IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, *ex rel.*
DARRELL V. MCGRAW, JR.,
ATTORNEY GENERAL,

Plaintiff,

v. Civil Action No. 01-C-197

MICROSOFT CORPORATION,

Defendant.

COMPLAINT

For its complaint against Defendant Microsoft Corporation ("Microsoft"), plaintiff alleges on behalf of itself and all others similarly situated that:

SUMMARY OF THIS ACTION

1. This is an action to collect penalties and damages suffered by the State and its citizens due to Microsoft's unlawful conduct.

2. For the purposes of this action, the following terms have the meanings stated and explained.

(a) A "personal computer," or "PC," is a digital information-processing device designed for use by one person at a time. A PC consists of the central processing components of a microprocessor and main memory, and mass data storage, usually a hard disk. A typical PC system consists of a PC, peripheral devices including a monitor, a keyboard, a mouse, and a printer, and an "operating system." PCs, which include desktop and laptop models, are distinguished from more powerful, more expensive computer systems known as “servers,” which are designed to provide data, services, and functionality through a digital network to multiple users.

(b) An “operating system” is a software program that controls the allocation and use of computer resources, including central processing unit time, main memory space, disk space, and input and output channels. The operating system is also referred to as a “platform.” The operating system supports the functions of other software programs, called “applications,” that perform particular tasks for the PC’s user, including word processing, spread sheet design and use, and database management.

(c) An “Intel based personal computer” is one designed to function with Intel Corporation’s 80x86/Pentium families of microprocessors, or with compatible microprocessors manufactured by Intel Corporation or other firms. Intel-based personal computers are the dominant type of personal computer sold and used in the United States and in the State of West Virginia.

(d) “Windows” is the operating system program developed, distributed and licensed by Microsoft, and includes Windows98 and its upgrades.

3. At all relevant times, Microsoft has possessed monopoly power — meaning the power to control price or exclude competition — in the market for operating systems for Intel-based personal computers.

4. At all relevant times, Microsoft has unlawfully and willfully maintained its monopoly power by anticompetitive and unreasonably exclusionary conduct.

5. Aware of its unlawfully and willfully maintained monopoly power, and in unlawful exercise of that monopoly power, Microsoft has knowingly licensed its Windows98 operating system for Intel-based personal computers, without regard to competition, at a

monopoly price in excess of that which Microsoft would have been able to charge in a competitive market.

6. The State and many of its citizens own or lease Intel based personal computers.

7. As a precondition to their first uses of Windows98 on their PCs, the State and its citizens are compelled to accept and agree to an end user license ("EULA") directly from Microsoft, pursuant to the terms of which Microsoft dictates that Windows98 is "licensed, not sold." The EULA is different from those licenses that Microsoft grants to original equipment manufacturers ("OEMs") which permit OEMs to preinstall Windows on PCs sold to end users. The terms of Microsoft's various license agreements are dictated and drafted solely by Microsoft.

8. As end-user licensees of Microsoft as to its Windows 98 operating system, the State and its citizens paid the monopoly price charged by Microsoft for their use of this software.

9. The State and its citizens are entitled to damages measured by the difference between a competitive price and the monopoly price that they incurred as end-user licensees for their use of Windows 98.

THE PARTIES

10. The plaintiff is the State of West Virginia, by and through Darrell V. McGraw, Jr., the Attorney General of the State of West Virginia, and is authorized to bring this action by virtue of the provisions of W.Va. Code §§ 46A-7-108, -109, -111 and 47-18-8, -9, in its sovereign capacity and as parens patriae. W.Va. Code § 47-18-17.

11. Microsoft is a corporation organized and existing under the laws or the State of Washington. Microsoft's principal place of business is located at One Microsoft Way, Redmond, Washington. Since its inception, Microsoft has focused primarily on developing and licensing computer software. Microsoft is the leading supplier of operating systems for personal computers. Microsoft markets and licenses Windows for Intel-based personal computers throughout the United States, including the State of West Virginia. Microsoft is authorized to conduct, and in fact does conduct, business in West Virginia.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

12. For the purposes of this action, the relevant product market consists of operating systems for Intel based PCs. At all relevant times, no other product has duplicated or fully substituted for the operating system. The complex interactions among operating system software, applications software, and the hardware attached to the PC are such that, at all relevant times, an operating system written for a non-Intel type of microprocessor typically would not work on another type of microprocessor without significant modification. Accordingly, original computer equipment manufacturers (commonly referred to as "OEM's") and PC users do not consider an operating system that runs a non-Intel based PC to be an effective substitute for an operating system that runs an Intel based PC.

