Amended pursuant to Supreme Court Rule 6-1(1)(b)(i).

Original Writ of Summons and Statement of Claim filed December 23, 2004.
Amended Statement of Claim filed November 23, 2005 pursuant to Order of Master Bolton made November 18, 2005.
Further Further Amended pursuant to 24(1)(b) and the Order of Master Barber made April 12, 2006
Third Further Amended Statement of Claim pursuant to Rule 24(1)(b) and the Order of Mr. J. Tysoe made November 24, 2006
Fourth Further Amended Statement of Claim pursuant to Rule 24(1)(b) and the Order of Mr. Justice Myers made Jan 20, 2014
Fifth Further Amended Statement of Claim pursuant to Rule 6-1(1)(b)(i) and the Order of Mr. Justice Myers made July 11, 2014

No. L043175
Vancouver Registry

In the Supreme Court of British Columbia

Between:

Pro-Sys Consultants Ltd. and Neil Godfrey

Plaintiffs

and:

Microsoft Corporation and Microsoft Canada Co./
Microsoft Canada CIE

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT*, RSBC 1996 c. 50

~~FOURTH~~ FIFTH FURTHER AMENDED STATEMENT OF CLAIM

THE PARTIES

1. The plaintiff Pro-Sys Consultants Ltd. ("Pro") is a British Columbia company with its registered office in Richmond, British Columbia, which, in or about March 29, 2002, purchased a laptop computer with a preinstalled Microsoft Operating System and Microsoft Applications Software. Pro thereafter became a licensee of the preinstalled Microsoft Operating System and Microsoft Applications Software for its own use and not for the purpose of resale or lease.

1A. The plaintiff Neil Godfrey is a businessman resident in Vancouver, British Columbia who has purchased several personal computers since 1989 for his personal use including a personal computer purchased in 2005. All of these personal computers have relied on Microsoft Operating Systems and Microsoft Applications Software.

2. Microsoft is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Redmond, Washington. Microsoft, through its affiliates and subsidiaries, is engaged in the development, manufacture, distribution, sale and license of operating systems and applications software for personal computers in Canada and worldwide. In its fiscal year 2003, Microsoft had revenues of approximately US$32 billion and net income of approximately US$9 billion dollars from its operations.

3. Microsoft Canada is a corporation organized and existing under the laws of the Province of Ontario, with its principal place of business in Mississauga, Ontario. Microsoft Canada is wholly owned and controlled by Microsoft and is engaged in the distribution, licensing and sale of operating systems and applications software for PCs in Canada. In its fiscal year 2003, Microsoft Canada had revenues of more than CDN$1 billion dollars.

4. Microsoft asserts that it is the worldwide leader in personal computing software. Microsoft and Microsoft Canada assert that Microsoft Canada is the industry leader in Canada with a dominant market share and brand awareness.

5. Throughout the Class Period, Microsoft and Microsoft Canada sold, marketed and licensed Microsoft Operating Systems and Microsoft Applications Software to manufacturers and sellers, distributors and resellers of PCs in British Columbia and elsewhere in Canada.

THE DEFINITIONS

6. The following definitions apply for the purpose of this Statement of Claim:

   (a) **"*Act*"** means the *Class Proceedings Act,* RSBC 1996 c. 50, as amended;

   (b) **"Adobe"** means Adobe Systems Incorporated;

   (c) **"Be"** means Be Inc.;

   (d) **"Borland"** means Borland International, Inc.

   (e) **"Budgetron"** means Budgetron Inc.;

(f) **"Burst"** means Burst.com Inc.;

(g) **"Class Period"** means the period from January 1, 1994 to the date the Court certifies this action as a class proceeding;

(h) **"Class"** or **"Class Members"** means all persons resident in British Columbia who, on or after January 1, 1994, indirectly acquired a license for Microsoft Operating Systems and/or Microsoft Applications Software for their own use, and not for purposes of further selling or leasing;

(i) **"Compaq"** means Compaq Computer Corporation;

(j) **"*Competition Act*"** means the *Competition Act*, R.S. 1985, c. 19 (2nd Suppl.), as amended;

(k) **"Corel"** means Corel Corporation;

(l) **"Dell"** means Dell, Inc.;

(m) **"DRI"** means Digital Research Inc.;

(n) **"Gateway"** means Gateway, Inc.;

(o) **"Go"** means Go Corporation;

(p) **"Hewlett Packard"** means Hewlett-Packard Corporation;

(q) **"IBM"** means International Business Machines Corporation;

(r) **"Intel"** means Intel Corp.;

(s) **"Lotus"** means Lotus Development Corporation;

(t) **"Micrografx"** means Micrografx Inc.;

(u) **"Microsoft"** means Microsoft Corporation;

(v) **"Microsoft Applications Software"** means any full or upgrade version of Microsoft's Word or Excel applications software or any full or upgrade version of Microsoft's Office, Works Suite, or Home Essentials applications suites, intended for use on Intel-compatible personal computers;

(w) **"Microsoft Canada"** means Microsoft Canada Co./Microsoft Canada CIE;

(x) **"Microsoft Operating Systems"** means any full or upgrade version of Microsoft's MS-DOS or Windows operating systems software intended for use on Intel-compatible personal computers;

(y) **"Netscape"** means Netscape Communication Corporation;

(z) **"Novell"** means Novell, Inc.;

(aa) **"Overcharge"** means the difference between the prices the defendants actually charged for Microsoft Operating Systems and Microsoft Applications Software in the PC market in Canada and the prices that the defendants would have been able to charge in the absence of their wrongdoing;

(bb) **"RealNetworks"** means RealNetworks, Inc.;

(cc) **"Sun"** means Sun Microsystems Inc.;

(dd) **"WordPerfect"** means WordPerfect Corporation; and

(ee) **"Z-Nix"** means Z-Nix Inc.

TECHNICAL AND INDUSTRY TERMS

7. The following subparagraphs provide explanations of technical and industry terms used in this statement of claim:

(a) **"applications"** are software programs such as word processors (e.g. Microsoft Word) and spreadsheets (e.g. Microsoft Excel) that perform specific tasks. Applications are typically written to run on a particular operating system;

(b) **"APIs"** or **"applications programming interfaces"** are blocks of code in the operating system (and certain other software) that can be used by applications to perform various functions. For example, when a computer user opens a word processing document, the word processing software issues a "call" to a particular API in the operating system. The operating system then instructs the computer to perform the instruction associated with that API. The same API can be used by other applications allowing for example, a user of spreadsheet software to also open spreadsheet documents;

(c) **"beta"** software is pre-release computer software that is sometimes distributed to users for testing and debugging before release of the final version;

(d) **"boot manager"** is software that allows multiple operating systems to be installed and run on the same PC;

(e) **"code"** or **"source code"** is a series of statements written in a programming language that can be read by humans. A computer program's source code is the collection of instructions that can be converted from this human-readable form to an equivalent computer-executable form.

(f) **"CPUs"** are the central processing units of the PC;

(g) **"DOS"** is a character-based operating system for use on Intel-compatible PCs;

(h) **"dual boot"** refers to a PC with more than one operating system installed where the user is given the option of selecting the operating system to load and run each time the computer is started;

(i) **"FUD"** means fear, uncertainty and doubt. In the computer industry, FUD generally refers to the use of disinformation as a competitive weapon to prevent decision-makers from adopting less well-known products regardless of their technical merits;

(j) **"GUIs"** or **"graphical user interfaces"** is software that allows users to issue commands to the PC by means of pointing and clicking on symbols representing

functions using a mouse or other pointing device. Early PC operating systems used character-based interfaces, in which users needed to type commands. In 1985, Microsoft began marketing a GUI-based operating environment for Intel-compatible PCs called Windows. Windows 3.0, which was released in 1990, was the first version of Windows to gain widespread adoption in the market;

(k) **"hypertext"** is a collection of documents containing cross-references or "links" to other documents on the web which, with the aid of a browser program, allow the user to jump from one document to another;

(l) **"IAP"** mans internet access provider;

(m) **"Intel-compatible PCs"** are PCs that use central processing units from Intel's x86/Pentium family of processors or compatible microprocessors manufactured by other firms (*e.g.* Advanced Micro Devices Inc.'s Athlon processors);

(n) **"internet"** means a global electronic network, consisting of smaller, interconnected networks, which allows millions of computers to exchange information;

(o) **"initial boot sequence"** is the process that occurs the first time a user turns on a PC. A boot sequence is the set of operations performed by a computer to load an operating system and other software when the computer is turned on;

(p) **"ISVs"** or **"independent software vendors"** are firms that develop applications and other software. They are "independent" in as much as they are not part of a vertically integrated hardware and software company. Examples of ISVs include Adobe, Lotus, Novell, and, in Canada, Corel;

(q) **"Java"** is a programming language and related technologies developed by Sun. Programs written in Java are run on another program called the Java Virtual Machine ("JVM"). Instead of running directly on the native operating system, the JVM interprets the program for the native operating system. Consequently, any

computer with a JVM installed can run a Java program regardless of the underlying operating system on that computer.

