

EDWARD MICHAEL O'BRIEN

Victoria Court

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDWARD MICHAEL O'BRIEN,

Plaintiff,

v.

MICROSOFT CORPORATION,

INTERNATIONAL BUSINESS MACHINES,

DISNEY CORPORATION,

and AMERICAN ONLINE-TIME WARNER INC.,

Defendants.

AMENDED COMPLAINT

Case No. CV 02-3127

I. OPENING STATEMENT

A. Conspiracy To Monopolize Breached Antitrust Laws:

1. Between 1992 and 2002, Microsoft restrained competition against *MS-Excel* and *MS-Office* via *Windows x.x* source code preclusion of *PFS: First Graphics*, top selling charting-graphing-wordpad software published by Software Publishing Corporation ["SPC"].

2. In 1990, Plaintiff, Edward Michael O'Brien and the Golf O'Brien Company ["PL"] obtained a license from SPC for integration of *PFS: First Graphics* in PL's program *Golf Coach*, the first (copyrighted 1989) computer program to produce charts, graphs and text-instruction based on sports statistics.

3. Preclusion of *PFS: First Graphics* support on *Windows x.x* and later Microsoft operating systems ["OS"] greatly restrained PL's competition in markets for charting-graphing-wordpad ["CGW"] software and in other sports-statistics-presentation ["SSP"] markets.

4. After 1995, via agreements between International Business Machines, Inc. ["IBM"] and Microsoft Corporation ["MS"], IBM curtailed and effectively eliminated OS/2 competition in certain computer operating system ["OS"] markets in exchange for favorable licensing terms for MS-Windows and MS-Office. IBM/MS deals were illegal, breaching federal and state antitrust laws, because Microsoft's OS and Office Productivity ["OP"] software monopolies were proven illegally increased at the time IBM agreed to diminish its competition and join concerted efforts to monopolize and exploit OS and OP markets.

5. Curtailment and/or elimination of OS/2 competition restrained competition by PL in OP and CGW and/or SSP markets because PL's software business, based solely on *Golf Coach* in 1990-1999, required OS/2 or other non-Windows OS be installed in a certain number of newly sold computers. Curtailment (50% reduction in 1995 and thereafter) and/or elimination of OS/2 competition restrained PL's competition and damaged PL's business because diminishment of OS/2 competition caused numbers of new computers on which *Golf Coach* could run to be insufficient to produce sales revenues, year-to-year, adequate for continued business viability. [EXHIBIT F]

B. Conspiracy to Exclude Breached Antitrust Laws:

1. Since 1992, PL has been in competition with MS via *Golf Coach* competition in CGW and SSP markets against *MS-Excel* bundled in *MS-Office* or sold alone at retail. Increase in *MS-Office* marketshare had direct, negative effect on *Golf Coach* marketshare in CGW markets.

2. After 1995, when MS, the Disney (Walt) Company ["WD"], American Online, Inc. ["AOL"] and Time Warner, Inc. ["TW"] agreed contractually to preclude Netscape, Inc.

competition in the Internet Browser ["IB"] market, they broke antitrust laws via (1) exclusive dealing and (2) monopolization.

2. At time of cause-of-action, MS browser program, Internet Explorer ["IE"] was sold, primarily, as an integral program bundled in Microsoft's office productivity suite, *MS-Office* ["OFFICE"]. MS contracts with defendants, including IBM, were structured and intended to increase MS market-share in the IB market (questionably monopolized at the time) , via increase of monopoly level market-share in OP and CGW markets (CGW monopoly was via *MS-Excel* also bundled in OFFICE).

3. Because MS/WD/AOL/TW contracts expressly and clearly precluded competition by *Netscape Navigator* they constituted "exclusive dealing" in violation of Title 15, United States Codes ["15 U.S.C."], sec. 1 and 14.

4. Because same contracts illegally increased the OFFICE monopoly, they constituted monopolization in violation of 15 U.S.C., sec. 2 and numerous state antitrust laws, including California Codes.

5. Because same contracts illegally increased the Feature Animated Film monopoly (WD) and/or the Internet Search Portal monopoly (AOL) and/or the News Magazine monopoly (TW) they constituted monopolization in violation of 15 U.S.C., sec. 2 and numerous state antitrust laws, including certain California Codes.

6. Because IBM concurred with MS/WD/AOL/TW conspiracy/conduct, it also restrained competition and monopolized markets via installation of Microsoft's OS and OP software that (1) created exclusive icon (internet link) presences for WD, AOL and TW in exchange for preclusion of *Netscape Navigator* access to their websites, and (2) contained source code that precluded downloading of Sun Microsystems, Inc. software. Therefore, IBM breached 15 U.S.C., sec 1, 2 and 14 and numerous state antitrust laws, including certain California Codes.

C. MS CONVICTION PROVES DEFENDANTS LIABILITY

1. *Prima facie* evidence exists inter *United States of America v. Microsoft*, CV 98-1232/1233 (CKK) to prove all defendants liable for *per se* violation of antitrust laws. Defendants restrained trade and commerce and monopolized markets illegally. Specifically, defendants' increase of the Microsoft OFFICE monopoly restrained the competition of Corel, Inc. via *WordPerfect*, Lotus Development Corporation via *Smartsuite* and competition by many other companies, including the Golf O'Brien Company ["GO"] under the sole proprietorship of plaintiff O'Brien.

2. This suit is brought to recover damages resulting from defendants' restraint of trade, monopolization and exclusive dealing.

D. ISSUES SPECIFIED

1. PL files this complaint and claim for treble damages against Defendants for cause: restraint of trade, attempted monopolization, monopolization and exclusive dealing in software markets where PL was competitive at time of cause-of-action.
2. Competition by IBM in PC, MAINFRAME and SERVER computer operating system markets, via the *OS/2* program (an excellent operating system developed jointly with MS and having significant correspondence with Microsoft's NT program), allowed PL to compete in charting-graphing-wordpad software markets with *Golf Coach*, a software compilation invented by PL and sold competitively with *MS-Excel*, bundled in OFFICE or sold separately.
3. Even though *MS-Excel* had (has) monopoly marketshare in CGW and other "spreadsheet" related markets, *Golf Coach* competed in CGW markets because *OS/2* supported *PFS: First Graphics*, the core program in *Golf Coach* licensed by GO from Software Publishing Corporation. MS engineered MS-DOS (and subsequent OS) to preclude *PFS: First Graphics* (the best selling CGW software in 1989-90) and, thereby, restrained, if not eliminated, *Golf Coach*, as well as *PFS: First Graphics*, competition with *MS-Excel*. *OS/2* literally saved *Golf Coach* from extinction in 1990-1997.
4. However, in 1997, IBM bowed to persistent MS demands for IBM's "neutralization" (term found in IBM/MS email communications in PL's possession) of *OS/2* and *Lotus Smartsuite* competition in OS and OP markets as a condition for IBM's licensing (favorable terms that eventually allowed IBM's superior competition) of Windows 95 (and subsequent OS) and OFFICE, installation of which was considered essential to IBM's optimized competition in PC, MAINFRAME and SERVER markets.
5. IBM's minimization and eventual elimination of *OS/2* competition minimized and eventually eliminated Golf O'Brien Company revenues from sales of *Golf Coach*, and, thereby, caused measurable antitrust injury to PL and a host of other competitors in OP/CGW markets.
6. When IBM minimized and eventually eliminated *Smartsuite* competition in OP markets it co-operated with MS to increase the MS monopoly in same. Increase in the OP monopoly increased MS monopoly in CGW markets via *MS-Excel*. Increase in *MS-Excel* monopoly power in CGW markets enabled MS to quash competition from all competitors, including GO.
7. As of February 16, 2002, thanks to a decision regarding access to information made by the Honorable Colleen Kolar-Kotelly presiding over *U.S. v. Microsoft*, it is now possible to prove MS code preclusion of *Golf Coach* via preclusion of *PFS: First Graphics*. Even if/when MS eliminates preclusion of *PFS: First Graphics*, absolute monopolization of OP markets will make competition with *MS-Excel* so difficult that revenues sufficient for economic viability cannot be reasonably projected by PL.

