

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

IN RE MICROSOFT CORP. ANTITRUST
LITIGATION

MDL Docket No. 1332

This Document Relates To:

Hon J. Frederick Motz

Daisy Mountain Fire District
v. Microsoft Corp.,
Civil Action No. JFM-07-2851

**DEFENDANT MICROSOFT CORPORATION'S
ANSWER AND DEFENSES**

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June 2, 2008

Defendant Microsoft Corporation, by its undersigned counsel, answers the First Amended Complaint of Daisy Mountain Fire District ("First Amended Complaint") and asserts affirmative defenses as follows:

ANSWER

1. Denies the allegations of Paragraph 1.
2. Denies the allegations of Paragraph 2.
3. Denies the allegations of Paragraph 3.
4. Denies the allegations of Paragraph 4.
5. Denies the allegations of Paragraph 5.
6. Denies the allegations of Paragraph 6, except admits that plaintiff purports to seek the relief to which it refers.
7. Denies the allegations of Paragraph 7, except (a) admits that the Superior Court of the State of Arizona, in and for Maricopa County, previously had jurisdiction over plaintiff's claims, but avers that the United States District Court for the District of Arizona has original diversity jurisdiction over all claims brought by plaintiff under 28 U.S.C. § 1332(d) (CAFA); and (b) admits that Microsoft removed this case to the United States District Court for the District of Arizona on September 14, 2007, and avers that a Conditional Transfer Order was entered on October 1, 2007, transferring this case to the United States District Court for the District of Maryland.
8. Denies the allegations of Paragraph 8, except (a) admits that it is authorized to and does conduct business in the County of Maricopa, Arizona; and (b) avers that venue would be proper in the Maricopa County in the event that the Superior

Court of the State of Arizona had jurisdiction, but further avers that venue is also proper in the United States District Court for the District of Arizona.

9. Denies the allegations of Paragraph 9, except (a) admits that the DOJ filed a complaint against Microsoft in the District of Columbia on July 15, 1994, in an action captioned *United States v. Microsoft Corp.*, Civil No. 94-1564; and (b) respectfully refers the Court to the complaint in that action for a complete and accurate description of its contents.

10. Denies the allegations of Paragraph 10, except (a) admits that (i) simultaneously with the filing of the complaint in that action, Microsoft and the DOJ settled the action pursuant to a Consent Decree without the DOJ having proved any elements of its claims, without any admission of wrongdoing by Microsoft, and without any judicial finding that Microsoft had violated the antitrust or any other laws; and (ii) the court entered the Consent Decree as a Final Judgment on August 21, 1995; and (b) respectfully refers the Court to the Consent Decree for a complete and accurate description of its contents.

11. Denies the allegations of Paragraph 11, except (a) admits that on October 20, 1997, the DOJ filed a petition for an order to show cause why Microsoft should not be found in civil contempt of the Consent Decree; and (b) respectfully refers the Court to the DOJ's petition for a complete and accurate description of its contents.

12. Denies the allegations of Paragraph 12, except (a) admits that (i) on May 18, 1998, the DOJ, joined by twenty states and the District of Columbia, filed suit against Microsoft alleging violations of Sections 1 and 2 of the Sherman Act, as well as state law violations; and (ii) on November 5, 1999, Judge Thomas Penfield Jackson issued findings

of fact in *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999)); and (b) respectfully refers the Court to the complaints in that action and Judge Jackson's findings of fact for a complete and accurate description of their contents.

13. Denies the allegations of Paragraph 13 and respectfully refers the Court to Judge Jackson's findings of fact for a complete and accurate description of its contents.

14. Denies the allegations of Paragraph 14, except (a) admits that Judge Jackson issued Conclusions of Law in *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000); (b) avers on June 21, 2001, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); and (c) respectfully refers the Court to those decisions for a complete and accurate description of their contents.

15. Admits the allegations of Paragraph 15, except (a) avers on June 21, 2001, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); and (b) respectfully refers the Court to that opinion and the DOJ's Proposed Final Judgment, dated April 28, 2000, for a complete and accurate description of their contents.

16. Denies the allegations of Paragraph 16.

17. Denies the allegations of Paragraph 17, except (a) admits that (i) Judge Jackson issued a Final Judgment on June 7, 2000, in *United States v. Microsoft*, 97 F. Supp. 2d 59 (D.D.C. 2000); and (ii) on June 28, 2001, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), which vacated in full the Final Judgment issued on June 7,

2000; and (b) respectfully refers the Court to those decisions for a complete and accurate description of their contents.

18. Denies the allegations of Paragraph 18, except (a) admits that the United State Court of Appeals for the District of Columbia Circuit remanded the case to the District Court in *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); and (b) respectfully refers the Court to that decision for a complete and accurate description of its contents.

19. Denies the allegations of Paragraph 19, except (a) admits that Judge Colleen Kollar-Kotelly issued an opinion and Final Judgment in *United States v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002); and (b) respectfully refers the Court to that decision for a complete and accurate description of its contents.

