (1986) (using direct proof to show market power in Sherman Act s 1 unreasonable restraint of trade action). Because such direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power. 2A Areeda et al., Antitrust Law p 531a, at 156; see also, e.g., Grinnell, 384 U.S. at 571. Under this structural approach, monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers. See Rebel Oil, 51 F.3d at 1434. 'Entry barriers' are factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level. See S. Pac. Communications Co. v. AT & T, 740 F.2d 980, 1001-02 (D.C. Cir. 1984)."

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

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

4. In 1998, when DOJ and 19 States filed complaint against Microsoft, IE had less than 51% of marketshare in the internet browser market. While MS most definitely had monopoly power in the computer operating systems market it did not possess same in the browser market. Thus, the appellate court's reversal of Microsoft's conviction for monopolization of the browser market was as much for market power deficiency as it was for inadequate allegations re competitor versus consumer benefits.

5. In 2002, IE allows MS to enjoy over 90% marketshare. MS monopoly and monopoly power in the internet browser market is no longer seriously questioned. Thus, MS may now be accused and convicted of monopolization and related crimes in the internet browser market.

F. Anticompetitive Conduct:

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

2. "In this case, after concluding that Microsoft had monopoly power, the District Court held that Microsoft had violated s 2 by engaging in a variety of exclusionary acts (not including predatory pricing), to maintain its monopoly by preventing the effective distribution and use of products that might threaten that monopoly. Specifically, the District Court held Microsoft liable for: (1) the way in which it integrated IE into Windows; (2) its various dealings with Original Equipment Manufacturers, Internet Access Providers ("IAPs"), Internet Content Providers, Independent Software Vendors, and Apple Computer; (3) its efforts to contain and to subvert Java technologies; and (4) its course of conduct as a whole." [*Supra*, II.(A.)(2.)(B.)]

3. This complaint specifies *predatory pricing* ("loss leading") to support plaintiff's sec.2 charges and, therefor, adds substantively and materially to appellate court's decision upholding and/or remanding MS convictions.

G. Relevant Markets:

1. Following are markets where Defendant's conduct caused PL to experience anticompetitive effects and are relevant to PL's cause of action:

a) *digital animation*: Productions (.swf and .dcr files) using Macromedia *Flash* and/or *Director*.

b) *digital video*: Productions (.mov, .avi, .wmv files) using Adobe Systems, Inc.'s *Adobe Premiere* or comparable digital video editing software.

c) *digital audio*: Productions (.wav, .au, .aiff, .wma, .rm, .mov files) using RealProducer, WindowsMediaProducer or QuicktimeProducer to produce digital audio files for import to authoring environments, embed in website html or mediated via CD/DVD.

d) *website development*: Products (.html, .swf, .dcr files), commonly termed business "webpages", that are internet server published in html code and suitable for indexing on the world-wide-web (internet).

e) *charting/graphing software*: Products that provide consumers with simple charting and graphing capability on PC, Server or Mainframe computers.

f) *digital literature*: Products (.html files), such as statistical logs, books and screenplays, published in website html code, or standalone, allowing instant reading and/or download.

g) *internet games*: The play-by-email game market where PL's *PlayPredict* lets users win prizes by sending emails predicting football plays (and yardage gained) while watching televised NFL games.

h) *screenplays*: The conventional market for motion picture screenplays.

2. Competitors in above noted markets are numerous, well-known and found throughout the United States and worldwide. Microsoft Corp., itself, competes with PL in at least one market noted above.

3. DOJ evidence discovered (certified) for *United States v. Microsoft Corp.*, CV 98-1232/1233 TPJ/CKK is exhibited herein to show anticompetitive, discriminatory agreements existed between other of PL's competitors, including Starwave, Inc., NBC Multimedia, Inc., Hollywood.com, Disney.com, AOL.com, CondeNast.com and SportsOnline.com, and Microsoft, as alleged above and below. [Exhibit B]

H. Code Commingling Confirmed:

1. "Microsoft knew that the inability to remove Internet Explorer made OEMs less disposed to pre-install Navigator onto Windows 95. OEMs bear essentially all of the consumer support costs for the Windows PC systems they sell. These include the cost of handling consumer complaints and questions generated by Microsoft's software. Pre-installing more than one product in a given category, such as word

processors or browsers, onto its PC systems can significantly increase an OEM's support costs, for the redundancy can lead to confusion among novice users. In addition, pre-installing a second product in a given software category can increase an OEM's product testing costs. Finally, many OEMs see pre-installing a second application in a given software category as a questionable use of the scarce and valuable space on a PC's hard drive." [*U.S. v. Microsoft*, CV 98-1232/1233 TPJ, Findings of Fact, #159.]

2. "Accordingly, we reject Microsoft's argument that we should vacate Finding of Fact #159 as it relates to the commingling of code, and we conclude that such commingling has an anticompetitive effect; as noted above, the commingling deters OEMs from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, developers' interest in rivals APIs as an alternative to the API set exposed by Microsoft's operating system." [*Supra*, II.(2.)(B.)(2.)(a.)]

3. Not only did MS tie of IE restrain Netscape's trade, it also increased OEM's costs passed on to the consumer. Therefore, PL and all other persons buying a Compaq computer installed with Windows 98, having IE code commingled with OS code, paid more for their computer than they would have, minus tie of IE. Increased consumer payment (and time-loss, cost, inconvenience, etc. for those needing Navigator) was *per se* antitrust injury to consumers because Microsoft was convicted of illegally increasing monopoly in OS market via "anticompetitive methods", ie. exclusionary practices. Tie of IE to Windows 98 via OS monopoly power was just as illegal as monopolization of Windows 98 via other exclusionary practices that triggered Microsoft's sec. 1 and 2 convictions. [*Ibid.*]

4. If tie of IE was not monopolization of the Internet Browser market in 1998 (yet to be determined on remand for rule-of-reason to District of Columbia) it was, certainly, part of an elaborate exercise of business legerdemain by MS to monopolize the OS market. Therefore, Plaintiff O'Brien has cause of action under 15 U.S.C., sec. 1 and 2 for MS tie of IE in 1998 causing overcharge, whether or not the browser market was monopolized by MS in 1998.

I. 15 USCS, Sec. 13(a)(b)(d) Analysis Criteria:

1. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different

purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promoting of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." [15 U.S.C., sec. 13(a)]

2. "While 15 USCS, sec.13(a) does not forbid price competition which will probably injure or lessen competition by eliminating competitors, discouraging entry into market, or enhancing market shares of dominant sellers, it prohibits sellers from selling like goods to different purchasers at different prices if result may be to injure competition in either sellers' or buyers' market, unless such discriminations are justified as otherwise permitted by Robinson-Patman Act. Utah Pie Co. v Continental Baking Co.

(1967), 386 US 685, and on remand (CA10 Utah) 396 F2d 161, 393 US 860." [15 USCS, sec. 13, n 39]

3. Did Microsoft sell and/or trade exactly the same goods (services, privileges, products, etc.) to unrelated purchasers at different prices, and if so did transactions injure competition in either Microsoft's market or the buyers' market(s)? If MS did so injure *competition* in said markets did injury to competition in CGW or other market(s) relevant to cause of action injure Plaintiff in same? And finally, did MS discrimination somehow qualify for justification under the Robinson-Patman Act?

4. "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. [*Ibid.*, sec. 13(b)]

5. "Test of good faith under 15 USCS, sec. 13(b) is not actual knowledge of competitors' prices, but existence of facts leading reasonable and prudent person to believe that granting of lower price would meet equally low price of competitor. *Covey Oil Co. v Continental Oil Co.* (1965, CA10 Utah), 340 F2d 993." [15 USCS, sec. 13, n 72]

6. Did Microsoft's price, if any charged inter First Wave Agreements for "goods" sold/traded to "privileged few" ISVs/ICPs, meet an equally low price of any MS competitor (selling/trading same goods) in relevant markets? Was MS "price" for goods "sold" to PL's competitors offered to PL? Was MS "price" charged to First Wave Agreement participants offered (met) by any MS competitor (ie. Netscape, et al.) in relevant markets?

