
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDWARD MICHAEL OBRIEN,

Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES, INC.

Defendant.

ORIGINAL COMPLAINT

Case No. CV 00-10778 MMM (AIJx)

PLAINTIFFS, Edward Michael O'Brien and Golf O'Brien Company ["OBRIEN"] bring this action against defendant International Business Machines, Inc. ["IBM"] for damages trebled under the antitrust laws of the United States, and doubled under the antitrust laws of California, and complain alleging as follows.

I. CAUSE OF ACTION

In *United States v. Microsoft* [CV 98-1232/1233 (TPJ)] state/federal prosecutors made allegations for Microsoft Corporation's ["MICROSOFT"] liability under Title 15, U.S.C., section 1, but did not specify certain combination(s) or conspiracy(s) entered into with intent to restrain trade, commerce and/or competition. Microsoft incurred liability and conviction under Sec. 1 because certain and numerous contracts with Original Equipment Manufacturers ["OEM"] of computers were discovered and submitted by prosecutors to prove MICROSOFT's anti-competitive behavior.

"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." [15 U.S.C., section 1]

State/Federal complaints seemed to agree (by the absence of affirmative statements to the contrary) that OEMs, although parties to said illegal contracts with MICROSOFT, were not necessarily liable as co-conspirators because they were "economically coerced" into licensing contracts, and other agreements, that clearly and illegally restrained trade and commerce and, most definitely, precluded competition.

The presumption of OEM innocence re Sec. 1, if essentially correct for Dell Corporation, Hewlett Packard, Inc., Compaq Corporation and numerous other OEMs discovered in agreement with MICROSOFT, was certainly not correct for IBM. Perhaps uniquely, IBM has, definite liability as a co-conspirator with MICROSOFT, and is, like its' co-conspirator, subject to prosecution for 15 U.S.C., sec. 1 violation(s).

Where other OEMs lacked ownership and/or control of (1) a competitive operating system ["OS"], (2) a competitive office productivity suite ["OP"], and (3) a competitive communications suite ["COM"], IBM owned, and profitably sold, (1) OS/2 and OS/2 WARP, (2) Lotus Smartsuite ["SMARTSUITE"], and (3) Lotus Notes ["NOTES"].

"Big Blue" was certainly not economically compelled by MICROSOFT to enter into illegal contracts. Where all other OEMs have been, tentatively, exempted from co-conspirator liability re Title 15, U.S.C., section 1 because of noted "economic compulsion" rationale, such an exemption cannot be reasonably granted to IBM.

Nor can Apple Computers, Inc. ["APPLE"] be exempted from liability if and when it is brought to justice for conspiracy with MICROSOFT. In 1997, and years following to date, APPLE had its' own OS (MacOS) and OP software (ClarisWorks) but, nevertheless, agreed with MICROSOFT to (1) preclude Netscape Navigator and (2) illegally tie MICROSOFT's Internet Explorer ["IE"] in exchange for licenses to OFFICE. It is not unreasonable to conclude that APPLE's actions in 1997, and following, were conditioned (version by version) by IBM's provision of the MacOS source code (essentially OS/2). Plaintiff, with separate cause of action against APPLE, has decided to wait for a more opportune time to file separate complaint for antitrust injury. [See EXHIBIT A]

When IBM willfully, and without economic compulsion, combined and acted with MICROSOFT to restrain trade/commerce and preclude competition in certain software markets it caused antitrust injury to OBRIEN and to a host of other competitors in relevant markets, and thereby incurred antitrust liability.

1. IBM intentionally broke certain federal and state laws by attempting to increase its' computer manufacturing and sales monopoly(s) and did, in fact, increase its' monopoly(s) using various methods, including conspiracy to monopolize, monopolization, attempted monopolization, illegal merger, illegal tie-in sales and certain other intentional restraints of trade which precluded interstate/international competition in software markets where OBRIEN was formally participant.

2. This action challenges conduct by IBM calculated and intended to prevent and/or destroy competition in markets where OBRIEN was a competitor of IBM.

3. IBM violated sections 1 and 2 of the Sherman Act (Title 15 U.S.C., sec. 1, 2) Section 3 of the Robinson-Patman Act (Title 15 U.S.C., sec. 13 (a)(f)), Section 3 of the Clayton Act (Title 15 U.S.C., sec. 14), Section 7 of the Clayton Act (Title 15 U.S.C., sec. 18) and Section VII. and XV. of Consent Decree, Case No. 72-344 (1956).

IBM also broke the laws of many states, including California's Cartwright Act (Cal. Bus. & Prof. Code, sec. 16720, et seq.) and the Unfair Competition Act (Cal. Bus. & Prof. Code, sec. 17200, et seq.)

4. Through various unfair and/or predatory acts, defendants in this action willfully maintained, increased and attempted to increase monopolies in markets for mainframe computers (AS/390 series, et al.) ["MAINFRAME"] and client-server computers (AS/400 series, RS/6000, Netfinity series, et al.) ["MINI"], and used these monopolies to intentionally brake antitrust laws via (1) conspiracy and cooperation with MICROSOFT re illegal software tie-ins and other efforts to monopolize computer OS markets and other software markets, (2) conspiracy with, and illegal merger of, Lotus Development Corporation ["LOTUS"], (3) illegal tying of computer sales and to purchases of OS and OP software (NOTES and SMARTSUITE), (4) selling OP software at unreasonable discount, and/or giving away OP software, thus precluding competition in certain related software markets, (5) willful, intentional and malicious cooperation in a malefactor's breach of a United States Department of Justice ["DOJ"] Consent Decree, Case No. 94-1564 (1994), and (6) breach of IBM Consent Decree, Case No. 72-344 (1956).

II. INTRODUCTION

1. On July 2, 1890 Congress passed the Sherman Antitrust Act in an effort to protect competition and prevent monopolies. Section 1 of the Sherman Act prohibits "[e]very contract, combination..., or conspiracy, in restraint of trade or commerce." 15 U.S.C. 1. Despite this broad language, almost from its inception the Sherman Act has been read to prohibit only those restraints of trade that are unreasonable. *Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (recognizing that because every agreement involving trade is a restraint on trade in some form, the proper inquiry is whether the restraint suppresses or destroys competition). Courts have also developed a doctrine of *per se* violations to cover those business relationships that 'because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Section 2 of the Sherman Act condemns '[e]very person who shall 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.' 15 U.S.C. 2 The Supreme Court has determined that 'the offense of monopoly under 2 of the Sherman Act 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).]

IBM has monopoly power in computer and software markets referenced in this action.

IBM has increased its monopoly power via *per se* illegal actions alleged herein and, therefore, has acquired or maintained monopoly power not merely as a consequence of a superior product, business acumen, or historic accident.

OBRIEN alleges, and will allege following, that IBM possessed requisite 'monopoly power' at time of cause of action, and willfully increased and/or maintained that power unlawfully.

2. "The 2d [Sherman Act] section deals directly with monopolizing, attempts to monopolize and combinations to monopolize. It is not concerned with acquisitions of property, or size, or aggregated capital, or the structure of the business of an individual or a corporation, but denounces as criminal the acts and conduct of the individual or corporation alone or in conjunction with others, which illegally excludes others from the trade." [*Standard Oil Company of New Jersey v. United States*, 221 U.S. 622; 55 L.Ed, U.S. 221, p.622.]

OBRIEN alleges IBM combined, contracted and/or conspired with MICROSOFT, LOTUS and other computer hardware/software manufacturing concerns, to monopolize and illegally exclude competitors from *bona fide* trade in computer hardware and software markets.

"Most harmful of all is the message that Microsoft's actions have conveyed to every enterprise with the potential to innovate in the computer industry. Through its conduct toward Netscape, IBM, Compaq, Intel, and others, Microsoft has demonstrated that it will use its prodigious market power and immense profits to harm any firm that insists on pursuing initiatives that could intensify competition against one of Microsoft's core products. Microsoft's past success in hurting such companies and stifling innovation deters investment in technologies and businesses that exhibit the potential to threaten Microsoft. The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest." [Thomas Penfield Jackson, U.S. District Judge, CV 98-1232 (TPJ), November 5, 1999]

IBM avoided being *harmed* by MICROSOFT, in the manner spoken of by Judge Jackson above, and did not sufficiently "pursue initiatives that could intensify competition against one of Microsoft's core products" to escape a charge of antitrust conspiracy and willful co-operation with Microsoft's illegal actions.

OBRIEN's software product GOLF COACH, in competition with certain MICROSOFT, LOTUS and IBM products in OP markets, was (is) an innovative collector/presenter of

golf playing statistics as well as a competitive graphing/charting/word-processing tool ["GCWT"] for general, as well as specialized, applications in OP environments.

OBRIEN makes allegations of antitrust standing and cause of action such that this court can grant relief sought. Standing on solid ground to make specified claims, plaintiff now states at least one set of provable facts in this complaint which carry antitrust liability for the defendants. [F.R.C.P. 12(b)6]

III. JURISDICTION, VENUE, COMMERCE AND LIMITS

Because this civil action arises under the laws of the United States of America, this Court has jurisdiction over this matter pursuant to section 15 of the Sherman Act, (Title 15 U.S.C., section 15) and Title 28 U.S.C., section 1331.

This complaint includes allegations of state antitrust and state unfair competition law violations, and seeks relief including damages for commercial and personal injuries sustained in California and other states. State law claims are so related to federal law claims raised in this complaint that they form part of the same case or controversy under Article III of the United States Constitution. Therefore, district court has supplemental jurisdiction over these state claims.

Venue is proper in this district under 28 U.S.C., sec. 1391 because defendants transact business, and are found, within this district. Defendants sold (sell) and/or licensed (license) computer hardware and software throughout each of the United States and in many countries of the world. Defendants delivered (deliver) copies of their products to retail stores/customers across state lines and international borders. Defendants sold (sell) and/or licensed (license) hardware and software in the United States in a manner representing a regular, continuous and substantial flow of interstate commerce, and have had a substantial effect upon interstate commerce as well as on commerce in California and worldwide. Defendants' anticompetitive practices complained of herein have resulted in loss or damage to plaintiff's business and person, and to the general welfare and economies of large numbers of consumers and companies in the United States and worldwide.

This action is within time limits.

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

" The Justice Department officially ended a 40-year-old antitrust regulation of International Business Machines, Inc. (IBM) yesterday. The federal government already had discarded portions of the antitrust consent decree, but maintained regulation of the mini-computer and mainframe markets. The Justice Department yesterday lifted those restrictions in a phase-out plan that will extend over five years.

The antitrust consent decree against IBM has existed since 1956; it was originally intended to prevent the computing monolith from monopolizing the market for punch-card tabulating and electronic data-processing machines. The consent decree ended last year for the PC and workstation portions of IBM's business. The latest move covers the remaining elements of IBM's business: AS/400 mini-computers and System 390 mainframes.

Lawyers for Independent Service Network International, an association of computer maintainers who opposed ending the decree, said they would recommend that their members appeal the decision.

ISNI lawyers contend that IBM, which controls 80 percent of the mainframe market, should still be regulated. Despite years of predictions that mainframes will gradually disappear, mainframe sales are actually surging. ISNI contends that more dollars are being spent on mainframes than ever before." ["IBM Freed of antitrust regulation", CNET News.com Staff, May 1, 1997, 7:30 a.m. PT][*Southern District of New York, United States of America v. IBM* , CV 72-344] [See EXHIBIT H]

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

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

IV. IDENTIFICATION OF PARTIES

A. DEFENDANTS

Mr. Louis V. Gerstner, Jr., former CEO of R. J. R. Nabisco, Inc. and American Express, Inc. is the Chairman and CEO of International Business Machines, Inc. 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)

IBM creates, develops, manufactures 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.

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.

B. PLAINTIFF

Edward Michael O'Brien, a graduate of the University of California at Santa Barbara, is currently the sole proprietor of Golf O'Brien Company ["GOB"], and the president of SAVIORG, a California public charity [Title 26 U.S.C., sec. 509(a)2 / 501(c)3]. Mr. O'Brien is the author of TAX WONDERS, a book on tax-saving methods using charitable donations, and is the inventor/owner of GOLF COACH, the first (1989) software product that allows golfers to acquire, process, analyze and present golf statistics on PC, MINI and MAINFRAME computers. Mr. O'Brien played professional golf on the California Golden State Tour in 1992, and is currently a resident of Montecito, California and Princeville, Hawaii.

Business address: P.O. Box 91003, Santa Barbara, California: tel. 805-568-4488, fax 202-521-3786

In 1968 plaintiff, Mr. O'Brien, as a second lieutenant in the U.S. Marine Corps stationed at Quantico, Virginia participated in the development of the first computer network at the Department of Defense (Washington, D.C.) in association with the Advanced Research Projects Agency (ARPA) and the Defense Intelligence Agency (DIA), under Mr. David Packard, co-founder of Hewlett Packard, Inc. and then Assistant Secretary of Defense, and Lt. Colonel Jerry Mulkey, DIA Director of Computer Operations and plaintiff O'Brien's father-in-law.

In 1972, following honorable discharge from USMC with rank of Captain (0-3) and award of the Spirit of America Honor Medal, Mr. O'Brien enrolled at UCSB (Goleta, California) as a political science major, and graduated in 1976. From 1972 to 1976 Mr. O'Brien participated directly in the development of the first online computer network (ARPAnet) and development (1968-1973) of Network Control Protocol (NCP), the foundational protocol suite upon which Transfer Control Protocol / Internet Protocol (TCP/IP) was written by Mr. Vinton Cerf (1973) at Stanford Research Institute (SRI), Palo Alto, California and proven on computers at UCSB, where Mr. O'Brien worked and studied.

Following work/preparation at UCSB, Mr. O'Brien worked on the IBM 360/150 mainframe computer at Orange Coast College in Costa Mesa, California in 1976-1977, and began developing computer programs in BASIC and FORTRAN that year.

In 1989, Mr. O'Brien created, developed, manufactured, marketed and sold GOLF COACH, a computer software compilation that acquires and processes golf game data (statistics) recorded on copyrighted cards, and prints graphics, charts and instructional text processed on PC, MAINFRAME or MINI computers. GOLF COACH was the first processor of golf statistical data on PC, MINI and/or MAINFRAME computers, and GOB holds all worldwide rights to these processes, formats, presentations and code.