(r) **"Linux"** is an operating system that runs on Intel-compatible PCs and servers, among other hardware. The core of the Linux operating system is open source.

(s) **"MDA"** means market development agreements between Microsoft and/or Microsoft Canada and OEMs;

(t) **"middleware"** is software that "sits" between two or more types of software and translates information between them. Middleware generally sits between an operating system and an application, and takes advantage of the APIs of the underlying operating system while also providing its own APIs for applications that run on top. In some cases, a middleware product is an application, and it provides APIs for the purpose of being used in combination with other applications. In other instances, middleware can simply be a translator, providing APIs for the purpose of allowing the same applications to be used on one or more operating systems that have different API sets. An application that relied only on the APIs provided by middleware could run on any computer on which the particular middleware was present, regardless of the underlying operating system. Middleware can also act as a platform if it exposes enough functions through its API set to allow software developers to write their programs into that middleware;

(u) **"network-centric"** refers to computing systems on which applications are run, in whole or in part, over the network, rather than on individual PCs;

(v) **"NSP"**, Intel's Native Signal Processing, is software that allows Intel's x86 family of processors to carry out tasks usually performed by separate chips known as "digital signal processors" and endows those processors with substantially enhanced capabilities';

(w) **"Object Windows Library"** or **"OWL"** means a feature of Borland's C++ programming language that enables programmers to write applications that were

platform independent, i.e., the applications could be written to OWL's APIs, not the operating systems' APIs.

(x) **"OEMs"** or **"original equipment manufacturers"** means PC manufacturers such as Dell, Gateway, Hewlett Packard, Acer, Lenovo, Toshiba, Sony, LG Electronics, Panasonic, Fujitsu/Fujitsu Siemens, Averatec, and IBM and, in Canada, Budgetron;

(y) **"open source"** means any software whose source code is distributed under an open source license requiring that the source code be distributed along with the software and that the source code be freely modifiable. Linux is an example of an open source operating system;

(z) **"operating system"** or **"OS"** is the software that controls the interaction between the computer's central processing unit, memory and attached devices such as keyboards, disk drives, display monitors and printers. The operating system also serves as a "platform" from which applications such as word processing, spreadsheet, financial accounting, browsers, and games can be launched. An operating system designed to run on Intel-compatible PCs (such as Microsoft's MS-DOS or Windows) will not function on PCs designed around other microprocessor architectures (such as Motorola or IBM's PowerPC processors) without modification. Microsoft's MS-DOS and Windows are examples of operating systems that run on Intel-compatible PCs;

(aa) **"PCs"** means personal computers;

(bb) **"platforms"** are any software or hardware on which other software can run. Platforms generally contain APIs that permit applications to invoke functions such as printing. Applications are "written" to a particular platform so as to take advantage of those APIs. Because of differences in API sets, applications written for one platform generally will not function on another platform without "porting" (i.e., being rewritten to use the APIs of the other platform to which the software is being "ported");

(cc) **"protocols"** are the common set of rules and instructions that computers follow when they communicate with each other;

(dd) **"Samba"** means open source software that can be run on a platform other than Microsoft Windows and that allows the host to interact with a Microsoft Windows client or server for file and print services;

(ee) **"web"** or **"World Wide Web"** is a collection of digital information stored on computers known as "web servers" connected to each other via the internet. The web is a portion of the "internet" which stands for "interlinked networks" and is a global network of individual computer networks linked together;

(ff) **"web browser"** is a type of application that enables a user to select, retrieve, and view resources on the web. In particular, web browsers provide a way for a user to view hypertext documents and follow the hyperlinks that connect them, typically by moving the cursor over a link and pressing the mouse button;

(gg) **"workgroup servers"** are computers that provide the basic infrastructure services that are used by office workers in their day-to-day work, namely sharing files, sharing printers, and the administration of how users and groups of users can access these services and other services of the network (for example, applications installed on the client PCs or servers); and

(hh) **"workgroup server operating systems"** are operating systems designed and marketed to deliver workgroup server services collectively to relatively small numbers of client PCs linked together in small to medium-sized networks.

THE NATURE OF THIS ACTION

8. Microsoft is the world's dominant firm in PC operating systems and applications software. Microsoft markets and licenses its software throughout the world, including Canada, largely through manufacturers, sellers and independent distributors of PCs. Microsoft Canada is the wholly-owned Canadian subsidiary of Microsoft.

9. Canada is part of a North American and worldwide market for PC operating systems and applications software.

10. Beginning as early as 1988, and continuing to present, Microsoft has pursued a business plan to exclude competition in the markets for Intel-compatible PC operating systems and applications software. Microsoft and Microsoft Canada engaged in a repeated, continuous, and continuing course of wrongful and anti-competitive acts done by unlawful means contrary to the public interest. Microsoft and Microsoft Canada directed their unlawful conduct toward consumers in Canada including the plaintiffs and the other Class Members while they knew, or should have known in the circumstances, that injury to the plaintiffs and the other Class Members was likely to result and has resulted.

11. Beginning in the late 1980's and early 1990s, and continuing to the present, Microsoft and Microsoft Canada have pursued a business plan to abuse their operating systems and applications software dominance. They engaged in a repeated, continuous, and continuing course of wrongful and anti-competitive acts done by unlawful means contrary to the public interest and directed toward consumers in Canada including the plaintiffs and the other Class Members while they knew, or should have known in the circumstances, that injury to the plaintiffs and the other Class Members was likely to result and has resulted.

12. Microsoft's unlawful conduct, in combination and agreement with and furthered by Microsoft Canada, certain IAPs, ISVs, OEMs (including Budgetron, Dell, Gateway, Hewlett Packard, Acer, Lenovo, Toshiba, Sony, LG Electronics, Panasonic, Fujitsu/Fujitsu Siemens, Averatec, and IBM), and Intel, constitutes wrongful and anti-competitive acts that were calculated to produce, and have produced, pernicious monopolies that virtually annihilated competition such that Microsoft is able to and is charging and receiving artificially inflated supra-competitive prices for Microsoft Operating Systems and Microsoft Applications Software that it otherwise would not have been paid in competitive markets unfettered by the effects of its unlawful conduct. Manufacturers and sellers of PCs and distributors of Microsoft products, because of the competitive nature of the distribution channels through which Microsoft Operating

Systems and Microsoft Applications Software reaches end users, have passed through these supra-competitive prices to Canadian consumers, including to the plaintiffs and the other Class Members.

13. As a direct consequence of the defendants' unlawful conduct, the plaintiffs and all other Class Members paid and continue to pay higher prices for Microsoft Operating Systems and Microsoft Applications Software than they otherwise would have paid in the absence of the defendants' conduct. As a result they have suffered damages.

MICROSOFT'S DOMINANCE OF THE INTEL-COMPATIBLE PC OPERATING SYSTEMS MARKET

14. In 1981, Microsoft contracted with IBM to develop the operating system software for the first IBM Intel-compatible PC. Microsoft acquired rights from another company for a product called QDOS, which borrowed heavily from an operating system developed by DRI called CP/M. Microsoft changed the name of QDOS to MS-DOS and licensed it to IBM and others.

15. By the mid-1980's, MS-DOS had become entrenched as the standard in the Intel-compatible PC operating systems market. The price of MS-DOS in the OEM channel escalated from US$2-$5 per copy in the 1981-1982 period to US$25-$28 per copy by 1988, even though MS-DOS remained largely unchanged during that time.

16. Microsoft has dominated the Intel-compatible PC operating systems market in North America and worldwide ever since. During most of the Class Period, Microsoft's MS-DOS and Windows operating systems have enjoyed market shares exceeding 95 percent in North America. As described further below, Microsoft engaged in a course of unlawful exclusionary and anti-competitive conduct, before and throughout the Class Period, which had the effect of increasing, maintaining and abusing its dominance in the market.

17. Microsoft's dominance is protected by high barriers to entry into the operating systems market, including the "applications barrier to entry." Consumers want an operating system for which there exists a substantial library of software applications. Software

developers, however, are reluctant to write applications to run on an operating system (and thereby make the platform more attractive to consumers) until it has attracted a sufficiently large user base. Thus, the small or non-existent market share of an aspiring competitor makes it difficult to develop its PC operating system into an acceptable substitute for Microsoft's Operating Systems. At the same time, the fact that a larger number of applications have been written to run on Microsoft Operating Systems than on other platforms has attracted end users to Microsoft's Operating Systems; end users assume that their interests in applications will be met as long as they use Microsoft's product.