7. "It shall be unlawful for any person engaged in commerce to pay or contact for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing,

handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. [*Ibid.*, sec. 13(d)]

8. "Neither 15 USCS, sec. 13(d) nor 15 USCS, sec. 13(e) can give rise to private cause of action against buyer, since subsections simply fail by their own terms to provide any sanction against one who knowingly accepts discriminations in price, services, or facilities; subsections impose liability only upon sellers who discriminate. *General Beverage Sales Co. Oshkosh v East Side Winery* (1975, DC Wis) 396 F Supp 590." [15 USCS, sec. 13, n 106]

9. "15 USCS, sec. 13(d) is not limited to payments 'to' customer, but covers also payments 'for benefit of customer'; coverage of 15 USCS, sec. 13(d) and 15 USCS, sec. 13(e) is limited by their implicit restrictions to promotional arrangements excluding thereby other incidents or terms of sale. *Re Herbert R. Gibson, Sr.* (1979, FTC Docket No. 9016." [15 USCS, sec. 13, n 105]

10. "Unlike subsection (a) of sec. 2 of Robinson-Patman Act (15 USCS, sec. 13), subsections (c), (d), and (e) of that section do not require, as proof of prima facie violation, showing that illicit practice had injurious or destructive effect on competition. *FTC v Simplicity Pattern Co.* (1959), 360 US 55, 79 S Ct 1005, reh den 361 US 855." [15 USCS, sec. 13, n 109]

11. 'It is not enough in case under Robinson-Patman Act, 15 USCS, sec. 13(d), to show that supplier has given promotional allowance to one customer and not to another; it must be shown that they are competing purchasers of products of like grade and quality. *Atlanta Trading Corp. v FTC* (1958, CA2) 258 F2d 365." [15 USCS, sec. 13, n 113]

12. Were beneficiaries of Microsoft's discrimination PL's competitors, and, if so, did they receive services, privileges and/or products that were "of like grade and quality" as those supplied to PL by MS?

13. "15 USCS, sec. 13(d) does not refer to benefits to 'favored buyers' in connection with original sale to buyer, such as discounts, nor does it refer to seller who charges different prices to different buyers according to qualification or functional level of buyer; rather it refers

to payments, in connection with resale by buyer of goods, for advertising, promotion, or other similar purposes. *Rutledge v Electric Hose & Rubber Co.* 1 (1975, CA9 Cal.) 511 F2d 668." [15 USCVS, sec. 13, n 123]

14. Did MS exclude PL when "paying" certain of PL's competitors with discounted or free technical support, promotional values, advertising and/or software to facilitate and competitively advantage their resale of MS product(s) or services?

J. Defendant's 15 USCS, Sec. 13 Liability:

1. Without justification or mitigation from pro-competitive effects, Microsoft discriminated against Plaintiff O'Brien and many other ISVs/ICPs by providing only certain, relatively few competitors with highly valuable discounted (or free) services, products and/or competitive (strategic) advantages in exchange for their agreement and conduct increasing MS sales and market-share where it had, or was about to have, monopoly(s).

2. Microsoft's "price", charged PL's competitors for benefits inter First Wave Agreements was not offered to PL. No MS competitor offered same "price" for same goods "of like quality" to PL or any First Wave Agreement participant.

3. "Nevertheless, protecting the applications barrier to entry was so critical to Microsoft that the firm was willing to invest substantial resources to enlist ICPs, ISVs, and Apple in its campaign against the browser threat. By extracting from Apple terms that significantly diminished the usage of Navigator on the Mac OS, Microsoft helped to ensure that developers would not view Navigator as truly cross-platform middleware. *Id.* 356. By granting ICPs and ISVs free licenses to bundle Internet Explorer with their offerings, and by exchanging other valuable inducements for their agreement to distribute, promote and rely on Internet Explorer rather than Navigator, Microsoft directly induced developers to focus on its own APIs rather than ones exposed by Navigator. *Id.* ¶¶ 334-35, 340. These measures supplemented Microsoft's efforts in the OEM and IAP channels." [*United States of America v. Microsoft Corp.*, CV 98-1232/1233 (TPJ), Conclusions of Law, I.(2)(a)(iii)]

4. Not only did "...granting ICPs and ISVs free licenses to bundle Internet Explorer with their offerings, and by exchanging other valuable inducements..." cause chosen few ICPs and ISVs to help restrain Navigator competition against IE, but certain and numerous "inducements" also increased

competitive advantages for chosen few. Increase in competitive advantages for chosen few in markets served by PL significantly curtailed PL's competition evidenced by directly related and measurable revenue loss.

5. As stated above, Defendant Microsoft inflicted antitrust injury on PL via (a) exclusive dealing in the course of its monopolization, (b) deceptive sales practice in the course of its monopolization, (c) unlawful tie-in sales in the course of its monopolization, and (d) denial of an essential facility in the course of its monopolization. Each of these offenses negatively impacted interstate competition and PL's ability to compete in markets noted above, a) thru h).

6. "Just as they fail to account for the measures that Microsoft took in the IAP channel, the goals of preventing free riding and preserving brand association fail to explain the full extent of Microsoft's actions in the ICP channel. Id. ¶¶ 329-30. With respect to the ISV agreements, Microsoft has put forward no pro-competitive business ends whatsoever to justify their exclusionary terms." [*Ibid.*]

7. "The District Court held that Microsoft engages in exclusionary conduct in its dealings with ICPs, which develop websites; ISVs, which develop software; and Apple, which is both an OEM and a software developer. See Conclusions of Law, at 42-43 (deals with ICPs, ISVs, and Apple "supplemented Microsoft's efforts in the OEM and IAP channels"). The District Court condemned Microsoft's deals with ICPs and ISVs, stating: "By granting ICPs and ISVs free licenses to bundle [IE] with their offerings, and by exchanging other valuable inducements for their agreement to distribute, promote[,] and rely on [IE] rather than Navigator, Microsoft directly induced developers to focus on its own APIs rather than ones exposed by Navigator." Id. (citing Findings of Fact p p 334-35, 340)." [*United States of America v. Microsoft Corp.*, Case No. 00-5212/00-5213 in the United States Court of Appeals - District of Columbia Circuit, decided June 28, 2001, II.(A.)(2.)(B.)(4.)]

8. "With respect to the deals with ICPs, the District Court's findings do not support liability. After reviewing the ICP agreements, the District Court specifically stated that 'there is not sufficient evidence to support a finding that Microsoft's promotional restrictions actually had a substantial, deleterious impact on Navigator's usage share' Findings of Fact p 332. Because plaintiffs failed to demonstrate that Microsoft's deals with the ICPs have a

substantial effect upon competition, they have not proved the violation of the Sherman Act." [*Ibid.*]

9. Insubstantial effect on browser competition, maybe...substantial effect on website development competition (1998-2003), definitely!

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

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

10. Plaintiff O'Brien wrote to Microsoft in 1994 requesting a business relationship similar to that given to above noted "chosen few" ISVs/ICPs. Microsoft did not return correspondence.