Mr. O'Brien founded the Golf O'Brien Company in Lompoc, California in 1990 primarily to manufacture and sell GOLF COACH. GOB was fortunate enough at its' beginning to acquire the sponsorship of Software Publishing Company (SPC) of Mountain View, California. SPC invested (suffered market dilution) license(s) to PFS: First Graphics, a leading GCWT program in 1990. PFS: First Graphics was bundled and made integral in GOLF COACH. The investment by SPC had an initial retail value of \$500,000.(5,000 copies). Additional lots if 5,000 copies was (is) expressly granted by SPC, conditioned on GOB sales of the entire previous 5,000 lot.

From 1990 to 1993, Mr. O'Brien studied and worked at California State Polytechnic University (CalPoly) in San Luis Obispo, California, and rendered several upgraded versions of GOLF COACH while maintaining status as a fulltime Environmental Engineering student, and playing professional golf (occasionally) on the Golden State Professional Golf Tour.

From August 1993 to December 1994, Mr. O'Brien studied fulltime at Oral Roberts University (ORU, Tulsa OK) in the Motion Picture and T.V. Department, and worked (independently) on GOLF COACH development and sales inter GOB which was a small business registered with taxing authorities in Oklahoma, as well as in California.

In 1994, Mr. O'Brien was awarded the President's Academic Scholarship (\$2,400.00) at ORU for the highest grade point average in major. GOLF COACH was sold to the ORU golf team, and Mr. O'Brien consulted extensively with ORU coaches and players in further development of the software product.

In 1995, with sales of GOLF COACH almost nil due to preclusion of its competition, as alleged herein, Mr. O'Brien established a business office and software development facility in Solvang, California. GOB began (with formal contracts, facilities, newly purchased equipment, materials, etc.) to develop a "multimedia" version of GOLF COACH using Mr. O'Brien's newly acquired skills and concepts.

Although a multimedia version of GOLF COACH had significant potential for circumvention of GCWT market preclusions existent as alleged, development was halted almost before it began by (1) resistance from investors and credit grantors, (2) saturation of OBRIEN's markets by MICROSOFT, LOTUS and IBM products, and (3) monopolistic pricing by Adobe Systems, Inc. ["ADOBE"] (a MICROSOFT/IBM partner: 60% of ADOBE's revenues come from joint ventures) and Macromedia, Inc. (ADOBE's close associate) of software that was essential for OBRIEN's development of certain multimedia functions inter GCWT product(s).

In 1996, Mr. O'Brien was bankrupt (unfiled), otherwise unemployed, newly orphaned and without family, occasionally homeless, and severely injured physically and mentally due in large part to the illegal actions of defendants.

In year 2000, Mr. O'Brien is a recipient of the Veterans Administration disability pension (C-25-899-843), and continues in formal and informal multimedia program development and in certain public charity activities while litigating cause(s) of action.

V. BASIS OF IBM LIABILITY

A. Relevant Markets Monopolized

OBRIEN asserts IBM had monopoly market power at time of cause of action in MAINFRAME and MINI markets. This claim is affirmed by the most recent hearing/trial of CV 72-344 and by statistics found in a multiplicity of authoritative publications.

B. Primary Channel of Distribution

MICROSOFT markets a variety of PC, MINI and MAINFRAME operating systems, including MS-DOS, Windows 3.11, Windows For Workgroups, Windows 95, Windows 98, Windows NT and Windows 2000.

MICROSOFT has maintained a monopoly share (in excess of 80%) of all PC and MINI OS markets over an extended period of time.

"Microsoft licenses copies of its software programs directly to consumers. The largest part of its MS-DOS and Windows sales, however, consists of licensing the products to manufacturers of PCs (known as 'original equipment manufacturers' or 'OEMs'), such as the IBM PC Company and Compaq Computer Corporation. An OEM typically installs a copy of Windows onto one of its PCs before selling the package to a consumer under a single price." [*United States v. Microsoft Corporation*, CV 98-1232 (TPJ), Findings of Fact, No. 10]

"The primary channel through which Microsoft distributes its operating systems is pre-installation on new PCs by OEMs. Because a PC can perform virtually no useful tasks without an operating system, OEMs consider it a commercial necessity to preinstall an operating system on nearly all of the PCs they sell. And because there is no viable competitive alternative to the Windows operating system for Intel-based computers, OEMs consider it a commercial necessity to preinstall Windows on nearly all of their PCs. Both OEMs and Microsoft recognize that OEMs have no commercially viable substitute for Windows, and that they cannot preinstall Windows on their PCs without a license from Microsoft." [*IBID.* < I> Complaint, No.21.]

Note: The above quotes are true but dated (1998). Currently, not only do many of the IBM PCs come with a MICROSOFT product installed, but all of IBM's MINIs run Windows NT installed.

"In or around August 1996, Microsoft imposed on OEMs licensing terms that restrict OEMs' ability to alter the Windows 95 boot-up sequence...through these restrictions, Microsoft leverages its Windows monopoly to ensure that Microsoft-designated applications or other software reach all new Windows users, and that no software not designated by Microsoft receives preferential placement, no matter which OEM has built the computer or what options the OEM would like to have in presenting software products to its customers." [*Ibid.* , No. 55, 59]

"Microsoft bundles, and plans to continue to bundle, the stand-alone version of IE 4.0 with other application programs (e.g., Word, Works, Encarta) in a package that will be the successor to Microsoft Works and Microsoft Home Essentials packages." [*Ibid.*,No.65 (d)]

The container for bundle of IE 4.0 is OFFICE.

"Microsoft's internal documents make clear that Microsoft tied that software to its Windows operating system, and refused to give OEMs an unbundled option, not because Microsoft believed the market wanted only a bundled product, but rather in order to foreclose OEM choice." [*Ibid.*, No. 72]

Plaintiff contends use of the word "choice", in quote above, implies choices leading to profits, not the entire range of choices available to OEMs, legal and illegal.

C. Background of Antitrust Litigation *Data Processing, Inc. v. IBM*, 585 F.Supp. 1470, 1476 (D.N.J. 1984) (finding that the integration of a "dump-restore" utility into mainframe operating system was a lawful package of technologically interrelated components); *ILC Peripherals Leasing Corp. v. IBM*, 448 F.Supp. 228 (N.D. Cal. 1978) (finding that disk drives and head/disk assembly combination were lawful); *Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980); *Telex Corp. v. IBM*, 376 F.Supp. 258, 347 (N.D. Okla. 1973); *Control Data Corp. v. IBM Corp.*, 430 F. 2d 1277, 1278 (8th Cir. 1970)

The cases cited above arose when IBM was accused of various forms of monopolization including tying its central processing unit to various peripheral devices. In *Telex* IBM was convicted of attempted monopolization, and plaintiff was awarded \$352.5 million in damages. *Control Data* settled out of court for an undisclosed amount.

VI. STANDING

This complaint declares OBRIEN likely to prevail on its' claims made herein because its pleadings satisfy federal court's standards.

Under 15 U.S.C., sec. 15(a), an action for treble damages may be brought by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Despite the broad wording of the statutory language, courts have limited the class of plaintiffs who may proceed with an antitrust action. Thus, even if a plaintiff can show harm from an antitrust violation sufficient for Article III standing requirements, the courts "must make a further determination whether the plaintiff is a proper party to the action." *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 535 n.31, 103 S.Ct. 893, 74 L.Ed2d 723 (1983). This further determination has been referred to as 'antitrust standing' *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1469 n.2 (9th Cir. 1985)"

"[D]etermination of standing is a question of law, defining the limits to which private treble damage actions may be brought for injuries caused in fact by violation of antitrust laws." *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 449 (9th Cir. 1985), *cert. denied* 472 U.S. 1018, 105 S.Ct. 3481, 87 L.Ed.2d 616 (1985). To determine whether a party has standing, courts analyze the facts of each case in light of the policy factors enumerated in *Associated General Contractors*, 469 U.S. at 538-45. The factors to consider are: (1) the nature of plaintiff's alleged injury--whether it was the type the antitrust laws were intended to forestall, (2) the directness of the injury, (3) the speculative nature of the harm, (4) the risk of duplicative recovery, and (5) the complexity in the apportioning of damages. *Bubar*, 752 F.2d at 449 (citing *Associated General Contractors*, 459 U.S. at 38-45). In addition, a court should consider whether more direct victims of the alleged violations exist. *Associated General Contractors*, 459 U.S. at 545." [*O'Brien v. Adobe Systems, Inc.*, CV 99-7863 AHM (RZx), Order of September 27, 1999]

OBRIEN alleges antitrust standing requirements well met.

A. Nature of Alleged Injury:

OBRIEN alleges that it was both a competitor with IBM in certain markets for software and a consumer of IBM products before and during time of cause of action (1990-1999). OBRIEN sustained injury not merely to its' person/business but to its competitive position in relevant markets noted above. OBRIEN's loss of investments, property, customers and revenues can be conservatively estimated at \$2,000,000. Loss of plaintiff O'Brien's business income and/or livelihood from business injury, and federally documented disability, is conservatively estimated at \$1,500,000. Loss of investments, property, customers and revenues by the multiplicity of companies competing with OBRIEN and MICROSOFT / IBM in relevant markets can be estimated in the billions of dollars.

B. Directness of Injury:

OBRIEN alleges that it was injured by MICROSOFT/IBM directly and proximately because OEMs were conspirators, not victims, of MICROSOFT's illegal actions, and, therefore, OBRIEN and fellow competitors in relevant markets were the first "targets" in the line(s) of injury. Directness of injury from IBM/LOTUS actions alleged herein is not in question.

C. Nature of Harm:

OBRIEN alleges quantified and qualified harm that in no wise requires speculation for its evaluation.

OBRIEN alleges non-speculative, antitrust damages due to (1) lost profits from lost sales (circa. 1990-1999), (2) expenditures for unused office equipment, supplies and space, renege vendor contracts and software manufacturing equipment and materials, (3) a formal software license granted by Software Publishing Company valued at \$500,000., annually, rendered unusable, and (4) loss of personal income, credibility and enjoyment of life derived from loss of business(es) and clinically validated psychological and physiological injuries traceable to Defendants' long-term, anti-competitive actions.

D. Duplicative Recovery Probability:

OBRIEN alleges unique sets of facts and circumstances in this action that have no conceivable probability of duplication by another plaintiff or class of same. No questions of common fact exist with class actions or other individual actions, and therefore, consolidation with or preclusion by other private antitrust actions is not a reasonable possibility.

E. Complexity of Apportionment of Damages:

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

Plaintiff's complaint clearly alleges that he was a "participant" in the market(s) of the alleged wrongdoer(s), and, thereby, a "proper party" to assert antitrust injury and standing.

VII. CAUSE SPECIFIED AND SUPPORTED

A. IBM's Conspiracy and Cooperation with MICROSOFT re Crimes Proven in [CV 98-1232/1233 (TPJ)]

IBM is an OEM that cooperated with MICROSOFT, occasionally under sales pressure but never without free will, before and at time of cause of action in exchange for software licensing benefits and other benefits. [See EXHIBIT A-H]

In 1999/2000 IBM is still licensee of MICROSOFT products, and continues to install MICROSOFT and LOTUS products in its' computers. IBM has a webpage, within its' primary website, devoted entirely to the sale of OFFICE versions. [<http://www.ibm.com>]

B. Federal Conclusions of Law and Liability

MICROSOFT has recently been found guilty of certain antitrust law violations alleged and proven by federal and state prosecutors in CV 98-1232/1233 (TPJ). In this case it was also proven (via depositions, emails and other evidence contained in court's internet available records) that OEMs (including IBM) willfully (albeit under certain forms of business coercion) conspired and cooperated in many of MICROSOFT's illegal actions and/or omissions for the purpose of increasing pecuniary gain and other benefits.

C. IBM Liability Coincides With MICROSOFT Liability

1. In conspiracy and cooperation with IBM, MICROSOFT has Monopoly Power In The Market For Operating Systems For Intel-Compatible Personal Computers ["X86"]. [*Plaintiff's Joint Proposed Conclusions of Law*, CV 98-1232,1233 (TPJ), Argument I (A) 1, 2.]

2. In conspiracy and cooperation with IBM, MICROSOFT Engaged in a Series of Anticompetitive, Exclusionary, Predatory Acts To Maintain its Monopoly. [*Ibid.*, Argument I (B) 1.]

3. In conspiracy and cooperation with IBM, MICROSOFT Impaired Consumer Choice, and Maintained and/or Increased its Monopoly by Stifling Competition from Netscape and Java. [*Ibid.*, Argument I (B) 2.]

4. In conspiracy and cooperation with IBM, MICROSOFT Took Other Anticompetitive Actions To Interfere With Distribution And Development of Cross-Platform Java. [*Ibid.*, Argument I (B) 3.]

5. In conspiracy and cooperation with IBM, MICROSOFT's Browser and Java Related Actions Were Parts of a Multi-Front Campaign To Impede Cross-Platform Middleware By Means of Threats That Restricted Consumer Choice. [*Ibid.*, Argument I (B) 4.]

6. In conspiracy and cooperation with IBM, MICROSOFT's Conduct Was Anticompetitive Considered As A Whole. [*Ibid.*, Argument I (B) 5.]

7. In conspiracy and cooperation with IBM, MICROSOFT Violated Section 1 of the Sherman Act by Unlawfully Tying a Web Browser To its Operating System. [*Ibid.*, Argument II (Prologue)]

8. In conspiracy and cooperation with IBM, MICROSOFT Violated Section 1 of the Sherman Act by Entering Into Numerous Unlawful Exclusionary Agreements. [*Ibid.*, Argument III (Prologue)]

9. In conspiracy and cooperation with IBM, MICROSOFT Attempted To Monopolize the Internet Browser Market. [*Ibid.*, Argument IV (Prologue)]

10. In conspiracy and cooperation with IBM, MICROSOFT Conditioned Continued Development of the vital Office Productivity Suite ["OP"] for the Apple Macintosh Operating System on Apple's Agreement to Favor Internet Explorer.

11. In conspiracy and cooperation with IBM, MICROSOFT's Pricing of Internet Explorer at Zero When Distributed Separately from Windows, and Providing Internet Explorer to Internet Access Providers (IAPs), Internet Software Vendors (ISVs), and Others at an Effective Royalty of Less Than Zero, With No Plan to Recoup MICROSOFT's Losses From Doing So Other Than Through Maintenance of MICROSOFT's Operating System Monopoly.

D. New Allegations Based on Cited Conclusions of Law:

Although not expressly found in the *MICROSOFT v. United States* Findings of Fact and/or Conclusions of Law, the following allegations have validity and support in the arguments noted above, and in the provable experience of the plaintiff.