13. The geographic market for operating systems for Intel based PCs is worldwide, but is limited to the State of West Virginia for this action.

14. In 1981, Microsoft released the first version of its Microsoft Disk Operating System for Intel-based PCs, known as "MS-DOS." The system had a character based user

interface that required the user to type specific instructions at a command prompt in order to perform tasks such as launching applications and copying files. When International Business Machines Corporation ("IBM") selected MS-DOS for pre-installation on its first generation of PCs, Microsoft's software became the dominant operating system for Intel based PCs.

15. In 1985, Microsoft began marketing a graphical user interface computer program called "Windows." This software enabled users to perform tasks by selecting icons and words on the computer monitor's screen by using a mouse. Although originally a user interface that functioned in conjunction with MS-DOS, Windows eventually became an independent operating system.

16. In 1995, Microsoft introduced Windows 95, which Microsoft advertised as the first operating system for Intel based PCs that had the same kinds of integrated features as the Mac OS operating system for PCs manufactured by Apple Computer, Inc. ("Apple"). Windows 95 was extraordinarily popular with OEMs and PC end-users. In June 1998, Microsoft launched its successor operating system, Windows 98. As of that time, more than ninety percent of new Intel based PCs had been shipped with a version of Windows preinstalled. Beginning in 1995, and continuing to the present, Intel based PC OEMs have had no commercially reasonable alternative to Microsoft operating systems for the PCs that they distribute.

17. Microsoft possesses, and at all relevant times has possessed, a dominant, stable, and increasing share of the market for operating systems for Intel based PCs. Over the last decade, Microsoft's share of the market for operating systems for Intel based PCs has exceeded ninety percent. For the last three years, Microsoft's share of that market has

been at least ninety-five percent. It has been projected that Microsoft's share of the market will increase over the next few years.

18. Microsoft's pricing behavior demonstrates that Microsoft possesses monopoly power in the market for operating systems for Intel based PCs. Microsoft did not even consider the prices of competitors' operating systems for Intel-based PCs when Microsoft set the price of Windows 98. Moreover, Microsoft raised the price that it charged OEMs of Intel based PCs for Windows 95, with few exceptions, to the same level as the price it charged for Windows 98 prior to its release. In a competitive market, it would be expected that the price of an older operating system would stay the same or decrease upon the release of a newer, more attractive version. Microsoft, however, was concerned with inducing OEMs to install Windows 98 instead of the older version. Microsoft would not have imposed this price increase if it were concerned that OEMs might shift their business to another vendor of an operating system for Intel based PCs.

19. As a consequence of its monopoly power in the market for operating systems for Intel based PCs, Microsoft was able to exercise unfettered discretion in setting the price for the license of its Windows 98 upgrade product, the operating system that Microsoft licenses to existing end-user licensees of Windows 95. A Microsoft internal study dated November 1997, establishes that Microsoft could have charged $49.00 for an upgrade to Windows 98. There is no reason to believe that the $49.00 price would have been unprofitable for Microsoft. The study, however, determined that a price of $89.00 would maximize revenues for Microsoft. Because of its monopoly power, Microsoft charged the higher price.

20. The facts set forth in paragraphs 25 and 26, above, came to light during the course of the consolidated trial of *United States v. Microsoft Corporation and New York v. Microsoft Corporation,* Civil Action Nos. 98-1232(TPJ) and 98-1233(TPJ), in the United States District Court for the District of Columbia ("U.S. v. Microsoft"). The evidentiary record of that trial closed on June 24, 1999. During or about September 1999, Microsoft began licensing its Windows 98 Second Edition as an upgrade of Windows 98 for a price of $19.95.