[Fortunate for PL, GO is currently involved in development of other software, multimedia and motion picture products sold in markets other than those monopolized by Microsoft. PL can reasonably project sufficient revenues from current GO projects such that survival of GO, if not its prosperity, is no longer in question.]

8. Because IE, manufactured and sold by defendant, Microsoft Corporation, was not sold as a separate product at certain times from 1997 thru 2002 (as MS admitted in its *U. S. v. Microsoft* appellate brief and elsewhere), consumers were forced at those times to buy MS operating systems and/or MS office productivity suite software, bundling IE, in order to obtain access to popular websites owned by defendants, The Disney (Walt) Company, American Online, Inc. and Time Warner, Inc. Website access to their sites was restricted to IE users by defendants' formal agreements [contracts] with MS requiring absolute preclusion of access to websites via *Netscape Navigator*. Agreement by defendant companies with MS specified an exchange of exclusive (extremely valuable) placement of WD/AOL/TW logos (website links) on Windows operating systems, installed in IBM computers, for cash and guarantee of preclusion of *Netscape Navigator*.

9. Agreements injured PL's ability to compete in OP markets and was *per se* violation of Title 15, United States Codes, section 1, 2, and 14.

10. Because Disney and AOL Time agreed not to support *Netscape Navigator* access to their websites as a condition for placement on Windows 95, 98, 2000 and NT desktops, defendants compelled consumers needing or just desiring Disney/AOL Time content to buy computers with OFFICE installed, or buy IE, sold separately (when it was available), for about \$90., ave. retail or OFFICE, sold separately, for about \$400., ave. retail.

11. For a considerable length of time following 1997 rule-of-thumb for many consumers was no OFFICE (installed in Mac or PC) no Disney/AOL Time website content. Strong and yet illegal inducement to buy software competitive with Corel's *WordPerfect*, Lotus' *Smartsuite*, and other OP/CGW software products, including *Golf Coach*.

12. Disney/AOL Time agreement with MS compelled consumers to buy OS tied to OFFICE(IE) installed in computers sold by all major Original Equipment Manufacturers ["OEM"], including IBM, thereby illegally increasing OS and OP monopoly(s) and tending to create another monopoly in IB markets.

13. Disney/AOL Time agreements with MS compelled consumers to take OS/OFFICE to get IE to get WD/AOL/TW website content which illegally increased monopolies, or attempted to establish monopolies, in markets for (1) animated feature films, televised animation and national theme parks (Disney), and (2) cable television services, news publications, recorded music and internet search portals (AOL Time).

14. WD/AOL/TW agreements with MS often compelled consumers to buy OS/OFFICE and thereby increased preclusion of SUN Microsystems, Inc. software (not precluded via OS/2 and other non-Windows OS programs) which increased probability of injury to those persons who needed SUN's software to compete in business or otherwise stay

healthy. PL was one. (See *O'Brien v. Microsoft/Compaq/RadioShack*, CV 01-08306 MRP (RCx) in the Central District of California, and *O'Brien v. IBM*, Case No. CV 00-10778 MMM).

15. In sum: Agreement with MS by Disney/AOL Time to exclude *Netscape Navigator* in exchange for desktop placement constituted conspiracy to monopolize, monopolization, attempted monopolization, exclusive dealing, and illegal tying and violated, respectively, Title 15, United States Codes, sections 1, 2, and 14 as well as California Codes: Business and Professions: section 16755.

16. Therefore, IBM, MS, WD, AOL and TW violated federal and state antitrust laws and are now liable for payment of treble damages proven by PL.

II. CAUSE OF ACTION

A. IBM and MS Violated Antitrust Laws and Injured PL:

1. In conspiracy with Microsoft Corporation, IBM violated sections 1 and 2 of Title 15, United States Codes. Plaintiff alleges and can prove IBM and MS restrained trade and monopolized markets using same or similar business practices for which MS has recently been convicted in federal courts. Violations of sec. 1 and 2 injured Plaintiff in ways that are specified herein in terms of quality and quantity of damages sustained.

2. 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 \$10,000,000. if a corporation, or, if any other person, \$350,000. or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U.S.C., sec. 1]

3. PL was injured and sustained damages in excess of \$75,000. when IBM and MS conspired to, and in fact did, via contracts and informal binding agreements, restrain trade in all of the United States and/or all of the major industrial nations of the world.

4. 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 \$10,000,000. if a corporation, or, if any other person, \$350,000., or by imprisonment not exceeding three years, or both said punishments, in the discretion of the court." [15 U.S.C., sec. 2]

5. PL was injured and sustained damages in excess of \$75,000. when IBM and MS conspired to, and in fact did, via illegal increase of monopoly and/or attempts to illegally monopolize, restrain trade in all of the United States and/or all of the major industrial nations of the world.

B. IBM, MS, WD, AOL and TW Violated Antitrust Laws and Injured PL:

1. In conspiracy with Microsoft Corporation, the Disney (Walt) Company, American Online-Time Warner, Inc., and IBM violated section 14 of Title 15, United States Codes. Plaintiff alleges and can prove all Defendants restrained trade, lessened competition and illegally monopolized using same or similar business practices for which MS has recently been convicted in federal courts. Violation of sec. 14 injured Plaintiff in ways that are specified herein in terms of quality and quantity of damages sustained.

2. Sec. 14: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." [15 U.S.C., sec. 14]

3. PL was injured and sustained damages in excess of \$75,000. when defendants conspired to, and in fact did, via contracts and/or formal agreements, deny use of MS competitor's product as a condition for grant of privileged position in the MS operating system's desktop. Such exclusive dealings resulted in the lessening of PL's competition via increase of MS monopolization.

