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

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

STATEMENT OF DEFENCE OF MICROSOFT CORPORATION AND MICROSOFT CANADA CO./MICROSOFT CANADA CIE

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INTRODUCTION

1. Microsoft Corporation ("**Microsoft**") is incorporated under the laws of the State of Washington, and has its headquarters in Redmond, Washington, as alleged in paragraph 2 of the Fifth Further Amended Statement of Claim filed November 13, 2014 ("**Statement of Claim**"). Since its inception, it has been engaged primarily in the development, marketing, and licensing of software. It also develops, manufactures, markets and sells other information technology products, including consumer electronics and personal computing and gaming hardware.

2. Microsoft Canada Co. ("**Microsoft Canada**") is a wholly owned subsidiary of Microsoft, incorporated under the laws of Canada and with its headquarters in Mississauga, Ontario. It markets information technology products developed and manufactured by Microsoft and its affiliated companies.

3. The defendants deny each and every allegation in the Statement of Claim except as expressly admitted in this Statement of Defence and deny that the plaintiffs are entitled to the relief requested. The defendants deny that the explanations of technical and industry terms at paragraph 7 of the Statement of Claim are accurate or reflect the meaning commonly ascribed to those terms within the relevant industry.

4. Microsoft has had a major role in developing and providing much of the software for the personal computer ("**PC**") revolution that has transformed daily life. Microsoft's position was won and maintained lawfully in an environment of intensely competitive and rapidly changing technology. Microsoft fulfilled its founders' goal of providing the software that would help put a PC "on every desk and in every home". Microsoft's success has been the product of its massive investments in research and development, the quality and functionality of its software, its strategic decisions, and its high volume / low cost pricing strategy. The class members, as purchasers of Microsoft's software in British Columbia, have been the beneficiaries of historic developments in functionality, reductions in cost and a continuing explosion of technical alternatives. The defendants deny that class members were overcharged due to any unlawful conduct; rather, Microsoft played a central role in making personal computing affordable for British Columbians.

5. Microsoft's operating system software products have been enormously successful because Microsoft developed excellent products initially at a time when no technical standard existed for PC operating systems. The success of Microsoft's operating systems occurred as a result of a number of technological and economic factors, including its decision to make its operating system openly available to PC manufacturers, economies of scale and scope, ongoing product development, and lawful use of network effects.

6. Microsoft's applications software products were successful because of a cross-platform applications strategy, the production of high quality and better performing applications, the adoption of a high volume and low price strategy, the investment of significant resources in the development of applications, and key marketing decisions, particularly the innovation of marketing productivity applications such as the Office suite.

7. The plaintiffs' claims have their genesis in proceedings brought under US and European ("**EU**") competition law that arose from complaints by competitors. The Statement of Claim relies on an amalgam of numerous episodes taken from Microsoft's history as one of the world's most successful software developers. Microsoft denies that any of the claims arising from these episodes represent a breach of Canadian law or that any of them resulted in higher prices charged to the class members.

8. The conduct alleged in the Statement of Claim is almost exclusively unilateral conduct that is not civilly actionable under Canadian law. Microsoft denies entering into any unlawful or conspiratorial agreements with the intention of harming the interests of consumers or of committing acts that were unlawful under the *Competition Act* or Canadian law more generally.

9. Throughout the history of computer technology, dominant technologies have been challenged or displaced by new and innovative technologies. Microsoft's success is but one example of this. The ongoing development of new products, such as mobile devices, web-based software and products yet unknown, demonstrates that the benefits of innovative technologies have not been constrained by Microsoft.

MICROSOFT'S OPERATING SYSTEMS SUCCESS

Overview of Operating Systems

10. An operating system ("**OS**") is effectively the command center of a computer. It controls the interaction between the microprocessor, memory and peripheral devices (such as keyboards, monitors and printers) that comprise a computer and the applications that run "on top of" the OS. Modern operating systems have three basic capabilities: (i) providing system services to software products that run on top of the operating system, (ii) providing a user interface that enables consumers to interact with the computer, and (iii) providing access to information stored on various media, such as floppy disks, CD-ROMs, and more recently, flash drives.