1. In conspiracy and cooperation with IBM, MICROSOFT has Monopoly Power In the Market for OP Software where GOLF COACH was (is) a competitor re Graphing/Charting/Word-processing Tools.

2. In conspiracy and cooperation with IBM, MICROSOFT Engaged In a Series of Anticompetitive, Exclusionary, Predatory Acts To Increase its Monopoly in OP software.

3. In conspiracy and cooperation with IBM, MICROSOFT Priced Microsoft Office and Other Related and Unrelated Software Products at Deep, Exclusive Discount and/or Zero With No Plan To Recoup its Losses Other Than Through Maintenance of its OS Monopoly.

4. In conspiracy and cooperation with IBM, MICROSOFT Hampered Development and Distribution of Cross-Platform Java Technology by Eliminating Windows 98's Ability To Successfully Download and/or Run Sun Microsystem's JAVA Developer's Kit (JDK 1.1), Irrespective of the Browser Used for Downloading.

5. In conspiracy and cooperation with IBM, MICROSOFT Violated Section 1 of the Sherman Act and Section 4 of the Clayton Act By Unlawfully Tying OP Software To its OS.

6. In conspiracy and cooperation with IBM, MICROSOFT and LOTUS Attempted To Monopolize the OP Software Market(s) Including GCWT Market(s).

7. In conspiracy and cooperation with IBM, MICROSOFT Used its OS Monopoly in PC Markets to Compel Same OEMs in "hand-held" PC Market(s) to Preclude Competition in Software Sales and Development via Installation of Deeply Discounted MICROSOFT Products and API Restrictions.

8. In conspiracy and cooperation With "hand-held" PC OEMs, including IBM, MICROSOFT Attempted to Monopolize and/or Monopolized Markets for hand-held PC OS.

9. In conspiracy and cooperation with IBM, other OEMs, and certain entertainment companies including Walt Disney, Inc., and the National Broadcasting Company, MICROSOFT illegally used its monopoly power in OS markets to preclude competition in browser and other software markets in exchange for grant of exclusive presence on the Windows 95/98/NT "desktop".

a) MICROSOFT's OEM Pre-Installment Kit ["OPK"] was delivered to each OEM customer (tied to the OS license) as a comprehensive package of files that MICROSOFT required OEMs to install on new computers having a "per system" license for MICROSOFT's OS. The OPK included OFFICE, and OFFICE included IE.

(b) Effective July 1, 1997 the National Broadcasting Company ["NBC"], and Disney Corporation, under the name Wired Digital, Inc. ["DISNEY"], signed contracts with MICROSOFT granting NBC and DISNEY exclusive "push" presence on the Windows 95/98/NT desktop in exchange for financial remuneration and specified agreements by entertainment companies for the exclusive promotion, use and linkage of IE. Use/Promotion of all other internet browsers by NBC/DISNEY was expressly forbidden in the carefully specified contracts. Copies of MICROSOFT OS and OP software installed by IBM and other OEMs including the "free" bundle of IE inter OFFICE, precluded not only OBRIEN's competition in GCWT markets but also competition from Netscape, Inc. and all other browser competitors in browser markets. Because of the increased demand for IE that NBC/DISNEY created, via worldwide demand for companies' services, OFFICE, the vessel for IE, experienced similar increase in demand. This increase in demand for IE inter OFFICE, based on antitrust illegal exclusive dealings (sec. 13), contributed to the preclusion of competition in OP markets as well as browser markets. [see EXHIBIT B, and expand with <http://www.usdoj.gov> *U.S. v. *Microsoft* under "Trial Exhibits" #855 and #1170]

VIII. MONOPOLISTIC PRACTICES WITH REGARD TO OFFICE PRODUCTIVITY SOFTWARE

A. Conspiracy and Cooperation With Microsoft

1. In addition to its Windows monopoly, MICROSOFT maintains a dominant position in other areas of the software industry. For example, in the area of software applications MICROSOFT's business applications products alone represent 39% of the entire PC software industry's applications revenues. OFFICE, a software package composed of MICROSOFT's word processing (MS-Word), spreadsheet (MS-Excel), presentation (MS-Powerpoint), and an email client (Outlook Express), represented 89% of all revenues in OP and related software market(s) in 1997-98.

Bundled in OFFICE, or standing alone, MS-Word, MS-Excel and MS-Powerpoint each supports GCWT and are, therefore, not only collectively but individually competitive with GOLF COACH.

2. Office productivity suites, and component programs, are software applications that are separate and distinct products from PC, MINI and MAINFRAME operating systems. Markets for office productivity suites and/or component applications are distinct product markets for software products that are themselves distinct and separate, even though file-sharing versions may be released providing an OP/OS integration state. [see EXHIBIT C]

3. IBM's subsidiary LOTUS (100% owned), makes SMARTSUITE, a highly competitive office productivity suite and NOTES, an advanced communications, "groupware", program suite.

4. The relevant geographic market for analyzing the market for OP and related software is the entire world. Another relevant geographic sub-market is the United States of America. MICROSOFT, LOTUS and IBM all engage in interstate/international trade re OS and OP software.

5. OFFICE has sufficient marketshare to impart monopoly power in markets for OP and related software. SMARTSUITE has the second largest marketshare in markets for OP and related software, and although that share is only about 10% global marketshare, IBM's closely coordinated marketing of SMARTSUITE with that of OFFICE produced a near perfect monopoly in relevant markets for IBM/MICROSOFT. After 1997, IBM dropped its' OP competition, and installed OFFICE in profitable obedience to MICROSOFT directives.

B. Preconditions And Post-conditions Re IBM's Monopolization

In addition to its' widely recognized MAINFRAME and MINI monopolies, IBM maintains dominant positions in other areas of the computer hardware and software industries. Currently, IBM is a leader in PC and Notebook computer ["NB"] sales and, although its' current PC operating system, OS/2 WARP (successor to OS/2), has given way in PC markets to "competition" by MICROSOFT, IBM continues to provide OS support (currently OS/8) for Apple Computers, Inc. ["APPLE"] computer products and its' own MINIs.

Mr. Gerstner was hired as Chief Executive Officer of IBM in 1994. In that year, IBM licensed and sold NOTES and SMARTSUITE successfully. IBM sales of NOTES equaled about \$970. million, or one-third of all IBM's net-income from software sales.

In 1995, IBM sold approximately four (4) million copies of OS/2 WARP, and used high consumer demand for its' OS product to profitably, albeit illegally, tie sales of NOTES and/or SMARTSUITE in its' computers installed with OS/2 WARP.

Ties of OP software expanded certain OS/OP installed bases and associated network-effects, and consequently IBM's MINI, and MAINFRAME monopolies were increased while IBM attempted to reestablish its 1980's monopoly in PC markets. These proven and provable facts are central to O'BRIEN's cause of action.

While IBM was tying NOTES and SMARTSUITE for a very small additional charge re a computer's sales price, LOTUS was charging consumers about \$495. for one copy of NOTES and \$299. for SMARTSUITE. These prices were considered by most industry analysts to be quite excessive and only marginally competitive by industry standards, especially considering IBM's "give away" installation of the same products.

Plaintiff contends LOTUS' "self-sacrificing" prices were actually a conspiratorial ploy to create more apparent value for IBM's computers installed (low cost per unit) with first rate OP software, and also to pragmatically reduce LOTUS stock value prior to IBM's planned, and virtually uncontested, "hostile" takeover bid. [See EXHIBIT D]

IBM destroyed LOTUS in 1994 and took its' valuable software patents for its' own purposes. (See LOTUS' financial figures in Standard & Poor's, May 1999, under International Business Machines, page 6344.) Although LOTUS continued to "sell" Lotus 1-2-3 and its' newer products, NOTES and SMARTSUITE, IBM had been very successfully selling computers installed with OS/2 and "give aways" of NOTES and SMARTSUITE in 1994-1995. On \$ 970,723,000. revenues for 1994 (only slightly lower than reported for 1993 - which speaks for NOTES and SMARTSUITE demand when 1-2-3 was flagging) LOTUS reported, for the first time in its' history, negative Net Income of \$ -20,879,000. and negative Earnings Per Share of \$ -0.44. Compare these unintelligible figures to LOTUS' positive Net Income for 1992 and 1993. An antitrust illegal business deal was being setup and executed in 1995 at the expense of many LOTUS shareholders.

In early 1995, LOTUS management was reasonably sure of a buyout offer from IBM, and was obviously aggrandizing IBM's position toward that eventuality with unreasonably high prices established for 1-2-3, NOTES and SMARTSUITE.

When IBM brought forth its' public offer to purchase all LOTUS stock for \$60. per share, LOTUS' management appeared to resist, and sought in federal court, the ability to exercise a 'poison pill' defense without expressed shareholder approval. [It may have been a few shareholders holding most of the shares (other than management) that had setup the

deal with Gerstner in early 1994 - only outright confession or a Civil Investigative Demand (CID) can reveal the truth in this matter.]

After seven days of "resistance" to IBM's otherwise uncontested buyout (federal court apparently could not swallow managements' 'poison pill' - no evidence available) LOTUS management agreed to sell (and thereby allow other shareholders to sell) for \$64. per share of common stock.

In all probability, LOTUS' management faked resistance to IBM's "unsolicited" takeover offer in order to cover-up its' questionable pre-merger preparations. The fake resistance was made to appear authentic by the computer giant's initial offer followed (after price objections from LOTUS management?) by an upgraded offer that could not be refused...all prearranged.

IBM, LOTUS' biggest customer in 1994, had used its position to co-opt LOTUS' management decisions, and to manipulate LOTUS' stock value prior to the buyout. On a year of excellent sales revenues of \$970,723,000. (versus \$981,000,000. in 1993 when LOTUS' Net Income was +\$46.2 million) LOTUS' stock was trading on public markets at \$32.50 per share immediately prior to IBM's offer of \$60./share (implying an 84% buyout premium - unheard of in 1994). In February 1993, the same stock traded (on average) at \$48.25 per share and a year before it was at \$86.00. How could LOTUS' stock shed over 55% of its value after two strong sales years and over 15% in just three months prior to IBM's takeover bid ?

How could LOTUS have negative net income on its' second highest annual gross income of \$970.7 million ? Where did the money go ?

To the cause: Immediately after IBM's cash tender offer, LOTUS' stock jumped up on public markets to \$61.75 per share, and remained near that level through the consummation of the buyout. No "white knights" were found (or sincerely asked) to defy IBM, and come to LOTUS' rescue. Using LOTUS' 1992-93 stock price averages (when IBM got interested), zero buyout premium was paid to LOTUS' shareholders in 1995. Of course, those shareholders who had hung-on, and had not bailed out at ruinous stock values prior to the buyout, were greatly relieved when they were miraculously rescued by hero IBM and its' CEO, in June of 1995.

How many LOTUS shareholders were ruined or severely injured by these alleged stock machinations ? Perhaps they should join us in cause of action.

"Circumstantial evidence is lifeblood of antitrust law, especially 15 USCS, sec. 18. *United States v. Falstaff Brewing Corp.* (1973) 410 US 526, 35 L ED 2d 475, 93 Ct 1096." [United States Code Service, *Lawyers Edition* (1985) at 15 U.S.C., sec. 18, notes no. 124 "Evidence"]

C. Takeover of LOTUS for Monopoly Purposes

"Notes, which runs on Windows, Apple's MacIntosh, IBM's OS/2 WARP and Unix systems, can work with other programs and applications written especially for it. 'It is', Gerstner told U.S. News last week, 'the product of the future. That whole category is going to be the fastest growing segment of software in the '90s and into the next century.' IBM hopes to make Notes something that every company wants to have on its laptops, PCs, workstations, network servers and mainframes. Analysts believe this strategy will set the standard for the next wave of computing. Together with Lotus, Gerstner said IBM 'can move faster to establish Notes as an open industry standard, and we can do this before competing products emerge.' [U.S. News & World Report, June 19, 1995, p.48]

OBRIEN includes email messages and other correspondence in this Second Amended Complaint ["SAC"] in Exhibits A-H that clearly and abundantly show Mr. Louis V. Gerstner "actively and knowingly engaged in a scheme designed to achieve anticompetitive ends". Co-operative plans, policies, points of negotiation, etc. developed directly and via subordinates of Mr. Gerstner and Mr. Bill Gates, CEO of MICROSOFT, are clearly referenced in OBRIEN's evidence.

OBRIEN includes emails, correspondence and quotes by Mr. Gerstner not so much to demonstrate anticompetitive conduct as to show preparation and intent to act anti-competitively. The quoted words of Mr. Gerstner reveal the CEO's awareness of the great potential inherent in the acquisition of LOTUS and the potential NOTES and SMARTSUITE had for becoming "industry standards...before competing products emerged.", ie., monopolies directly beneficial to MINI and MAINFRAME monopolies. Via the CEO's own words, a direct link can be seen between the executives' awareness and attitude, publicly expressed, and the ensuing establishment of noted monopolies.

An "open industry standard" is a monopoly by another name. However, all or a portion of the source code is, under certain circumstances, available to outside developers. [*Ibid.*]

OBRIEN contends that IBM's takeover of LOTUS was illegal not because circumstances surrounding the transaction were questionable, but because IBM fully and obviously intended to increase its monopolies in MAINFRAME and MINI markets via integration (installation) of LOTUS products, even though those products, installed in IBM machines, would preclude competition in markets where NOTES and SMARTSUITE were sold, and where OBRIEN competed. In fact, preclusion of competition was fully intended, and companies like The Golf O'Brien Company ["GOB"] were clearly targeted.

As MICROSOFT precluded competition in PC/OP markets by compelling installation of its' OP software on OEM PCs, so did IBM preclude competition in MAINFRAME and MINI OP markets when it used its' longstanding MAINFRAME and MINI monopolies to leverage NOTES and SMARTSUITE as instant OP monopoly(s) in markets for MAINFRAME and MINI "groupware" software. MICROSOFT had not yet begun to compete in this market in 1995, but publicly planned to do so with MS-Exchange. IBM was the uncontested master of markets where OBRIEN pinned its' hopes for competition.