III. MONOPOLY POWER

1. Allegations claiming the existence of monopoly power for MS in relevant markets are legendary and do not require specification in this action. It is sufficient to state fact that MS, and/or one or more of the other defendants, had at time of cause of action, monopoly power in markets relevant to this complaint such that dismissal of the complaint is not reasonable absent defense claims beyond insufficient monopoly power.

2. Plaintiff exhibits herein a prior complaint filed, lodged and reviewed by this court, entitled *Edward Michael O'Brien v. International Business Machines*, CV 00 - 10778 MMM (AIJx). Reasonable reader will agree prior complaint is not substantially similar to

this complaint. However, prior complaint contains allegations of MS/IBM monopoly power, and other specified factors related to their alleged monopolization and restraint of trade, that support and empower allegations made herein claiming defendants incurred liability under federal/state antitrust laws. [EXHIBIT A]

IV. PARTIES

1. AOL Time Warner, Inc. is one of the world's leading media and entertainment companies. AOL/Time publishes and distributes magazines and books; produces and distributes recorded music, motion pictures and television programming; owns and operates retail stores; owns and administers music copyrights; operates cable TV systems; and owns and operates the leading internet search portal, America Online. Corporate Offices: 75 Rockefeller Plaza, New York, NY 10019; tel 212-484-8000

2. Disney (Walt) Co. is one of the world's largest entertainment conglomerates with operations in film and television programming and retail (creative content), broadcasting and theme parks and resorts. Disney also has internet website and printed publication operations. Corporate Offices: 500 South Buena Vista Street, Burbank, CA 91521; tel 818-560-1000

3. Microsoft Corporation develops, makes, licenses and supports a wide range of software products, including operating systems, server applications, business and consumer productivity applications, software development tools and Internet software and technologies. Windows is the company's "flagship" PC operating system. Corporate Offices: One Microsoft Way, Redmond, WA 98052-6399; tel 425-882--8080

4. International Business Machines, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of New York, whose principal place of business is New Orchard Road, Armonk, NY 10504, (tel 914-499-1900)

5. IBM creates, develops, manufacturers and sells advanced information technologies, including computer systems, software, networking systems, storage devices and micro-electronics, and translates these technologies into marketed values for customers via solutions/services businesses established worldwide.

6. Lotus Development Corporation is a software development company and is a wholly owned subsidiary of IBM, whose operations are integral and consolidated with those of IBM.

7. Edward Michael O'Brien, is a graduate of the University of California at Santa Barbara and former Captain in the United States Marine Corps. Mr. O'Brien is sole-proprietor of the Golf O'Brien Company, a software and website development company established in 1990. GO sells custom crafted, multimedia websites, motion picture scripts, CD-ROM music and GOLF COACH, the first (Copyrighted, 1989) software

application to allow golfers to acquire, process, analyze and present golf statistics on PC, SERVER and MAINFRAME computers. Recently, Mr. O'Brien donated a partial (50%) interest in GO to SAVIORG, a California public charity [Title 26 U.S.C., sec. 509(a)2 / 501(c)3] chaired by Mr. O'Brien. Mr. O'Brien is also the author of GIVENGET, a well known internet book on tax-saving ideas using charitable donations. Mr. O'Brien played professional golf on the California Golden State Professional Golf Tour in 1992, and is currently a resident of Santa Barbara, California and Princeville, Hawaii.

V. BACKGROUND

1. In 1997-1998, when the United States Department of Justice ["DOJ"] case against MS was effectively dismissed by the United States Court of Appeals for the District of Columbia for reason, insufficient evidence, IBM apparently determined that it was safe and very profitable to eliminate competition against MS.
2. Even though IBM continued to manufacture and sell PCs installed with (a) OS/2 and (b) IBM's office productivity suite, *Lotus SmartSuite*, IBM chose, in face of aggressively ministered and persistent pressure from MS in 1995-1998, to eliminate competition in OS and OP markets, and, thereby, to fully participate in privileged software licensing arrangements in exchange for cash and the cost of illegally increasing MS monopolies.
3. This decision (series of decisions), compelled by MS and made by IBM, caused antitrust injury to PL and to many other competitors in OS, OP and CGW markets.
4. IBM, in conspiracy with MS, injured plaintiff and others in ways other than those alleged above. Given premise [specified in allegations found in *O'Brien/Golf O'Brien v. Gates/Microsoft*, CV 00 - 01132 R (RCx) and *O'Brien v. Gates, Microsoft, Compaq, Radio Shack*, CV 01 - 08306 MRP (RCx): both cases active in the District of Maryland, MDL 1332] illegal increase of the MS-Office monopoly caused antitrust injury to PL, it can be proven defendants in this case inflicted further injury via exclusive dealing.
5. In 1998, IBM obtained license to MS-Windows 98 and MS-Office on condition it restrict, and/or agree to the restriction of, the number of third party icons on it's PC boot screen to those elite companies (The Disney Company, American On-Line, Inc., Time Warner, Inc., et al.) who had contracted with MS to preclude access to their popular services via *Netscape Navigator*.
6. IBM's decision to enter the MS conspiracy against Netscape (attempting to, and eventually succeeding to, monopolize the Internet Browser market) illegally increased MS monopoly in OP and CGW markets because IE was bundled in MS-Office, and exclusionary tie was therefore a violation of Section 14 as well as a second distinct violation of Sections 1 and 2 of Title 15, United States Codes, and did, in fact, cause antitrust injury to PL and many other software developers in the United States of America and worldwide.

7. In 1994, following *bona fide* offer communicated from PL to MS, MS refused to take even the first step in the negotiation process leading to an agreement between the Microsoft Corporation and the Golf O'Brien Company for the bundling of *Golf Coach* (the only legal method of graphically presenting sports statistics on computers) in Microsoft's OS and/or OP software.
8. Refusal to negotiate (deal) was particularly offensive considering the many other software companies at the time whose bundling offers were being respectfully considered (if not accepted) by MS.
9. Because MS held a strong and increasing monopoly in OP and CGW markets, MS refusal to communicate regarding solicited bundling negotiations constituted exclusive dealing and restraint of trade, and clearly violated antitrust laws.
10. Without ability to sell the bundle of *Golf Coach* inter *MS-Office* or other MS product, PL had no commercially viable access to competition in OP/CGW markets once IBM's *OS/2* had been "neutralized" (eliminated).
11. MS preclusion of Sun Microsystems, Inc. competition via OS (installed in all major OEM computers, including IBM computers) source code preclusion of downloads was directly responsible for restraint of PL's competition in relevant markets because PL needed Sun's software for development of JAVA language based multimedia software necessary to compete in relevant markets. [See *O'Brien v. Microsoft, Compaq, Radio Shack*, CV-01-08306 MRP (RCx)]

VI. RELATED CASE IN POINT

1. Let reader remember IBM and MS co-developed MS-DOS, and used the operating system program(s) to absolutely monopolize and dominate PC markets (not Apple/MacIntosh markets) from 1982 to 1988.
2. For the sake of argument, let Windows 95 be named MS-DOS 7.0/MS-Windows 4.0 because the district court in *Caldera*, the Honorable Bee Benson presiding, recently ruled that Windows 95 may be two separate and distinct products effectively composed of "MS-DOS 7.0" and "Windows 4.0". [*CALDERA, INC. v. Microsoft Corporation*, CV 96-645 (B), Opinion & Order of November, 1999, Conclusion.]
3. When an OEM purchased a license for Windows 95 it accepted the preclusion of all DOS platforms other than MS-DOS 7.0 on which ran MS-Windows 3.1 (upgraded effectively) to 4.0. (Caldera, Inc. owned/sold DR DOS ,the OS developed by Digital Research, Inc., thus "DR" DOS)
4. IBM installation of MS_Windows 95, as two separate products tied in all but a *de minis* percentage of IBM machines, precluded not only DR DOS but all similar DOS

platforms capable of supporting MS-Windows 3.1/"4.0" and competing in Windows OS environments.