21. There are several substantial barriers to entry into the market for operating systems software for Intel-based PCs. Microsoft's market power reflects that the market for operating software is characterized by substantial economies of scale. That is, once the software is written, copies can be reproduced relatively inexpensively. Another daunting barrier to entry is created by the number of software applications that must run on an operating system in order to make the operating system attractive to end users. This barrier is generally referred to as the "network effect." End users want to be able to have a large number of quality applications available to them. Accordingly, most applications are currently written to run on Windows. The economies of scale and network effects reinforce one another such that it would be prohibitively difficult, time-consuming, and expensive to create an alternative operating system that could run the programs that run on Windows. Any potential new operating system entrant therefore faces a high and strong barrier to successful entry into the market for operating systems for Intel-based PCs. This barrier to entry is often referred to as the "applications barrier to entry."

22. At all relevant times, and as Microsoft has consistently been aware, Microsoft's dominant share of the market for operating systems for Intel based PCs has

been the principal contributing force in creating and maintaining the applications barrier to entry into that market. As Microsoft also consistently has been aware, it is directly due to the applications barrier to entry that Microsoft has been able to establish the price for Windows 98 licenses as set forth in paragraphs 27 and 28. Microsoft established the price for Windows 98 licenses, without regard to competition, at a monopoly price in excess of what Microsoft would have been able to charge in a competitive market. The State and its citizens paid those monopoly prices.

23. The experiences of IBM and Apple, Microsoft's only significant operating system rivals in the 1990s, demonstrate the strength of the applications barrier to entry that Microsoft created and presently enjoys.

24. IBM introduced its OS/2 Warp operating system for Intel based PCs in late 1994, and spent tens of millions of dollars in an effort to attract independent software vendors to develop applications for OS/2 Warp and to reverse engineer key aspects of the Windows coding. Despite these efforts and expenditures, IBM could not obtain either significant market share or independent software vendor support for OS/2 Warp. The enormous Windows installed base made it prohibitively expensive for IBM to continue attempting to attract enough software developer support to challenge Windows. Although at its peak OS/2 Warp ran approximately 2,500 applications and had ten percent of the market for operating systems for Intel based PCs, IBM ultimately determined that the applications barrier to entry created by Microsoft prevented any effective competition against Windows 95. For that reason, in 1996, IBM ceased its efforts to convince independent software vendors to write applications for OS/2 Warp. IBM now targets OS/2 Warp at a market niche, consisting mainly of banks that use particular kinds of applications

that run on OS/2 Warp. IBM's abandonment of any effort to compete with Windows is demonstrated by the fact that IBM prices OS/2 Warp at more than twice the price of Windows 98.

25. Apple has also been unable to compete effectively with Windows, providing another example of the strength of the applications barrier to entry that Microsoft has created and enjoys. Although Apple's Mac OS operating system supports more than 12,000 applications, even an inventory of that magnitude is not sufficient to enable Apple to present a significant percentage of users with a realistic substitute for Windows. The absence of a large installed base of Mac OS reinforces the disparity between the applications made available for Mac OS and those made available for Windows, further inhibiting Apple's sales. The applications barrier to entry that Microsoft created and enjoys has therefore prevented the Mac OS operating system from constraining Microsoft's ability to control the price for Windows 98.

26. In U.S. v. Microsoft, the Court held that Microsoft enjoys monopoly power in the market for Intel-based PC operating systems. That finding has been upheld by a unanimous D.C. Circuit Court of Appeals, sitting en banc. U.S. v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001), reh. den. 8/2/2001. At all relevant times, Microsoft has aggressively and willfully maintained the applications barrier to entry into the market for operating systems for Intel based PCs, and thereby has maintained its monopoly pricing power in that market through anticompetitive and unreasonably exclusionary conduct. The ultimate purpose and resulting effect of Microsoft's unlawful actions in maintaining the applications barrier to entry have been to enable Microsoft to unlawfully exercise its monopoly power by licensing its Windows 98 operating system for Intel-based PCs, without regard to competition, at a

monopoly price in excess of what Microsoft would have been able to charge in a competitive market, to the injury of the State and its citizens.