18. Microsoft distributes its Microsoft Operating Systems through two different channels: the OEM channel and the "finished goods" channel. The overwhelming majority (in excess of 85 percent in North America) of Microsoft Operating Systems are distributed through the OEM channel. Microsoft's dominance in the operating systems market, and over its OEM distributors, is such that OEMs and Microsoft both recognize that sellers of Intel-compatible PCs have no commercially viable substitute for Windows operating systems and accordingly Microsoft has been able to use its dominant position to charge prices for its Microsoft Operating Systems that are substantially above what it could charge in a competitive market.

MICROSOFT'S ABUSE OF ITS DOMINANT POSITION IN THE INTEL-COMPATIBLE PC OPERATING SYSTEMS MARKET

19. Beginning as early as 1988, Microsoft embarked upon a campaign to prevent or lessen competition substantially and to thereby increase the price of its products in the market for Intel-compatible PC operating systems. Microsoft Canada and others actively participated in or facilitated that campaign. As a part of the campaign, Microsoft and Microsoft Canada combined or agreed with others, including IAPs, ISVs, OEMs, and Intel to prevent or lessen, unduly, competition and to otherwise restrain or injure competition unduly. As a consequence, Microsoft has unlawfully maintained and abused its dominant position in the North American market for Intel-compatible PC operating systems and has charged supra-competitive prices.

Microsoft's Campaign Against DR DOS

20. Around 1987, DRI, which had developed the CP/M OS on which MS-DOS was based, began planning a new version of DOS to be called DR DOS. The result of DRI's efforts was a product designated as DR DOS 3.31 (introduced in 1988) followed by an enhanced DR DOS 5.0 (in 1990) and DR DOS 6.0 (in 1991). DRI's DOS versions were direct competitors to MS-DOS. They received numerous industry awards and enthusiastic reviews. DR DOS was offered at prices below the supra-competitive price levels of MS-DOS products.

21. Microsoft responded to the DR DOS threat by engaging in a campaign of anti-competitive practices with OEMs, including:

(a) entering into agreements for "per processor" licenses with certain OEMs, including Budgetron in Canada, beginning in 1988 when DR DOS was released. These licenses effectively shut out DRI from covered OEMs because the agreements required the OEMs to pay Microsoft a royalty on each such PC shipped regardless of whether a Microsoft Operating System was installed. An OEM that installed DR DOS or another non-Microsoft operating system would have to pay two license fees on each PC (one to Microsoft, and one to the developer whose operating system was actually installed);

(b) entering into agreements for long-term licenses. Even though the life cycle of a DOS release was somewhat less than two years, Microsoft required OEMs to enter into agreements of two and three years duration, which insured the OEM would continue to purchase Microsoft product beyond the life cycle of a release. By lengthening the duration of the contracts, Microsoft denied the entry of any competitor and perpetuated the exclusionary effects of the per-processor licenses;

(c) entering into agreements for minimum commitment licenses often with "pre-paid balances". Microsoft required OEMs to enter into agreements with minimum purchase commitments that usually exceeded the commercially realistic expectations of the number of computers the OEM would ship. At the end of the agreement, the OEM would have either an outstanding owed balance for

operating systems the OEM was committed for but did not sell or a "pre-paid balance" from advances paid for operating systems they did not ship. Microsoft would then threaten to enforce the unmet minimum commitments or refuse to refund "pre-paid balances" unless the OEM agreed to enter into exclusionary agreements with Microsoft for the next period of licensing. The net effect of the minimum commitments made it more costly for an OEM to switch to a Microsoft competitor;

(d) establishing a pricing structure for Windows licences that made it prohibitively expensive for OEMs to license Windows without also licensing MS-DOS, thereby making it economically unfeasible for OEMs to install Windows to run on top of DR DOS. Microsoft informed OEMs that the price for Windows alone would be higher than the price of Windows and MS-DOS combined;

(e) providing OEMs who explicitly or implicitly agreed to purchase and ship MS-DOS to the exclusion of DR DOS with preferential treatment with respect to access to essential information, product support and service; and

(f) retaliating against OEMs that did not comply with Microsoft's wishes. For instance, Z-Nix supported DR DOS by bundling DR DOS 6.0 and Microsoft Windows 3.1 and claimed no incompatibility between the systems. Following Microsoft's audit demands and a copyright and infringement action commenced against it by Microsoft, Z-Nix filed for bankruptcy in or around 1995.

22. Microsoft also responded to the DR DOS threat to its Microsoft Operating Systems with a campaign of other anti-competitive practices including:

(a) engaging in a campaign, in combination with its outside public relations agency, Waggener Edstrom, and others, to create FUD regarding the use of DR DOS. Microsoft reported supposed flaws in DR DOS to journalists who covered the industry (many of whom relied on their close relationships with Microsoft) as crippling "bugs," while not mentioning that MS-DOS releases had such severe bugs that Microsoft was required immediately to release "patches" to cure them;

(b) putting Novell (which had acquired DR DOS in a merger with DRI in 1991) on a "beta blacklist," refusing to provide a Windows 3.1 beta to Novell's DR DOS development team, and thereby hampering Novell's ability to offer a Windows 3.1 compatible release of DR DOS, even though Microsoft allowed other ISVs to participate in Microsoft's beta program;

(c) inserting secret, encrypted code into the final Windows 3.1 beta version that triggered a false error message whenever a PC was running DR-DOS with Windows. This secret code had the intended effect of creating concern among OEMs and influential users about DR DOS. While this code was inactive in the final version of Windows 3.1, it had had its intended effect of creating FUD among influential beta testers; and

(d) beginning with Windows 95 (and continuing with later releases), bundling its Windows operating environment with MS-DOS, so that consumers could no longer purchase the latest version of Windows separately and decide to run it on top of DR DOS.

23. In September 1994, as a result of Microsoft's practice of wrongful and anti-competitive acts, Novell announced that it would cease the marketing and development of DR DOS. Microsoft had succeeded in eliminating DR DOS as a competitive threat in the operating systems market. After Novell's announcement, Microsoft increased the price of MS-DOS to reflect the reduced market competition.

Microsoft's Campaign Against OS/2

24. In the mid-1980's, Microsoft and IBM decided to collaborate on a new operating system that would replace MS-DOS. The product, which was later sold under the name OS/2, was intended to be a state-of-the-art, GUI-based operating system for PCs. However, as Microsoft's monopoly position in operating systems became more entrenched because of Microsoft's per-processor licensing and other anti-competitive acts, Microsoft lost interest in collaborating with IBM. In 1991, IBM and Microsoft terminated their joint development agreement, leaving IBM to continue development of OS/2 alone.

25. Microsoft engaged in a campaign of wrongful and anti-competitive conduct to exclude OS/2 from the OEM distribution channel. That campaign included:

(a) imposing restrictive OEM licenses that permitted OEMs to only market Microsoft Operating Systems, effectively cutting IBM off from the critical OEM channel;

(b) entering into agreements for "per processor" licenses with certain OEMs which effectively shut out OS/2 from covered OEMs because the agreements required OEMs to pay Microsoft a royalty on each PC shipped regardless of whether a Microsoft Operating System was installed. Consequently, a covered OEM that installed OS/2 would have to pay two license fees on each PC;

(c) entering into long term (2-3 year) agreements with OEMs that exceeded the life cycle of a DOS release and effectively tied the OEM to each subsequent Microsoft Operating System release; and

(d) imposing commercially unrealistic minimum commitment requirements with OEMs often with pre-paid balances, used as leverage to induce the OEM to enter into exclusionary agreements with Microsoft at the next round of licensing.

26. An important feature of OS/2 was its ability to run OS/2, Windows and DOS applications simultaneously. Microsoft undermined this important feature, and thereby created FUD among users and potential users of OS/2. Microsoft's wrongful and anti-competitive conduct included:

(a) strategically using its control over Windows source code to cause delays in OS/2's ability to run Windows applications, notwithstanding its obligation under its joint development agreement with IBM to provide Windows source code compatibility for OS/2;

(b) modifying Windows to create incompatibilities between OS/2 for Windows and Windows 3.11 when Microsoft learned that IBM was creating a version of "OS/2 for Windows" that would make it easier for users who already had DOS/Windows installed on their PCs to adopt OS/2.

27. By the mid-1990s, Microsoft's wrongful and anti-competitive conduct had the effect of eliminating OS/2 as a significant competitor in the operating systems market.