11. "Id. p 339. The District Court further found that the effect of these deals is to "ensure [] that many of the most popular Web-centric applications will rely on browsing technologies found only in Windows," id. p 340, and that Microsoft's deals with ISVs therefore 'increase[] the likelihood that the millions of consumers using [applications designed by ISVs that entered into agreements with Microsoft] will use Internet Explorer rather than Navigator.' Id. p 340." [*Ibid.*]

12. "The District Court did not specifically identify what share of the market for browser distribution the exclusive deals with the ISVs foreclose. Although the ISVs are a relatively small channel for browser distribution, they take on greater significance because, as discussed above, Microsoft had largely foreclosed the two primary channels to its rivals. In that light, one can tell from the record that by affecting the applications used by 'millions' of consumers, Microsoft's exclusive deals with the ISVs had a substantial effect in further foreclosing rival browsers

from the market. (Data introduced by Microsoft, see Direct Testimony of Cameron Myhrvold p 84, reprinted in 6 J.A. at 3922-23, and subsequently relied upon by the District Court in its findings, see, e.g., Findings of Fact p 270, indicate that over the two-year period 1997-98, when Microsoft entered into the First Wave agreements, there were 40 million new users of the internet.) Because, by keeping rival browsers from gaining widespread distribution (and potentially attracting the attention of developers away from the APIs in Windows), the deals have a substantial effect in preserving Microsoft's monopoly, we hold that plaintiffs have made a prima facie showing that the deals have an anticompetitive effect." [*Ibid.*]

13. "Of course, that Microsoft's exclusive deals have the anticompetitive effect of preserving Microsoft's monopoly does not, in itself, make them unlawful. A monopolist, like a competitive firm, may have a perfectly legitimate reason for wanting an exclusive arrangement with its distributors. Accordingly, Microsoft had an opportunity to, but did not, present the District Court with evidence demonstrating that the exclusivity provisions have some such pro-competitive justification. See Conclusions of Law, at 43 (citing Findings of Fact pp 339-40) ('With respect to the ISV agreements, Microsoft has put forward no pro-competitive business ends whatsoever to justify their exclusionary terms.'). On appeal Microsoft likewise does not claim that the exclusivity required by the deals serves any legitimate purpose; instead, it states only that its ISV agreements reflect an attempt 'to persuade ISVs to utilize Internet-related system services in Windows rather than Navigator.' Appellant's Opening Br. at 114. As we explained before, however, keeping developers focused upon Windows--that is, preserving the Windows monopoly--is a competitively neutral goal. Microsoft having offered no pro-competitive justification for its exclusive dealing arrangements with the ISVs, we hold that those arrangements violate s 2 of the Sherman Act." [*Ibid.*]

14. Therefore, district court can hold Microsoft liable for same illegal arrangements (crystallized at same time as cause of action alleged herein) causing antitrust injury to Plaintiff O'Brien.

15. "Java, a set of technologies developed by Sun Microsystems, is another type of middleware posing a potential threat to Windows' position as the ubiquitous platform for software development. Findings of Fact p 28. The Java technologies include: (1) a programming language; (2) a set of programs written in that language, called the

'Java class libraries,' which expose APIs; (3) a compiler, which translates code written by a developer into "bytecode"; and (4) a Java Virtual Machine ('JVM'), which translates bytecode into instructions to the operating system. Id. p 73. Programs calling upon the Java APIs will run on any machine with a 'Java runtime environment,' that is, Java class libraries and a JVM. Id. p p 73, 74." [*Ibid.*, II.(A.)(2.)(B.)(4.)]

16. "In May 1995 Netscape agreed with Sun to distribute a copy of the Java runtime environment with every copy of Navigator, and 'Navigator quickly became the principal vehicle by which Sun placed copies of its Java runtime environment on the PC systems of Windows users.' Id. p 76. Microsoft, too, agreed to promote the Java technologies--or so it seemed. For at the same time, Microsoft took steps 'to maximize the difficulty with which applications written in Java could be ported from Windows to other platforms, and vice versa.' Conclusions of Law, at 43. Specifically, the District Court found that Microsoft took four steps to exclude Java from developing as a viable cross-platform threat: (a) designing a JVM incompatible with the one developed by Sun; (b) entering into contracts, the so-called 'First Wave Agreements,' requiring major ISVs to promote Microsoft's JVM exclusively; (c) deceiving Java developers about the Windows-specific nature of the tools it distributed to them; and (d) coercing Intel to stop aiding Sun in improving the Java technologies." [*Ibid.*]

17. "The First Wave Agreements:

"Microsoft took the further step of offering valuable things to ISVs that agreed to use Microsoft's Java implementation. Specifically, in the First Wave agreements that it signed with dozens of ISVs in 1997 and 1998, Microsoft conditioned early Windows 98 and Windows NT betas, other technical information, and the right to use certain Microsoft seals of approval on the agreement of those ISVs to use Microsoft's version of the Windows JVM as the "default." Microsoft and the ISVs all read this requirement to obligate the ISVs to ensure that their Java applications were compatible with Microsoft's version of the Windows JVM. The only effective way to ensure compatibility with Microsoft's JVM was to use Microsoft's Java developer tools, which in turn meant using Microsoft's methods for making native calls and (unless the developers were especially wary and sophisticated) Microsoft's other Java extensions. Thus, a very large percentage of the Java applications that the First Wave ISVs wrote would run only on Microsoft's version of the Windows JVM. With that in mind, the First Wave ISVs would not have

any reason to distribute with their Java applications any JVM other than Microsoft's. So, in exchange for costly technical support and other blandishments, Microsoft induced dozens of important ISVs to make their Java applications reliant on Windows-specific technologies and to refrain from distributing to Windows users JVMs that complied with Sun's standards. The record contains no evidence that the relevant provision in the First Wave agreements had any purpose other than to maximize the difficulty of porting Java applications between Windows and other platforms. Microsoft remained free to hold the First Wave ISVs to this provision until a court enjoined its enforcement in November 1998." [*United States v. Microsoft Corp.*, CV 98-1232/1233 TPJ, Findings of Fact, no.401]

"In addition to the First Wave agreements, Microsoft entered an agreement with at least one ISV that explicitly required it to redistribute Microsoft's JVM to the exclusion of any other and to rely upon Microsoft's native methods to the exclusion of any other methods. Such agreements were also prohibited by the November 1998 injunction." [*Ibid.*, no. 402]

The District Court also found that Microsoft entered into First Wave Agreements with dozens of ISVs to use Microsoft's JVM. See Findings of Fact p 401 ('[I]n exchange for costly technical support and other blandishments, Microsoft induced dozens of important ISVs to make their Java applications reliant on Windows-specific technologies and to refrain from distributing to Windows users JVMs that complied with Sun's standards.'). Again, we reject the District Court's condemnation of low but non-predatory pricing by Microsoft." [*Supra.*, II.(A.)(2.)(B.)(4.)]

18. As stated above, benefits (consideration) given by MS exclusively to certain ISVs/ICPs reduced PL's ability to compete with them. Therefore, proven sec. 2 violation regarding above noted 'First Wave Agreements' empowers PL's claim for Microsoft's *per se* liability for antitrust injuries sustained from MS exclusive dealing inter monopolization conspiracies.

19. "To the extent Microsoft's First Wave Agreements with the ISVs conditioned receipt of Windows technical information upon the ISVs' agreement to promote Microsoft's JVM exclusively, they raise a different competitive concern. The District Court found that, although not literally exclusive, the deals were exclusive in practice because they required developers to make Microsoft's JVM the default in the software they developed. Id. p 401." [*Ibid.*]

20. Deals were also "exclusive in practice" because they excluded other ISVs/ICPs from highly competitive benefits granted by powerful monopolist.

21. "Microsoft offered no pro-competitive justification for the default clause that made the First Wave Agreements exclusive as a practical matter. See Findings of Fact p 401." [*Ibid.*, II.(A.)(2.)(B.)(5.)(b.)]

22. "Because the cumulative effect of the deals is anticompetitive and because Microsoft has no pro-competitive justification for them, we hold that the provisions in the First Wave Agreements requiring use of Microsoft's JVM as the default are exclusionary, in violation of the Sherman Act." [*Ibid.*]

23. Because deals were proven exclusionary in DOJ/States case(s) they can be proven exclusionary in this case. Clearly, Microsoft's discriminatory deals caused business injury to PL and violated both federal and state laws. [15 U.S.C., sec. 1, 2 and 13(a)(b)(d)(f) and 13a: California Bus. & Prof. Codes, sec. 16700, et seq. and 17200, et seq.]