28. The most significant potential threat to Microsoft's operating system monopoly, which exists because of the applications barrier to entry that Microsoft created and enjoys, is not from a direct attack by existing or new operating systems. Instead, as Microsoft itself has expressly recognized, the applications barrier to entry could be seriously eroded, and Microsoft's operating system monopoly correspondingly threatened, by new software products that may support, or even themselves become, alternative platforms to which applications can be written, and which can be used in conjunction with multiple operating systems, including, but not limited to, Windows.

29. At all relevant times, Microsoft has acted aggressively to protect its Windows monopoly against any such potential competitive threats to the applications barrier to entry that Microsoft created and enjoys, and to leverage Microsoft's operating system monopoly into other software markets, by engaging in a multitude of anti-competitive and exclusionary activities. Microsoft's conduct includes agreements integrating other Microsoft software products with Microsoft's Windows operating system; exclusionary agreements precluding companies from distributing, promoting, buying, or using products of Microsoft's software competitors, including even potential competitors; and exclusionary agreements restricting the right of companies to provide services or resources to Microsoft's software competitors, including even potential competitors. Microsoft's consistent and coordinated pattern of acts have had no valid or sufficient business purpose, and made no business sense for Microsoft except as a means of protecting its operating system monopoly.

30. At least as early as 1995, Microsoft recognized that the Internet presented one of the most serious threats to the applications barrier to entry, and thereby to Microsoft's operating system monopoly. At that time, Microsoft Chairman Bill Gates described the Internet as "the most important single development to come along since the IBM PC was introduced in 1981." The means of accessing the Internet with a PC is known as a "browser," which is a specialized software program that allows a PC user to locate, access, display, and manipulate all of the content and all of the applications software located on the Internet's World Wide Web. At all relevant times, Microsoft has marketed and licensed an Internet browser known as "Internet Explorer" (sometimes referred to below as "IE").

31. In May 1995, Mr. Gates warned his subordinate executives that a competing Internet browser posed a serious threat to the applications barrier to entry and thus to Microsoft's operating system monopoly.

> "A new competitor 'born' on the Internet is Netscape. Their browser [known as Navigator] is dominant, with a 70% usage share, allowing them to determine which network extensions will catch on. They are pursuing a multi-platform strategy where they move the key API [applications programming interface] into the client to commoditize the underlying operating system."

32. Internet browsers that compete with Microsoft's Internet Explorer then posed, and have continued to pose, a serious competitive threat to Microsoft's operating system monopoly. The applications barrier to entry, consisting of the large number of software applications that will run on the Windows operating system but not on other operating systems, has precluded other potential software developers of operating systems from competing with Windows. If, however, application programs could be written to run on

multiple operating systems, then competition in the market for operating systems for Intel based PCs could be reinstated. Browser technology, in combination with a new programming language known as “Java,” presented that potential competition, which was viewed as a threat to Microsoft when Mr. Gates issued his warning in May 1995.

33. Java was designed to permit applications written in its language to be run on multiple operating systems for Intel based PCs, including Windows. Given that capability, Java-based applications are not restricted to Windows as their only operating system, as was previously the case with other applications. That restriction imposed by Windows has constituted the very foundation of the applications barrier to entry into the market for operating systems for Intel based PCs that Microsoft has created and enjoys. The distribution of Java through Internet browsers that compete with Microsoft’s Internet Explorer therefore threatened to eliminate the applications barrier to entry that protected Microsoft’s monopoly of operating systems for Intel based PCs, and also threatened to destroy Microsoft’s power to license its Windows operating systems for Intel based PCs at monopoly prices, without regard to competition, for a price in excess of what Microsoft would be able to charge in a competitive market.

34. Non-Microsoft Internet browsers are the most significant means of distributing Java technology to end-users. Microsoft has recognized that the widespread use of browsers, other than its own Internet Explorer, threatens to increase the distribution and use of Java, and in so doing threatens Microsoft’s operating system monopoly by weakening the applications barrier to entry. Microsoft therefore determined aggressively to use its Internet Explorer to counter the threat to Microsoft’s operating system monopoly presented by Java. A presentation to Microsoft Chairman Bill Gates on January 5, 1997,

discussing how to respond to the Java threat, emphasized “Increase IE share” as a key Microsoft strategy.