5. When Judge Benson refused to dismiss Calder's suit, and called for a "factfinder" to interpose, ie. initiate Discovery, Microsoft immediately settled with Caldera, Inc. for \$275,000,000., paid quarterly.

6. Thus, *GOLF COACH*, which had only the possibility of purchase/installation in computers not already installed with MS (or IBM) OP software, was, along with DR DOS, precluded from competition by the same illegal actions of IBM/MS. (ie., MS OS monopoly permitted no OS to be available for run of MS OS precluded *PFS: First Graphics*)

7. Had IBM installed a certain significant percentage of DR DOS/Windows 3.1/"4.0" platforms in its computers, and had Caldera, Inc., or one of its non-Microsoft OS competitors, not imitated MICROSOFT/IBM and demanded a tied installation of certain other OP related software, purchases of *GOLF COACH* could have been justified by consumers, and the Golf O'Brien Company could have remained a viable competitor in CGW markets.

8. Because MS refused to sell MS-Windows 3.1/"4.0" for platforms other than MS-DOS, it illegally tied its products, and caused antitrust injury directly to Caldera, Inc., a host of competitors and, circuitously but nevertheless directly, to PL.

9. MS and IBM, conspirators, sought via OS licensing agreements, to inflict injury on Caldera, Inc. and other competitors and would-be competitors in OS markets, by restricting access to Windows source code(s) such that competitors ability to compete in contemporary OS markets was precluded, and MICROSOFT's "barriers to entry" into PC OS markets (core monopoly) were maintained and strengthened when OS competitors failed to compete and, effectively, went out of business.

10. PL, and fellow competitors in OP and related markets, were the "necessary and foreseeable" victims of the alleged illegal actions by conspirators against Caldera, Inc., et al. in OS markets. PL's injury was an integral aspect of the conspiratorial actions alleged, and was of the type of injury antitrust laws were intended to prevent.

11. "The Court made clear that the availability of section 4 did not depend upon the intent of the conspirators, but '[w]here the injury alleged [was] so integral an aspect of the conspiracy alleged, there [could] be no question that the loss was precisely 'the type of loss that the claimed violations...would be likely to cause.' The harm, thus, was not so fortuitous or incidental as to fall outside the protection of section 4 [Clayton Act]." [*Blue Shield v. McCready*, 457 U.S. 479 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)]

VII. STATE LAW BASED CLAIMS

A. All Defendants are Liable for Indirect Antitrust Injury:

1. Injury to Sun Microsystems, Inc., via defendants' preclusion of software downloads from Sun's website, was antitrust injury to the PL who had business need for Sun's software and, therefore, MS/IBM liable for treble damages resulting from direct and/or "compound direct" antitrust injury.
2. Injury to Netscape, Inc., via defendants' preclusion of *Netscape Navigator*, was antitrust injury to PL who was a competitor in OP/CGW markets where competition was restrained via defendants' preclusion in the Internet Browser market causing consumer compulsion to purchase OFFICE and, thereby, increase OFFICE monopoly.
3. "For California's Cartwright Act purposes, direct injury to plaintiff from defendants' antitrust actions, also mediated 'indirectly' to a plaintiff by third party injured by same defendants, is compounded direct antitrust injury, and violates Cartwright Act (Sec. 16727)." [*Krigbaun v. Sbarbaro (1913)*, 23 Cal App 427, 138 P. 364.]

B. Defendants Liable for Cartwright Act Violations:

1. "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)]
2. "b) 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...'" [*Ibid.*]
3. Defendants actions alleged above violated California's Cartwright Act at sections 16721 and 16727, and injured PL who brings this supplementary action for damages inter federal complaint, with authority of Section 16750 of Act.
4. "An illegal tie-in contract is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different or tied product, or at least agrees that he will not purchase that product from any other supplier. Tying arrangements are illegal per se whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. Tie-in agreements which substantially lessen competition or tend to create a monopoly are illegal under the Cartwright Act, Bus. & Prof. Code, sec. 16727, providing that it shall be unlawful for any person to sell a commodity or to fix a price charged on it on the condition that the purchaser shall not deal in goods of a competitor of the seller where the

effect of the agreement may be to substantially lessen competition." [*Mailand v. Burckle* (1978), 20 Cal 3d 367, 143 Cal Rptr 1.]

5. All conditions met. Defendants, in close cooperation, committed *per se* illegal tying and exclusively dealt via agreement to "...not deal in goods of a competitor (Netscape) of the seller (Microsoft)...", and thereby caused antitrust injury not only to Netscape, Inc. but to the Golf O'Brien Company (PL) in relevant markets.

6. "A tie-in arrangement is *per se* illegal under Bus. & Prof. Code, sec. 16727, and Bus. & Prof. Code, sec. 16720-16726, if two separate products are tied and the seller has sufficient economic power over the tying product. Under sec. 16727, the seller has sufficient economic power if he has a dominant monopolistic position in the tying product or the tie-in restrains a substantial volume of commerce in the tied product. Under sec. 16720-16726, however the seller has sufficient economic power only if both conditions are found." [*People v. National Association of Realtors* (1984, 4th Dist), 155 Cal App 3d 578, 202 Cal Rptr 243.]

7. All conditions met. Defendants' actions restrained substantial amounts of commerce in markets for Internet Browsers, Feature Film Productions, Feature Animation Films, News Publications, etc., as well as markets for OP and GCW software. Defendants' actions restrained a substantial amount of commerce in OP and CGW markets, where PL was competitive.

8. "A tying arrangement is unreasonable *per se* under Bus. & Prof. Code, sec. 16727 when either of the above two elements are present, although under the Sherman Act both elements are required for a finding of illegality." [*People v. National Asso. of Realtors* (1981, 4th Dist), 120 Cal App 3d 459, 174 Cal Rptr 728, 22 ALR4th 79, appeal after remand (4th Dist) 155 Cal App 3d 578, 202 Cal Rptr 243.]

9. All conditions met. Defendant's actions unreasonably restrained competition in markets for Charting-Graphing-Wordpad software and website development, and clearly injured the Plaintiff in those markets.

