

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IN RE MICROSOFT CORP.
ANTITRUST LITIGATION

This Document Relates To:
Daisy Mountain Fire District
v. Microsoft Corp.

)
) MDL Docket No. 1332
) Hon. J. Frederick Motz
)

) No. JFM-07-2851
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)

FIRST AMENDED COMPLAINT

Plaintiff on behalf of itself and similarly situated government entities, agencies and political subdivisions of the State of Arizona who have purchased Microsoft software, by and through counsel, brings this action against Defendant Microsoft Corporation (“Microsoft”), for damages under the antitrust laws of the state of Arizona, A.R.S. §§ 44-1401 et seq., and demands a trial by jury, complaining and alleging as follows:

NATURE OF THE ACTION

1. This action concerns Microsoft’s anticompetitive and monopolistic practices, specifically those acts or practices that it intended to use, did use, and continues to use to prevent and destroy competition and acquire and/or maintain monopoly power and raise prices to supra-competitive levels in the United States, including in Arizona, in the following product markets:

- a. The sale and/or licensing of Intel-compatible personal computer operating system software;
- b. The sale and/or licensing of Intel-compatible personal computer word processing

applications software; and

- c. The sale and/or licensing of Intel-compatible personal computer spreadsheet applications software.

The software referenced in sub-paragraphs a through c are collectively referred to as the “Covered Products.”

2. Since the mid-1980s, Microsoft has dominated the operating system software market. For example, in the United States its market share at times has exceeded 95 percent. Beginning in the late-1980s and continuing through the present, Microsoft engaged in a series of predatory acts designed to, and which did, eliminate competition and prevent entry in the operating system software market. Software companies offering superior operating systems and/or lower prices (namely, companies such as Digital Research, Inc. (“DRI”), International Business Machines (“IBM”), and Be, Inc.) were not able to compete with Microsoft because of Microsoft’s unlawful conduct. Microsoft has had no significant competitor in the operating system software market since 1994 when DRI and IBM were eliminated as meaningful competitors.

3. Microsoft also directed its exclusionary conduct at complementary software products, often of a type known as middleware. Although middleware targets did not directly compete with Microsoft’s operating system, Microsoft understood that they had the potential to become direct competitors and/or to greatly strengthen the competitive position of actual or potential competitors.

4. Microsoft also directed its exclusionary conduct at certain office productivity

applications, particularly word processing and spreadsheets, to dominate these markets and because their cross-platform possibilities threatened Microsoft's operating system monopoly. As a result of its unlawful conduct, Microsoft has dominated these applications markets since at least the mid-1990s, achieving market shares in each exceeding 90 percent.

5. Microsoft has used its monopoly power over operating systems, word processing and spreadsheet applications software to injure consumers of its products, including Plaintiff, primarily by charging supra-competitive prices for its operating system software and for its word processing and spreadsheet applications software (both as stand-alone products and as part of the Microsoft office suite).

6. Plaintiff seeks to recover for damages sustained as result of this conduct, primarily the overpayments made to Microsoft for its operating system, word processing and spreadsheet applications software. Plaintiff also seeks treble damages and costs, including an award of reasonable attorneys' fees.

JURISDICTION AND VENUE

7. Pursuant to A.R.S. §44-1408, this action is for damages and other relief for violation of the Arizona Antitrust Act. The Superior Court of the State of Arizona in and for the County of Maricopa has jurisdiction over this civil action pursuant to A.R.S. §44-1405. On or about September 14, 2007, Microsoft removed this case to the United States District Court for the District of Arizona.

8. Venue is proper in the Superior Court of the State of Arizona in and for the

County of Maricopa because: (i) Microsoft transacts business, committed an illegal or tortious act, and/or is found within that district; and (ii) a substantial portion of the affected trade and commerce described below has been carried out in that district.

GOVERNMENT ACTION

9. The United States Department of Justice (“DOJ”) complained of and investigated, among other things, Microsoft’s illegal and anticompetitive practices in the operating system market in *United States v. Microsoft*, Civil No. 94-1564 (D.D.C. Petition filed July 15, 1994) (“Microsoft I”). The anticompetitive practices complained of included, among others, inducing original equipment manufacturers (“OEMs”) to enter into per-processor license agreements with Microsoft, which required the OEM to pay a royalty to Microsoft on every machine the OEM shipped regardless of whether the machine contained Microsoft’s operating system (MS-DOS), another operating system, or no operating system. Thus, an OEM could only use a competing operating system if it was willing to pay twice - once to Microsoft and once to Microsoft’s competitor.