When plaintiff O'Brien was told by the head coach of the UCLA men's golf team that GOLF COACH was not needed, even though both men and women teams kept extensive statistical records, Mr. O'Brien asked why. The young, successful coach showed Mr. O'Brien a mainframe computer printout of the team's statistics. Although the stats were seen extensively presented on broad IBM printer paper, they were presented only as numerical information. The coach admitted he did not convert the numerical data into meaningful graphs, charts and/or text so that his "visual" and/or "verbal" players (the vast majority of people learn via visual and/or verbal representations) could successfully integrate certain playing changes via meaningful presentations of personal golf statistics.

When Mr. O'Brien showed the coach what GOLF COACH could do for his team, the coach said if he needed charts and graphs he could use the software already installed on the school's IBM mainframe computer to create it. Mr. O'Brien then questioned the coach's ability to create the type of detailed, state-of-the-art graphical/textual presentation that GOLF COACH produces, but to no avail. The sale was lost because Mr. O'Brien (experienced in software development but new to software sales) had not been able to help the UCLA golf coach perceive his need for GOLF COACH.

The response from solicitations of over 100 other college and high school golf coaches and scores of private golf schools (with few exceptions) was the same. No real need perceived...but real need was there.

GOLF COACH was a good idea, but it was not especially wanted because MICROSOFT/IBM software, resident on mainframes, client-servers and/or PCs could, at least in the minds of coaches and athletic directors solicited, do an adequate job. An erroneous assumption, to be sure, but one found ubiquitous. Golf teachers and coaches were not to grasp the true instructive value of statistical gathering and analysis on computers until the mid-1990s. GOLF COACH was the first of its genre invented in 1989! While GOB was going about the world preaching the doctrine of statistics based golf instruction on PC, GOB desperately needed to be a competitor first in markets of general GCWT interest (OP and related markets) in order to survive financially and, via incessant advertising and public relations, reach customers (golfers) having special interests, best served by GOLF COACH's unique approach to golf instruction.

Proof of the illegality of IBM's takeover of LOTUS, concomitant with their role in alleged preclusion of OBRIEN's competition, is in the statistics. As alleged, in 1995 IBM had statistically verified monopolies (70% or more marketshare) for MAINFRAME and MINI computers, and was trying to increase its substantial marketshare in PC/NB markets and in OS and OP software markets.

In 1999/2000, IBM has significantly stronger monopolies in markets for MAINFRAME and MINI computers and has substantially increased its marketshare in PC/NB computers and software, relative to 1994-1995 levels. Today over 30% of all IBM's annual revenues come from a monopoly that almost nobody has even heard of...Software Systems Services ["SSS"]. Every monopolistic sale of an IBM computer system tends to increase IBM's SSS monopoly.

"IBM would put its worldwide sales force and \$7 billion in cash behind *Notes*, which dominates the market for so-called groupware and which experts say, represents the next big advance in personal computing. By using *Notes*, teams of workers in different offices--or even different countries--can call the same documents to their computer screens and work on them together. LOTUS commands fully 65% of all sales of groupware, which totals about \$500. million at present and is expected to balloon to \$5. billion a year by the end of the decade." [Time Magazine, June 19, 1995, "IBM hostile LBO of Lotus", v.145, p. 50]

In 1995 it was said, "Today, *Notes* is the only game in town", says Carter Lusher, a research director at the Gartner Group, which tracks the computer industry. [*Ibid.*]

D. IBM is Liable

In 1994 thru 1997, IBM tied NOTES and/or SMARTSUITE to its OS inter PC, MAINFRAME, and MINI sales, and so illegally precluded competition in markets for OP, groupware and GCWT. IBM's tying strategy was fully developed and targeted at time of LOTUS' acquisition by IBM. Therefore, IBM's merger of LOTUS and its subsequently illegal tying, as alleged, were federal and state antitrust violations. Both these violations, in conjunction with other alleged Section 1 and 2 violations, worked to injure OBRIEN and many other IBM competitors in relevant software and hardware markets. [See EXHIBIT A]

In 1997, IBM caused additional antitrust injury to OBRIEN when it acted in conspiracy with MICROSOFT to increase monopolies in certain computer hardware/software markets. These actions also breached IBM's Consent Agreement with DOJ (1956/1975).

Specifically, IBM broke federal antitrust laws and a federal Consent Decree when it withdrew SMARTSUITE from competition with OFFICE, and agreed to the MICROSOFT demand for tie of OFFICE to its' WINDOWS 95 licensing contracts. [See EXHIBIT A]

The MICROSOFT/IBM conspiracy to monopolize OS, OP, Internet Browser ["BROWSER"] and MINI OS/OP markets resulted in actions which directly and proximately injured OBRIEN in OP and related GCWT markets.

Considering MICROSOFT's 90-92% OP marketshare with OFFICE, IBM's 6-8% OP marketshare with SMARTSUITE became critical for OBRIEN's competition and survival. Unlike OFFICE, SMARTSUITE could be easily uninstalled (add/remove macros). One of OBRIEN's sales strategies sought to persuade new IBM computer buyers to uninstall their SMARTSUITE program, and sell or trade it for GOLF COACH bundled with MS-WORKS, LOTUS 1-2-3, WordPerfect or similar, slightly outdated, OP software - costing far less than OFFICE or SMARTSUITE.

Another strategy was to approach (solicit) new IBM PC buyers with GOLF COACH as not only a uniquely effective golf-stats instructional program, but, in some respects, equal

to and/or superior to SMARTSUITE in certain graphing/charting capabilities. OBRIEN could not make the same claim for superiority re OFFICE.

Loss of SMARTSUITE, as an "open door" to competition in relevant markets, was devastating to OBRIEN.

E. Price Discrimination

OBRIEN can prove competitor and consumer status regarding IBM products, and it is not required to prove a purchase of SMARTSUITE, NOTES or OFFICE in order to prove antitrust injury of the sort antitrust laws were designed to prevent. Damage to competition, as alleged in certain markets, can be accurately quantified as actual revenue/net-income loss as well as other types of loss from preclusion of OBRIEN's competition by OEMs, among which IBM is prominent.

In fact, OBRIEN did acquire MS-WORKS installed in a new IBM (PS/2) computer purchased and used by the Plaintiff for business purposes in 1993 in Santa Maria, California.

OBRIEN has standing primarily as a competitor rather than as a consumer to bring claims against IBM not because OBRIEN's damages can not be measured by a certain consumer price differential, but because OBRIEN's most valuable asset, *participatory competition*, was destroyed by a conspiracy involving a software monopolist's price discrimination in favor of a hardware monopolist and its' customers. Said price discrimination enabled OEMs, in close cooperation with MICROSOFT and LOTUS, to preclude virtually all competition in OP and related software markets, worldwide, by selling and /or giving away highly competitive OP products to customers, obtained by OEMs at discount, or no, cost.

If OBRIEN had been able to purchase a license to SMARTSUITE or OFFICE for \$X. while a competitor's purchase of the same product was 10% of \$X. would the differential in price have had any appreciable effect on OBRIEN's ability to compete ?

No. Only a *de minis* consumer injury would have been sustained by the plaintiff unless, of course, OBRIEN had engineered one or both products into its' compilation, GOLF COACH.

Software products in question were not so engineered into OBRIEN's product because they were too expensive for OBRIEN, or any of its competitors except OEMs, to license/purchase.

OBRIEN was injured competitively because GOLF COACH could not compete with a MICROSOFT/OEM or a LOTUS/IBM installation of highly competitive software in newly sold computers that relentlessly sated demand for OP software and related tools, year-after-year.

If OBRIEN had been able to obtain SMARTSUITE or OFFICE at the same, or near, price paid by OEMs, OBRIEN would certainly have added that valuable software to GOLF COACH, and thereby made GOLF COACH much more desirable to consumers and much more competitive in relevant markets. OBRIEN would have sold GOLF COACH in sufficient numbers to ensure its' business viability if not its' long-term prosperity.

In fact, OBRIEN sent a business letter in 1994 to Mr. Gates suggesting this possibility and/or a bundling of GOLF COACH in one or more MICROSOFT product, but did not receive a response from the busy CEO/COB.

If OBRIEN was precluded from (x) amount of sales revenue over (y) period of time (projected from its sales history, current market expectations, etc.), given reasonable competition in relevant markets devoid of price discrimination, OBRIEN's damages can reasonably be quantified, in part, as the net-income from (x) sales lost due to MICROSOFT's highly competitive OS and OP products sold well under reasonable price levels by OEMs because software supplier discriminated in price(s) charged for those products in favor of OEMs without sufficient cost justification.

"A complete examination of the difficulties in estimating lost profits will take us too far afield, but a few observations are in order. First, one must recognize that lost profits are equal to the difference between the profits actually earned and the profits that would have been earned 'but for' the antitrust violation. Because one must estimate what might have been, an inevitable imprecision accompanies this exercise. The Supreme Court has expressed a tolerance for this imprecision: '[I]t will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference.' [*Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)]

Other damages to OBRIEN's company assets, customer relations, vendor relations, community relations, industrial relations, and company employees and officers can be evaluated by the court at trial with appropriate criteria proven.

In 1994, LOTUS sold IBM licenses for NOTES and SMARTSUITE that discriminated in price such that one buyer, IBM, could preclude competition in markets where that software had been competitive because its' cost was extremely low relative to retail prices, and IBM could give away the software installed in computers, or charge only slightly higher prices for installed computers.

"Fundamental aim of Robinson-Patman Act is to protect buyers' competitors from evil effects of direct or indirect price discrimination." (*American News Co. v. FTC (1962, CA2)*, 300 F.2d 104, cert. denied, 371 U.S. 824.)

IBM was the "buyer", referenced above, at time of plaintiff's cause of action. IBM's competitors were the victims.

OBRIEN would have benefited greatly by obtaining a license to SMARTSUITE and then engineering that program into the GOLF COACH compilation. However, LOTUS did not make its extremely low-cost licenses for SMARTSUITE, granted only to IBM, available to OBRIEN or any other of IBM's competitors in OP markets.

These two distinct forms of defendants' participation in price discrimination bring Section 2, Robinson-Patman Act [Title 15 U.S.C., sec. 13(a)] liability to both LOTUS and its owner, IBM. Another form of defendants' price discrimination appears at VII.(D)(9)(a,b).

OBRIEN contends that it was injured by the LOTUS/IBM conspiracy (pre-merger) and concerted efforts (post-merger) via Price Discrimination re SMARTSUITE because competition in relevant markets was intentionally diminished and/or destroyed as a direct result of the discrimination.

"Despite large quantity differences in purchases of supermarket chain and non-favored buyers from common suppliers, evidence supported FTC's finding that supermarket chain, charged with inducing price discrimination, had reason to believe that discriminatory terms and prices it received were not cost-justified." (*Fred Meyer, Inc. v. FTC (1966, CA9)*, 359 F.2d 351)

IBM had reason to believe that MICROSOFT's "prices" (ie. royalty requirements) for OFFICE and MS-Windows 95/98 licenses "were not cost-justified", but Big Blue dealt with the proven antitrust violator very profitably, nevertheless. IBM is cooperating with MICROSOFT's proven illegal actions to date. Even as this complaint is being written on June 20, 2000, IBM pays "per system" for MICROSOFT's ties of OFFICE (including IE) re NT and Windows 2000 licenses. MICROSOFT's ties have been specifically condemned by the federal court in CV 98-1232/1233 (TPJ)!

OBRIEN does not claim "indirect purchaser" status in this action. However, even certain indirect purchasers in circumstances similar to Plaintiff's have been granted standing to raise similar claims.

"Standing to raise claim under Sec. 2 (a) of Robinson-Patman Act [15 U.S.C., sec. 13 (a)] is derived from Sec. 4 of the Clayton Act [15 U.S.C. 15] indirect purchaser is considered 'target' of seller's price discrimination and has standing, if there is evidence that discrimination was 'aimed at' indirect purchaser by virtue of nature and foreseeable effect of antitrust conspiracy." [*Schwimmer v. Sony Corp. of America (1980, CA2 NY)* 637 F.2d 41]

MICROSOFT's price discrimination, alleged herein, was aimed, directly, at OEM's competitors not dealing with MICROSOFT in OS and OP markets not aligned OEMs themselves. OBRIEN, as competitor "target" and *bona fide* purchaser of an IBM computer with MICROSOFT's software factory installed, meets criteria for standing to raise claims for price discrimination against defendants.

Actual damages to OBRIEN, stemming specifically and directly from alleged price discrimination, are difficult to isolate and quantify. However, various methods of proof historically accepted by the court will, at time of trial, permit proof of well specified damages to OBRIEN caused by defendants' Sec. 13 violation(s).

Although not central to this cause of action, as is illegal tying, price discrimination is a charge adding force and effect to central cause of action.

Note: Contributions by two consumer advocate agencies, Ralph Nader, and Consumer Project on Technology, also add effect to Plaintiff's allegations. In the following exhibit are two printings that are worthy of note. [see EXHIBIT F]

F. Cooperative Breach of Consent Decree

In 1994, MICROSOFT signed a consent decree with DOJ that provides MICROSOFT shall not enter into any license agreement that:

1. Exceeds one year in duration
2. Restricts OEM ability to offer a non-Microsoft operating system
3. Is a per processor license
4. Conditions license upon licensing of another Covered Product or certain other products
5. Contains a minimum commitment
6. Is contrary to descriptions of acceptable per system licenses
7. Contains any prohibited non-disclosure agreement

MICROSOFT has suggested that its Consent Decree defeat in 1994 was somehow a victory, and was in fact no finding of liability. Attorney General Janet Reno saw things differently, and said so on July 16, 1994:

"Microsoft's unfair contracting practices have denied other U.S. companies a fair chance to compete, deprived consumers of an effective choice among competing PC operating systems, and slowed innovation."

The Assistant Attorney General in charge of the Antitrust Division at the time, Anne K. Bingaman, expressed a similar sentiment:

"Microsoft is an American success story but there is no excuse for any company to try to cement its success through unlawful means, as Microsoft has done with its contracting practices."

It takes two to tango. IBM and other OEMs willfully and knowingly helped MICROSOFT brake its' Consent Decree, on an uncountable number of occasions, over a number of years (1994-2000)!

DOJ filed a court memorandum in November, 1999 accusing MICROSOFT of violating the court settlement when the Redmond, Washington based company allegedly required computer manufacturers to carry Internet Explorer as a condition for licensing the Windows 95 operating system on their PCs. Of the several pages that constitute the Consent Decree, only one paragraph appears to address the point of contention directly:

"Microsoft shall not enter into any License Agreement in which the terms of that agreement are expressly or impliedly conditioned upon: (1) the licensing of any other Covered Product, Operating System Software product of other product (provided, however, that this provision in and of itself shall not be construed to prohibit Microsoft from developing integrated products; or (2) the OEM not licensing, purchasing, using or distributing any non-Microsoft product." [*United States of America v. Microsoft*, CV 94-1564, IV.(E)1, 2.]