Microsoft's Campaign Against Go

28. Go was the developer of PenPoint, a PC operating system designed primarily to accept handwriting as a form of input. Intel was interested in Go's technology and initially offered to provide Go with substantial financing and a valuable endorsement of Go's technology. Microsoft demanded that Intel withdraw its support of Go's technology and Intel agreed to do so by withdrawing its endorsement and dramatically scaling back its investment. Microsoft also forced Compaq to license Microsoft's "Pen Windows" instead of Go's software, made unauthorized use of Go's valuable trade secrets, and participated in other predatory acts directed at Go. As a result of these wrongful and anti-competitive practices, Microsoft eliminated the competitive threat from Go.

Microsoft's Campaign Against BeOS

29. Be was the developer of BeOS, a powerful, graphical, easy to use operating system capable of handling the vast streams of data required by multimedia applications. From the time of its release in the Fall 1998, BeOS for Intel-compatible PCs received widespread praise from journalists and industry leaders for its technical capabilities, speed and ease of use.

30. Be sought to overcome the applications barrier to entry by adopting a "dual boot" strategy to position BeOS as a "complement" to Windows rather than to compete directly with the Microsoft Operating System. Be intended for BeOS to be pre-installed on new PCs alongside Windows. The user would then decide which operating system to load when starting up the computer. Over time, as more users adopted the BeOS, developers would write more applications software for the operating system.

31. Microsoft's restrictive licensing agreements with OEMs, coupled with its threats to raise the price of Windows to OEMs that installed Be's software on their computers, resulted in OEMs refusing to pre-install BeOS alongside Windows on their PC products. Despite backing from Intel, the technical capability of BeOS for multimedia applications and the

fact that Be eventually offered to license BeOS without royalty, Be was unable to convince even a single major OEM to offer a dual boot PC with BeOS pre-installed. In November 2001, Be sold its intellectual property and other technical assets to Palm, Inc. and exited the market.

Microsoft's Other Unlawful Conduct in the Operating Systems Market

32. When Microsoft ended certain long-term and per-processor licensing arrangements following an investigation by the United States Department of Justice (described in the findings adopted and relied on in paragraph 83 below), Microsoft developed and implemented new OEM licensing agreements with similarly restrictive effects. Microsoft entered into MDAs and other similar agreements with OEMs. Because of the relative size of the discounts offered, and the extremely narrow margins in the PC business, OEMs could not commercially forego participation in Microsoft's Windows MDA program. Moreover, Microsoft used the vague language in the MDA provisions to threaten withholding of the MDA funds unless OEMs abandoned or reduced their commitments to Netscape and Java. Because of Microsoft's ability to leverage these MDA discounts, OEMs were discouraged from pre-installing competing operating systems.

33. In 2000, Microsoft added a provision to its MDAs with OEMs prohibiting the sale of PCs without a pre-installed Microsoft Operating System. As a result of this provision, OEMs could no longer effectively sell only the hardware to resellers or end users and allow the end user to install the operating systems themselves. This strategy reduced the attraction of competing open source operating systems such as Linux. It also undermined the finished goods channel as an effective distribution channel for non-Microsoft operating systems.

34. Microsoft has engaged in, and continues to engage in, an orchestrated campaign to spread FUD about Linux and other open source projects that threaten Microsoft's dominance in the market for Intel-compatible PC operating systems. Microsoft requires end users of its Microsoft software to enter into restrictive end user license agreements with Microsoft. Microsoft dictates the terms of these agreements, which impose significant restrictions on

the use of the software by the end user licensee and grants Microsoft certain rights and remedies against the end user licensee for breach of the license agreement. The restrictions, for instance, preclude reverse engineering of the software. They also restrict use of Microsoft Applications Software (such as Internet Explorer and Office) to Microsoft Operating Systems. These restrictions create FUD among ISVs who wish to create software to allow Microsoft Applications Software to run non-Microsoft operating systems, and among end users who wish to run Microsoft Applications Software on non-Microsoft operating systems. Given Microsoft's monopoly in important applications markets, such as word processor and spreadsheet software, the effect of Microsoft's license restrictions – and the resulting FUD – is the maintenance of the applications barrier to entry against competing operating systems.

35. Microsoft has pressured Intel, as well as various major OEMs such as Dell and Compaq, to boycott Linux. Microsoft has also taken steps to the detriment of Linux in the OEM market by restricting source code deliveries to OEMs and intentionally interpreting MDA's against the interests of Linux.

36. LindowsOS (now known as Linspire), which is developed and marketed by Lindows.com, Inc., is an Intel-compatible PC operating system based on Linux that competes directly with Microsoft on the PC desktop. Microsoft interfered with Lindows.com, Inc.'s ability to distribute its product through the OEM channel.

37. The results of Microsoft's wrongful and anti-competitive agreements and arrangements with OEMs throughout the 1990's and continuing to the present and its other anti-competitive acts as pleaded above, actively participated in or facilitated by Microsoft Canada and others, include, *inter alia*, that ISVs who wish to develop competitive operating systems have been excluded from the market.

MICROSOFT'S UNLAWFUL ACTIVITIES DIRECTED AT MIDDLEWARE AND OTHER CROSS-PLATFORM TECHNOLOGIES

Microsoft's Campaign Against Micrografx's Mirrors

38. In the late 1980s, Micrografx offered a developer tool called Mirrors that allowed applications written for Microsoft Operating Systems applications to be ported to OS/2 and vice versa. Mirrors had the capacity to substantially weaken the applications barrier to entry.

39. Microsoft induced Micrografx to share its confidential intellectual property on the representation that Microsoft was interested in licensing Mirrors for its applications programmers, and Microsoft signed a non-disclosure agreement. However, Microsoft did not license Mirrors and eventually developed competing developer tools that it incorporated into its Microsoft Operating Systems, essentially eliminating demand for Mirrors as a stand-alone product.

Microsoft's Campaign Against Borland's C++

40. In the early 1990s Borland developed C++ which was a popular programming language among PC applications developers. Borland's C++ had an OWL that enabled programmers to write applications that were platform independent, i.e., the applications could be written to OWL's APIs but not the operating systems' APIs. Eventually, Borland innovated OWL to the point where it could be used to write applications that could be ported to Microsoft Operating Systems, OS/2, Apple's Mac OS, and UNIX with virtually no conversion effort.

41. Microsoft embarked on a campaign to cripple Borland's C++ because OWL posed a threat to the applications barrier to entry. In particular, Microsoft made false claims about the nature and timing of the release of new versions of its competing developer tools to deprive Borland of the advantages of being the first entrant into that market and having the superior product.

42. Furthermore, Microsoft refused to renew the license for its software developer kit to Borland unless Borland's C++ also carried and supported Microsoft's software

equivalent to OWL. Borland could not sell C++ without the software developer kit and therefore had no choice but to agree to Microsoft's demands. As a result, Microsoft's developer tools soon became dominant and Microsoft thereby perpetuated the applications barrier to entry.

Microsoft's Campaign Against Navigator

43. After Microsoft eliminated DR DOS and OS/2 as viable operating systems competitors, a serious threat to Microsoft's dominance in the operating systems market arose from various middleware products, which could substitute for or enhance some of the functions of the operating system. Applications written to middleware APIs could run on Microsoft or other operating systems. Thus, middleware threatened to undermine the applications barrier to entry.

44. Netscape developed a middleware product called Navigator. Released in December 1994, Navigator was the first commercially successful graphical web browser allowing access to the World Wide Web by PC users. Microsoft recognized early on the threat that Navigator posed to its operating system dominance.

45. Microsoft recognized that the Navigator browser was becoming a "platform" to which many applications were being written. Microsoft further realized that if Navigator remained the dominant web browser, more and more applications would be written using Navigator as a platform. Because Navigator could be run on various PC operating systems (including numerous non-Microsoft operating systems), the success of Navigator as an alternative platform threatened to reduce or eliminate the applications barrier to entry, which protected Microsoft's dominance in the market for Intel-compatible PC operating systems. Moreover, Microsoft recognized the threat posed by Netscape's browser as the primary distribution vehicle for Sun's competing Java technologies software (described below).

46. Microsoft initially sought to eliminate Navigator as a platform threat by soliciting an express agreement from Netscape not to compete. In or about June 1995, Microsoft executives offered Netscape an arrangement under which Microsoft would be the sole supplier of browsers for Windows 95 and successor operating systems, while Netscape

would be the sole supplier of browsers for other operating systems. Netscape refused to participate in Microsoft's scheme. Microsoft retaliated against Netscape by withholding crucial APIs from Netscape. Microsoft also set out to undermine Netscape's potential as a platform threat by denying Navigator access to the distribution, promotion, and resources that they needed in order to be competitive.