35. Microsoft separately recognized that Netscape’s Navigator browser was itself a “platform” to which many applications were being written. If Navigator thrived, more and more applications would be written using Navigator as a platform. Because Navigator could be run on any Intel-based PC operating system, the success of this alternative platform also threatened to reduce or eliminate the applications barrier to entry protecting Microsoft’s operating system monopoly. This is the threat that Microsoft’s Chairman Bill Gates referred to in his May 1995 communication as the threat that Netscape would “commoditize” the operating system.

36. In response to the competitive threat to Microsoft’s operating system monopoly posed by Netscape’s Navigator browser, both as a platform and as a vehicle for distributing Java, Microsoft determined to squash that competitive threat by embarking on an extensive and aggressive campaign to market and distribute Microsoft’s own Internet Explorer browser. Microsoft described that campaign as a religious war or “jihad” to win the “browser war.” Microsoft embarked on that effort because winning the “browser war” was essential to Microsoft’s ability to preserve the applications barrier to entry that protects Microsoft’s operating system monopoly, and to preserve Microsoft’s corresponding power to license its Windows operating systems for Intel-based PCs at monopoly prices, without regard to competition, in excess of what Microsoft would be able to charge in a competitive market.

37. A monopolist’s weapon of choice is its monopoly power. Microsoft used its operating system monopoly power as the means of destroying the threat that Netscape’s

Navigator posed to the applications barrier to entry. As of February 1997, Microsoft had concluded that it would "be very hard to increase browser share on the merits of IE 4 alone." Instead, Microsoft determined that: "It will be more important to leverage the OS [operating system] asset to make people use IE instead of Navigator."

38. Microsoft first attempted to eliminate competition from Netscape by soliciting an express horizontal agreement not to compete. In May 1995, Microsoft executives met with Netscape executives for the purpose of inducing Netscape not to compete with Microsoft and to divide the browser market. Microsoft proposed that it would be the sole supplier of browsers for use with Windows 95 and successor operating systems, and that Netscape would be the sole supplier of browsers for operating systems other than Windows 95 and its successors. Netscape refused to participate in Microsoft's patently unlawful scheme.

39. Microsoft thereupon set about to exclude Netscape and other browser rivals from access to the distribution, promotion, and resources that they needed in order to be competitive. To be successful, browser rivals would need to offer their browser products to OEMs and PC users at a level sufficiently pervasive to facilitate the widespread distribution of Java, or to make their browsers an attractive programming platform in their own right. As has been shown above, those two potential scenarios would, either alone or in combination, erode the applications barrier to entry that is the basis of Microsoft's operating system monopoly. Microsoft was determined not to let either scenario come to fruition.

40. One means by which Microsoft sought to maintain its monopoly was to expend hundreds of millions of dollars in the testing and promotion of Internet Explorer,

and then distribute that product without separate charge. Such actions would only make sense to a predatory monopolist. As if any further explanation of that behavior were necessary, Microsoft's Vice President in charge of the Platforms Group told industry executives: "We are going to cut off [Netscape's] air supply. Everything they're selling, we're going to give away for free." And Microsoft's Chairman Bill Gates boasted in June 1996: "Our business model works even if all [of Microsoft's] Internet software is free _ . We are still selling operating systems. What does Netscape's business model look like? Not very good."

41. In addition to free distribution, Microsoft took all necessary actions to ensure that significant market participants distributed and used Internet Explorer instead of Netscape's Navigator, including paying some customers to take IE and using its Windows monopoly power to induce others to do so. Gates was blunt in seeking the support of Intuit, a significant application software developer, as he reported in a July 1996 Microsoft e-mail:

> "I was quite frank with him [Scott Cook, Chairman of Intuit] that if he had a favor we could do for him that would cost us something like $IM to do that in return for switching browsers in the next few months I would be open to doing that."

42. Microsoft imposed restrictions on the primary distributors of operating systems software, OEMs, to limit competition and maintain and strengthen Microsoft's monopoly over operating system software thereby increasing Microsoft's browser share.