OFFICE is a "Covered Product" and/or "other product" which is not necessarily integrated functionally with any MICROSOFT OS product. OFFICE components (MS-WORD, MS-EXCEL, MS-POWERPOINT, etc.) are, individually, non-integrated "other product" for purposes stated in the Consent Decree. An integrated software product, for the sake of argument in this matter, would be Adobe Postscript. Postscript code is *sine qua non* inter OS software. It is to be found necessarily integrated in every Windows OS, and the OS will not work without it. [see EXHIBIT C]

When OEMs agreed to purchase licenses for OFFICE or only MS-Works, Ms-Excel, etc., tied to MICROSOFT's OS license they agreed, in willful conspiracy, to intentionally preclude competition in markets for OP and related products. Defendants entered into "License Agreement(s) in which the terms are expressly or impliedly conditioned upon the licensing of..." MICROSOFT OS products and products other than OS (and integral components), such as OFFICE.

Clear-cut, conspiratorial breach of Consent Decree (1994) directly and proximately injured the plaintiff as alleged, herein.

On May 12, 1998, the Court of Appeals overturned the district court's order of December 1997 granting preliminary injunctive relief from MICROSOFT's actions in contempt of its Consent Decree of 1994, and gave two reasons for doing so: (1) no showing of entitlement to preliminary injunctive relief under the Consent Decree, and (2) "...the United States presented no evidence suggesting that Windows 98 was not an Integrated Product". Thus, Windows 95/98 were declared exempt from Section IV. (E)(1) liability until federal evidence was found to the contrary. [*United States of America v. Microsoft Corporation*, Civil Action No. 1232, Complaint at III.(D)(11).]

Prosecution had not asked for preliminary injunction. District court had erred in grant of same, and was rightly overturned. The contempt issue was eclipsed by appellate court's correction of the injunction error and declaration re lack of federal evidence for non-integration.

"...the United States was there seeking to enforce that Final Judgment and had not commenced a new action under antitrust laws, the alleged 'integration' of Windows 95 and the Microsoft IE browser was a complete defense; and that antitrust tie-in principles and precedents could not be used to construe the Final Judgment." [*Ibid.*]

Although there were many who knew that WIN95 and IE were not "integrated", no prosecutor had presented federal evidence for integration...until the issue of DOS + WINDOWS integration was adjudicated.

In 1996, *Caldera, Inc. v. Microsoft Corporation* was filed, and did commence an action under antitrust laws on the very same issue of "two separate products" (ie., two software programs not primarily integrated to the extent of being, thereafter, functionally dependant) re antitrust tie-in liability. In November 1999 the court held that MICROSOFT's OS products (DOS/WINDOWS) were at least sufficiently "two separate products" to merit further proceeding in the case (denial of defendant's motion for dismissal on Consent Decree *integration* grounds) and submission to court's fact finder. Therefore, Caldera's illegal tying claim was not dismissed based on the cited appellate court conclusion that MS-DOS/MS-WINDOWS 3.1/95/98 were effectively "integrated products", absent evidence to the contrary. [*Caldera, Inc. v. Microsoft Corp.*, CV 96-645 B, Order of November, 1999]

On January 10, 2000 MICROSOFT settled with Caldera, Inc. for a reported \$275. million. Technically, not an admission of guilt...

Nevertheless, conspirators IBM/MICROSOFT can now, unquestionably, be held liable for violation of the MICROSOFT/DOJ Consent Decree at IV.(E)(1), because the Windows 95/98/2000 OS with which they have been tying/installing "other software" over a number of years is not, absent evidence to the contrary, "integrated product".

With Judge Dee Benson's affirmation of Caldera, Inc.'s argument for "two separate products", federal evidence came into being such that the appellate court's argument against "two separate products" was made no longer controlling.

IBM's installation of Windows 3.1/95/98/2000/NT, tied to OFFICE, on its MAINFRAME, MINI and PC computers, before and after the *Caldera* ruling, establishes IBM's liability and status as a willing accomplice in MICROSOFT's long-term and on-going violation of the referenced Consent Decree.

The MICROSOFT / IBM breach of Consent Decree (on-going to date) injures OBRIEN and fellow competitors in several ways including the foreclosure of OS competition from Caldera, Inc. (maker of DR DOS) and numerous other OS competitors of MICROSOFT

via MICROSOFT/OEM conspiracies/actions that maintain "barriers to entry" into OS competition worldwide. Without a third (or more) strong competitor in OS markets, the installation/tie by major OEMs of OFFICE, coupled with IBM's installation/tie of NOTES and SMARTSUITE (OFFICE was PC installed by IBM after mid 1997 - although the NOTES/SMARTSUITE hybrid Lotus Domino is to be found installed in MINI and MAINFRAME computers today) comprehensively precluded OBRIEN's competition in OP and related GCWT markets.

In order to obtain certain and substantial economic benefits, IBM willingly accepted MICROSOFT's demands for OEM licensing of Windows 3.1/95/98/2000/NT on certain conditions that have been proven *per se* illegal. These demands, willingly complied with by OEMs, including IBM, violated antitrust laws, as specified by federal court's Conclusions of Law in CV 98-1232/1233; breached MICROSOFT's Consent Agreement with DOJ, and violated other antitrust laws as alleged in this complaint.

G. Machines Also Evolve

IBM, cooperating fully with a proven antitrust offender, incurs full liability not only for breach of MICROSOFT's Consent Decree but its' own Consent Decree of 1956 at sections VII. and XV. [*United States of America v. International Business Machines Corporation*, U.S.C.A. 97-6184]

United States v. IBM, Case No. CV 72-344, reveals a strong parallel in OBRIEN's case that alleges IBM's tying of its' computer sales to sales of its' software, and/or MICROSOFT's software, installed in PC, AS/400 and System 390 lines of computers. OBRIEN's case contains allegations and charges having "substantial identity" with proven allegations and charges found at Sections VII. and XV. of cited Consent Decree. [See EXHIBIT H]

"(a) IBM is hereby enjoined and restrained from entering into, adhering to, maintaining, or furthering, directly or indirectly and whether inside or outside the United States, any contract, agreement, understanding, plan or program with any person engaged in the manufacture, sale, distribution or repair and maintenance or tabulating cards, tabulating card machinery, tabulating machines or systems, or electronic data processing machines or systems to: (1) divide sales or manufacturing territories; [and] (2) allocate markets among manufacturers;"[*United States of America v. International Business Machines Corporations*, Consent Decree 1956, CV 72-344, section XV.(a)(1)(2)]

As alleged by OBRIEN in SAC, IBM entered into contracts, agreements and conspiracy with MICROSOFT to violate 15 U.S.C., section 1 and breach both corporations' Consent Decree. What is newly alleged herein, to support SAC's allegations and expand cause of action, is the fact that IBM/MICROSOFT co-developed certain computer programs (source and object code) that became software products named "Windows NT" and "OS/2 WARP". [See EXHIBIT H] The combination then allocated Windows NT and OS/2 WARP to certain computer software and computer hardware markets, controlled by

respective monopolies in same. Therefore, IBM violated Section XV. (a)(1)(2) of its' Consent Decree.

IBM's conspiracy and actions with LOTUS also qualifies as "dividing sales" and "allocating markets" for data processing systems, and, therefore, allegations for IBM's breach of its' Consent Decree at Section XV. have additional evidence in the facts and circumstances of the IBM/LOTUS relationship.

"(b) IBM is hereby enjoined and restrained from conditioning the sale or lease of any standard tabulating or electronic data processing machine (which shall include any machine unit on a separate base even if in normal use it is mechanically or electrically connected with another such machine unit) upon the purchase or lease of any other standard tabulating or electronic data processing machine." [*Ibid.*, Section XV.(b)]

"(a) 'Tabulating card' shall mean a unit record card designed for the recording of data in the form of punched holes to be sensed by mechanical or electrical (including electronic) means." [*Ibid.*, Section II.(a)]

A computer tabulating card is the predecessor of, and in direct line of technological evolution with, computer programs, especially programs (code) stored on silicon disks ("cards" approximate "software").

"(e) 'Electronic data processing system' shall mean any machine or group of automatically intercommunicating machine units capable of entering, receiving, storing, classifying, computing and/or recording alphabetic and/or numeric accounting and/or statistical data without intermediate use of tabulating cards, which system includes one or more central data processing facilities and one or more storage facilities, and has either (1) the ability to receive and retain in the storage facilities at least some of the instructions for the data processing operations required, or (2) means, in association with storage, inherently capable of receiving and utilizing the alphabetic and/or numeric representation of either the location or the identifying name or number of data in storage to control access to such data, or (3) storage capacity for 1,000 or more alphabetic and/or decimal numeric characters or the equivalent thereof." [*Ibid.*, Section II.(e)]

Computer software is "capable of entering, receiving, storing, classifying, computing and/or recording alphabetic and/or numeric accounting and/or statistical data without intermediate use of tabulating cards...". "(f) 'Electronic data processing machine' shall mean a machine or device and attachments therefore used primarily in or with an electronic data processing system." [*Ibid.*, Section II. (f)]

The "electronic data processing machine", referenced in the Consent Decree, obviously includes Personal Computers (including Notebook computers) ["PC"], a Server (mini-mainframe) ["MINI"] and/or a mainframe ["MAINFRAME"] computers. Additionally, it must be recognized that in year 2000 software is "capable of entering, receiving, storing, classifying, computing, and/or recording alphabetic and/or numeric accounting and/or

statistical data (GOLF COACH !) without intermediate use of tabulating cards." [plug added][*Ibid.*]

"(c) IBM is hereby enjoined and restrained from requiring any purchaser of an IBM tabulating or electronic data processing machine to have it repaired or maintained by IBM or to purchase parts and subassemblies from IBM." [*Ibid.*, Section VII. (c)]

An IBM computer's OS and/or OP Suite is an integral *part* and/or *subassembly* of the computer. When IBM required buyers of its' computers to purchase, and/or accept at no or minimal extra cost, OS/2, OS/2 WARP, SMARTSUITE, NOTES, DOMINO and/or NT and OFFICE, it violated Section VII.(c) of its' Consent Decree.

IBM conditioned the sale of its' computers upon the purchase of data processing software produced and sold commercially by IBM and MICROSOFT. Although data processing software (essentially synonymous with computer "tabulating card") is not, semantically, a "machine", software illegally tied by MICROSOFT and IBM contained "virtual machines" (OFFICE/IE and SMARTSUITE/NOTES) that emulate actions-and-effects, in data processing realms, so identical to data processing machine actions-and-effects that they are appropriately called "virtual machines".

Note: Another example of a virtual data processing machine currently in existence is the virtual audio mixing-board. A conventional audio mixing-board is a mechanical/electrical device containing a variety of slides, switches, dials, gauges, scopes, plugins, etc. Software mixing-boards (the one used by the Plaintiff is sold by Optcode, Inc.) mix digital audio inputs (files or threads) on computer (screen) exactly like mechanical/electrical mixing-boards mix inputs from tape recordings in a conventional studio. In fact, many virtual mixing-boards are now used commercially in recording studios.

Some computer programmers consider OFFICE to be a type of computer in its own right. Macromind Director, sold by Macromedia, Inc., is certainly a "computer" having its own operating system, unique interface, language(s), import/export functions and both internal and remotely accessed memory systems. Virtual memory, found in many contemporary computer programs (including Macromind Director, on which Plaintiff has hundreds of hours development experience), replaces and/or augments silicon chips (RAM) installed inter motherboard. Relatively inexpensive software systems now take the place of hugely expensive mechanical aircraft flight simulators. Software pinball machine systems take the place of mechanical pinball machines and virtual poker/blackjack dealers are to be found functionally rendered on computer instead of rending at casino tables. How about a virtual machine-gun on the finger tips (mouse) of a youngster engrossed in a computer game where players drive virtual jeeps.

IBM illegally tied computer products in 1952, and following, in a manner substantially identical to ties alleged illegal by OBRIEN in year 2000. When IBM allocated its' software to certain MICROSOFT and IBM dominated markets in 1988-1994, and, in 1994-2000, conditioned the sale of its' PC, MINI and/or MAINFRAME computers on the

purchase, and/or acceptance at no or minimal cost, of its' (1) Operating Systems, (2) Office Productivity software, and/or (3) Communications software, it violated not only 15 U.S.C., sections 1, 2 and 14, but also breached Sections VII.(c) and XV.(a)(b) of its' Consent Decree.

G. Antitrust Violations Re Licensing

When MICROSOFT illegally tied its OP software to IBM licensing of MICROSOFT's OS it continued to injure OBRIEN by saturating/dominating relevant markets with OFFICE and other MICROSOFT products, thereby precluding OBRIEN's competition.

Note: In its many procedures for licensing OFFICE, MICROSOFT offers both "per copy" and "per system" licenses to OEMs. Under a per copy license, an OEM pays MICROSOFT a royalty (below wholesale value) for each copy of OFFICE it installs on a computer. Under a per system license, an OEM pays MICROSOFT a royalty for each computer it sells within a particular "system" of computer models. Generally speaking, the per copy licensing royalty is significantly higher than the per system.

OEMs do not wish to pay the significantly higher royalties for per copy licenses, because profits will suffer. As a result, OEMs use the per system method of licensing OFFICE. However, should MICROSOFT cooperate with OEMs to arbitrarily change model numbers/names it could effect the same results that the illegal "per processor" method of licensing effected before it was condemned by the Consent Decree. This has not been alleged, heretofore, but it sure seems that model names/numbers change alot.

OEMs have been able to negotiate only limited exceptions, i.e., grants of permission from MICROSOFT not to bundle OFFICE on all computers sold within a given system. On information and belief, few or no OEMs have been able to negotiate exceptions with MICROSOFT for anything more than a very small percentage of a given model line.

It is impractical in an economic sense for an OEM to install competing OP and related software on a computer subject to a per system license. In order to do so the OEM would have to pay for both OFFICE and the competing product, and, likewise, would be required to pass along to the customer the cost of offering both OFFICE and the competing product.