47. Microsoft recognized that pre-installation of web browsers on new PCs by OEMs was one of the two most efficient vehicles for the distribution of browsers, the other being distribution by IAPs. Microsoft sought to exclude Netscape and rival browsers from the OEM channel. To that end, Microsoft entered into licensing agreements for Windows with various OEMs with contractual restrictions, which had the effect of preventing many OEMs from distributing non-Microsoft browsers. Those restrictions included:

(a) preventing OEMs from removing end user (i.e., customer) access to Microsoft's Internet Explorer web browser, which meant that Internet Explorer would remain visible to end users on systems sold by the OEMs. OEMs could not commercially install two browsers on their systems, in part because (1) pre-installing more than one browser could significantly increase an OEM's support costs, and (2) the duplication could lead to confusion among new computer users. Microsoft's restrictions on removing end user access to Internet Explorer thus prevented many OEMs from installing a second browser, such as Navigator, and thereby impeded the distribution of rival browsers in the important OEM distribution channel;

(b) prohibiting OEMs from modifying the initial boot sequence of Windows - the process that occurs the first time a consumer turns on the computer. Before Microsoft added this restriction, many OEMs had included internet sign-up procedures in the initial boot sequence to encourage consumers to choose internet access from a list of providers supplied by the OEM. Many of the IAPs on those lists had used Navigator with their internet access software. Thus, Microsoft's new restriction prevented OEMs from promoting rival browsers; and

(c) prohibiting OEMs from adding icons or folders to the Windows desktop that were different in size or shape from those supplied by Microsoft, and from using the

'Active Desktop' feature of Windows 98 to promote third party brands. These restrictions similarly prevented OEMs from promoting rival browsers, such as Navigator, on the systems they sold.

48. Moreover, Microsoft used threats, such as higher price structures for Windows than those being paid by competitors, and incentives, such as reductions in the royalty price of Windows, to induce especially important OEMs, such as Compaq, Gateway and IBM, to design their distributional, promotional and technical efforts to favour Internet Explorer to the exclusion of Navigator.

49. When Microsoft's executives decided that the contractual restrictions placed on OEMs would not be sufficient to reverse the direction of Navigator's usage share, Microsoft set out, in late 1995 or early 1996, to technologically "bind" its two separate products—Internet Explorer and the Windows operating system. To that end, Microsoft excluded Internet Explorer from the "Add/Remove Programs" utility in Windows 98 (although it had been included in that utility in Windows 95). Microsoft also commingled the code related to browsing with other codes in the same files in Windows. These acts forced OEMs to sell Windows with Internet Explorer and prevented them from pre-installing non-Microsoft browsers because of the effect on OEM customer support costs and the possibility of end user confusion.

50. In addition to its wrongful and anticompetitive acts in the OEM channel, Microsoft entered into additional anti-competitive agreements and arrangements to undermine any platform threat posed by Navigator including:

(a) entering into agreements with major IAPs to provide easy access to their services from the Windows desktop in return for the IAPs' agreement to promote Internet Explorer exclusively and to keep shipments of internet access software using Navigator under a specified percentage. These agreements involved fourteen of the top fifteen IAPs, which accounted for a large majority of all internet access subscriptions in North America. Microsoft's agreements thus helped keep usage of Navigator below the critical level necessary for it to provide a real threat to

Microsoft's dominance in the market for Intel-compatible PC operating systems; and

(b) agreeing to give certain ISVs "preferential support" in return for the ISVs' agreement to use Internet Explorer as the default browsing software for any software they developed with a hypertext-based user interface. The ISVs also agreed to use Microsoft's "HTML Help" (which is only accessible with Internet Explorer) to implement their applications' help functions. In these so-called "First Wave" agreements, signed between Fall 1997 and Spring 1998, Microsoft agreed to provide early beta versions of Windows 98 and Windows NT, other technical information, and the right to use certain Microsoft certifications, to important ISVs that agreed to Microsoft's terms, to the exclusion of rival browsers.

51. The result of Microsoft's campaign against Netscape Navigator, actively participated in or facilitated by Microsoft Canada and others, was a dramatic reversal in usage share. Navigator's usage share in North America fell from above 80 percent in January 1996 to 55 percent in November 1997, and Internet Explorer's usage share rose from 5 percent to 36 percent over the same period. Internet Explorer's share in the North American market by the latter part of 1998 had reached approximately 50 percent. Internet Explorer's share has been steadily rising as Windows 95 users have converted to Windows 98 and to subsequent versions of Microsoft Operating Systems. Recent estimates place Internet Explorer's worldwide share at more than 95 percent of the market. With such limited reach, Navigator no longer posed a threat to Microsoft.

Microsoft's Campaign Against Java

52. For Microsoft, a key to maintaining and reinforcing the applications barrier to entry has been preserving the difficulty of porting applications from Windows operating systems to other platforms, and vice versa.

53. In May 1995, Sun announced that it had developed the Java programming language. The Java technology enables applications written in the Java language to run on a variety of platforms with minimal porting. Java was a significant development because as it

became easier for ISVs to port their applications to different operating systems with the result that more applications would be written for operating systems other than Windows and the "applications barrier" that protected Microsoft's dominance in the market for Intel-compatible PC operating systems would be undermined.

54. In May 1995, Netscape agreed to include a copy of Sun's Java with every copy of Navigator. Navigator quickly became the principal vehicle by which Sun placed copies of Java on the PC systems of Windows users, and as Navigator grew in popularity, the distribution of Java increased as well.

55. By 1996, senior executives at Microsoft had become aware that a significant number of ISVs were writing network-centric applications in the Java programming language, and that Java was likely to increase in popularity among ISVs. Microsoft therefore became interested in maximizing the difficulty with which applications written in Java could be ported from Windows to other platforms, and vice versa (thereby undermining Java's cross-platform threat). Microsoft engaged in various anti-competitive agreements and arrangements to accomplish this purpose, including:

(a) licensing and then corrupting Java, by creating Microsoft-specific Java development tools and a Windows-compatible Java runtime environment that made porting more difficult than with the Sun version of Java;

(b) discouraging business allies, such as Intel, from cooperating with Sun, by threatening that cooperation with Sun on Java would jeopardize business relationships with Microsoft. As a result of just such a threat, Microsoft obtained Intel's agreement to stop assisting Sun in or about the spring of 1996; and

(c) entering "First Wave" agreements with ISVs in 1997 and 1998, conditioning release of early beta versions of Windows 98 and Windows NT, other technical information, and the right to use certain Microsoft certifications, on the agreement of those ISVs to use Microsoft's non-compliant version of Windows Java as the "default."

56. In addition to the wrongful and anti-competitive acts targeted specifically at Java, Microsoft's efforts to prevent widespread distribution of Navigator also served to undermine the threat posed by Java. Because Navigator had become the principle distribution vehicle for cross-platform variants of Java on Windows, as Microsoft succeeded in limiting Navigator's reach, it also limited distribution of Java.

57. As a direct result of Microsoft's wrongful and anti-competitive conduct, actively participated in or facilitated by Microsoft Canada and others, the cross-platform threat posed by Java to Microsoft's dominance in the market for Intel-compatible PC operating systems was eliminated.

58. As a further result of Microsoft's wrongful and anti-competitive conduct, in combination with and furthered by Microsoft Canada and other participants, Microsoft has and continues to expand market share for its own middleware platform called the .NET.

Microsoft's Campaign Against Threats Posed by Media Technologies

59. RealNetworks produces software that supports the "streaming" of audio and video content from the web. RealNetworks' streaming software presents a set of APIs that compete with Microsoft's multimedia DirectX software for ISVs' attention. Versions of RealNetworks' software were developed for multiple operating systems including Windows, Apple's Mac OS and Linux. In 1997, Microsoft sought to convince RealNetworks to abandon development of its streaming media software and to adopt Microsoft's multimedia platform. In response to the continuing threat posed by RealNetworks' streaming media platform, Microsoft has bundled its media software to Windows in a manner similar to the bundling of Internet Explorer in its campaign against Netscape Navigator. Microsoft continues to undermine RealNetworks by withholding technical information.

60. Microsoft has also engaged in anti-competitive and unlawful conduct against Burst as part of its efforts to maintain the applications barrier to entry protecting its operating systems monopoly. Burst was the developer of video streaming technology that would enable a media provider to perform extremely efficient transmissions of time-based media over networks. Microsoft's unlawful conduct directed at Burst included, among

other things, misappropriating Burst's intellectual property and using that intellectual property to release competing products.

Microsoft's Campaign Against Other Middleware Threats

61. Microsoft responded with similar wrongful and anti-competitive conduct against other middleware and analogous threats to Microsoft's dominance in the market for Intel-compatible PC operating systems.