20. Denies the allegations of Paragraph 20, except (a) admits that the United States Court of Appeals for the Fourth Circuit issued an opinion in *In re Microsoft Corp. Antitrust Litigation*, 355 F.3d 322 (4th Cir. 2004); and (b) respectfully refers the Court to that decision for a complete and accurate description of its contents.

21. Denies the allegations of Paragraph 21, except (a) admits that Charles I. Friedman, P.C., and The Power P.E.O., Inc., filed a proposed class action against Microsoft on January 12, 2000; and (b) respectfully refers the Court to that complaint for a complete and accurate description of its contents.

22. Admits the allegations of Paragraph 22, and respectfully refers the Court to the November 15, 2000 order issued in *Friedman v. Microsoft*, CV2000-722 (Sup. Ariz. Maricopa County) for a complete and accurate description of its contents.

23. Admits the allegations of Paragraph 23, and respectfully refers the Court to the January 6, 2005 order issued in *Friedman v. Microsoft*, CV2000-722 (Sup. Ariz. Maricopa County) for a complete and accurate description of its contents.

24. Admits the allegations of Paragraph 24 as to plaintiff, but denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 24 as to other members of the purported class.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 25.

26. An answer to Paragraph 185 is not required because, by Order entered April 16, 2008, the Court rejected plaintiff's claim that it falls under the exemption of A.R.S. §12-510.

27. Denies the allegations of Paragraph 27, except admits that (a) Microsoft is a corporation organized and existing under the laws of the State of Washington; (b) Microsoft's principal place of business is located at One Microsoft Way, Redmond, Washington; (c) Microsoft is a leading licensor of operating system and computer software for personal computers ("PCs"); and (d) Microsoft's revenues and net income for Microsoft's fiscal year 2006 were, respectively, \$44.3 and \$12.6 billion.

28. An answer to Paragraph 185 is not required because, by Order entered April 16, 2008, the Court rejected plaintiff's claim that it falls under the exemption of A.R.S. §12-510.

29. Denies the allegations of Paragraph 29.

30. Denies the allegations of Paragraph 30.

31. Denies the allegations of Paragraph 31.

32. Denies the allegations of Paragraph 32, and respectfully refers the Court to Judge Jackson's findings of fact for a complete and accurate description of its contents.

33. Denies the allegations of Paragraph 33.

34. Denies the allegations of Paragraph 34.

35. Denies the allegations of Paragraph 35.

36. Denies the allegations of Paragraph 36.

37. Denies the allegations of Paragraph 37.

38. Denies the allegations of Paragraph 38.

39. Denies the allegations of Paragraph 39.

40. Denies the allegations of Paragraph 40, except admits that plaintiff purports to bring this action on behalf of the putative classes described in that Paragraph.

41. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 41.

42. Denies the allegations of Paragraph 42.

43. Denies the allegations of Paragraph 43.

44. Denies the allegations of Paragraph 44.

45. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 45.

46. Denies the allegations of Paragraph 46.

47. Denies the allegations of Paragraph 47.

48. Denies the allegations of Paragraph 48.

49. Denies the allegations of Paragraph 49.

50. Denies the allegations of Paragraph 50, except admits that (a) software generally is characterized by economies of scale; (b) unlike many products, virtually all costs associated with producing software are fixed costs; (c) marginal costs are relatively small; and (d) many of the costs of developing software are “sunk.”

51. Denies the allegations of Paragraph 51, except admits that an application created to run on a particular operating system often will run on other operating systems if it is adapted or ported to the other operating systems.

52. Denies the allegations of Paragraph 52.

53. Denies the allegations of Paragraph 53.

54. Denies the allegations of Paragraph 54.

55. Denies the allegations of Paragraph 55.

56. Denies the allegations of Paragraph 56, except admits that both DR-DOS and OS/2 competed with MS-DOS.

57. Denies the allegations of Paragraph 57, except avers that middleware technologies are a significant source of competition to Microsoft’s operating system products such as Windows.

58. Denies the allegations of 58.

59. Denies the allegations of Paragraph 59, except admits that (a) in 1981, Microsoft released the first version of its “Microsoft Disk Operating System” or MS-DOS; (b) along with UCSD P-System and CP/M 86, International Business Machines Corporation (“IBM”) selected MS-DOS as one of the operating systems for its first personal computer; and (c) MS-DOS eventually became the most popular operating

system for personal computers for many reasons, including consumer preferences and the number of popular applications that were written for MS-DOS.

60. Denies the allegations of Paragraph 60, except (a) denies knowledge and information sufficient to form a belief as to the truth of the allegations in the first and last sentences of that Paragraph; and (b) admits that in 1988, DRI released its operating system software under the name DR-DOS.

61. Denies the allegations of Paragraph 61.

62. Denies the allegations of Paragraph 62, except admits that (a) in the mid-1980s, Microsoft and IBM collaborated on the development of the OS/2 operating system, which was first released in 1987; and (b) this collaboration ended in 1990.

63. Denies the allegations of Paragraph 63.

64. Denies the allegations of Paragraph 64.

65. Denies the allegations of Paragraph 65.

66. Denies the allegations of Paragraph 66.

67. Denies the allegations of Paragraph 67, except admits that Borland's development tools were popular products and continue to be updated and widely distributed.