43. Microsoft, among other things, imposed a variety of restrictive licensing provisions, including long-term distribution contracts and exclusive dealing distribution agreements. These monopoly-based restrictive agreements, inter alia, maintain, and

enhance the importance of Microsoft's ability to provide preferential placement on the desktop and in the boot-up sequence to various Internet Service Providers (known as "ISPs") and Internet Content Providers (known as "ICPs"), in return for those firms' commitments to give preferential distribution and promotion to Internet Explorer and to restrict their distribution and promotion of competing browsers.

44. In addition, the Microsoft imposed per-processor licensing fees, under which OEMs paid a license fee to Microsoft for every computer shipped, whether or not the computer had Microsoft operating software installed. That practice created a significant barrier to entry to competing software, as OEMs would be forced to pay twice just to load a different brand of software on their new computers.

45. Microsoft has never allowed OEMs to ship Windows 95 or Windows 98 to consumers without Internet Explorer installed on their new computers. Windows' monopoly position made it a commercial necessity for OEMs to pre-install Windows 95 on virtually all of the PCs the OEMs sold. This practice closed the significant OEM channel of distribution for competing Internet browsers. Microsoft thereby unlawfully leveraged its operating system monopoly to require PC manufacturers to license and distribute Internet Explorer on every PC those OEMs shipped with Windows, with the purpose and effect of foreclosing competing Internet browsers that, as described above, threatened to erode the applications barrier to entry sustaining Microsoft's operating systems monopoly.

46. Microsoft designed Windows 98 so that removal of Internet Explorer by OEMs or end users is operationally more difficult than it was in Windows 95 (the "technological tie-in"). Although it is nevertheless technically feasible and practicable to remove Microsoft's Internet browser software from Windows 98 and to substitute other

Internet browser software, OEMs are prevented from doing so by Microsoft's contractual tie-in. Microsoft has thus continued this practice begun with Windows 95, with the purpose and effect of foreclosing competing Internet browsers that threatened to erode the applications barrier to entry sustaining Microsoft's operating systems monopoly.

47. As Microsoft also required OEMs to adopt the uniform "boot-up" sequence and "desktop" screen that Microsoft has dictated in order to preserve Microsoft's advantageous desktop positioning that Microsoft secures for its own Internet Explorer and other Microsoft software and to foreclose competing software from securing preferential placement. This "boot-up" sequence determines the screens that every user sees upon turning on a Windows-based PC. Microsoft's exclusionary restrictions also forbid, among other things, any changes by an OEM that would remove from the PC any part of Microsoft's Internet Explorer software. OEMs are also prohibited by Microsoft from adding to the PC a competing browser in any more prominent or visible way than the way Microsoft requires Internet Explorer to be presented.

48. Through these and other license conditions that restrict the ability of OEMs to promote software that Microsoft believes could weaken the barriers to entry, Microsoft prevented its competitors from gaining any meaningful share of the operating software market. The effect of this exclusionary conduct has been to deny the State and its citizens and competitive software prices and the choice of competitive software products.

49. The same monopoly-based restrictive agreements that Microsoft uses with OEMs also maintain, and enhance the importance of Microsoft's ability to provide preferential placement on the desktop and in the boot-up sequence to various Internet Service Providers (known as "ISPs") and Internet Content Providers (known as "ICPs"), in

return for those firms' commitments to give preferential distribution and promotion to Internet Explorer and to restrict their distribution and promotion of competing browsers.

50. As a result, these restrictions further excluded competing Internet browsers from the most important channels of distribution. The restrictions enhanced Microsoft's ability to maintain the applications barrier to entry that competing Internet browsers have threatened to erode by distributing Java and becoming platforms that could substitute for Windows.

51. In its agreements with ISPs, Microsoft leveraged its operating system monopoly by imposing on ISPs the requirements that they offer Microsoft's Internet Explorer browser primarily or exclusively as the browser they distribute; that they refrain from promoting or mentioning to their subscribers the existence, availability, or compatibility of any competing Internet browser; and that they use on their own Internet sites Microsoft-specific programming that makes those sites look better when viewed through Internet Explorer than when viewed through competing Internet browsers.