K. Java Developers Deceived and Injured with "Treadmill":

1. "According to Sun, the version of Java distributed by Microsoft worked better with its Windows software. Such a move threatened Java's ability to provide a cross-platform development environment, Sun's lawyers said."

2. PL, like thousands of other java program developers, wanted (for business, artistic and other reasons) java products to be 100% cross-platform.

3. "Richard Green testified that 'the concept of having a significant share or a widespread share is not the valid concept. The concept of having a prevalent share or an equivalent share is really the valid concept and that is what we seek.' (12/3/02 Tr. at 128.) Green used cell phones as an example: 'if I am looking to purchase a cell phone and I had a chance of purchasing a cell phone that can talk [to] a hundred percent of all the other cell phones or another cell phone that could talk to 70% of all the cell phones . . . [assuming equivalence in functionality and price], I will probably choose the cell phone that is 100%.' (Id. at 129.) Green said that in his experience software developers view competing platforms in the same way. (Id. at 130.) Green's testimony was confirmed by Rick Ross, an independent software developer. According to Ross, 'if there's a significant disparity [in the distribution of competing

platforms], then developers have a strong economic incentive to go with the more widely-distributed technology, particularly if their qualities in many other respects are similar.' (12/3/02 Tr. at 332.) Ross was later asked, '[W]hy is it that nearly widespread distribution of one platform isn't enough to attract many developers to target that platform if the competing platform contains ubiquity?'

4. He responded:

'Well, you can't do everything. It takes a lot of time and energy to learn about these APIs. These are very complicated sets of programming interfaces. You have to gain expertise and the tools and developers, like everybody else, only have 24 hours in a day. So you can't be a master of all technologies. And if there is one which is clearly dominant and one which is clearly driving the largest sort of profit-oriented incentives to adopt that technology in favor of another, even if there's another that has - - and I am not exactly sure what widespread means. But if one is ubiquitous and truly dominant and there is a future for future parity or a large degree of parity between the platforms, most developers aren't going to support both. The vast majority of developers will just pick the dominant leader, go with the market leader. It's the safe thing to do, especially in a downturn economy like this.' [*Sun Microsystems, Inc. v. Microsoft Corp.*, CV 02-2739 JFM, at MDL 1332, USDC - District of Maryland, p.22]

5. "Microsoft has vehemently denied any wrongdoing and has maintained that it stuck to the letter of its licensing agreement with Sun. Any changes Microsoft made to Java merely allowed developers to take advantage of features specific to Windows, the company has argued."

6. "The case has been watched closely, and Microsoft's dealings with Java were cited by U.S. District Court Judge Thomas Penfield Jackson in the U.S. government's antitrust case against Microsoft as evidence of the software giant's anticompetitive behavior." [<http://www.javaworld.com/>: January 23, 2001]

7. Most important factor in above statement is found in phrase "...worked better with..." describing effect of Microsoft's transitioning of Sun's cross-platform java code from *mostly* cross-platform compatible (1996) to *partially* cross-platform (1997) and, eventually, *not* cross-platform (1998-2003).

8. "This API exposure will complete our strategy of providing a very slippery slope (leading to Windows) to developers." [U.S. v. Microsoft, Gov. exhibit # 1334, Nielsen to Toutonghi: April 23, 1997: 3:49 PM]

9. Obviously, Judge Jackson carefully considered discovered (admitted) evidence in [CV 98-1232/1233 TPJ] and determined clearly and unequivocally that Microsoft had transitioned Sun's fully cross-platform java code into development applications that produced only Windows specific programs.

10. "Keep the developers which will inevitably defect to Java in our camp by providing two sets of class libs. First, we make sure that AFC is cross platform, better than JFC and Sun's class libs, but not so much better that it competes with our platform specific APIs. If we have to make it compete with our Win32 APIs in order to keep it competitive, then Sun's APIs severely threatens us anyhow. We should be able to keep these cross platform features competitive with Sun's through appropriate resource allocation...Ideally, they'll be largely platform dependent on Windows and no one will care about Safe Win32." [Ibid., Muglia to Slivka: April 22, 1997: 6:46 AM]

11. Deception, like the devil, is in the details. With subtle, detailed modifications to java code in betas, current versions and upgrades, MS deceived java developers (1996-1999) into believing that faster, more versatile VM/SDK/VJ++ development applications were capable of producing fully cross-platform java products.

12. PL, fellow ISVs and other java program developers bought-into MS java development heavily, (even though downloads were eventually free) by investing money, time, designs, production plans, etc. in reasonable assumption (unrefuted by Microsoft literature or in "unrelated" publications) that Microsoft's license of Sun's java code required MS's java development kits produce essentially same/similar cross-platform products relatively benign to Sun's competition in java and other markets. Sun would not have licensed on probability of anticompetitive products would they...duh?

13. Microsoft injured PL and many other persons needing to produce java programs in two ways. First, MS deceived developers into buying/using MS java development software (VM/SDK/VJ++) which did not produce fully cross-platform java applications. Secondly, MS influenced Intel and AMD such that they curtailed and/or adversely modified CPU chip

support for java applications produced in non-Microsoft environments.

14. "In February 1997, one of Intel's competitors, called AMD, solicited support from Microsoft for its '3DX' technology, which provided sophisticated multimedia support for games. Microsoft's Allchin asked Gates whether Microsoft should support 3DX, despite the fact that Intel would oppose it. Gates responded: 'If Intel has a real problem with us supporting this then they will have to stop supporting Java Multimedia the way they are. I would gladly give up supporting this if they would back off from their work on JAVA which is terrible for Intel.' Near the end of March, Allchin sent another message to Gates and Maritz. In it he wrote, 'I am positive that we must do a direct attack on Sun (and probably Oracle). . . . Between ourselves and our partners, we can certainly hurt their (certainly Sun's) revenue base. . . . We need to get Intel to help us. Today, they are not.' Two months later, Eric Engstrom, a Microsoft executive with responsibility for multimedia development, wrote to his superiors that one of Microsoft's goals was getting 'Intel to stop helping Sun create Java Multimedia APIs, especially ones that run well (ie native implementations) on Windows.' Engstrom proposed achieving this goal by offering Intel the following deal: Microsoft would incorporate into the Windows API set any multimedia interfaces that Intel agreed to not help Sun incorporate into the Java class libraries. Engstrom's efforts apparently bore fruit, for he testified at trial that Intel's IAL subsequently stopped helping Sun to develop class libraries that offered cutting-edge multimedia support." [U.S. v. Microsoft, CV 98-1232/1233 TPJ, Findings of Fact, #406.]

Aside: Plaintiff O'Brien, inventor and seller of *PlayPredict*, a play-by-email game for sale at <http://www.angelfire.com/biz2/savicom>, also competes with Microsoft in certain games markets where java applets/applications and browser/OS compatibility play a big part.

15. In 1998, Plaintiff O'Brien downloaded JDK from Sun's website. When JDK would not run on PL's computer (or any other surveyed computer) installed with Windows 98, PL was forced to obtain applets/applications developed on Microsoft's SDK/VJ++ (java development tools) in order to own applets/applications for eCommerce sales presentations designed and intended for cross-platform distribution and/or publication.

16. PL was subsequently injured economically by Microsoft's deceptive engineering and marketing of SDK/VJ++. PL had been led by (1) Sun's claims for cross-platform support re JDK products and (2) Microsoft's reticence about exclusive Windows support into believing that SDK/VJ++, based entirely on Sun's java programs licensed without special modification rights given to MS, would produce cross-platform supported java applets and applications.

17. Fact that SDK/VJ++ products were not supported on OS/2, UNIX, Linux and other non-Windows OS, due entirely to MS modification of Sun's java code (licensed without authorization to so modify) caused damage to PL when SAV's eCommerce sales were reduced due, at least in part, to preclusion of java applets and applications inter presentations accessed on systems with only non-Windows OS.