MICROSOFT's per system licensing process wrongfully hampers competition among OP and related software products (including GCWT products like GOLF COACH) by effectively precluding OEMs from offering consumers the option of licensing a competing Office-like application, or no such software at all. Consumers who purchase certain lines of new computers are thereby forced by OEMs to receive, and pay for, OFFICE.

MICROSOFT, in conspiracy with IBM and other OEMs, has willfully and illegally sought to maintain and extend its monopoly in OP and related software, as well as OS software.

"Actual competition between Microsoft and actual and potential competitors in the markets for Internet browser and related software, office productivity suits, and first screen and boot up access has been or is threatened to be curtailed and foreclosed;

OEMs have been denied, or are threatened with denial of, the benefits of a free, open and competitive market in the sale of licensing rights for Internet browsers and related software, office productivity suites, and first screen and boot up access;

Consumer purchasers of personal computers pre-loaded with software have been denied, or are threatened with denial of, the benefits of a free, office productivity suites, and first screen and boot up access;

Barriers to entry into the markets for operating systems and office productivity suites have been raised and reinforced, tending to forestall the development of actual competition in those markets; and [t]he States' general welfare and economies have been injured through prevention of free and open competition in each of the States' economies.

Plaintiff States and their citizens will be subject to a continuing, substantial and immediate threat of irreparable injury to the general welfare and economy and to competition in their states unless Defendant is enjoined from its illegal conduct." [*STATE OF NEW YORK, ex rel. Attorney General ELIOT SPITZER, et al., v. MICROSOFT CORPORATION*, Civil Action No. 98-1233 (TPJ), p. 8]

H. Comprehensive Preclusion and Erosion of Security

1. Memory Drain and Network Insecurity

In conspiracy and full cooperation with all major OEMs, when MICROSOFT tied its' OP software (OFFICE) to its' OS software (WINDOWS) it virtually destroyed most software markets.

When IBM agreed to install OFFICE (96/97/98) with WINDOWS (3.1/95/98) almost all other software options were precluded because individual software applications require individual Random Access Memory (RAM) allocation and, in years 1994 thru 1997, new computers had only 4 megabytes ["MB"] (minimum) thru 32 MB (maximum) of total RAM installed.

WINDOWS (95/98/2000) requires 16 MB (minimum) and 32 MB (optimal) of RAM and OFFICE (96/97/98/2000) requires 16 MB (minimum) and 32 MB (optimal) of RAM.

Most OEM machines having only 4 MB - 32 MB of RAM could accommodate only the MICROSOFT OS/OP products installed! Even 64 MB machines ("high-end" and expensive) were just marginally capable of accommodating additional software.

Specialized software (professionally essential) like Adobe Premiere, Adobe Photoshop and Macromedia Director (products used mostly for multimedia development) survived

and even prospered because certain users (usually multimedia professionals or wantabes) were willing to buy/install more RAM, bigger harddrives, special peripherals, etc.

The vast plurality of consumers were not so disposed to buy additional equipment/software/memory. Because new computers in 1994-1998 had insufficient RAM, Plaintiff's GOLF COACH and most other useful/desirable, but not professionally essential, programs were precluded from competition for lack of RAM on new computer systems, directly attributable to MICROSOFT/OEM illegal tying of OP to OS software.

For want of RAM, software innovation stagnated and almost died in the early and mid 90's. It would have effectively died had it not been for recent federal/state prosecutions/convictions of MICROSOFT. Now, in year 2000, it is time to complete the antitrust safeguard loop on behalf of USA and global consumers, businesses and governments. It is timely and appropriate to prosecute (publicly and privately) OEMs, including IBM, who conspired with MICROSOFT to commit (long-term) anticompetitive acts.

Note: IBM's installation inter OFFICE of OutLook Express ["OE"], an email client, has contributed greatly to worldwide internet/intranet insecurity. IBM's installation of DOMINO and NOTES on its' MAINFRAMES (used by the most powerful companies having the most valuable intellectual property) was, on July 31, 1998, proven highly vulnerable to hacker attack.

"Remote intruders can potentially retrieve: in development databases, confidential company records, etc., etc. All of the above can be achieved by connecting to a vulnerable Notes Client. Users can overwrite/create system files." [see EXHIBIT G]

Much of the destruction of the ILOVEYOU computer virus/worm that was distributed globally on May 11, 2000 came from monopolistically tied/installed OE. Because OFFICE has been tied to OEM licenses of WINDOWS 3.1/95/98/2000/NT since 1991, it has captured (diluted) over 90% of current worldwide markets for OP software. OE was primarily responsible for the proliferation of the ILOVEYOU virus/worm because the OE "Address Book" folder was targeted by the hacker for access/capture of all addresses contained therein for automatic email distribution of the same virus/worm to the addressees. Targeting by hacker(s) was especially easy due to hacker's use of Microsoft's Visual Basic and its facile integration with OE. ILOVEYOU code was written (more like patched together with copy&paste) especially for WINDOWS/OFFICE systems.

As stated, but reiterated for emphasis, IBM curtailed and eventually stopped competing with OFFICE via SMARTSUITE in 1997. From that time onward to the present, IBM has installed OFFICE on millions of its' new computers (NB, PC, MINI, MAINFRAME) sold worldwide. The great majority of large corporations (100+ employees or more) use IBM computers supporting OFFICE/WINDOWS.

" 'Happy', 'Form' and 'Chernobyle' (computer viruses) work on Windows, while big-league heavies like 'Explore.zip' (not to mention year 2000 contenders 'Kakworm', 'Bubbleboy' and, of course, 'ILOVEYOU') head straight for Microsoft Outlook Express.

This is no accident. Nearly all these viruses were written in Microsoft's Visual Basic, a programming language that works across the wide world of Windows. 'It's not even a loophole', says Richard Smith, the Boston-based security expert who helped track down Melissa's author. 'It's all by-the-book Microsoft programming.'" [Time Magazine, May 15, 2000, p.56]

"Security experts have long warned that Microsoft software is so widely used and so genetically inter connected that it qualifies as a monoculture-that is, the sort of homogeneous ecosystem that makes as little sense in the business world as it does in the biological. Using Word, Excel and Outlook exclusively on Windows machines in a company network 'is like planting Kansas with the same grain of wheat', says Bill Cheswich, a senior researcher at Lucent. When a virus preys on the crop, nothing is left standing. The companies hit hardest by the Love Bug were closed Microsoft shops. Users who had planted their PCs with a slightly more colorful selection of seeds - even just substituting Eudora for Outlook - suffered not at all."

"That lesson in biodiversity was not lost on the trustbusters at the Justice Department. Their legal bid to break Microsoft in two is intended to promote precisely such healthy genetics. The most overused example of what would happen if the Windows half of Microsoft were wrenched from the half that produces Word, Excel and Outlook is that the latter would start churning out versions of its products for rival operating system Linux. Call it enforced crossbreeding." [*Ibid.*]

2. Anti-competition Alleged With Specificity

a. From 1990 to 2000, MICROSOFT/IBM precluded the competition of OBRIEN in markets for graphing/charting/word-processing tools by tying sales of licenses for MICROSOFT/IBM products, other than OS, to sales of licenses for OS software. Installation of MICROSOFT's OS was considered by OEMs (other than IBM in 1995-1997 with its OS/2 and OS/2 Warp) so essential to computer sales that they willingly submitted to MICROSOFT's legally questionable demands re installation of *other* MICROSOFT software.

This *other* software contained GCWT very similar to, and very competitive with, GOLF COACH. Any person or organization wishing to graph/chart/wordprocess golf statistics (or virtually any other sport's playing statistics) for the purpose of individual or group instruction could use a MICROSOFT/IBM product just as easily (but perhaps not as comprehensively) as GOLF COACH. Conversely, OBRIEN's product is not limited to presentation of sporting data. Where MICROSOFT products provide much more than graphing/charting/wordprocessing, GOLF COACH specializes in and customizes same. Average retail price for GOLF COACH has been \$29.95 plus tax. Average retail price for OFFICE has been about \$289.00 plus tax and for SMARTSUITE about \$299.00 plus tax.

If an economizing golfer, or her golf club, needed only golf statistics presentations, via a GCWT program, a most practical solution was GOLF COACH.

Note: In 1989 GOLF COACH was all alone...the first of its kind. Copyrighted. Today, perhaps twenty-five (25) substantially similar programs exist commercially (many in Australia), and, through the benevolent neglect of GOB, they are not sued or otherwise restricted in any way. After suffering near total preclusion of its' own competition for nearly a decade, OBRIEN believes it can at least permit, *gratis*, worldwide assistance for golfers (especially beginners) of all ages, nationalities and creeds by not precluding the efforts of other companies struggling against the machinations alleged herein, and providing a diversity of instruction and other benefits for the game we love.

If other companies in future make bona fide efforts to develop and sell GOLF COACH type program(s), OBRIEN will continue to waive its copyright/patent claims in their regard. All OBRIEN wanted was the ability to compete and the chance to succeed on the merits of its product/service; not make money merely by the preclusion of competition or innovation via copyright/patent exploitation.

b. MICROSOFT's alleged illegal preclusion of competition re its OS and other software was made super effective in regard to OBRIEN's competitive efforts via MICROSOFT's powerful influence over IBM and APPLE.

From 1990 through 1999, IBM, ostensibly to counter MICROSOFT's much publicized predatory and/or competition threatening behavior, nevertheless contributed to the preclusion of competition in plaintiff's markets, and, thereby, strengthened MICROSOFT's monopoly(s) as well as its own.

In order to maintain autonomy and monopoly power and to more effectively compete with other leading computer manufacturers (unanimously yielding to MICROSOFT's licensing demands) IBM released and installed OS/2 WARP, an operating system technically competitive with Windows 95/98. IBM also installed NOTES and SMARTSUITE in MAINFRAME and/or MINI and/or PC/NB computers, software products entirely controlled by IBM which were very competitive with OFFICE and certain other MICROSOFT products. SMARTSUITE contained GCWT very similar to both OFFICE and GOLF COACH.

MICROSOFT v. IBM competition is, largely, a myth. Today IBM sells on its' website a wide range of MICROSOFT products. [See EXHIBIT A]

There has been some genuine competition... IBM's NOTES exposed APIs that made it very competitive with MICROSOFT's Visual Basic, and facilitated competition not only against MS-Visual Basic but also tended strongly (at first) to erode MICROSOFT's barriers to entry and establishment in OS markets.

"Microsoft also exploited IBM's dependency on Windows (particularly, the financial terms and timeliness of access to licenses, information, and support) in an effort to limit

IBM's marketing of Lotus Notes as a middleware threat (e.g., pp. 78, 120, 129, 132), as well as IBM's sale of OS/2 Warp and SmartSuite, which competed directly with Windows 95 and Office (pp. 115-132). These actions confirm both Microsoft's ability and Microsoft's readiness to use monopoly power to blunt threats by means that reduce rather than expand consumer choice on the merits. They show that it is Microsoft's corporate practice to pressure other firms to halt software development that either shows the potential to weaken the applications barrier to entry or competes directly with Microsoft's most cherished software products." [Supra., Argument I(B)4(b), CV 98-1232, 1233], [See EXHIBIT A (email)]

APPLE installed OFFICE (after much coercion by MICROSOFT re preclusion of Netscape Navigator requirement) and/or ClarisWorks in most of its' computers at time of cause of action. ClarisWorks, owned by Apple, like OFFICE was competitive with GOLF COACH re GCWT capabilities. [see EXHIBIT E]

Not only did MICROSOFT use its' great monopoly power to directly preclude OBRIEN's competition it also exercised preclusive influence over other companies that had potential to allow OBRIEN's competition. The net result of MICROSOFT's monopolistic actions, as alleged, was total preclusion of OBRIEN's competition and virtual destruction of its' business and livelihood.

I. Restraint of Trade and Commerce

"Although Sun intended Java technologies eventually to allow developers to write applications that would run on multiple operating systems without any porting, the Java class libraries have never exposed enough APIs to support full-featured applications. Java developers have thus always needed to rely on platform-specific APIs in order to write applications with advanced functionality. Recognizing this, Sun sponsored a process for the creation of a software method that would allow developers writing in Java to rely directly upon APIs exposed by a particular operating system in a way that would nevertheless allow them to port their applications with relative ease to Java Virtual Machines ["JVM"] running on different operating systems.

On March 12, 1996, Sun signed an agreement granting Microsoft the right to distribute and make certain modifications to Sun's Java technologies. Microsoft used this license to create its own Java development tools and its own Windows-compatible Java runtime environment. Because the motivation behind the Sun-sponsored effort ran counter to Microsoft's interest in preserving the difficulty of porting, Microsoft independently developed methods for enabling 'calls' to 'native' Windows code that made porting more difficult than the method that Sun was striving to make standard. Microsoft implemented these different methods in its developer tools and in its JVM. Microsoft also discouraged its business allies from aiding Sun's effort. For example, Gates told Intel's CEO in June 1996 that he did not want the Intel Architecture Labs cooperating with Sun to develop methods for calling upon multimedia interfaces in Windows." [*United States v. Microsoft*, CV 98-1232 (TPJ), Findings of Fact, No. 387, 388.]

IBM has been one of MICROSOFT's leading business allies and was effectively encouraged by MICROSOFT to join the illegal preclusion of competition from Sun Microsystems, Inc.

Due to the IBM / MICROSOFT tying of OS licenses and hardware to purchases of GOLF COACH's competitors, OFFICE and SMARTSUITE, the only computers available for running GOLF COACH were the relatively few having non-Microsoft OS systems not containing OP and/or memory consuming software. If OBRIEN was to compete (even nominally) in GCWT markets, a new multimedia GOLF COACH had to be developed, at least partially in Java, and then ported from the DOS/Windows environment to other platforms running compliant virtual machines inter browsers.

Opportunities where such unlikely factors obtained were few and far between. Redevelopment in Java and porting costs were too expensive to justify exploiting the few wholesale/retail opportunities that existed.

J. Tying Criteria Well Met

The evolution of antitrust law and court precedent has established certain essential factors as criteria used by federal courts in determining the viability of contemporary antitrust actions. The following list of criteria, phrased as possible objections to antitrust prosecution, was obtained from an authoritative source (Antitrust Law Journal, vol. 62, 1993/1994, p. 325). The plaintiff alleges, without specificity but certainly with the ability to prove specifically and comprehensively, each criteria well met (overcome) by the facts and circumstances of this case.

(1) No Conspiracy: According to federal and state actions currently before the federal bench, MICROSOFT, and certain OEMs including IBM, were in close working relationship at time of cause of action. MICROSOFT's competition precluding tie-in "sales" to OEMs are a matter of record and specified fact.