10. The United States District Court for the District of Columbia entered a Final Judgment in *Microsoft I* on August 21, 1995, which barred several anticompetitive terms in Microsoft’s agreements with OEMs. Prohibited contract provisions included per-processor license provisions, license terms exceeding one year in length, provisions prohibiting or restricting OEMs from licensing or distributing non-Microsoft Operating Systems, provisions conditioning an OEM's license of one Microsoft operating system product upon the license of

another Microsoft product or upon the OEM not licensing a non-Microsoft product, minimum commitment provisions, and provisions requiring royalty payments to Microsoft other than on a per-copy or per-system basis.

11. In 1997, the United States sought to have Microsoft held in contempt for violating the 1995 Final Judgment, in large part due to Microsoft's requirement that OEMs license and distribute Microsoft's Internet browser (Internet Explorer) as a condition of obtaining a license for Windows 95, Microsoft's latest operating system at that time. Despite the court's entry of a preliminary injunction on December 11, 1997, Microsoft publicly announced on December 15, 1997 that any OEM that did not agree to license and distribute Internet Explorer could not obtain a license to the current version of Microsoft's Windows operating system.

12. Subsequent proceedings led to a renewed complaint by the United States. 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 ("Microsoft II"). The DOJ and Microsoft vigorously litigated the merits of DOJ's allegations for eighteen months. On November 5, 1999, Judge Thomas Penfield Jackson released his Findings of Fact based on the extensive evidence presented during the bench trial ("Findings").

13. Judge Jackson's Findings concluded, inter alia, that Microsoft has held and continues to hold a monopoly in the market for "Intel-Compatible PC Operating Systems"; that Microsoft has sustained and perpetuated this monopoly by using anti-competitive and

unreasonably exclusionary conduct to gain advantage; and that Microsoft has leveraged its advantageous position to restrict competition in other software markets.

14. On April 3, 2000, Judge Jackson issued his Conclusions of Law (“Conclusions of Law”) in Microsoft II, in which he found, inter alia, that “Microsoft maintained its monopoly power by anticompetitive means and attempted to monopolize the Web browser market, both in violation of [Section 2 of the Sherman Act]. Microsoft also violated [Section 1 of the Sherman Act] by unlawfully tying its Web browser to its operating system.” Conclusions of Law at 2.

15. In the remedy stage of Microsoft II, proposals submitted to the court by the DOJ asked the court to split Microsoft into two different companies -- with one company retaining the Windows operating system business and the other taking the rest of Microsoft’s business, including software applications and Internet browser software.

16. The DOJ reorganization plan was recommended, in large part, to restrict Microsoft’s wrongful exercise of its combined monopoly power over operating systems and applications software, and to prevent it from continuing to leverage its monopoly power in the operating system software market to exert control over, and raise barriers to entry in, the software applications markets, and thereby to stifle competition and charge supra-competitive prices in the applications markets.

17. On June 6, 2000, the Microsoft II court approved the DOJ proposal and directed that Microsoft be split into two separate companies. On June 28, 2001, the Court of Appeals for the District of Columbia Circuit reversed the imposition of the DOJ reorganization plan, but

upheld the trial Court's judgment that Microsoft had violated the Sherman Act in numerous respects, affirming the following Findings of Fact and Conclusions of Law:

- a. That Microsoft possesses monopoly power in a properly-defined relevant market for Intel-compatible PC operating systems;
- b. That Microsoft unlawfully maintained its operating systems monopoly by thwarting distribution of competing browsers and imposing restrictive contract terms on OEMs instead of competing on the merits;
- c. That Microsoft unlawfully "welded" Internet Explorer to Windows for the sole purpose of protecting its operating system monopoly and preventing competition on the merits;
- d. That Microsoft entered unlawful exclusive deals with Internet Access Providers ("IAPs") in order to thwart Netscape Navigator and thereby protect Microsoft's operating system monopoly;
- e. That Microsoft entered into unlawful agreements with ISVs mandating the use of Internet Explorer, for the purpose of thwarting the Netscape Navigator threat to Microsoft's operating system monopoly;
- f. That Microsoft unlawfully forced Apple to exclusively promote Internet Explorer by threatening to halt development of Microsoft Office for the McIntosh, thereby hindering the distribution of rival browsers that would have promoted competition in the operating system market;

- g. That Microsoft unlawfully thwarted the Java threat to its operating system monopoly by imposing on ISVs a requirement that they use Microsoft's incompatible version of the Java Virtual Machine as a condition of receiving needed technical support;
- h. That Microsoft intentionally deceived ISVs into using Microsoft's "polluted" [Microsoft's term] incompatible version of Java development tools, thereby protecting Microsoft's operating system monopoly from the competition that would have arisen from cross-platform Java; and
- i. That Microsoft threatened and ultimately coerced Intel to halt Intel's technical initiatives to support Java.