C. IBM/MS Violated California's Unfair Competition Act:

1. "The California Unfair Practices Act (Bus. & Prof. Code, sec. 17000, et seq.) prohibits selling articles below cost or giving them away for the purposes of injuring competitors or destroying competition." [*Lowell v. Mother's Cake & Cookie Co.* (1978), 79 Cal App 3d 13, 144 Cal Rptr. 664.]

2. MS virtually "gave away" and/or deeply discounted MS-Office (approx. retail value \$400.), MS-Works (approx. retail value \$200. per copy), and other "office productivity" software products (as alleged above) to IBM and other OEMs who willingly accepted products tied to the licensing of Microsoft's Windows OS. Minimal or no cost for universally demanded software greatly value-added new computers for sale and greatly increased software manufacturer's installed base.

3. Why would MS actually require installation of expensive OP products by IBM and other OEMs when OEMs were not charged significantly more money for licensing both OS and OP software? Plaintiff O'Brien claims OP products were tied to Microsoft's OS in order to preclude competition in relevant markets, and thereby increase Microsoft's OS and OP monopoly(s).
4. Additionally, illegally tied software products installed in new computers purchased by consumers, not only increased manufacturer's installed base but also (1) increased network effects, and (2) increased upgrade probability. Low or no cost licenses for OP and other Non-OS software became highly profitable, year after year following original purchase from OEM.
5. PL was among MS's "targets" for preclusion of competition, and was aided and abetted by IBM.
6. PL alleges MS and IBM violation(s) of the Unfair Trade Practices Act, sec. 17043, 17045, 17047, 17049, under authority of sec. 17070, and claims fines and damages as prescribed by law and/or as the court may determine appropriate for damages claimed.

VIII. FORMAL CHARGES

A. SHERMAN ACT, SECTION ONE: CLAYTON ACT, SECTION 3: TYING OTHER APPLICATIONS TO AN OPERATING SYSTEM

1. IBM arbitrarily curtailed sales of its own operating system, and illegally tied sales of its computers (tying product) to sales of Microsoft's operating systems and other applications (tied product), including but not limited to Office Productivity Suites and related software in violation of Section 1 of the Sherman Act, 15 U.S.C., sec. 1. and Section 3 of the Clayton Act, 15 U.S.C., sec. 14.
2. All defendants named herein restrained trade and precluded competition by agreeing not to use and/or support the software of a Microsoft competitor in violation of the Sherman Act, 15 U.S.C., sec. 1. and Section 3 of the Clayton Act, 15 U.S.C., sec. 14.
3. "Illegal tie-ins...under section 1 may also qualify as anticompetitive conduct for section 2 purposes." [*Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Professional Pubs., Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995)]
4. All defendants named herein engaged in anticompetitive conduct in violation of the Sherman Act, 15 U.S.C., sec. 2.

B. SHERMAN ACT, SECTION ONE: ROBINSON-PATMAN ACT, SECTION 3: AGREEMENTS IN RESTRAINT OF TRADE

1. Microsoft formally and informally agreed with IBM, in exchange for favorable terms in the licensing of Microsoft's OS, to use various methods to (1) restrict Java programming capability thereby precluding JAVA development and competition in OP, CGW and multimedia markets, and (2) maintain and/or increase barriers to entry into OS markets and barriers to development in Java environments, constituting unreasonable restraints of trade in violation of Section One of the Sherman Act, 15 U.S.C., sec. 1. and Section 3 of the Robinson-Patman Act, 15 U.S.C., sec. 13(a)(f).

C. SHERMAN ACT, SECTION TWO: ATTEMPTED INCREASE OF MONOPOLY

1. At time of cause-of-action IBM had monopolies and monopoly power in markets for MAINFRAME and SERVER computers and in numerous PC, MAINFRAME and SERVER components markets.

2. Through the actions complained of herein, IBM has willfully and illegally attempted to maintain and increase its monopolies in these markets in violation of Section 2 of the Sherman Act. 15 U.S.C., sec. 2.

D. SHERMAN ACT, SECTION TWO: LEVERAGING OPERATING SYSTEM MONOPOLY

1. In violation of Section 2 of the Sherman Act, IBM and MS have, by the means set forth above, knowingly and intentionally used monopoly power in markets for (1) MAINFRAME and SERVER computers and PC, MAINFRAME and SERVER components and (2) computer operating systems to compete monopolistically with intent to preclude competition in market(s) for Office Productivity Suites and related software, including market(s) for GCW and markets for Java language based programming.

E. BREACH OF DOJ CONSENT DECREE *PRIMA FACIE* EVIDENCE HEREIN

1. "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws..." [Title 15, United States Codes, section 16(a)]

2. Microsoft, in conspiracy, full cooperation and concerted action with IBM, has violated and continues to violate Section IV.(B), (E)(1),(2) of Civil Action No. 94-1564, Final Judgment. Continued violation of DOJ Consent Decree (1994) brings continued injury to plaintiff and to markets where it competes.

3. Before its expiration, IBM breached its own Consent Decree, Civil Action No. 72-344 (1956) at Section XV. by (1) attempting to increase its monopolies via methods proscribed in consent decree and (2) actually increasing monopoly by using the power of monopoly in MAINFRAME and SERVER markets and/or PC, MAINFRAME and SERVER component markets to preclude competition in OP, CGW and/or website

development markets via conspiracy and concerted (long term) action with Microsoft and its associates.

F. BREACH OF CARTWRIGHT/UNFAIR COMPETITION ACTS

1. Illegal practices by defendants named in this complaint were in violation of California's Cartwright Act, Cal. Bus. & Prof. Code, sec. 16720, et seq., and California's Unfair Competition Act, Cal. Bus & Prof. Code, sec. 17200, et. seq.

IX. NO BUSINESS RATIONALE FOR DEFENDANTS

A. Breach of Trust Trust:

1. IBM's actions, as alleged in this complaint, have had a pernicious effect on competition without sufficient, countervailing virtue in relevant markets.

2. In 1994, in order to regain dominance in PC markets and to partially compete with Microsoft in OS and OP markets, IBM decided to "turn things around" by risking implementation of its' traditional sales methods (1932-1989) under the bold new leadership of Mr. Louis V. Gerstner, former CEO of tobacco-king, RJR Reynolds, Inc.

3. IBM bundles (ties to OS and hardware sales) MS and IBM software. Other OEMs do not bundle their own software as a rule, even though it can be highly profitable, because it is patently illegal.

4. Microsoft has not been forcing OEMs against their will to conspire and perform illegal acts that preclude competition in global markets for OS and OP software. It is proven fact, *prima facie*, in over two thousand (2000) email messages used formally as Trial Exhibits in *U.S. v. Microsoft*, CV 98-1232/1233 (CKK), and in the files of PL, that leading OEMs, including IBM, willingly agreed to, and long-term cooperated with, MS published and unpublished requirements for OS/OP licensing.