(2) No Coercion: Although MICROSOFT, technically, did coerce OEMs into conspiracy and other illegal actions as alleged in recent federal and state prosecutions, allegations in this case show that OEMs were not compelled, beyond their wills or business reasoning, to brake antitrust laws.

(3) No Relevant Market(s) Alleged: OBRIEN has clearly alleged preclusion of competition by MICROSOFT, IBM and other OEMs in national and international markets for Office Productivity related software including GCWT markets.

(4) No Tying Market Power:

MICROSOFT, in conspiracy and concerted action with IBM and other OEMs, has vast tying market power as represented by widely acknowledged figures: 90% OS marketshare (tying product), and 89% OP related software marketshare (tied product).

IBM itself has great tying power in its MAINFRAME and MINI monopolies, and has illegally tied products to these products including SMARTSUITE and NOTES.

(5) No Showing of Possible Antitrust Injury:

Antitrust laws exist to protect competition in commercial markets. OBRIEN's antitrust injury resulted when it was precluded from competition within a market served by numerous software companies which were likewise precluded from competition via IBM's breach of antitrust laws.

OBRIEN and other competitors in OP markets were the "necessary and foreseeable" victims of the alleged illegal actions against Caldera, Inc. and other competitors in OS markets where MICROSOFT, in conspiracy with IBM, monopolistically sought to preclude competition.

(6) No Foreclosure of Competition in Tied Product Market:

Clearly alleged in complaint and established by federal court's Findings of Fact and Conclusions of Law re the MICROSOFT/IBM conspiracy: IBM's tie of SMARTSUITE clearly complemented MICROSOFT's preclusion of competition in OP markets.

(7) No Economic Benefit from Sale of Tied Product:

All participating OEMs enjoyed great economic benefits from installation and sale of tied OP software like OFFICE, MS-Works, MS-Excel, etc. The retail price of OFFICE always exceeded \$250.00, and was a great value incentive for consumers to choose the computers of OEMs favored by MICROSOFT. IBM, in addition to its' participation in OFFICE ties, also tied NOTES and SMARTSUITE to OS/2 WARP in its computers.

(8) No Sales Agreement for Section 3 Liability:

Formal sales agreements between MICROSOFT, IBM and other OEMs are in the records of cited federal/state antitrust cases and to be found in numerous other authoritative sources.

(9) Not Two Separate and Distinct Products:

Where MS-DOS 6.0 is questionably separate and distinct from MS-Windows 3.1/95/98, MS-Windows 3.1/95/98 is unquestionably separate and distinct from OFFICE. IBM's PC, MAINFRAME and MINI products are, of course, separate and distinct from LOTUS' NOTES and SMARTSUITE even though IBM owns LOTUS.

(10) Business Justification Outweighs Anticompetitive Effects:

MICROSOFT, in conspiracy with IBM, having 90%+ OS marketshare and 89%+ OP software marketshare could not justify otherwise illegal preclusion of competition in these markets by a rationale citing need for more business. Illegal activities increasing both IBM and MICROSOFT monopoly(s) cannot be justified by a nebulous "positive impact" claim on relevant market(s) or the economy at large.

(11) Insubstantial Effect on Interstate Commerce:

MICROSOFT's tying, in conspiracy and concerted action with IBM and other OEMs, and their other anticompetitive practices, have had substantial effect on interstate markets for OS and OP software, including markets for GCWT. This fact is not contested. IBM's tying of NOTES and SMARTSUITE also has had substantial effect on interstate markets for OS and OP software, including markets for GCWT.

The MICROSOFT/IBM preclusion of OBRIEN's competition also had a significant effect on interstate markets. OBRIEN sold GOLF COACH in Oklahoma as well as in California and Hawaii from 1990 to 1998. Plaintiff O'Brien served as founding president of SAVIORG, a California public charity, in Oklahoma, Hawaii and California from 1990 to date. OBRIEN planned and took practical steps to expand its' private business and charitable operations at time of cause of action, and would have probably traveled/traded in Oklahoma, Hawaii, California and other states/countries had he not been injured and effectively restrained by defendants' actions.

(12) No Purchase of a Tied Product:

Obviously, OEMs purchased, via royalty payments, OP software for installation in their machines in order to purchase MICROSOFT OS licenses. Consumers purchased same MICROSOFT OS and OP products installed in their new computers sold by IBM and other OEMs.

In 1997, MICROSOFT's monopolistic business strategies were applied to IBM until IBM diminished, and eventually stopped, its' OP competition by eliminating SMARTSUITE installations in IBM PC computers, and agreeing to install OFFICE instead. [see EXHIBIT A]

MICROSOFT/IBM directly injured OBRIEN and many other OP/GCWT competitors (as well as millions of email users worldwide) via proven antitrust illegal dealings that eliminated the only realistic opportunity(s) in GCWT markets for profitable competition against OFFICE. Without SMARTSUITE installed on IBM's new computers, and able to be uninstalled by vendors/consumers, GOLF COACH had little probability of being purchased and installed on any new computers (year-to-year) because OFFICE installations could not be uninstalled by any OEMs/vendors/consumers. By the end of 1997, 98% of worldwide OP/GCWT markets had been foreclosed by two companies.

In 1998, when OBRIEN attempted to download Sun's Java Development Kit ["JDK"] to hardrive, and then install and run the program, JDK would not install properly. OBRIEN

attempted JDK downloads on several subsequent occasions over several months duration, and each time the installation faltered at the 99% complete marker.

In 1999 OBRIEN attempted a JDK download on Windows NT 4.0, running on a Silicon Graphics 320, and after a 100% completed installation, the program failed to run on the system. Several more attempts, spaced weeks apart, met with the same results.

Even had OBRIEN broken down and purchased MICROSOFT's Software Developers Java Kit ["SDJK"], OBRIEN's multimedia Java programs would not have run on OBRIEN's only browser, Netscape Navigator. OBRIEN was, therefor, compelled to purchase Internet Explorer, but to no avail when complex multimedia Java development, via noted MICROSOFT and/or SUN formats, proved beyond OBRIEN's level of expertise living (disabled) on an Island (Kauai, Hawaii) where no professional assistance was available.

In 1999, Mr. O'Brien moved to Santa Barbara, California where he could find interaction and facilities allowing multimedia development. In fact, Mr. O'Brien has, in 2000, produced numerous multimedia works at Santa Barbara City College and UCSB. Mr. O'Brien is now working on a multimedia version of GOLF COACH that promises to be unique and highly competitive in GCWT and multimedia sports markets.

"Microsoft anticipated that the JAVA language would become a popular medium in the multimedia arena. It thus wanted to ensure that the JAVA software created to deliver multimedia content would not rely on JAVA implementations that fostered portability." [*Ibid.*, No. 403]

"In pursuit of its goal of minimizing the portability of JAVA applications, Microsoft took steps to thwart the very creation of cross-platform JAVA interfaces." [*Ibid.*, No. 404]

MICROSOFT's restraint of trade and commerce, as alleged above, were in close conspiracy and cooperation with IBM, and constituted actionable antitrust injury to the plaintiff.

IX. RELATED CASE IN POINT

For the sake of argument, let MICROSOFT's Windows 95 be named MS-DOS 7.0/MS-Windows 4.0 because the court in *Caldera* has 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.]

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 4.0. (Caldera, Inc. owned/sold DR DOS ,the OS developed by Digital Research, Inc., thus "DR" DOS)

The IBM installation of MICROSOFT's two separate products, tied in all but a *de minis* percentage of 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.

Thus, OBRIEN's GOLF COACH, which had only the possibility of purchase/installation in computers not already installed with MICROSOFT (or IBM) OP software, was, along with DR DOS, precluded from competition by the illegal actions of IBM/MICROSOFT.

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.

Because MICROSOFT 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 DOS co-competitors and, circuitously but nevertheless directly, to OBRIEN.

MICROSOFT 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 MICROSOFT's Windows 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.

OBRIEN, 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. OBRIEN's injury was an integral aspect of the conspiratorial actions alleged, and was of the type of injury antitrust laws were intended to prevent.

"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. McCreedy*, 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)]

"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.]

X. CARTWRIGHT ACT VIOLATIONS

"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)]

"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.*]

MICROSOFT's illegal tying of its' OP related software to IBM's licensing of its OS violated California's Cartwright Act at sections 16721 and 16727, and injured OBRIEN who brings this supplementary action for damages inter federal complaint, with authority of Section 16750 of Act.

"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.]

All conditions met. IBM, in close cooperation with MICROSOFT, has committed *per se* illegal tying, and thereby caused antitrust injury to the plaintiff in relevant markets.

"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.]

All conditions met. Defendant's actions restrained substantial amounts of commerce in markets for MAINFRAME, MINI, and PC/NB computers as well as markets for OP and GCWT software.

"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.]

All conditions met. Defendant's actions unreasonably restrained competition in markets for MAINFRAME, MINI, and PC/NB computers as well as markets for OP and GCWT software markets.

XI. UNFAIR COMPETITION ACT VIOLATIONS

"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.]

MICROSOFT virtually "gave away" or deeply discounted OFFICE (approx. retail value \$300. per copy), MS-Works (approx. retail value \$250. per copy), and its other "office productivity" software products (as alleged above) to IBM and other OEMs who willingly accepted such products tied to licensing Microsoft's OS.

Why would MICROSOFT require installation of OP products by IBM and other OEMs when they were not charged a significantly higher price re OEM licensing of the OS ? OBRIEN claims the products were tied to MICROSOFT's OS in order to preclude competition in relevant markets and thereby increase and/or build-up MICROSOFT's OS and OP monopoly(s).

Additionally, illegally tied software products, once purchased and installed in computers by consumers, (1) increase installed base, (2) increase network effects, and (3) require periodic upgrades, all profitable, year after year, for the malefactors.

OBRIEN was among MICROSOFT's "targets" for preclusion of competition, and was aided and abetted by IBM.

OBRIEN alleges IBM's 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 OBRIEN's injuries claimed.

XII. FORMAL CHARGES

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

IBM has illegally tied sales of computers (tying product) to the distribution of other applications, 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.

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

MICROSOFT has formally and informally agreed with IBM, in exchange for the licensing of MICROSOFT's OS, to tie Office Productivity Suites and related software to IBM hardware sales, and to use various methods to restrict API exposure and Java programming capability thereby maintaining and/or increasing barriers to entry into OS markets and barriers to development re 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).

"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)]

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

IBM had (has) monopolies in MAINFRAME and MINI computers.

Through the actions complained of in this Petition, 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

In violation of Section 2 of the Sherman Act, IBM has, by the means set forth above, knowingly and intentionally used its monopoly power in markets for MAINFRAME and MINI computers to compete monopolistically with intent to preclude competition in separate market(s) for Office Productivity Suites and related software, including market(s) for GCWT and markets for Java language based programming.

E. CLAYTON ACT, SECTION 7: ILLEGAL MERGER

In violation of Section 7 of the Clayton Act, Title 15 U.S.C., section 18, IBM has, by means set forth above, knowingly and intentionally used its monopoly powers to preclude

competition in certain computer software and hardware markets via illegal merger performed for monopolistic purposes.

F. BREACH OF DOJ CONSENT DECREE *PRIMA FACIE*

"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)]

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 OBRIEN and to markets where it competes.

IBM breached its own Consent Decree, Civil Action No. 72-344 (1956) at Section XV. by (1) attempting to increase its monopolies and (2) actually increasing and using the power of monopoly in MAINFRAME and MINI markets to preclude competition in OBRIEN's markets via conspiracy and concerted (long term) action with MICROSOFT tying (bundling) OP software to sales of operating system/computers.

G. BREACH OF CARTWRIGHT/UNFAIR COMPETITION ACTS

Illegal practices by IBM alleged 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.

XIII. CONCLUSION

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

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.

IBM bundles (ties to OS and hardware sales) MICROSOFT 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. [see EXHIBIT G]

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 (TPJ), that leading OEMs, including IBM, willingly agreed to, and long-term cooperated with, MICROSOFT'S published and unpublished requirements for OS/OP licensing.

In many cases, MICROSOFT did not even disguise its' illegal intent (ie., the OPK). OEM's behavior has been rationalized by certain Machiavellian ("ends justify means") executives and their 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.

Chief among MICROSOFT'S compliant OEMs, and involved with MICROSOFT 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 operation.

IBM monopolies virtually guarantee worldwide NB, PC, MINI and MAINFRAME 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.loph.com> *section 05.12.00 - Microsoft Office 2000 Scripting Advisory]

A. Review of Antitrust Actions Against IBM

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.

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

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.

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's to obstruct justice with 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, remains in effect today.

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

"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.

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),]

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

"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.*]

"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.

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.*]

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)]

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.

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.*]

B. Antitrust Injury Sustained

OBRIEN alleged antitrust injury from the MICROSOFT/IBM conspiracy [clearly indicated without naming conspirators in federal/state prosecutors' allegations in *U.S. v. Microsoft* CV 98-1232/1233 (TPJ)] that did not end in 1995. OBRIEN's antitrust injuries continued through the end of the millenium and beyond. Prior to 1995, it was only MICROSOFT that precluded OBRIEN's competition as proven in its' Consent Decree of 1994. In 1994-1997 it was MICROSOFT and IBM, concurrently but individually, precluding competition as alleged in FAC and found alleged in *U.S. v. Microsoft*, CV 98-1232/1233 (TPJ). In 1997-2000 it has been a MICROSOFT/IBM combination that has precluded/destroyed competition as alleged. Federal evidence (emails and hand-written notes by executives) downloaded from the DOJ website (publicly available), proves *prima facie*, that IBM maximized its' conspiratorial advantages by obeying MICROSOFT's demands to "neutralize" (cancel all sales of) its' own software (OS/2 Warp and SMARTSUITE/NOTES), and install only WINDOWS Operating Systems (3.1/95/98) tied to OFFICE. IBM's business reasons for complete capitulation to MICROSOFT demands ? MICROSOFT products were selling better...much better.

OBRIEN has experienced continuous business injury, 1990-2000, and personal injury directly linked to that business injury, from Defendants' monopoly empowered preclusion of competition from 1990 through year 2000. OBRIEN's "antitrust injury" was caused by (1) MICROSOFT's proven monopolization, 1990-1993, following close and continuous

business dealings with IBM from 1982 to 1990, (2) relatively independent monopolization by MICROSOFT, 1991-1996, and (3) resumption and exploitation of the now famous MICROSOFT/OEM (IBM) conspiracy, circa 1997-2000.