18. "Microsoft's 'Java implementation' included, in addition to a JVM, a set of software development tools it created to assist ISVs in designing Java applications. The District Court found that, not only were these tools incompatible with Sun's cross-platform aspirations for Java--no violation, to be sure-- but Microsoft deceived Java developers regarding the Windows-specific nature of the tools. Microsoft's tools included 'certain keywords and compiler directives' that could only be executed properly by Microsoft's version of the Java runtime environment for Windows. Id. p 394; see also Direct Testimony of James Gosling p 58, reprinted in 21 J.A. at 13959 (Microsoft added 'programming instructions ... that alter the behavior of the code.'). As a result, even Java 'developers who were opting for portability over performance ... unwittingly [wrote] Java applications that [ran] only on Windows. Conclusions of Law, at 43. That is, developers who relied upon Microsoft's public commitment to cooperate with Sun and who used Microsoft's tools to develop what Microsoft led them to believe were cross-platform applications ended up producing applications that would run only on the Windows operating system." [*United States of America v. Microsoft Corp.*, Case No. 00-5212/00-5213 in the United States Court of Appeals - District of Columbia Circuit, decided June 28, 2001, II.(A.)(2.)(B.)(5.)(c.)]

19. Again, email from/to Microsoft executives show intent to deceive developers and preclude cross-platform development.

"We expand both our platform dependent and platform independent Java APIs. We make APIs platform independent only as necessary to compete with Sun's cross platform

offering and keep developers using Microsoft APIs. We remain on the treadmill only until our platform specific API exposure/innovation can outpace Sun's platform independent work enough to gain critical mass. If our platform independent APIs really compete with our own Windows APIs, its only because Sun's did in the first place." [U.S. v Microsoft, CV 98-1232/1233 (TPJ), Government Exhibit # 1334]

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

21. '[O]k, i just did a follow up call.... [The reporter] liked that i kept pointing customers to w3c standards [(commonly observed internet protocols)].... [but] he accused us of being schizo with this vs. our java approach, I said he misunderstood [--] that [with Java] we are merely trying to add rich platform support to an interop layer.... this plays well.... at this point its [sic] not good to create MORE noise around our win32 java classes. instead we should just quietly grow j [(Microsoft's development tools)] share and assume that people will take more advantage of our classes without ever realizing they are building win32-only java apps.' GX 1332, reprinted in 22 J.A. at 14922-23. [Supra, II.(A.)(2.)(B.)(5.)(c.)]

22. "Finally, other Microsoft documents confirm that Microsoft intended to deceive Java developers, and predicted that the effect of its actions would be to generate Windows-dependent Java applications that their developers believed would be cross-platform; these documents also indicate that Microsoft's ultimate objective was to thwart Java's threat to Microsoft's monopoly in the market for operating systems. One Microsoft document, for example, states as a strategic goal: 'Kill cross-platform Java by grow[ing] the polluted Java market.' GX 259, reprinted in 22 J.A. at 14514; see also id. ('Cross-platform capability is by far the number one reason for choosing/using Java.') (emphasis in original)." [Supra]

23. "Microsoft easily could have implemented Sun's native method along with its own in its developer tools and its JVM, thereby allowing Java developers to choose between speed and portability; however, it elected instead to implement only the Microsoft methods. The result was that if

a Java developer used the Sun method for making native calls, his application would not run on Microsoft's version of the Windows JVM, and if he used Microsoft's native methods, his application would not run on any JVM other than Microsoft's version. Far from being the unintended consequence of an attempt to help Java developers more easily develop high-performing applications, incompatibility was the intended result of Microsoft's efforts." [U.S. v. Microsoft, CV 1232/1233 (TPJ), Findings of Fact, #390]

Note: Microsoft's "native methods" equals Sun's "applets".

24. "Microsoft's conduct related to its Java developer tools served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive. Unsurprisingly, Microsoft offers no pro-competitive explanation for its campaign to deceive developers. Accordingly, we conclude this conduct is exclusionary, in violation of s 2 of the Sherman Act." [U.S. v. Microsoft, CV 1232/1233 (TPJ), Conclusions of Law:]

25. Recent material decision (on preliminary injunction) at MDL 1332 in the District of Maryland further condemns Microsoft's anticompetitive behavior as it relates to PL's claims. "Because of the competitive threat Java presented, Microsoft devised and implemented a strategy to 'wrest control of Java away from Sun' and to 'turn Java into just the latest, best way to write Windows applications.' (Pl's. Ex. 21, 4/14/97 Slivka email to Gates.)" [Sun Microsystems, Inc. v. Microsoft Corp., CV 02-2739 JFM, at MDL 1332, USDC - District of Maryland, p.8]

26. Microsoft's above noted conviction for deceiving developers of java programs using MS development tools was affirmed by the United States Court of Appeals. Subsequent obfuscation of sentencing (punishment) specific to that particular conviction inter DOJ/States "settlement" (since when is district court's sentencing, following appellate court's review, an opportunity for settlement?) does not vitiate conviction's prejudicial impact in these and subsequent proceedings.

L. Tie Damaged PL:

1. "Anticompetitive bundled sales are limited to instances in which competitive discipline is lacking (the seller can force the tied sale) and the seller's conduct is abusive (the seller creates, maintains, or extends market power)."

[THE ANTITRUST TYING LAW SCHISM: A CRITIQUE OF *MICROSOFT III* AND A RESONSE TO HYLTON AND SALINGER, *Antitrust Law Journal* (2002), vol 70, issue 1, by Warren S. Grimes, p.199-200.]

2. It is axiomatic. Virtually every competitive software developer, digital-media developer and/or website developer is *forced* to purchase the latest Microsoft operating system immediately or soon after release. For ISPs/ICPs, elasticity of demand for most recent Microsoft OS is zero.

3. Developers have no choice about whether or not to take a browser, a wordprocessor, a spreadsheet, or any other software tied to their purchase of the current Windows OS.

4. Microsoft's tie-in sale of Windows 98/IE to PL was abusive and illegal because MS created, maintained, and/or extended market power via the tie.

5. "Liability for tying under s 1 exists where (1) two separate 'products' are involved; (2) the defendant affords its customers no choice but to take the tied product in order to obtain the tying product; (3) the arrangement affects a substantial volume of interstate commerce; and (4) the defendant has 'market power' in the tying product market. *Jefferson Parish*, 466 U.S. at 12-18. The Supreme Court has since reaffirmed this test in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 461-62 (1992). All four elements are required, whether the arrangement is subjected to a *per se* or Rule of Reason analysis." [*U.S. v. Microsoft*, CV 98-1232/1233 TPJ, Conclusions of Laws, II.(A.)]

6. "The plaintiffs allege that Microsoft's combination of Windows and Internet Explorer by contractual and technological artifices constitute unlawful tying to the extent that those actions forced Microsoft's customers and consumers to take Internet Explorer as a condition of obtaining Windows. While the Court agrees with plaintiffs, and thus holds that Microsoft is liable for illegal tying under s 1, this conclusion is arguably at variance with a decision of the U.S. Court of Appeals for the D.C. Circuit in a closely related case, and must therefore be explained in some detail."

7. "The two most recent Supreme Court cases to have addressed the issue of product and market definition in the context of Sherman Act tying claims are *Jefferson Parish*, *supra*, and *Eastman Kodak*, *supra*. In *Jefferson Parish*, the Supreme Court held that a hospital offering hospital services and anesthesiology services as a package could not

be found to have violated the anti-tying rules unless the evidence established that patients, i.e. consumers, perceived the services as separate products for which they desired a choice, and that the package had the effect of forcing the patients to purchase an unwanted product. 466 U.S. at 21-24, 28-29. In Eastman Kodak the Supreme Court held that a manufacturer of photocopying and micrographic equipment, in agreeing to sell replacement parts for its machines only to those customers who also agreed to purchase repair services from it as well, would be guilty of tying if the evidence at trial established the existence of consumer demand for parts and services separately. 504 U.S. at 463."