62. In 1995, Intel was in the advanced stages of developing software, called NSP software that would endow Intel's x86 microprocessors with enhanced graphics and video performance. Intel did not believe that Windows had kept pace with advances in Intel's processors. Consequently, Intel designed its NSP software to expose its own set of APIs, which, if used by ISVs, would make porting of their software to non-Microsoft operating systems easier. In or about August 1995, Microsoft threatened Intel that it could not count on Microsoft to support Intel's next generation of processors as long as Intel was developing platform software that competed with Windows. In the face of this threat, by the summer of 1996, Intel agreed to stop developing platform interfaces that might attract ISVs' attention away from Windows.

63. Samba is open source software that allows Linux or Unix machines to act as file, print and authentication servers for Windows clients. Samba permits servers and Intel-compatible PCs running Linux to co-exist in networks that include Windows servers and PCs. Microsoft, though, uses and refuses to document certain undocumented interfaces to communicate between their servers and client PCs. Therefore, PCs running Linux are not fully inter-operable on a Windows network which has created a barrier to the adoption of Linux PCs. Microsoft has refused to document certain features of these interfaces.

64. Microsoft's approach to Samba is part of a broader three part strategy for eliminating competition in the workgroup server market. First, Microsoft used its logo and certification programs for its Microsoft Operating System so that developers would write applications that would also run on its workgroup server operating system. Second, Microsoft intentionally excluded rivals like Sun and Samba from the workgroup server

operating system market by refusing to disclose technical information to them. Third, Microsoft bundled critical networking functions and features into its Microsoft Operating System products, and designed those functions and features so that customers cannot fully use them unless they also purchase Microsoft's workgroup server operating systems. As a result, consumers could not substitute a non-Windows workgroup server operating system if they wished to use all of the functions and features of Windows that they purchased as part of their Microsoft Operating System.

65. By intentionally denying non-Microsoft workgroup servers the ability to fully use the functions and features of the Microsoft Operating Systems, but not similarly restricting Microsoft workgroup servers, Microsoft has increased the costs for end users to use products that compete with Microsoft. If end users switch operating systems they need to replace every Microsoft device or product that connects to it. As a result, Microsoft has been able to charge supra-competitive prices for its products.

MICROSOFT'S DOMINANCE IN THE INTEL-COMPATIBLE PC APPLICATIONS SOFTWARE MARKET

66. Having secured its dominance in the Intel-compatible PC operating systems market, Microsoft has abused that dominance to gain unfair advantages in the complementary applications software markets. In the late-1980's, Microsoft recognized that the transition to GUIs, where it had a strong market position with its Windows operating environment, provided Microsoft an opportunity to gain an important presence in applications, such as, word processors and spreadsheets.

67. Since the early 1990's, Microsoft has possessed a dominant, persistent and increasing share of the North American market for Intel-compatible PC word processing applications software. Microsoft Word presently enjoys North American market share in the order of 95 percent.

68. During that same period, Microsoft has also possessed a dominant, persistent and increasing share of the North American market for Intel-compatible PC spreadsheet applications software. Microsoft Excel presently enjoys North American market share in the order of 95 percent.

69. Because of a lack of realistic alternatives to word processor and spreadsheet applications, and the prohibitive expense involved in developing new word processor or spreadsheet applications software that could become a viable alternative to Microsoft Applications Software, Microsoft has abused its dominant position by charging supra-competitive prices for its Microsoft Applications Software that are substantially above what it could charge in a competitive market. Indeed, Microsoft has done so for a significant period of time without losing market share to competitors. Microsoft Canada and others actively participated in or facilitated Microsoft's unlawful conduct.

MICROSOFT'S ABUSE OF ITS DOMINANT POSITION IN THE INTEL-COMPATIBLE PC APPLICATIONS SOFTWARE MARKETS

70. When Microsoft's anti-competitive applications software campaign began in the late 1980's and early 1990's, there were several existing competitors in both markets. Lotus 1-2-3 was the market leader in spreadsheets, and WordPerfect was the market leader in word processors. Beginning as early as 1988, Microsoft embarked upon a campaign to prevent or lessen competition substantially and to thereby increase the price of its products in the market for Intel-compatible PC applications software. Microsoft Canada and others actively participated in or facilitated that campaign. As a part of the campaign, Microsoft and Microsoft Canada combined or agreed with others, including IAPs, ISVs, OEMs, and Intel to prevent or lessen, unduly, competition and to otherwise restrain or injure competition unduly. As a consequence, Microsoft has unlawfully maintained and abused its dominant position in the North American market for Intel-compatible PC operating systems and has charged supra-competitive prices.

Microsoft's Campaign to Misdirect Developers' Resources Towards OS/2

71. In the late-1980's, Microsoft began jointly developing OS/2 with IBM as the "operating system of the 1990's" and as the successor to DOS. Unlike DOS, which had a character-based interface, OS/2 would have a GUI. OS/2 would also have other technical advantages over DOS.

72. Beginning in 1989, Microsoft engaged in a concerted effort to convince the ISV Lotus to write the next version of its Lotus 1-2-3 spreadsheet to run on OS/2. Microsoft similarly engaged in an effort to persuade the ISV-WordPerfect to write the next version of its WordPerfect word processing software to run on OS/2. Microsoft successfully arranged for the two developers to write their applications for the new platform and both Lotus and WordPerfect subsequently devoted substantial resources to writing their applications for OS/2 in reliance on Microsoft's representations about the platform.

73. By November 1989, Microsoft decided internally to abandon its commitment to OS/2 and focus instead on MS-DOS and Windows. Even after Microsoft had made that decision, however, it continued to misrepresent its intentions for OS/2 to its ISV partners to induce them to develop applications for OS/2. While Lotus and WordPerfect continued to devote development resources to OS/2, Microsoft moved forward with development of its own applications software for Windows. When Microsoft finally disclosed its intentions concerning OS/2, Microsoft had already gained a critical first-mover advantage for its Excel spreadsheet applications and its Word word processor applications on the Windows platform.

Microsoft's Selective Disclosure of Technical Information

74. Microsoft understood the need for competing applications developers to have access to the technical underpinnings of the Microsoft Operating Systems on an equal basis with its own applications developers. Certain Microsoft executives falsely claimed that Microsoft had created a "Chinese wall" that prevented its own applications software developers from having preferential access to technical information about the Microsoft Operating Systems. In reality, Microsoft's applications and middleware developers did have preferential access to such technical information. As early as 1988 and 1989 Microsoft began using undocumented APIs in its applications and middleware that were not available to outside developers and continued this practice to at least 2001.

75. Microsoft could have chosen to provide timely access to the Microsoft Operating Systems specifications to competing ISVs and others in the normal course of business. Indeed, Microsoft provided some smaller ISVs - in the so called "First Wave" agreements

- with preferential access to technical information about Microsoft's Operating Systems provided that these ISVs agreed not to develop applications that competed with Microsoft's applications. However, with respect to leading ISVs such as Lotus and WordPerfect (later owned by Corel, a Canadian corporation), Microsoft chose to preclude, limit or delay such access in order to be first to market with Word and Excel and thereby create an unfair advantage for its own products over its direct competitors' products in the word processor and spreadsheet markets.

Microsoft's Other Campaigns in the Applications Software Markets

76. In order to obtain and maintain its dominance in the applications software markets, beginning in the early 1990's and continuing throughout the Class Period, Microsoft has engaged in the following anti-competitive acts participated in or facilitated by Microsoft Canada and others:

(a) threatening OEMs that they would receive a license for Windows only if they agreed not to offer competitors' non-Microsoft applications software;

(b) threatening OEMs that it would increase the price for its Microsoft Operating Systems if the OEMs distributed non-Microsoft applications software;

(c) threatening to withhold from OEMs market development funds if the OEMs distributed non-Microsoft applications software;

(d) providing discounts to purchasers who agreed to purchase only Microsoft Applications Software;

(e) providing discounts to purchasers who limited their distribution of non-Microsoft Applications Software;

(f) threatening OEMs that Microsoft would withhold technical support for Microsoft's Operating Systems, including Windows, if the OEMs offered competitors' non-Microsoft applications software; and

(g) raising the price of Windows to smaller OEMs in exchange for an agreement from larger OEMs with comparatively greater market share to offer Microsoft Applications Software exclusively.

77. Microsoft's and Microsoft Canada's wrongful and anti-competitive campaigns against Navigator, Java, and others, as described above also served to secure and maintain Microsoft's dominance in the spreadsheet and word processor applications software markets.

78. Moreover, had Microsoft not undermined the browser and Java innovations described above, word processor and spreadsheet software applications could have been written for the Java platform. These applications would have competed with Microsoft Word and Microsoft Excel, but would have run on a multitude of operating systems. As a consequence, Microsoft would have lost its capacity to exclude competitors to Word and Excel.