In 1982-1984, IBM added PCs to its line of computers using MICROSOFT's OS exclusively, and continued certain actions sanctioned by national and international authorities, most notably at that time the European Common Market (EC).

In 1985-1992, MICROSOFT was a seasoned partner of IBM, and they conspired and enacted carefully planned and well executed breaches of antitrust laws re MAINFRAME, MINI, and PC operating systems which MICROSOFT developed and sold, exclusively, to IBM. After acquiring a license to use APPLE's Graphical User Interface (GUI) source code(s) which APPLE had acquired/developed under questionable circumstances via associations at Xerox, Inc. (Palo Alto Research Center), MICROSOFT continued to break antitrust laws re sales of its DOS/Windows OS and other products, and narrowly escaped conviction in four actions brought by APPLE for copyright infringement and contractual breach.

How could MICROSOFT be convicted of stealing APPLE's GUI when APPLE did not have full proprietary interest in the GUI, and probably stole the essential GUI idea(s) from Xerox ?

"It is not easy to distinguish expression from ideas, particularly in a new medium. However, it must be done, as the district court did in this case...Apple cannot get patent-like protection for the idea of a graphical user interface, or the idea of a desktop metaphor which concededly came from Xerox." [*Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994), III.(B)]

Why no Xerox lawsuit(s) Xerox executives were able to successfully startup and run Adobe Systems, Inc. (1983) because of close cooperation with APPLE. ADOBE's monopolies for Video Editing, Printer Drivers, Digital Illustration, and Digital Photo Editing sprang directly from the APPLE/ADOBE union. IBM supplied APPLE with its' OS, uniquely capable of running ADOBE's products, beginning in the 80's and continuing to this very day. MICROSOFT's use of ADOBE's products are responsible for about 60% of ADOBE's annual revenues.

In 1994, MICROSOFT/IBM persisted in braking antitrust laws while gaining near perfect monopolies in OS and OP markets. Thus, the DOJ Consent Decree (1994) became necessary to protect international businesses and consumers.

IBM/MICROSOFT *per se* breach of their Consent Decrees, with destructive effects upon software and hardware market competition, is pointedly alleged in this complaint.

In 1997-1998, MICROSOFT/IBM continued to violate antitrust laws and to exploit and increase their monopoly power(s). Thus, (after many formal and informal warnings (issued over many months from FTC, DOJ, State Attorneys General, and the United

States Congress) federal, state, and private antitrust actions against MICROSOFT and its' conspirators (not formally named in state/federal complaints but clearly referenced as OEMs) was necessary to protect national and international businesses and consumers.

As stated above and now for emphasis, in January 2000, MICROSOFT settled an antitrust tying action with Caldera, Inc. for a reported \$275. million, and engaged in negotiations toward settlement of federal and state prosecutions noted above. When those negotiations broke down, the first district court released it's Conclusions of Law (Judgment).

OBRIEN is a proper party and among the most qualified to bring this action for antitrust injury and treble damages against defendants because its' claims comprehensively satisfy statute tests and court's precedential tests for antitrust standing, and Plaintiff appropriately and comprehensively follows suit in a continuum of actions by federal, state and private litigants. Where Caldera, Inc. claimed antitrust tying by MICROSOFT of its' OS product(s), OBRIEN alleges antitrust tying by IBM/MICROSOFT of OP product(s), and alleges, for the first time privately, supplementary California antitrust claims against IBM.

B. Evidence for IBM Violations, *Prima Facie*

IBM engaged in monopolization, attempted monopolization, illegal tying, and predatory pricing of OFFICE, NOTES, SMARTSUITE, and certain other software products by installing the software in MAINFRAME, MINI, and PC/NB computers for sale, and making little or no additional markup in price of so installed computers.

There exists an abundance of evidence in Plaintiff's possession for proof of alleged antitrust violations by IBM, in conspiracy and full cooperation with MICROSOFT.

"The court further finds that defendant threatens to, and will unless restrained by the following equitable relief, continue its unlawful conduct to the irreparable injury of plaintiffs and of the industry and the public generally, but with the damage and equitable constraints herein provided it is likely that such further injury can be avoided...IBM should be enjoined and required to price separately its separate EDP products, including but not limited to CPU's, memories (as set forth in paragraph F128), tape products and their controllers, disk products and their controllers, printer products and their controllers and communication controllers." [*Telex Corp. v. International Business Machines, Inc.*, 367 F. Supp. 258 (1973), pp. 312]

"EDP" is Electronic Data Processing. "Tape products" is tantamount to "software" in 1973. "Communication controllers" can be made analogous to communications software. IBM's NOTES and Lotus Domino are excellent examples of communication software.

"IBM should be enjoined from adopting, implementing or carrying out predatory pricing, leasing or other acts, practices or strategies with intent to obtain or maintain an illegal monopoly in a relevant market for EDP peripheral equipment plug compatible to its

CPU's or any relevant submarkets thereof, in violation of Section 2 of the Sherman Act." [Ibid., p. 313, note 48]

"Plug compatible" in 1973 meant "able to be connected to or installed within". Since 1994, software can be accessed inter CPU via remote, "plug-in" drives and, inter browser, via installation and/or download of specialized "plug-in" software. (example: QuickTime 4.0)

"Evidence established that manufacturer of electronic data processing systems undertook selective pricing with specific and predatory intent suppressing and eliminating competition in plug compatible peripheral products and warranted finding of attempted monopolization in light of such effort and intent to maintain monopoly, coupled with apparent present ability to do so. Sherman Anti-Trust Act, sec. 2, 15 U.S.C.A., sec. 2." [Ibid., p. 260, note 16.]

On May 25, 2000, as the federal court in Washington D.C. deliberated on issues of final judgment and appropriate remedies re *U.S v. Microsoft*, it was important to realize that "Microsoft's effort to protect its' operating systems monopoly - and to extend that monopoly into the Internet browser market - encompassed a full catalogue of exclusionary practices:" [BRIEF ON REMEDY OF AMICI CURIAE COMPUTER AND COMMUNICATION INDUSTRY ASSOCIATION AND SOFTWARE AND INFORMATION INDUSTRY ASSOCIATION, Argument: A.(1)b., CV 98-1232/1233 (TPJ)], and to realize that said extension of monopoly, re bundling and distribution of IE, has been and continues to be (primarily) via OFFICE/IE tied to OS agreements with IBM and other OEMs.

C. Origination

Monopolization, maintaining a monopoly's "barriers to entry", predatory pricing, illegal tying, exclusive dealing, price discrimination, use of "vaporware", customer/competitor coercion...why do these antitrust charges made and upheld against IBM in numerous legal actions in the 50's, 60's and 70's read exactly like MICROSOFT's charges in federal/state/private actions in the 80's and 90's ?

Could it be that MICROSOFT's violations claimed and found by federal court in [CV-98-1232/1233 (TPJ)] and [CV-96-645 (B)] are actually *emulations*, clones if you will, of MICROSOFT's powerful and more experienced partner, IBM ?

It is not too difficult to see IBM actually training and encouraging (financially and otherwise) the young entrepreneur, Bill Gates, to duplicate its' successful sales methods in exchange for production of operating systems and other software which IBM was kept from successfully selling itself due to certain restraints issuing from its' Consent Decree (1956) and other proven federal/state liabilities (*Telex*, et al.), referenced above.

As a junior partner without proven federal/state liability in early 1980's, MICROSOFT was considered very useful to IBM. MICROSOFT a promising software developer and

perhaps even more cognizant of contemporary software issues than IBM, with full approval from IBM (and perhaps financing), purchased the original DOS program from a Seattle company for only \$50,000. IBM could have done that, and developed DOS in-house and exclusively IBM.

Junior partners tend to become like senior partners. Notice MICROSOFT was charged by APPLE with antitrust crimes only a year or two after MICROSOFT began to "study" under IBM.

Later, in the mid 90's, MICROSOFT (finally exonerated in 1992 of charges brought by APPLE) would (ostensibly) break with IBM largely because of MICROSOFT's effective employment of IBM's own marketing/licensing methods re Windows OS, and go on to perfect and establish those methods industry wide.

Certainly not without antitrust liability, MICROSOFT and its' founder must, nevertheless, be viewed sympathetically as without copyright/patent for illegal, computer industry sales methods.

Credit for origination belongs to the *dp* pioneer, International Business Machines, Inc., while credit for perfection must go to MICROSOFT.

XIV. DISCUSSION ON REMEDIES

As found in allegations preceding, OBRIEN sustained business injury justly 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

Federal antitrust statutes specify penalties and/or remedies for proven breach(s) of Title 15, United States Codes, sections 1, 2, 13a 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.

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 therefor 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) Sec. 18: "Divestiture is potential remedy for private parties injured by violations of Clayton Act. *Fuchs Sugars & Syrups, Inc. v Amstar Corp.* (1975, SD NY) 402 F Supp 636, 1975-2 CCH Trade Cases, sec. 65436 " [United States Codes Service *Lawyers Edition* (1985) at 15 U.S.C., sec. 18, notes no. 128 "Remedies"]

g) "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>)]

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.

Declaration of Penalties/Remedies:

On its face it appears, in this private antitrust case, that the appropriate penalty/remedy for proven breach of sec.1, 2, 13a, 14 and 18 is:

- a) For convictions on Sections 1 and 2: International Business Machines Corporation must pay two-million dollars (trebled) to Plaintiff.
 - b) For convictions on Sections 1 and 2: Mr. Louis V. Gerstner, Jr. must pay two-hundred thousand dollars (trebled) to Plaintiff.
 - c) For conviction on Section 13a: Both Defendants, individually and/or collectively, must pay \$5,000 (trebled) to Plaintiff.
 - d) For conviction on Section 14: Both Defendants, individually and/or collectively, must pay a sum of money to be computed under State criteria at Section 2.(b)3 below.
 - e) For conviction on Section 18: IBM corporation must divest Lotus Development Corporation within a reasonable period of time as determined by the court.
- c) Plaintiff does not, and will not, claim imprisonment as an appropriate penalty/remedy for any of defendants' proven antitrust offenses.

B. State 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.

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)]

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:

(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 gain multiplied by two or an amount equal to the amount of the gross loss multiplied by two, whichever is applicable."

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.: International Business Machines Corporation must pay two-million dollars (trebled), or the gain (pecuniary) that IBM derived from breaches of these antitrust laws, if the gain is proven greater than \$2.0 million.

b) For convictions on Sections 16000, et seq. and Section 17000 et seq.: Mr. Louis V. Gerstner, Jr. must pay two-hundred thousand dollars (trebled), or the gain (pecuniary) that Mr. Gerstner derived from breaches of these antitrust laws, if the gain is proven greater than \$2.0 million.

XV. PRAYER

Cited controlling by the Jackson court defending its' decision to breakup MICROSOFT are MICROSOFT's OFFICE/IE tying violations.

Although 15 U.S.C., section 18 speaks of divestiture as an appropriate remedy only for illegal merger, breakup of MICROSOFT cannot remedy the problems found in software company. MICROSOFT, even if broken up into separate OS, OP, and IE companies, will nevertheless retain its' ability to demand tie-in sales of OFFICE/IE inter OS licensing sales to OEMs.

The OFFICE Company ["OC"] and the IE Company ["IEC"] will certainly have the ability to exercise strong influence, if not direct command, to fulfill OS Company ["OSC"] strategies inter software/hardware/Internet industries. OSC will be able to compell, informally of course, OEMs to install OC and IEC products in their computers containing a MICROSOFT OS.

OSC will most probably enjoy *de facto* if not *de jure* affiliate status (or more equity) in OC and IEC businesses.

If historical fact allows valid prediction, failure by OEMs to illegally purchase tied products will meet with OSC displeasure, and be reflected in subsequent negotiations for OS licenses. Complying OEMs will, naturally, receive bigger licensing fee discounts. Contested issues between OSC and OEMs, technically inflammatory but largely irrelevant, will be publicly and artfully cited as cause(s) for licensing fee variables. Thus, escape from "exclusive dealing" charges, as in the recent past, will be accomplished by OSC, even as it continues to advance international exclusionary practice.

So where is the remedy for exclusionary practice in MICROSOFT's breakup? Did Standard Oil, Inc. stop monopolizing after its' breakup, and if so how long did it take?

Power to remedy business inequities is usually found in the nature of business...money. Presently, and in future, MICROSOFT 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 MICROSOFT will realistically tend to comprehensively and effectively curtail the malefactors' *de facto* and *de jure* illegal plans and actions.

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 MICROSOFT, not all.

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 IBM's future actions (and indeed the actions of an entire industry led by IBM) to award punitive (exemplary) damages of a financial (pecuniary) nature.

Toward the goal of better computer business globally, OBRIEN 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.

OBRIEN'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, OBRIEN 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.

1. OBRIEN claims and prays for compensatory damages (business and personal) in the amount of \$10,500,000.
 2. OBRIEN claims and prays for IBM's divestiture of Lotus Development Corporation as soon as deemed practicable by the Court.
 3. OBRIEN 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.
 4. For award to plaintiff of its attorneys' fees and other costs of suit.
 5. For such other and further damage award and/or relief as the Court deems just and equitable.
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DATED this 5th day of October, year of our Lord, 2000.

Executed by _____

Edward Michael O'Brien

Pro se

Victoria Center

P.O. Box 91003

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Keynote made on June 7, 2000 only hours after the District Court issued its final judgment of Microsoft re CV 98-1232/1233 (TPJ): Title 15, U.S.C., section 1 reads, "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."

Why did not the Court state in its' Conclusions of Law and Final Judgment who had illegal contract(s), combination(s) and/or conspiracy(s) with Microsoft when it was convicted of violating (15 U.S.C., sec. 1). Who were conspirators with Microsoft, and so equally liable for violation of section 1.

Makers of PC, MINI (Server) and/or Mainframe computers are officially named "Original Equipment Manufacturers (OEM)". OEMs were in conspiracy with Microsoft in performance of federally alleged and proven illegal acts. Some OEMs cannot claim a business justification for their actions in conspiracy with MICROSOFT.

International Business Machines, Inc. (IBM) is the greatest of these OEMs. IBM was doing nicely in 1997 with strong OS and OP sales supporting increases in computer sales. Without a survival rationale, IBM joined MICROSOFT's conspiracy simply to increase profits...illegally.