8. "Both defendants asserted, as Microsoft does here, that the tied and tying products were in reality only a single product, or that every item was traded in a single market. In Jefferson Parish, the defendant contended that it offered a 'functionally integrated package of services' - a single product - but the Supreme Court concluded that the 'character of the demand' for the constituent components, not their functional relationship, determined whether separate 'products' were actually involved. 466 U.S. at 19. In Eastman Kodak, the defendant postulated that effective competition in the equipment market precluded the possibility of the use of market power anti-competitively in any after-markets for parts or services: Sales of machines, parts, and services were all responsive to the discipline of the larger equipment market. The Supreme Court declined to accept this premise in the absence of evidence of 'actual market realities,' 504 U.S. at 466-67, ultimately holding that 'the proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers.' Id. at 482 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966))."

9. "In both Jefferson Parish and Eastman Kodak, the Supreme Court also gave consideration to certain theoretical 'valid business reasons' proffered by the defendants as to why the arrangements should be deemed benign. In Jefferson Parish, the hospital asserted that the combination of hospital and anesthesia services eliminated multiple problems of scheduling, supply, performance standards, and equipment maintenance. 466 U.S. at 43-44. The manufacturer in Eastman Kodak contended that quality control, inventory management, and the prevention of free riding justified its decision to sell parts only in conjunction with service. 504 U.S. at 483. In neither case did the Supreme Court find those justifications sufficient if anticompetitive effects were proved. Id. at 483-86; Jefferson Parish, 466 U.S. at 25 n.42. Thus, at a minimum, the admonition of the D.C. Circuit

in Microsoft II to refrain from any product design assessment as to whether the 'integration' of Windows and Internet Explorer is a 'net plus,' deferring to Microsoft's 'plausible claim' that it is of 'some advantage' to consumers, is at odds with the Supreme Court's own approach."

10. "The significance of those cases, for this Court's purposes, is to teach that resolution of product and market definitional problems must depend upon proof of commercial reality, as opposed to what might appear to be reasonable. In both cases the Supreme Court instructed that product and market definitions were to be ascertained by reference to evidence of consumers' perception of the nature of the products and the markets for them, rather than to abstract or metaphysical assumptions as to the configuration of the 'product' and the 'market.' *Jefferson Parish*, 466 U.S. at 18; *Eastman Kodak*, 504 U.S. at 481-82. In the instant case, the commercial reality is that consumers today perceive operating systems and browsers as separate 'products,' for which there is separate demand. Findings pp 149-54. This is true notwithstanding the fact that the software code supplying their discrete functionalities can be commingled in virtually infinite combinations, rendering each indistinguishable from the whole in terms of files of code or any other taxonomy. *Id.* pp 149-50, 162-63, 187-91."

11. "Proceeding in line with the Supreme Court cases, which are indisputably controlling, this Court first concludes that Microsoft possessed 'appreciable economic power in the tying market,' *Eastman Kodak*, 504 U.S. at 464, which in this case is the market for Intel-compatible PC operating systems. See *Jefferson Parish*, 466 U.S. at 14 (defining market power as ability to force purchaser to do something that he would not do in competitive market); see also *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 504 (1969) (ability to raise prices or to impose tie-ins on any appreciable number of buyers within the tying product market is sufficient). While courts typically have not specified a percentage of the market that creates the presumption of 'market power,' no court has ever found that the requisite degree of power exceeds the amount necessary for a finding of monopoly power. See *Eastman Kodak*, 504 U.S. at 481. Because this Court has already found that Microsoft possesses monopoly power in the worldwide market for Intel-compatible PC operating systems (i.e., the tying product market), Findings pp 18-67, the threshold element of 'appreciable economic power' is a fortiori met."

12. "Similarly, the Court's Findings strongly support a conclusion that a 'not insubstantial' amount of commerce was foreclosed to competitors as a result of Microsoft's decision to bundle Internet Explorer with Windows. The controlling consideration under this element is 'simply whether a total amount of business' that is 'substantial enough in terms of dollar-volume so as not to be merely de minimis' is foreclosed. Fortner, 394 U.S. at 501; cf. International Salt Co. v. United States, 332 U.S. 392, 396 (1947) (unreasonable per se to foreclose competitors from any substantial market by a tying arrangement)."

13. "Although the Court's Findings do not specify a dollar amount of business that has been foreclosed to any particular present or potential competitor of Microsoft in the relevant market, including Netscape, the Court did find that Microsoft's bundling practices caused Navigator's usage share to drop substantially from 1995 to 1998, and that as a direct result Netscape suffered a severe drop in revenues from lost advertisers, Web traffic and purchases of server products. It is thus obvious that the foreclosure achieved by Microsoft's refusal to offer Internet Explorer separately from Windows exceeds the Supreme Court's de minimis threshold. See Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1341 (9th Cir. 1984) (citing Fortner)."

14. "The facts of this case also prove the elements of the forced bundling requirement. Indeed, the Supreme Court has stated that the 'essential characteristic' of an illegal tying arrangement is a seller's decision to exploit its market power over the tying product 'to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.' Jefferson Parish, 466 U.S. at 12. In that regard, the Court has found that, beginning with the early agreements for Windows 95, Microsoft has conditioned the provision of a license to distribute Windows on the OEMs' purchase of Internet Explorer. Findings pp 158-65. The agreements prohibited the licensees from ever modifying or deleting any part of Windows, despite the OEMs' expressed desire to be allowed to do so. Id. pp 158, 164. As a result, OEMs were generally not permitted, with only one brief exception, to satisfy consumer demand for a browserless version of Windows 95 without Internet Explorer. Id. pp 158, 202. Similarly, Microsoft refused to license Windows 98 to OEMs unless they also agreed to abstain from removing the icons for Internet Explorer from the desktop. Id. p 213. Consumers were also effectively compelled to purchase Internet Explorer along with Windows 98 by Microsoft's decision to stop including Internet Explorer on the list of

programs subject to the Add/Remove function and by its decision not to respect their selection of another browser as their default. Id. pp 170-72."

15. "The fact that Microsoft ostensibly priced Internet Explorer at zero does not detract from the conclusion that consumers were forced to pay, one way or another, for the browser along with Windows. Despite Microsoft's assertion that the Internet Explorer technologies are not 'purchased' since they are included in a single royalty price paid by OEMs for Windows 98, see Microsoft's Proposed Conclusions of Law at 12-13, it is nevertheless clear that licensees, including consumers, are forced to take, and pay for, the entire package of software and that any value to be ascribed to Internet Explorer is built into this single price. See *United States v. Microsoft Corp.*, Nos. CIV. A. 98-1232, 98-1233, 1998 WL 614485, *12 (D.D.C., Sept. 14, 1998); IIIA Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 760b6, at 51 (1996) ('[T]he tie may be obvious, as in the classic form, or somewhat more subtle, as when a machine is sold or leased at a price that covers 'free' servicing.'). Moreover, the purpose of the Supreme Court's 'forcing' inquiry is to expose those product bundles that raise the cost or difficulty of doing business for would-be competitors to prohibitively high levels, thereby depriving consumers of the opportunity to evaluate a competing product on its relative merits. It is not, as Microsoft suggests, simply to punish firms on the basis of an increment in price attributable to the tied product. See *Fortner*, 394 U.S. at 512-14 (1969); *Jefferson Parish*, 466 U.S. at 12-13."