5. In many cases, MS did not even disguise its' illegal intent (ie., Microsoft's "OPK" agreement). OEM's behavior has been rationalized by certain machiavellian ("ends justify means") executives and apologists as the necessary, corporate (non-human person) imperative requiring maximized profits, even at human (consumer, small businesses, et al.) expense re competition, price, quality and opportunity for innovation.

6. Chief among Microsoft's compliant OEMs, and involved with MS since 1982, is IBM. IBM's antitrust liability extends to before the existence of Microsoft (1936-1972) and, probably, will extend to well after the software giant from Redmond loses unitary operations capability.

7. IBM monopolies virtually guarantee worldwide network vulnerability to Unauthorized Network Access (UNA) because only a narrow range of software products are installed (tied to sales) on IBM machines, and those software products (UNIX, WINDOWS, OFFICE, SMARTSUITE, DOMINO, et al.) are increasingly well known and exploited with increasing ease by "hackers" who are radically increasing in number and in knowledge of practiced and proven techniques that accomplish their illegal and destructive ends with increasing negative impact on worldwide data-processing systems. [<http://www.lopht.com> *section 05.12.00 - Microsoft Office 2000 Scripting Advisory]

B. Review of Antitrust Actions Against IBM

1. DOJ filed an antitrust suit against IBM and Remington-Rand, Inc. in 1932, alleging that the two companies, which controlled virtually the entire market for punch card machines, were illegally requiring customers to buy their cards tied to IBM computer sales. The case went to the United States Supreme Court, which ruled in favor of the Justice Department in 1936.

2. Remington-Rand was replaced by Microsoft as IBM's computer industry partner in the 1980's, and the software giant has been inextricably linked to legal and illegal business transactions with the hardware giant ever since.

3. In 1952 IBM, the leading company (monopoly) selling computer punch cards and MAINFRAME computers, was discovered by federal investigators to be breaking antitrust laws. Thus, a Consent Decree (1956) was compelled by federal court on behalf of DOJ to restrain certain of IBM's business practices, and thereby protect businesses and consumers, worldwide.

4. In 1969, IBM was found continuing to break antitrust laws as the dominant (monopoly) seller of MINI and MAINFRAME computers, and was again summoned to federal court and again charged with breach of antitrust laws. Principle among the issues raised by DOJ was IBM's alleged illegal software "bundling" (tying) in new computers for sale. Although the case was dropped in 1982, after thousands of pages of depositions, testimony, etc. had been unnecessarily produced (ie. after Reagan Administration prosecutors permitted antitrust defendant to file vast and unmanageable amounts of litigation), a revised DOJ Consent Decree (1956/1972) became necessary to protect international businesses and consumers. That Consent Decree, relative to specified issues raised in this complaint, remained in effect through 2001. Today there is need for another IBM Consent Decree, especially regarding its PC, MAINFRAME and SERVER components monopolies.

5. IBM's competitors filed over 15 antitrust actions during the late 1960's and early 1970's. A few succeeded.

6. "Until shortly after the government suit was filed (1969), IBM priced a computer to include software and related support (for example, maintenance, and training of personnel) thus making it more difficult for firms that specialize in software and support

services to compete. This practice, called 'bundling', often required buyers to pay for a lot of services they did not want at all or could have obtained more cheaply elsewhere, but they wanted IBM equipment enough to accept the package deal. Several of the suits list bundling as one of IBM's offenses, claiming that the firm's dominance of the industry makes it an anti-competitive tactic.

7. In June 1969, IBM announced an extensive plan to unbundle. The plan included a three percent decrease in computer prices coupled with separate charges for training customer personnel, for some software, and for other services. The unbundling plan was hailed by many software firms as a great boon to competition and, in particular, to their business. Others complained that it did not go far enough and have continued to press for further unbundling." [*Reason*, April 1974, pp. 4-10, Ms Sara Baase (San Diego State University),]

8. IBM resumed its once successful bundling strategy in 1994-1995 using IBM products and software produced by IBM subsidiary LOTUS, as alleged herein.

9. "The suits complain that IBM practices price discrimination (by outright discounts and other means) favoring customers in areas where competition is intense or where IBM stands to lose a customer or gain other benefits such as prestige." [*Ibid.*]

10. "During the late 1960's there was a trend of IBM main-frame users toward buying peripherals from other companies because of the poorer quality, higher prices, and remote delivery dates of some comparable IBM products. (It should not pass unnoticed that IBM loses customers when they can get better or cheaper service elsewhere.) According to testimony in the *Telex* trial, in 1970 IBM formed a (secret) task force to find ways to reverse the trend. This task force recommended long-term lease plans, very large price cuts (disguised by giving existing models face-lifts and new model numbers), and strategic timing of product announcements to confuse the marketing plans of other companies and keep computer users always expecting something new from IBM. IBM allegedly would plan several improvements and new models for a product in advance, then announce them one at a time until they regained the sales they had been losing. All of these policies drew heavy criticism from Telex, Inc. in its suit.

11. Aside from strategic timing of announcements for products it really produced and sold, IBM is accused of announcing machines with specifications it could not and never intended to meet in order to cause delay or cancellation of orders to competitors." [*Ibid.*]

12. To reiterate for emphasis, Telex Corp. won its case, and was awarded triple damages by the court amounting to over \$350. million. [*Telex Corp. v. International Business Machines, Inc.*, 367 F.Supp. 258 (1973)]

13. It is obvious to the student of recent federal and private prosecutions of MICROSOFT that "vaporware", and certain other anti-competitive techniques alleged by prosecutors, came directly from IBM tutelage and example conveyed to Mr. Gates and his fledgling corporation when under the IBM wing.

14. Control Data Corporation (CDC), one of IBM's main competitors in the manufacture/sale of computers, also sued IBM in 1968. "CDC's suit complained of IBM's 'anti-competitive' and illegal monopolistic practices, but CDC settled out of court for some attractive business concessions. It acquired Service Bureau Corporation, the free use of IBM equipment at SBC (for six months), about \$30. million in research and development contracts from IBM, and agreement that IBM would stay out of the data services business for six years, and other benefits worth millions of dollars." [*Ibid.*]

X. DISCUSSION ON REMEDIES

1. Plaintiff, Edward Michael O'Brien and the Golf O'Brien Company, sustained business injury accurately and reasonably estimated at \$2,000,000. and personal injury estimated at \$1,500,000. Plaintiff is able to prove these losses with a cognizable legal/economic theory, expert witnesses and detailed, well documented evidence.

A. Federal Specifications

1. Federal antitrust statutes specify penalties and/or remedies for proven breach(s) of Title 15, United States Codes, sections 1, 2, 13a, 15 and 18. Many state antitrust statutes specify compensatory, exemplary and other forms of remedy for personal (personal 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.

2. Federal Penalties/Remedies:

a) 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]

b) 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]

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

d) Sec. 14: Statute is silent on remedy, but that does not imply that none exists in similar case precedent or in the mind and discretion of the Court.

e) 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]

f) "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>)]

3. Checking Federal Trade Commission ["FTC"] antitrust cases listed for review on the FTC website, circa 1997/1998, Plaintiff was unable to find the above referenced case and/or any reference to the fine. However, this news item and other notices in various newspapers give strong indication that such an action (fine) by federal court of jurisdiction did take place in 1997.