52. Microsoft's "jihad" in waging the "browser war" has had independent, significant effects on the market for Internet browsers, such that Internet Explorer is now the dominant browser with usage share in excess of 80%. In that context, Microsoft's unlawful and anti-competitive behavior in pursuing its "jihad" against competing Internet browsers has had the purpose and effect of unlawfully maintaining Microsoft's monopoly power in the market for operating systems for Intel-based PCs, by preventing competing Internet browsers from distributing Java and also becoming platforms, consequences which Microsoft itself acknowledged would erode the applications barrier to entry that Microsoft well knows protects its monopoly.

53. Microsoft, like other for-profit corporations, measures its own performance in terms of profits as a function of revenues. Ultimately, therefore, Microsoft's "jihad" had as its purpose maintaining Microsoft's power to charge monopoly prices for its Intel-based PC operating systems. That Microsoft's unlawful acts of monopolization have been successful in staving off the threat to the applications barrier to entry posed by competing Internet browsers is evidenced by the fact that Microsoft did not even need to consider the prices of competitors' operating systems, let alone the prices of competitors' Internet browsers, when Microsoft set the price for Windows 98.

54. As has been shown above, Microsoft has willfully and unlawfully wielded its monopoly power to preserve that very power. In the course of doing so, and in willful and unlawful exercise of its monopoly power, Microsoft has knowingly licensed its Windows 98 operating system for Intel-based PCs, without regard to competition, at a monopoly price in excess of what Microsoft would have been able to charge in a competitive market. Through its actions, Microsoft has wrongfully injured the State and its citizens, and competition in general.

55. The PC industry is highly competitive. As a result, software retailers, including OEMs and distributors of upgrade CD ROMs must recover their costs, plus a competitive return on their investment or they will go out of business. Because Microsoft has charged software resellers inflated monopoly prices for the Windows operating system software, the resellers must charge the State and its citizens this monopoly price, plus any other costs associated with reselling, plus a competitive rate of return. Monopoly charges to resellers result in monopoly prices to the State and its citizens. The State is informed and believes, that OEMs and distributors of upgrade CD ROMs treated Microsoft's

monopoly price for Windows 98 as an element of their costs and have passed all of Microsoft's monopoly price on to the State and its citizens. Because Microsoft has set the price of Windows 98 at a monopoly price, the overcharge incurred by the State and its citizens was determined in advance without regard to the interactions of supply and demand.

56. The State and its citizens have suffered antitrust injury to their business or property by, inter alia, paying monopoly prices for Windows 98, ultimately to Microsoft. The State and its citizens are therefore entitled to compensatory damages based on the difference between the monopoly prices they paid and the price that they would have paid in a competitive market for operating systems for Intel-based PCs.

RELEVANT MARKETS

57. The relevant product market is operating systems for Intel based PCs.

58. The relevant geographic market is the State of West Virginia.

MARKET EFFECTS

59. The acts and practices of Microsoft as alleged in the foregoing paragraphs have had the purpose, or effect, or the tendency or capacity to unreasonably restrain competition and injure competition in the State of West Virginia.

60. The acts and practices of Microsoft as alleged in the foregoing paragraphs foreclosed competition in the operating system market for Intel based PCs, allowing Microsoft to maintain its monopolistic position in operating systems for Intel-based PCs,

and allowing Microsoft to charge monopoly prices to the State and its citizens for operating systems.

61. Microsoft's acts and practices as alleged in the foregoing paragraphs injured competition in the software industry to the extent that software products formerly competing with Microsoft's products have been effectively eliminated from the marketplace, reducing consumer choice and permitting Microsoft to charge monopoly prices for its products to the State and its citizens.

62. Because of Microsoft's conduct and actions, consumers in West Virginia have been deprived of the benefits of competition of among producers of operating systems for Intel-based PCs and from entry of new competitors.

CLAIM FOR RELIEF ANTITRUST

63. The Plaintiff realleges the preceding paragraphs as if set forth fully herein.

64. As described above, beginning sometime prior to June 1998, and continuing thereafter, Microsoft attempted to and did establish, maintain and/or use a monopoly of trade or commerce within the State of West Virginia for the purpose of excluding competition and/or controlling, fixing or maintaining prices in the market for operating systems for Intel-based personal computers.