16. "As for the crucial requirement that Windows and Internet Explorer be deemed 'separate products' for a finding of technological tying liability, this Court's Findings mandate such a conclusion. Considering the 'character of demand' for the two products, as opposed to their 'functional relation,' id. at 19, Web browsers and operating systems are 'distinguishable in the eyes of buyers.' Id.; Findings 149-54. Consumers often base their choice of which browser should reside on their operating system on their individual demand for the specific functionalities or characteristics of a particular browser, separate and apart from the functionalities afforded by the operating system itself. Id. 149-51. Moreover, the behavior of other, lesser software vendors confirms that it is certainly efficient to provide an operating system and a browser separately, or at least in separable form. Id. 153. Microsoft is the only firm to refuse to license its operating system without a browser. Id.; see *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287 (2d Cir. 1979).

This Court concludes that Microsoft's decision to offer only the bundled - 'integrated' - version of Windows and Internet Explorer derived not from technical necessity or business efficiencies; rather, it was the result of a deliberate and purposeful choice to quell incipient competition before it reached truly minatory proportions."

17. USCA affirmed USDC conclusion (final judgment) that MS illegally (15 U.S.C., sec. 1 violation) tied IE to Win98 according to controlling doctrine (tests) found (cited in USCA decision) in :

Caldera, Inc. v. Microsoft Corp., 72 F. Supp 2d 1295 (D. Utah 1999)

Eastman Kodak v. Image Technical Servs., Inc. , 504 U.S. 451 (1992)

IBM v. U.S., 298 U.S. 131 (1936)

International Salt Co. v. U.S., 332 U.S. 392 (1947)

Jefferson Parrish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)

Northern Pac. Ry. Co. v. U.S., 356 U.S. 1 (1958)

Response of Carolina, Inc. v. Leasco Response, Inc., 537 F2d 1307 (5th Cir. 1976)

Standard Oil Co. v. U.S., 337 U.S. 293 (1949)

United States v. Microsoft Corp., 87 F. Supp. 2d 30

United States v. Microsoft Corp.. 253 F.3d 34 (D.C. Cir. 2001)

United States v. Microsoft Corp., 147 F3d 935 (D.C. Cir. 1998)

18. "These arguments all point to one conclusion: we cannot comfortably say that bundling in platform software markets has so little 'redeeming virtue', *N. Pac. Ry.*, 356 U.S. at 5, and that there would be so 'very little loss to society' from its ban, that 'an inquiry into its costs in the individual case [can be] considered [] unnecessary.' *Jefferson Parish*, 466 U.S. at 33-34 (O'Connor, J., concurring)." [*United States of America v. Microsoft Corp.*, Case No. 00-5212/00-5213 in the United States Court of

Appeals - District of Columbia Circuit, decided June 28, 2001, IV.(B.)]

19. "We remand the case for evaluation of Microsoft's tying arrangements under the rule of reason...That rule more freely permits consideration of the benefits of bundling in software markets, particularly those for OSs, and a balancing of these benefits against the costs to consumers whose ability to make direct price/quality tradeoffs in the tied market may have been impaired." [*Ibid.*]

20. Note: Plaintiff O'Brien was disappointed that Judge Colleen Kollar-Kotelly did not decide on Microsoft's tie of IE to Windows liability prior to her final judgment. MS conviction in Judge Jackson's court for illegal tie was reversed by the Court of Appeals but remanded to Kollar-Kotelly's court for "rule of reason" adjudication. District Court's Final judgment (November 12, 2002) mysteriously does not mention Microsoft's tie-in liability. Did DOJ/States unofficially drop prosecution of the illegal tie claim? Did Judge Kollar-Kotelly abridge due process of law re conviction/remand/rule of reason adjudication?

21. PL does not see where commingling of IE code with Windows 98 code provides any more benefit than the "bolt-on" of IE to Win 98. Commingling did, as the Court concluded and affirmed, produce significant anti-competitive phenomena.

22. Nevertheless, if called upon to do so, PL will employ criteria sourced in [*Antitrust Law Journal*, Vol. 69, issue 2, 2001, pp.469-526] and elsewhere to apply rule-of-reason, or modified rule-of-reason, to proof of illegal tie.

23. In 1998, PL, an experienced software and website developer living in Princeville, Kauai, purchased a Compaq "Presario" computer from Radio Shack, Inc. (Tandy Corp.) in Lihue, Kauai, Hawaii. The computer had Windows 95 (OS) and Netscape Navigator as its internet browser. PL needed (was professionally compelled to purchase) the latest Microsoft OS for timely/relevant software/website development and so purchased Windows 98 (CD ROM) on the very day it was made available at Radio Shack. Purchase of Windows 98 required purchase of IE commingled inter OS.

24. Radio Shack manager wanted to install Windows 98/IE at his store and keep the CD ROM in his possession, and inferred Microsoft licensing policy required store installation and retention of media. After reading MS licensing agreement devoid of such a covenant, however, PL

insisted on keeping purchased CD ROM. Manager eventually agreed.

25. Coda (to show devastating scope/impact of Defendant's monopolization):

Prior to purchase, PL was denied access to the (The) Walt Disney, Inc. website because Disney had agreed with Microsoft to support only Internet Explorer access. Loss of access to Disney's website injured PL when ISP/ICP could not obtain frequent access to Disney website productions for competitive reasons inter website animation market competition. PL could not "keep-up" as well with Disney's state-of-art website animation because Disney/Microsoft had effectively restrained competition in the website animation market via restraint (destruction) of Netscape's competition in browser markets. Internet monopolization crimes tend to snowball.

26. It may very well be the destiny of this Court to take the next step in rendering software-tie case law. [Exhibits C]

VI. DAMAGES SPECIFIED

1. When Defendant Microsoft entered into "First Wave Agreements" with certain software vendors that excluded PL and many other ISVs from certain highly competitive benefits, PL suffered revenue losses of approximately \$1,000,000 due to SAV's curtailed ability to compete in relevant markets.

2. When MS deceived many ISVs, including PL, into using Microsoft's development tools to develop java applications ubiquitously, but erroneously, believed to be entirely cross-platform, PL suffered losses of approximately \$1,000,000 from SAV's reduced ability to compete in relevant markets.

3. When Defendant tied purchase of Internet Explorer to Plaintiff's purchase of Windows 98, PL suffered loss of IE's total cost of approximately \$100. "The fact that Microsoft ostensibly priced Internet Explorer at zero does not detract from the conclusion that consumers were forced to pay, one way or another, for the browser along with Windows." [III.(G)11.]

4. Although violation did not directly injure PL, fact of MS underpricing for IE intentionally breached Cal. Bus & Prof. Codes, sec. 17040, 17043 and 17044, and directly

injured Netscape by subverting Navigator's competition with MS's "loss leader"). This fact bright-lines MS liability for IE's tie to Windows 98 that directly and proximately caused antitrust injury to PL...at any price for IE determined above zero.

5. Learning curve alone, from Navigator literacy to IE literacy, consumed PL's time and productivity such that PL's loss of \$500. is reasonably estimated to be tie-in's resultant antitrust injury to Plaintiff. Fact IE performed certain internet browsing functions at least slightly more productively than Navigator on Windows 98 virtually compelled PL's use of IE once commingled IE code had been leveraged into PL's computer via Windows monopoly power and ISV/ICP compulsion in 1998 to upgrade OS from Windows 95 (Navigator) to Windows 98 (Internet Explorer).

VII. DISCUSSION ON REMEDIES

1. Federal Specifications:

a) As found in allegations proceeding, 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 targeted documentation.

b) Federal antitrust statutes specify penalties and/or remedies for proven breach(s) of Title 15, United States Codes, sections 1 and 2. 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. 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]

(4) "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](http://www.wired.com/news/politics/0,1283,32358,00.html))]

(5) Checking Federal Trade Commission antitrust cases listed for review on the FTC website, circa 1997/1998/1999, Plaintiff was unable to find the above referenced case and/or any reference to the much publicized fine. However, news items and other forms of notice in various newspapers give strong indication that such an action (fine) by a federal court was at least proposed as reasonable remedy for MS anticompetitive conduct.