B. Declaration of Penalties/Remedies:

1. On its face it appears, in this private antitrust case, that the appropriate penalty/remedy for proven breach of sec.1, 2, 13a, 14, 15 is:

a) For convictions on Sections 1 and 2: defendants must pay one-million dollars (trebled) to Plaintiff.

b) For conviction on Section 13a: Defendants, individually and/or collectively, must pay \$5,000 (trebled) to Plaintiff.

c) For conviction on Section 14: Defendants, individually and/or collectively, must pay a sum of money to be computed under State criteria at Section 2.(b)3 below.

C. State Specifications Re California Law

1. 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.

2. " a) 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)]

3. "b) 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:"

4. "(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."

5. "(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."

6. "(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."

7. Discussion: On its face it appears in this case that the appropriate state penalty/remedy for proven breach(s) of Sections 16000 et seq. and Section 17000, are:

a) For convictions on Section 16000, et seq. and Section 17000 et seq.: Defendants must pay one-million dollars (trebled) each, or the gain (pecuniary) that defendants derived from breaches of antitrust laws, if the gain is proven greater than \$3.0 million.

b) For convictions on Sections 16000, et seq. and Section 17000 et seq.: Defendants IBM and MS must pay one-million dollars (trebled) each, or the gain (pecuniary) that defendants derived from breaches of antitrust laws, if the gain is proven greater than \$3.0 million.

D. Equitable Remedies:

1. Power to remedy business inequities is usually found in the nature of business ...money. Presently, and in future, MS must be fined x% of income (pecuniary gain) for each proven antitrust charge made by federal/state/private prosecutors. Only on-going FTC and DOJ powers, (supervised by U.S. District Court) to investigate, complain of, prove and financially punish antitrust violations by MS will realistically tend to comprehensively and effectively curtail malefactors' *de facto* and *de jure* illegal plans and actions.

2. Such on-going antitrust remedy is not without precedent. The IBM Consent Decree (1956) was intended as an on-going, periodically administered DOJ investigation of IBM's actions to ensure compliance with antitrust laws year-to-year, indefinitely, or as limited by the court upon grant of termination petition. Many of IBM's antitrust violations were curtailed by the Consent Decree (1956)...unfortunately, with the help of MS, not all.

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

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

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

XI. EVIDENCE

1. Microsoft's *Market Development and Support Agreement* with IBM, signed by both parties on March 1, 1996, proves *prima facie* that IBM (1) agreed to curtail and/or discontinued OS/2 support (restrain competition against Windows 95, etc.), and (2) agreed to curtail and /or discontinue support for *Lotus Smartsuite* and/or *Lotus Notes* (restrain competition against MS-Office) . [EXHIBIT B]

2. Same MS/IBM agreement breaches MS Consent Decree, CV 94 - 1564, at sections IV.(B.), (C.), (E)(1)(2), (F.), and (K.), as proven by contents in above cited formal agreement.
3. In February, 2000 plaintiff O'Brien filed *O'Brien v. Microsoft*, CV 00 - 01132 R (RCx) in the Central District of California. Case is pending in MDL 1332 in the District of Maryland. Case (complaint) contains allegations and charges that MS breached its Consent Decree, finalized on July 15, 1994, and terminated exactly seventy-eight (78) months later on December 31, 2000.
4. O'Brien's pending case at MDL 1332 and, of course, *U.S. v. Microsoft*, CV 00 - 1232/1233 CKK, pending in the District of Columbia, toll MS liability and time limits under Consent Decree, CV 94 - 1564. [EXHIBIT C]
5. Same MS/IBM agreement proves tie of OFFICE and/or MS-Word and/or MS-Excel to license sales of Windows 95, and subsequent MS OS, via Microsoft's "OPK" (OEM Pre-installation Kit) requirement. [EXHIBIT B]
6. Same agreement proves IBM agreed (affirmed MS logo agreement terms) to install WD, AOL, and TW logos on all desktops inter new computers sold, even though logos were exclusively purchased with contracts that required preclusion of Netscape's competition in Internet Browser markets. [EXHIBIT B]
7. IBM reduced its OS competition with OS/2 by over 50% in compliance with Microsoft's wishes. IBM went from 7% of the PC OS market to just 4% of same. MS increased its market share by the 4% dropped by IBM in 1995-1996. Authoritative chart shows IBM maintained a steady 3% of OS market, thereafter through 2000. [EXHIBIT D]
8. Apparently, IBM was not required to completely eliminate *Lotus notes* and *Lotus Smartsuite* from competition in the agreement noted above but was required merely to initiate curtailment of competition in 1995 and complete "neutralization" of computers for sale in 1996-2000. Progressively curtailed *Lotus Smartsuite* sold IE bundled in OFFICE. [EXHIBIT E]
9. Evidence from CV 98-1232/1233 CKK reveals IE separate from Windows. [EXHIBIT F]
10. From March 1997, when IBM agreed to curtail competition in OS and OP markets in order to get favorable licensing terms from MS, to August 1998 MS share in IB markets more than doubled ! [EXHIBIT G]

11. A document generated by consumer advocate Ralph Nader declares fact that IBM eliminated OS/2 competition in favor of licenses and installations of Windows programs. [EXHIBIT H]

12. IBM's Consent Decree (1956) extends through 2002. And, like MS, numerous breaches of same can be proven. [EXHIBIT I]

13. When Windows precluded run of JAVA applets, Golf O'Brien Company geared its competition in CGW, and multimedia markets to IBM's OS/2 Warp 4 which was promised by IBM in 1996-1998 but did not materialize as promised. [EXHIBIT J]

14. In 1999, an article in PC Week magazine refers to facts and circumstances that prove, or can prove conclusively, that IBM totally capitulated to MS competition in OS markets. [EXHIBIT K]

15. MS restrained trade and competition by Netscape (and other browser makers) via the Internet Jumpstart Kit (IJK) as well as its patently illegal tying of IE to licenses for Windows. IJK, force-fed to OEMs desiring favorable licensing terms, clearly breached California Business & Professions Codes, sec. 17200, et seq. by literally giving away valuable internet browser software in order to obtain certain other business advantages. [EXHIBIT L]

16. Microsoft admitted Sun Microsystems' JAVA language was the biggest threat to its "flagship" Windows 95 in an email dated April 14, 1997. By April 14, 1998 MS had integrated new OS source code that precluded Sun's downloads via Windows 98.