Microsoft's Anti-competitive Use of Office Related Applications To Maintain Its Dominance In The Operating Systems and Applications Markets.

79. Microsoft uses its dominance in the applications market, and in particular its dominance of office related applications such as word processors (e.g. Microsoft Word) and spreadsheets (e.g. Microsoft Excel), to protect its operating system monopoly. Because these office applications are the primary way in which the majority of end users interact with their PC, Microsoft uses these applications to maintain a barrier to entry that protects Microsoft's operating system monopoly.

80. Microsoft controls whether these office applications can be ported to competing platforms. Using that control, Microsoft has refused to port these office applications to competing platforms in order to wrongfully maintain its dominance, and it has used these applications to exact anti-competitive agreements in exchange for continued support on competing platforms.

81. By controlling the office applications, Microsoft also controls the file formats generated by these applications. To maintain its monopoly position and decrease competition,

Microsoft has adopted Microsoft-specific file formats, thereby obstructing competitors' abilities to interoperate with such files. Consequently, competing office applications, like Sun's StarOffice, Corel WordPerfect Office and Lotus SmartSuite, are unable to read or duplicate these Microsoft-specific file formats in the same manner as Microsoft's office applications. By precluding full interoperability with competing office productivity applications, Microsoft obstructs competition.

82. Microsoft also uses its control of office applications to create technical ties and dependencies that force consumers to purchase additional Microsoft server products, including Microsoft Exchange Server, Microsoft Internet Information Server, and Microsoft SQL Server. In order to effectively use all of the office applications' functions in such a network, a user must purchase these additional Microsoft products. As a result, if a user later wishes to switch its applications or operating system, it will incur increased costs because it necessarily will have purchased and implemented not just the office applications, but a number of other Microsoft products as well. These technical ties and dependencies are intentionally designed by Microsoft to raise the barriers to entry protecting its monopoly positions by significantly raising the costs of switching to non-Microsoft products.

FINDINGS OF FACT AND LAW FROM FOREIGN PROCEEDINGS

83. The plaintiffs adopt and rely on:

(a) the findings of fact and law from the August 21, 1995 final judgment in *United States v. Microsoft Corp.*, Civ. No. 94-1564 (D.D.C., complaint filed July 15, 1994);

(b) the findings of fact from *United States v Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) as modified on appeal by the findings of fact and law in (c) below;

(c) the findings of fact and law from *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001);

(d) the findings of fact and law from the European Commission's Decision of March 24, 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft);

(e) the findings of fact and law from the European Commission's Decision of 12 July 12 2006 to Impose Penalty Payments on Microsoft;

(f) the findings of fact and law from the European Commission's Decision of 16 December, 2009 in Case COMP/39.530 — Microsoft (Tying), notified under document C(2009) 10033; and

(g) the findings of fact and law from the European Commission's Decision of 6 March, 2013 in Case COMP/39.530 – Microsoft (Tying), notified under document C(2013) 1210.

MICROSOFT'S CONDUCT WAS AND CONTINUES TO BE ILLEGAL IN THE UNITED STATES AND EUROPE

84. Microsoft's conduct that is particularized in this statement of claim took place and continues to take place in, among other places, the United States and Europe where it was and continues to be illegal and contrary to the competition laws of the United States and Europe.

THE INTENTIONAL INTERFERENCE WITH ECONOMIC INTERESTS

85. The defendants' wrongful and anti-competitive acts as particularized at paragraphs 8 to 84 and 9089 to 9291 was unlawful conduct intended to injure the plaintiffs and the other Class Members by artificially increasing the price they were required to pay to acquire Intel-compatible PC operating systems and Intel-compatible PC applications software as a means of enriching the defendants.

~~86. The defendants' wrongful and anti-competitive acts as particularized at paragraphs 8 to 84 and 89 to 91 constituted unlawful conduct, namely:~~

~~(a) an unlawful restraint of trade at common law and equity;~~

~~(b) an offence in relation to competition contrary to Part VI of the Competition Act in that the defendants:~~

~~(i) combined or agreed with certain IAPs, ISVs, OEMs (including Budgetron, Dell, Gateway, Hewlett Packard, Acer, Lenovo, Toshiba, Sony, LG Electronics, Panasonic, Fujitsu/Fujitsu Siemens, Averatec, and IBM), and Intel to prevent or lessen, unduly, competition and to otherwise restrain or injure competition unduly. Microsoft and Microsoft Canada dictated the terms of these combinations and agreements, and were aware or ought to have been aware that the effect of the agreements would be to prevent or lessen competition unduly; and~~

~~(ii) knowingly or recklessly made false or misleading representations to the public;~~

~~(c) an illegal violation of, among other things, United States and European antitrust law; and~~

~~(d) conduct which is prohibited by the Microsoft's own corporate policies, including its Standards of Business Conduct, which state that:~~

> ~~We manage our business in compliance with laws and regulatory requirements.~~
>
> ~~...~~
>
> ~~Fair Competition and Antitrust: As a global business, we encounter laws and regulations designed to promote fair competition and encourage ethical and legal behavior among competitors. Antitrust laws and fair competition laws generally prohibit any activity that restrains free trade and limits competition. We conduct our business in compliance with these laws.~~

86. The defendants' wrongful and anti-competitive acts support civil actions for damages or compensation under Canadian law and under the law of the jurisdiction in which the acts took place. In particular, had Microsoft's competitors and potential competitors set out in paragraphs 20 to 82 suffered loss they would have claims against Microsoft for:

(a) unlawful conspiracy;

(b) damages under s. 36 of the *Competition Act*;

(c) damages arising from breaches of the *Sherman Act*, CH. 647, 26 Stat. 209, *codified* at 15 U.S.C. ss 1-7; and

(d) damages arising from breaches of Articles 101 and 102 of the *Treaty on the Functioning of the European Union*. .

87. The conduct of Microsoft was intended to harm the plaintiffs and compelled them to pay the artificially high prices for Intel-compatible PC operating systems and Intel compatible PC applications software. Alternatively, the harm to the plaintiffs and other Class Members was a necessary means of achieving the end of enriching the defendants.

~~87.~~88. The plaintiffs and the other Class Members have suffered economic loss as a result of the defendants' conduct which had the effect of raising, maintaining and stabilizing prices of Intel-compatible PC operating systems and Intel-compatible PC applications software at artificially high and non-competitive levels.

~~88.~~89 The defendants' wrongful and anti-competitive acts as particularized at paragraphs 8 to 84 and 90~~89~~ to 92~~91~~ constituted tortious interference with the economic interests of the plaintiffs and the other Class Members and renders Microsoft and Microsoft Canada liable to pay the resulting damages.

THE CONSPIRACY

~~89.~~90. The Canadian subsidiary, Microsoft Canada, participated in and furthered the objectives of the conspiracy by knowingly modifying its competitive behaviour in accordance with instructions received from its parent company, Microsoft. Microsoft Canada thereby acted in concert with Microsoft in carrying out the conspiracy and is liable for such acts.

~~90.~~91. During the Class Period, at times and places some of which are unknown to the plaintiffs the defendants wrongfully, unlawfully, maliciously and lacking *bona fides* conspired and agreed together, the one with the other or others of them, and with their servants and agents as follows:

(a) to suppress and eliminate competition in the sale and supply of Intel-compatible PC operating systems and Intel-compatible PC applications software in Canada and elsewhere; and

(b) to prevent or lessen, unduly, competition in the development, production and manufacture of Intel-compatible PC operating systems and Intel-compatible PC applications software.

91.92 The defendants were motivated to conspire and their predominant purposes and predominant concerns were:

(a) to harm the plaintiffs and the other Class Members by requiring them to purchase Microsoft Operating Systems and Microsoft Applications Software rather than products of competitors in the Intel-compatible PC markets;

(b) to harm the plaintiffs and the other Class Members who purchased Microsoft Operating Systems and Microsoft Applications Software by requiring them to pay artificially high prices; and

(c) to unlawfully increase their profits on the sale of Microsoft Operating Systems and Microsoft Applications Software to consumers in Canada.

92.93 In furtherance of the conspiracy, during the Class Period, the following acts were done by the defendants and their servants and agents:

(a) they met secretly in the United States and Canada from time to time to discuss the issues giving rise to the conspiracy;

(b) they directed their servants, agents and employees from time to time to perform wrongful or unlawful acts in furtherance of the conspiracy;

(c) they met secretly in the United States and Canada from time to time to monitor the effects of the conspiracy;

(d) they instructed members of the conspiracy at meetings not to divulge the existence of the conspiracy; and

(e) they carried out the acts pleaded in paragraphs 8 to 84 and 9089 to 9291.