68. Denies the allegations of Paragraph 68.

69. Denies the allegations of Paragraph 69, except avers that middleware technologies, including some of those listed in Paragraph 68, are a significant source of competition to Microsoft's operating system products such as Windows.

70. Denies the allegations of Paragraph 70.

71. Denies the allegations of Paragraph 71.

72. Denies the allegations of Paragraph 72, except denies knowledge and information sufficient to form a belief as to the truth of the allegation in the last sentence of that Paragraph.

73. Denies the allegations of Paragraph 73, except admits on information and belief that DR-DOS 3.31, DR-DOS 5.0, and DR-DOS 6.0, were released on or about the years there alleged.

74. Denies the allegations of Paragraph 74.

75. Denies the allegations of Paragraph 75.

76. Denies the allegations of Paragraph 76, except admits that Novell announced in September 1994 that it would cease the marketing and developing of DR-DOS.

77. Denies the allegations of Paragraph 77, except admits that (a) in the mid-1980s, Microsoft and IBM collaborated on the development of the OS/2 operating system; and (b) this collaboration ended in 1990.

78. Denies the allegations of Paragraph 78.

79. Denies the allegations of Paragraph 79.

80. Denies the allegations of Paragraph 80.

81. Denies the allegations of Paragraph 81, except respectfully refers the Court to the August 21, 1995 Consent Decree for a complete and accurate description of its contents.

82. Denies the allegations of Paragraph 82.

83. Denies the allegations of Paragraph 83.

84. Denies the allegations of Paragraph 84.

85. Denies the allegations of Paragraph 85, except admits that Micrografx developed a tool called Mirrors.

86. Denies the allegations of Paragraph 86.

87. Denies the allegations of Paragraph 87.

88. Denies the allegations of Paragraph 88.

89. Denies the allegations of Paragraph 89.

90. Denies the allegations of Paragraph 90.

91. Denies the allegations of Paragraph 91.

92. Denies the allegations of Paragraph 92, except (a) admits that (i) in the spring of 1995, Intel first informed Microsoft of Intel's imminent plans to release Native Signal Processing ("NSP") commercially; (ii) Microsoft learned that Intel's NSP software was designed to run only on Windows 3.1 and was incompatible with both Windows 95 and Windows NT; and (iii) Microsoft advised Intel of its concerns about incompatibility; (b) avers that as a result of its efforts, many elements of Intel's NSP software were commercially released in a form compatible with Windows 95 and Windows NT.

93. Denies the allegations of Paragraph 93, and respectfully refers the Court to the decision referenced for a complete and accurate description of its contents.

94. Denies the allegations of Paragraph 94, except admits that (a) Web-browsing software such as Netscape's Navigator is a significant source of competition to Microsoft operating system products such as Windows; and (b) Web-browsing software may be considered an example of "middleware" (as plaintiff uses the term in the Complaint) that can serve as a limited platform for software development and represents

one of a number of technologies and competitive forces that constrains Microsoft's ability to achieve or exercise substantial market power.

95. Denies the allegations of Paragraph 95.

96. Denies the allegations of Paragraph 96.

97. Denies the allegations of Paragraph 97, except (a) admits that Microsoft software providing web browsing functionality obtained an increasing share of usage relative to Netscape Navigator and other software providing web browsing functionality as Microsoft has steadily improved the quality of its software; and (b) avers on information and belief that Internet Explorer technologies are generally recognized to be superior to Netscape Navigator for computer users as well as for software developers creating new programs that interact with software providing web browsing functionality.

98. Denies the allegations of Paragraph 98, except admits that (a) Sun Microsystems, Inc., announced that it had developed Java programming language in May 1995; and (b) Sun Microsystems promoted Java as permitting software to run "across platforms," *i.e.*, on many operating systems and other platforms.

99. Denies the allegations of Paragraph 99, except denies knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of that Paragraph.

100. Denies the allegations of Paragraph 100.

101. Denies the allegations of Paragraph 101.

102. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 102.

103. Denies the allegations of Paragraph 103.

104. Denies the allegations of Paragraph 104.
105. Denies the allegations of Paragraph 105.
106. Denies the allegations of Paragraph 106.
107. Denies the allegations of Paragraph 107.
108. Denies the allegations of Paragraph 108.
109. Denies the allegations of Paragraph 109.
110. Denies the allegations of Paragraph 110.
111. Denies the allegations of Paragraph 111.
112. Denies the allegations of Paragraph 112.
113. Denies the allegations of Paragraph 113.
114. Denies the allegations of Paragraph 114.
115. Denies the allegations of Paragraph 115.
116. Denies the allegations of Paragraph 116.
117. Denies the allegations of Paragraph 117.
118. Denies the allegations of Paragraph 118.
119. Denies the allegations of Paragraph 119.
120. Denies the allegations of Paragraph 120.
121. Denies the allegations of Paragraph 121.
122. Denies the allegations of Paragraph 122.
123. Denies the allegations of Paragraph 123.
124. Denies the allegations of Paragraph 124.
125. Denies the allegations of Paragraph 125.