17. PL noticed said download preclusion on his Compaq *Presario* notebook computer in April 1998 when Windows 98 would not setup Sun's Java Developer's Kit (JDK) 1.0 needed by PL to commence cross-platform, java applet development itself needed to save PL's software business precluded by MS. [EXHIBIT M]

18. Contractual agreements between MS and Disney and MS and AOL are available at <http://www.usdoj.gov/atr/cases/exhibits/1.pdf> Agreements show in many clauses and sections that MS demanded and got major media companies to break federal and state "exclusive dealing" laws, including 15 U.S.C., sec. 1 and 14, and Cal. Bus. & Prof. Codes, sec. 16700, et seq. [EXHIBIT N]

19. There are many other forms of evidence that can prove allegations made herein. Supplied merely tip-of-the-iceberg.

XII. CONCLUSION

A. Improbable Loss of Windows Not Disaster:

1. The leader of the computer world is the owner of IBM. Bill Gates and Microsoft follow that leader.
2. Plaintiff O'Brien needs *Windows* to support the software he sells (and plans to sell). Defendant Microsoft, following the holder of patents for virtually every PC, Server and Mainframe component (multi-monopoly), is able to make and sell a version of *Windows* that does not preclude PL's software on IBM component filled computers (IBM, Compaq, Dell, HP, etc.). So far, MS/IBM have refused to do so and are, therefore, liable for permanent damages resulting from ongoing antitrust injuries.
3. Today, in *U.S. v. Microsoft*, CV 98-1232/1233 CKK, nine (9) sovereign States in these United States of America, including the District of Columbia, insist that Microsoft begin making/selling a version of *Windows* that does not preclude software products competitive with MS products. Like *Golf Coach* that is competitive with *Excel*.
4. "...Gates said he would set his engineers to work on developing a stripped down Windows if a court ordered it. But he said he would ask his lawyers and 'every court that would listen' to relieve Microsoft of the obligation." [<http://www.cnn.com/us> : article appeared at 9:00am on 04-24-02 when read by PL, and disappeared by 9:30am...mysteriously.]
5. "We'd be in an awful situation where we'd have a court order where we couldn't comply and would have to withdraw Windows from the marketplace", Gates said. [*Ibid.*]
6. Construction of the sentence, accurately quoted above, reveals obstructive design and intent of speaker. This is often the case with Mr. Gates' sentence structure.
7. There are only two courts that will listen to Microsoft's pleadings for continued monopolization. Federal and State. Even if the ludicrous scenario proposed by Mr. Gates comes to pass, and MS is compelled to "...withdraw Windows from the marketplace", numerous adequate PC, Server and Mainframe operating systems exist and are ready to enter the marketplace vacated by Windows.
8. Partial Alternative OS list: Macintosh, AIX4, Digital Unix 3.2C, Digital Unix 4.0 B, HP-UX 10.20, HP-UX 9.x, IRIX 5.x, IRIX 6.2, Linux 1.2, Linux 2.0, Solaris 2.4, Solaris 2.5.1, Solaris 2.6, Solaris 2.6 (x86), Sun OS 4.1.3, Sun OS 54 (x86) [Government Exhibit No. 13, *U.S. v. Microsoft*, CV 98-1232/1233 CKK]
9. For example, *Linux 2.0* is an excellent PC operating system currently installed by IBM in a relatively small number of new computers. A PC purchaser can bring her new PC home and, on day of purchase, download *Linux 2.0* into her computer for *free*. She would not be required to pay OEM seller (MS indirectly) for a version of *Windows* in order to data process (well).

B. IE Separate Product and Tied as Such:

1. "Microsoft VP takes the stand: Windows head admits DOJ settlement would still allow company to control desktop icons. April 25, 2002: 4:19 PM EDT : WASHINGTON (CNN/Money) - Following on the heels of Microsoft Chairman Bill Gates' testimony, the executive in charge of Windows testified Thursday that Microsoft's programs, such as Internet Explorer, are fundamentally a part of Windows and can't be removed.
2. Christopher Jones, Microsoft's vice president of the Windows Client Team, testified that the proposed remedy by the non-settling states -- which would force Microsoft to offer stripped-down versions off Windows with and without the other programs like Internet Explorer and Windows Media Player -- would be impossible for Microsoft to implement. Jones said that the settlement with the Department of Justice and nine states makes much more sense."
3. Plaintiff O'Brien was asked in 1995 if he wanted to buy Windows 95 with or without Internet Explorer. With IE, cost was \$x. more. Because IE was separate in 1995 its integration in 2002 is arbitrary and optional. IE was developed as separate code that most certainly *can* be separated from Windows OS code(s) and sold separately if/when required by courts or economic necessity.
4. Microsoft contracts, signed with Disney, AOL and NBC noted and specified above, expressly, and in detail, require companies to feature, support and use IE, and not to feature and/or support Navigator (See Government Exhibits inter CV 98-1232/1233 CKK)
5. If IE cannot be sold separately, As Mr. Jones stated in Court on March 25, 2002, how can MS contracts expressly require companies to feature, support and/or use IE? All noted companies used Windows as their server OS at time of contracting for preferential placement of icons.
6. MS liability for preclusion of IE competitors is an established fact. That preclusion resulted in the increase of MS monopoly(s) inter office productivity software. Illegal increase of the OFFICE monopoly decreased PL's competition in OP and related markets and caused antitrust injury.
7. "The courts found that Microsoft (MSFT: Research, Estimates) illegally prevented computer makers from replacing the Internet Explorer icon with Netscape Navigator icon in order to crush its rival. The current hearings, under U.S. District Judge Colleen Kollar-Kotelly, will decide what restrictions will be imposed on Microsoft as a remedy for that and other illegal behavior. Gates has repeatedly complained that the remedies under consideration would be technically impossible to comply with or would force Microsoft to withdraw its Windows operating system from the market and force widespread layoffs at the company." [*Ibid.*]
8. All defendants restrained trade and monopolized in violation of 15 U.S.C., sec. 1 and 2.

9. Defendants Microsoft Corp., the Disney (Walt) Company, American Online, and Time Warner excluded a Microsoft competitor from competition in violation of 15 U.S.C., sec. 1 and 14, and thereby illegally increased the OP monopoly, violating sec. 2.

10. All Defendants restrained trade and monopolized in violation of California's Cartwright Act, re California Business and Professions Codes: sec. 16720, et seq.

11. IBM and MS restrained competition via low-pricing in violation of the California Unfair Practices Act, re California Business and Professions Codes: sec. 17200, et seq.

12. For violations of federal and state laws causing antitrust injury to the plaintiff in this case all Defendants are liable for payment of federal law specified treble damages and/or California law specified double damages.

XIII. PRAYER

1. Plaintiff O'Brien claims and prays for compensatory damages (business and personal) in the amount of \$10,500,000.

2. Plaintiff O'Brien claims and prays for an award of punitive (exemplary) damages in the amount of \$10,000,000,000., approximately equal to twice the *pecuniary gain* defendants derived from *per se* illegal, antitrust actions over the time period encompassed by cause(s) of action in this case.

3. For award to plaintiff of its attorneys' fees and other costs of suit.

4. For such other and further damage award and/or relief as the Court deems just and equitable.

DATED: April 24, 2002

Executed by _____

Edward Michael O'Brien

pro se