65. There are significant barriers to entry in the market for operating systems for Intel-based personal computers.

66. The specific acts engaged in by Microsoft to acquire and maintain its monopoly power in the West Virginia market for operating systems for Intel-based

computers are described above. Such acts have unreasonably restricted competition in this market, and as a result, Microsoft owns a dominant share of such market.

67. Microsoft willfully and flagrantly maintained its monopoly power in this market.

68. Microsoft licensed its Windows 98 operating system to end-users, without regard to competition, at a monopoly price in excess of what Microsoft would have been able to charge in a competitive market.

69. As end-user licensees of Microsoft as to its Windows 98 operating system, the State and its citizens incurred the monopoly price charged by Microsoft for their use of Windows 98.

70. Microsoft has reaped and continues to reap enormous profits by virtue of its wrongful conduct.

71. Said conduct constitutes the establishment, maintenance or use of a monopoly for the purpose of excluding competition or controlling, fixing or maintaining prices in violation of West Virginia Code § 47-18-4.

CLAIM FOR RELIEF CONSUMER PROTECTION

72. The State realleges and incorporates herein the allegations contained in the previous paragraphs.

73. Microsoft's unlawful, anticompetitive activities as set forth in the foregoing paragraphs are unfair methods of competition and unfair or deceptive acts and practices injurious to the public interest and in violation of West Virginia Code section 46A-6-101 , 102 and 104.

CLAIM FOR RELIEF CONSUMER PROTECTION

74. The State realleges and incorporates herein the allegations contained in the previous paragraphs.

75. Upon information and belief, Defendant Microsoft distributes its products, including Internet Explorer and others, to end-users below cost or for free in violation of W.Va. Code § 47-11A-1 *et seq.*

76. Microsoft engages in trade or commerce that directly or indirectly affects the State and its citizens by distributing its products, including Internet Explorer and others, below cost.

77. Microsoft has committed and continues to engage in unfair methods of competition and unfair or deceptive practices in the conduct of trade or commerce including, but not limited to, selling below cost or giving away its products, all in violation of W.Va. Code § 47-11A-1 *et seq.* and W.Va. Code § 46A-1-101 *et seq*.

WHEREFORE, Plaintiff, the State of West Virginia, prays for a judgment against Defendants as follows:

a. Adjudge and decree that Defendant Microsoft has engaged in conduct in violation of the West Virginia Antitrust Act, W.Va. Code § 47-18-1 *et seq*.;

b. Adjudge and decree that Defendant Microsoft has engaged in conduct in violation of the West Virginia Consumer Credit and Protection Act, W.Va. Code § 46A-1-101 *et seq*.;

c. Enjoin and restrain the Defendants, their affiliates, assignees, subsidiaries, successors and transferees, and the officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on their behalf or in concert with them, from engaging in any conduct, contract, combination or conspiracy, and from adopting or following any practice, plan, program or device having a similar purpose or effect to the anticompetitive and unfair or deceptive actions set forth above;

d. Award State and its citizens treble damages for Defendant Microsoft's violations of W. Va. Code § 47-18-1, *et seq.*, in an amount to be determined at trial;

e. Grant Plaintiff equitable relief in the nature of disgorgement and/or restitution due to defendants' wrongful conduct, with said amount to be determined at trial pursuant to the West Virginia Consumer Credit and Protection Act;

f. Award maximum civil penalties as provided for by law;

g. Grant Plaintiff all statutory damages permitted under W.Va. 46A-1-101 et seq., W.Va. 46A-6-4 and 106.

h. Grant Plaintiff the costs of prosecuting this action, together with interest and reasonable attorneys' fees in connection with the prosecution of this case; and

i. Grant such further relief as this Court may deem just and proper under the circumstances.

JURY DEMAND

Plaintiff demands a trial by jury on all claims for which there is a right to a jury trial.

STATE OF WEST VIRGINIA, *ex rel.*
DARRELL V. MCGRAW, JR.,
ATTORNEY GENERAL

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