9392.A. The defendants' conduct particularized in paragraphs 8 to 84 and 9089 to 9291 constituted the following unlawful and illegal acts; ~~for the reasons set out in paragraphs 86(a) to 86(d) above.~~

(a) an unlawful restraint of trade at common law and equity;

(b) an offence in relation to competition contrary to Part VI of the Competition Act in that the defendants:

(i) combined or agreed with certain IAPs, ISVs, OEMs (including Budgetron, Dell, Gateway, Hewlett Packard, Acer, Lenovo, Toshiba, Sony, LG Electronics, Panasonic, Fujitsu/Fujitsu Siemens, Averatec, and IBM), and Intel to prevent or lessen, unduly, competition and to otherwise restrain or injure competition unduly. Microsoft and Microsoft Canada dictated the terms of these combinations and agreements, and were aware or ought to have been aware that the effect of the agreements would be to prevent or lessen competition unduly; and

(ii) knowingly or recklessly made false or misleading representations to the public;

and

(c) an illegal violation of, among other things, United States and European antitrust law.

93.94 The defendants' conduct particularized in paragraphs 8 to 84 and 9089 to 9291 was wrongful and unlawful for the reasons set out in paragraphs 93A86(a)-(d) above. This wrongful and unlawful conduct was directed towards the plaintiffs and other Class Members, which conduct the defendants knew or should have known in the circumstances would likely cause injury to the plaintiffs and the other Class Members. The plaintiffs and other Class Members have suffered damages as a result of the defendants' conduct particularized herein.

91.95 The defendants' conduct as particularized at paragraphs 8 to 84 and 9089 to 9291 constituted a tortious conspiracy to injure the plaintiffs and the other Class Members and renders the defendants liable to pay the resulting damages.

VICARIOUS LIABILITY

95.96 The acts alleged in this statement of claim to have been done by each corporate defendant were authorized, ordered and done by each corporate defendant's officers, directors, agents, employees or representatives while engaged in the management, direction, control or transaction of its business affairs in pursuit of the defendants' overall business plans and therefore are acts for which the defendants are vicariously liable.

UNJUST ENRICHMENT AND WAIVER OF TORT

96.97 In the alternative, the plaintiffs plead that they and the other Class Members are entitled to recover the unjust enrichment accruing to the defendants. In the further alternative, the plaintiffs waive the tort and plead that they and the other Class Members are entitled to recover the unjust enrichment accruing to the defendants rather than their tort damages.

97.98 The defendants have each been unjustly enriched by the receipt of the Overcharge on the Microsoft Operating Systems and Microsoft Applications Software sold to end users in British Columbia. The plaintiffs and the other Class Members have suffered a deprivation in the amount of the Overcharge attributable to these sales in all of British Columbia.

~~98.~~99 Since the Overcharge received by the defendants from the plaintiffs and each Class Member results from the defendants' wrongful and unlawful acts as described in paragraphs 8 to 84 and 9089 to 9291, there is and can be no juridical reason justifying the defendants' retaining any part of the Overcharge. In particular, the contracts by which the defendants purport to have received the overcharge are illegal and void because:

(a) they violate and are prohibited by Part VI of the Competition Act in that the defendants combined or agreed with others, including OEMs and other direct purchasers, to prevent or lessen, unduly, competition and to restrain or injure competition unduly. These agreements and combinations are particularized in paragraphs 12, 19, 21, 24, 25, 31-35, 37, 42, 47-51, 57, 69, 76 and 83 above. Microsoft and Microsoft Canada dictated the terms of these agreements and combinations, and were aware or ought to have been aware that the effect of the agreements would be to prevent or lessen competition unduly;

(b) they violate and are part of a course of conduct that violates United States antitrust law;

(c) they are prohibited by and violate Microsoft's own corporate policies; and

(d) they violate public policy and are an unlawful restraint of trade at common law and equity.

~~99.~~100 The plaintiffs plead that, in the circumstances, justice and good conscience require the defendants to account to them and to the other Class Members for the Overcharge on the Microsoft Operating Systems and Microsoft Applications Software sold in British Columbia.

~~100.~~101 Further, in all the circumstances, justice and good conscience requires that the defendants be required to disgorge to the plaintiffs and the other Class Members an amount equal to the Overcharge from the sales of Microsoft Operating Systems and Microsoft Applications Software in British Columbia.

THE RESULTING DAMAGES OF THE PLAINTIFFS AND THE OTHER CLASS MEMBERS

~~101.~~102. The plaintiffs and the other Class Members have suffered damages as a result of the defendants' wrongful and unlawful acts as described in paragraphs 8 to 84 and ~~90~~89 to ~~92~~91, which had the effect of raising, maintaining and stabilizing prices of Microsoft Operating Systems and Microsoft Applications Software at artificial and non-competitive levels throughout the Class Period.

~~102.~~103. During the Class Period, the plaintiffs and other Class Members have purchased billions of dollars of Microsoft Operating Systems and Microsoft Applications Software. By reason of the defendants' tortious interference with their economic interests and conspiracy to injure, the plaintiffs and the other Class Members paid more for Microsoft Operating Systems and/or Microsoft Applications Software than they would have paid in the absence of Microsoft's wrongful and unlawful conduct and, as a result, have suffered damages.

~~103.~~104. The plaintiffs assert that their combined damages and those of the other Class Members are capable of being reasonably estimated on an aggregate basis as the difference between the prices actually obtained by the defendants and the prices which would have been obtained in the absence of the defendants' wrongful and unlawful conduct.

PUNITIVE DAMAGES AND COSTS

~~104.~~105. The plaintiffs plead that the defendants' wrongful conduct, as particularized above in paragraphs 8 to 84 and ~~90~~89 to ~~92~~91.

(a) exploits the vulnerability and needs of the Class Members;

(b) is high-handed and outrageous and constitutes profiteering from the needs of vulnerable, unsuspecting consumers;

(c) is motivated solely by economic considerations; and

(d) is anti-competitive and unlawful.

~~105.~~106 The defendants' wrongful acts as particularized above are tortious, unlawful, offend the moral standards of the community, warrant the condemnation of the Court, were high handed, malicious, arbitrary or highly reprehensible and departed to a marked degree from ordinary standards of decent behaviour and render the defendants liable to pay punitive damages which the Court should fix as a percentage of the revenue from the Overcharge on the sales of Microsoft Operating Systems and Microsoft Applications Software in British Columbia.

~~106.~~107 The plaintiffs and the other Class Members are also entitled to recover as damages or costs in accordance with the *Act* the costs of administrating the plan in this action.

THE RELEVANT STATUTES

~~107~~108 The plaintiffs plead and rely upon the *Act* and Part IV and Part VI of the *Competition Act* and all amendments thereto.

WHEREFORE the plaintiffs claim against the defendants on their own behalf and on behalf of the Class:

(a) an Order pursuant to the *Act* certifying this action as a class proceeding and appointing it as representative of the Class;

(b) damages, including punitive damages, for tortious interference with economic interests or relations in such sum as the Court finds appropriate;

(c) damages, including punitive damages, for conspiracy to injure and/or unlawful means conspiracy in such sum as the Court finds appropriate;

(d) damages including the full cost of investigation as per section 36, *Competition Act*, R.S.C. 1985, c. C-34,

(e) a declaration that Microsoft and Microsoft Canada have been unjustly enriched at the expense of the plaintiffs and the other Class Members by their receipt of the Overcharge;

(f) a declaration that Microsoft and Microsoft Canada account for and make restitution to the plaintiffs and the other Class Members in an amount equal to the Overcharge;

(g) judgment in an amount equal to the Overcharge;

(h) an Order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;

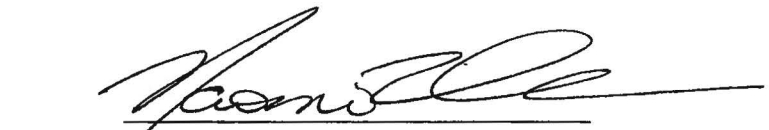
(i) pre-judgment and post-judgment interest;

(j) the costs of administering the plan of distribution of the recovery in this action in such sum as the Court finds appropriate; and

(k) such further and other relief as this Court deems just.

Place of trial: Vancouver, British Columbia

Dated December 22, 2004



for J.J. Camp, Q.C.
Camp Fiorante Matthews
Solicitors for the Plaintiffs

This Writ of Summons and Statement of Claim is filed by J.J. Camp, Q.C., Camp Fiorante Matthews, 400 – 555 West Georgia Street, Vancouver, British Columbia, V6B 1Z6. Telephone: (604) 689-7555