11. Many companies have developed and marketed operating systems for PCs, including International Business Machines Corporation ("**IBM**"), Apple Computer, Inc. ("**Apple**"), Sun Microsystems, Inc. ("**Sun**"), The Santa Cruz Operation, Digital Research Inc. ("**DRI**"), Novell, Inc. ("**Novell**") and Red Hat, Inc. ("**Red Hat**").

12. Such companies and independent software vendors ("**ISVs**") write software products, including applications, which enable a computer to perform particular functions, such as word processing or e-mail. Such products rely on functions provided by an OS for which the OS has enabled access through application programming interfaces ("**APIs**"). When ISVs call upon functionality provided by an OS, they do not have to write the software code necessary to provide that same functionality in their own products. This reliance on APIs can save ISVs considerable time and expense and enable them to develop products that are smaller and, therefore, easier to distribute and more efficient to operate. Relying on APIs also permits ISVs to focus on adding innovative features to their products rather than expending development effort on low-level functionality that users take for granted.

13. Software created to run on a particular operating system will not necessarily run on other operating systems. Operating system developers devote significant resources to promoting their technology to encourage ISVs to write applications for their operating systems. From its very early years, Microsoft has been particularly focused on, and successful at, facilitating the development by third parties of applications for Microsoft's operating systems.

Microsoft's Operating Systems

14. In the 1970s, computers were large and cost tens of thousands, sometimes millions, of dollars. There was no commercial software industry. The goal of Bill Gates and Paul Allen, the founders of Microsoft, was to develop commercial software products for personal computers to enable a future with a PC on every desktop and in every home.

15. In 1981, Microsoft released the first version of its "Microsoft Disk Operating System" or MS-DOS. Along with two other OSs, IBM selected MS-DOS as one of the OSs for the first IBM PC. MS-DOS had a character-based user interface ("**CUI**"), which requires users to type very specific instructions at a command prompt to perform particular tasks like launching an application. As the plaintiffs plead in **paragraph 15** of the Statement of Claim, Microsoft's MS-DOS OS became the standard OS for Intel-compatible PCs in the early to mid-1980s, before the plaintiffs' earliest allegations of anti-competitive conduct. MS-DOS's position as the standard OS for Intel-compatible PCs was lawfully obtained. Microsoft was entitled to charge prices for its MS-DOS OS which reflected this position. Microsoft was not required to price its product by reference to its marginal cost of production or to set its profits based upon any industry or regulatory standard. Despite that, Microsoft consistently followed a low price / high volume strategy, seeking to grow its markets.

16. In 1985, Microsoft first shipped a new product called "Windows" with a graphical user interface ("**GUI**") that permitted users to perform tasks by clicking on icons on the screen rather than typing commands. Although originally only a shell sitting on top of MS-DOS, Windows took on more and more OS functionality over time. Early versions of Windows ran only in real mode and used over half of the available memory of a typical PC at the time. With the release of Windows 3.0 in 1990, the role of MS-DOS was reduced essentially to providing the file system and certain device drivers, and most basic operating system functionality moved into Windows. Windows 3.0 could run in protected mode, which dramatically improved Windows' memory management and gave GUI application developers access to extended memory.

17. In 1995, Microsoft fully integrated the functionality of Windows 3.x and MS-DOS with the release of Windows 95, Microsoft's first GUI OS for Intel-compatible PCs that had an

integrated design similar to other OSs. Windows 95 enjoyed unprecedented popularity with consumers.

18. In June 1998, Microsoft released the successor to Windows 95, called Windows 98. Like Windows 95, Windows 98 provided a wide array of functionality beneficial to consumers, ISVs, and original equipment (PC) manufacturers ("**OEMs**").

The Operating Systems Market

19. In answer to the references in the Statement of Claim to the "Intel-compatible PC operating systems market", the defendants deny that the appropriate market definition in considering whether any of their conduct was unlawful, would likely prevent or lessen competition unduly or was otherwise anti-competitive (which is expressly denied), is or was Intel-compatible PC operating systems during any of the class period, or any period in which the plaintiffs allege anti-competitive conduct.

20. Regardless of how the market is defined, the defendants deny that their conduct was unlawful under any applicable law, or that it would likely prevent or lessen competition unduly or was otherwise anti-competitive.

21. Microsoft's OS products have faced and continue to face competition from other providers of OSs on Intel-compatible and non-Intel-compatible PCs and other computing devices, including providers of Apple, Google and Linux OSs, as well as a series of emerging new web-based technologies.