18. Though the case was remanded to the District Court for further proceedings regarding the appropriate remedy for Microsoft's antitrust violations, the Court of Appeals specifically noted that private actions are an important complement to governmental enforcement actions because "the threat of private damage actions . . . deter[s] those firms inclined to test the limits of the law." *United States v. Microsoft*, 253 F.3d 34, 49 (D.C. Cir. 2001).

19. On November 12, 2002, the District Court entered a Final Judgment that imposed various obligations on Microsoft and prohibited Microsoft from engaging in certain conduct.

20. Subsequently, the Fourth Circuit Court of Appeals explained that "[t]he D.C. Circuit held that Microsoft illegally maintained a monopoly in the market of 'licensing of all

Intel-compatible PC operating systems worldwide' through 12 specified acts of anticompetitive conduct" and held that "Microsoft may be precluded from relitigating the facts necessary to this judgment under the doctrine of offensive collateral estoppel." *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 328 (4th Cir. 2004).

PRIOR CLASS ACTION

21. On January 12, 2000, Charles I. Friedman, P.C. and The Power P.E.O. Inc., filed a proposed class action against Microsoft on behalf of indirect purchasers, including Plaintiff, for claims under the Arizona Antitrust Act based upon the essential conduct at issue here.

22. On November 15, 2000, the court in *Friedman et al. v. Microsoft*, CV2000-722 (Sup. Ariz. Maricopa County) certified a class defined as "All end user licensees of Windows 98 residing in the State of Arizona as to whom Microsoft has an electronic mail address that is computer-accessible by Microsoft."

23. On January 6, 2005, the court in the consolidated action, *Friedman et al. v. Microsoft*, No. CV2000-722 (Sup. Ariz., Maricopa County), approved a settlement of certain claims, including certifying a Settlement Class. The terms of that settlement specifically excluded from the Settlement Class "government entities" defined as "any federal, state, or local government, or any of its subdivisions (agencies, bureaus, departments, divisions, offices etc.), or any entity that is created by constitution, statute, code or administrative rule and that derives at least 66% of its funding from one or more of the aforementioned entities, including without limitation public schools."

24. Plaintiff and members of the class that Plaintiff seeks to represent were not members of the Settlement Class in *Friedman et al. v. Microsoft*.

PARTIES

25. Plaintiff Daisy Mountain Fire District is a “government entity” as that term is defined in the Settlement Agreement in *Friedman et al. v. Microsoft*. See ¶ 19. Plaintiff has been an indirect purchaser of Microsoft operating systems, word processing and spreadsheet applications software.

26. Plaintiff Daisy Mountain Fire District is a political subdivision of the state so as to fall under the exemption of A.R.S. §12-510.

27. 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 is the world’s largest supplier of operating system software and applications software for personal computers. In its fiscal year 2006, Microsoft had revenues of approximately \$44.3 billion and net income of approximately \$12.6 billion.

A.R.S. § 12-510

28. Proposed Class members are state entities for the purpose of A.R.S. § 12-510.

MICROSOFT’S MONOPOLY POWER IN THE RELEVANT MARKETS

The Relevant Product Markets

29. At all material times, Microsoft has had monopoly power in the following product markets:

- a. The sale and/or licensing of Intel-compatible personal computer operating systems software;
- b. The sale and/or licensing of word processing applications software compatible with Windows; and
- c. The sale and/or licensing of spreadsheet software compatible with Windows.

The Relevant Geographic Market

30. At all material times, the relevant geographic market for the claims asserted by Plaintiff has been the United States.

Microsoft's Monopoly Power In The Relevant Market For Operating Systems

31. Microsoft has possessed a dominant and persistent share of the United States market for Intel-compatible PC operating system software. During most of the relevant period, Microsoft's share of this market has exceeded 90 percent, reaching 93 percent in 2003 and forecasted to be over 95 percent in 2006.

32. The inability of server operating systems, non-Intel compatible PC operating systems, information appliances, network computers, server-based computing and middleware generally to provide a reasonable substitute for Microsoft's operating systems, or to discipline its monopoly power, is set forth in Judge Jackson's Findings at ¶¶ 19-32. It would be prohibitively expensive and take years for a new Intel-compatible operating system to attract enough developers and consumers to become a viable alternative to a dominant incumbent. Findings at ¶ 31.

33. Throughout the relevant period, Microsoft has had monopoly power in the relevant