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 and 2 is:

b) Payment of one-million, two-million or three-million dollars (trebled) to Plaintiff depending on number of charges proven.

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 was 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 et seq., are:

a) For convictions on section 16700, et seq. and/or section 17200 et seq.: Microsoft Corporation must pay two-million dollars (trebled), or twice the gain (net income) that MS derived from breaches of federal/state antitrust laws. Because Defendant's pecuniary gain fro illegal activity was greater than PL's loss from same, statute required gain based penalties are more "applicable" in this case for determination of fair and exemplary damages and to fulfill the letter and spirit of sec. 16755(1)(3).

VIII. COMMENT ON REMEDIES

1. Because certain of Microsoft's antitrust conviction(s) have withstood appeal, State Attorneys General remedy demand for opening of Microsoft's Windows code to public scrutiny and/or use 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* and other cases cited above, Microsoft conviction(s) for monopolization of the computer operating system market and/or associated exclusive dealings conviction(s) require MS no longer legally entitled to sue persons who infringe upon MS-Windows, MS-IE and other Microsoft patents.

IX. PROLOGUE TO CONCLUSION

1. In 1995, Microsoft's most recently released OS, Windows 95, had a retail cost of about \$50. Price was competitive with those charged by most competitors in the OS market. Claris Works (Apple), WordPerfect (Correl) and Smartsuite (IBM) competed reasonably well (generated net income) against MS-Office (Microsoft) in the office productivity suite market. Netscape Navigator enjoyed dominant marketshare over Microsoft's Internet Explorer and all other competitors in the internet browser market. SAV-Golf Coach, in competition with MS-Excel and numerous other products in charting/graphing/wordpad market(s), was selling very slowly, but the simple yet versatile and useful *Golf Coach* had significant potential for penetration (profitability) in emerging internet, and conventional, multimedia markets where computer literacy was marginal (ie. beginners, novices, etc.). Java development was only a twinkle in Jim Barksdale's eye and a promise in his microphone.

2. In 1998, Microsoft's most recently released OS, Windows 98, had a retail cost of about \$90. which was about twice the cost of products offered by a dwindling number of competitors in OS markets. Claris Works, excellent OP software for the MacIntosh environment to be sure, was practically non-competitive against newly released Mac-Office (Microsoft) and WordPerfect and Smartsuite were making their last-ditch-stands in the OP marketplace. (Plaintiff bought WordPerfect as a form of protest in 1998. He never used it.) Navigator held onto a tenuous 50/50 marketshare duel with IE. Sun Microsystems, Inc. enjoyed absolute dominance in the new java development applications

market with JDK. SAV's *Golf Coach*, even with new multimedia concepts added on, had been selling only minimally, but SAV managed to continue aggressive competition in ISV/ICP markets with custom website designs and website enhancements crafted using "stolen" applets and java applications.

3. In 2003, most recently released OS, Windows XP, has a retail cost of about \$250. and its only viable competitor, Linux-RedHat, has a retail cost of about \$39. MS-Office has a retail cost of about \$450. versus only viable competitor, Linux-StarOffice, costing zero as a download or included in Linux-RedHat at no extra cost. WordPerfect, Claris Works and Smartsuite are only marginally competitive (less than 2% marketshare). A few antique copies can still be found installed by OEMs, risking the wrath of MS for nostalgia sake. PL's multimedia is more famous than profitable. He continues in competition with significant hope and faith that comprehensive justice will permit profits and even some affluence...eventually.

4. Although 50 meter Perini Navi sailing yacht owned by Netscape's chairman can be seen in all its glory in/out the Santa Barbara harbor, it is extremely difficult to find Netscape Navigator installed on any new computers, all of which are installed with Microsoft's "flagship" OS. MS marketshare in the internet browser market is, roughly 98% and climbing.

5. SUN hangs on doggedly. Dwindling, secondary marketshare in java development has recently been protected via decision in the District of Maryland - MDL 1332 (Hon. J. Frederick Motz) granting injunctive relief from outright devastation via Microsoft's barely restrained anticompetitive business methods (ie. refusal to support java in OS).

6. Plaintiff's competition against MS in charting/graphing/wordpad software market(s) is practically non-existent (very marginal). SAV does retain its license from Software Publishing Corp. for *Golf Coach's* core program, *PFS: First Graphics*, valued in excess of \$1,000,000.

7. Following payment of damages, and other relief sought in this case, SAV will continue to manufacture, market and sell *Golf Coach*. Projections for marginal profitability of the asset by 2004 are not unreasonable.

8. SAV's website offers a vast array (library) of original and modified Flash/Director (Macromedia, Inc.) products and

PL has managed to complete two literary projects which are beginning to generate substantial revenues.

X. CONCLUSION

1. Defendant Microsoft Corp. intentionally inflicted antitrust injury on Plaintiff O'Brien and other ISVs/ICPs in markets relevant to cause of action specified in this case by (a) unlawfully excluding Plaintiff's competition; (b) practicing deception illegally against Plaintiff; (c) increasing Plaintiff's business and personal expenses via monopolistic tying; (d) discriminating against PL and other MS competitors engaged in interstate commerce in price, services and/or facilities; (e) discriminating against PL and other MS competitors engaged in interstate commerce via anticompetitive underselling of services; (f) discriminating against PL and other MS competitors engaged in interstate commerce via grant of rebates, discounts, allowances, and/or advertising services, and (g) denying access to an essential facility such that interstate competition with MS was restrained causing antitrust injury to PL and many other MS competitors.

2. Via monopolization and myriad attempts to monopolize, using forms/methods alleged above, Microsoft Corporation breached 15 U.S.C., sec. 1 and 2, and violated related California Business and Professions Codes, sec. 16700 et seq and 17200 et seq.

3. Via discrimination, using forms/methods alleged above, Microsoft Corporation breached 15 U.S.C, sec. 13(a)(b) and (d), and violated related California Business and Professions Codes, sec. 16700 et seq and 17200 et seq.

4. Microsoft is liable for payment of damages and grant of other relief to Plaintiff O'Brien as specified below.

XI. PRAYER

"...in the net which they hid their own foot is caught." - Psalms 9:15

1. Plaintiff Edward Michael O'Brien prays for this Court's cash 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 must be fined twice its total net income derived from conduct proven to violate federal/state antitrust laws and injurious to American consumers and competitors, including the Plaintiff in this case.

2. Reliance exclusively on federal/state prosecutions to remedy Defendant's antitrust inequities is not sufficient because government prosecutors rarely demand sufficient financial penalty to effectively curtail c-corporation 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 and competitors at all socio-economic levels in all countries of the world and to insure lawful compliance by Microsoft Corporation (and, indeed, entire industries led by MS) with antitrust laws, to award to PL not only compensatory damages for real and measurable injury inflicted by the Defendant, but also sufficient and effective punitive (exemplary) damages financial 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, Courts in the State of California and in numerous other states. And on these criteria/precedent, Plaintiff makes request for Court's award of punitive (exemplary) damages to be paid by Defendants in cash relative to Defendant's "pecuniary gain" derived from their antitrust actions, proven illegal in this and related cases.

5. PL'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 against MS made in federal or state courts and, therefore, PL is entitled to twice Defendant's pecuniary gain derived from Defendant's proven illegal actions, on-going at inception of Plaintiff's cause of action to date, as evidenced by authoritative public and/or private financial records.

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

7. 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 Defendant Microsoft Corp derived from *per se* illegal, antitrust actions over the time period encompassed by cause(s) of action in this case. Payment can be easily made form Microsoft's widely publicized \$43. billion cash reserve. [Exhibit D]

8. PL claims and prays for court's compel of Microsoft's OS code modification such as to permit the full operation of *PFS: First Graphics* and *SAV-Playpredict* on all Windows programs presently and future existent.

9. PL claims and prays for court's award of attorneys' fees and other costs of this suit.

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

Submitted on January 25, 2003

by _____

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