22. The general dynamics of the software industry, which is characterized by continual, rapid change and innovation of new technologies, leads to competition between software products based on features and functionality, rather than solely on price. There is also a significant, constant risk that the software category leader will be displaced by a new entrant that provides a superior alternative product—these competitors can emerge rapidly and unexpectedly—which imposes constraints and pressure on the current leader to continue to innovate and keep prices low.

23. Microsoft's OS products also face competition from previous versions of Microsoft OS products installed on consumers' PCs. Microsoft has to offer incentives to consumers to convince them to replace older, but operational, versions of Microsoft's OS software with Microsoft's new or upgraded OS products. The need to incentivize Microsoft's current customers to upgrade operational software constrains Microsoft's prices and promotes innovation.

24. Software piracy also constrains Microsoft's prices and promotes innovation, as it provides competition for sales of legitimate software. Software piracy, which includes software that is illegally copied or counterfeit, and also genuine software that is improperly licensed, underlicensed or used for unlicensed purposes (such as academic products illegally sold to individuals not involved in education), is a very significant issue in Canada, with rates for 1994 to 2006 estimated at 33 to 46%. The existence of piracy on such a massive scale requires Microsoft to keep the price of its operating systems and applications low to reduce incentives for software piracy. It also results in many class members not knowing whether they have paid for pirated or genuine software, and whether Microsoft ever received any money from a direct purchaser for the same product.

25. Contrary to the plaintiffs' assertion in paragraphs 17 and 79 of the Statement of Claim, Microsoft denies that it unlawfully uses its office-related applications as a barrier to entry or that there is an "applications barrier to entry" into the alleged operating systems market.

26. The availability of useful applications enhances the success of Windows and the PCs that run Windows. The number of applications written for Windows also reflects the success and popularity of Microsoft's OS software. However, contrary to the plaintiffs' allegations, the number of applications written for Windows does not constrain and has not constrained meaningful competition from emerging. Consumers are attracted to new, competing products that offer a set of high-quality applications that meet their needs. The number of applications written for a particular OS or device does not, by itself, dictate success or impede the success of a new entrant that seeks to compete with Microsoft. Meaningful competition can and has emerged from competitors that offer fewer applications than have been written for Windows.

The Reasons for Microsoft's Success in Operating Systems

27. From early on, Microsoft has enjoyed considerable success with its OS software, first MS-DOS and later Windows, as a result of lawful competitive conduct, including technological innovation, the development of attractive products, low prices and innovative business strategies (such as volume licensing).

28. Microsoft's core approach has been to offer products that have value and appeal to consumers, at low prices, and maximize the volume of software sold. Microsoft has lawfully devoted substantially more resources to research and development and more extensive support to ISVs than any other OS developer.

29. Microsoft began to develop and market its MS-DOS OS at a time when there were very few PC manufacturers, few applications available, and a limited market for PCs. By 1980, a number of companies were offering microcomputers that were the precursors to today's PC; however they generally offered complete computer systems in which hardware and OS software were sold as a single unit and each OEM had its own, distinct OS. Applications written for one type of PC would not run on another type of PC, end-users could not easily share information and different skills or training was required to operate each type of PC.

30. Microsoft made a crucial strategic decision to maintain an open strategy and develop OSs and applications for a wide range of computer hardware manufactured by others, unlike competitors such as Apple which maintained a closed strategy. Thus, when IBM licensed MS-DOS as the OS for its PCs, Microsoft negotiated for the right to also license MS-DOS to others and did license MS-DOS to other OEMs. Microsoft supported new OEMs and ISVs and promoted their adoption of Microsoft's OS, licensed its software at attractive prices to attain high volumes and widespread use, and worked hard to improve the OS by adding new features and innovating existing features. By adopting this open strategy, Microsoft established a business model that not only increased its user base, but also created greater competition between manufacturers of hardware and software applications who exercised their own business judgment to adopt the Microsoft OS. The pro-competitive effects of open access to a common operating system resulted in innovation, improvements in functionality and compatibility across different

brands of PCs, as well as lower prices for consumers. Microsoft's business strategy has provided significant benefits to consumers.

31. Microsoft became the market leader in Intel-compatible PC operating systems in the 1980s as a result of the runaway success of MS-DOS. Microsoft's success continued as a result of the benefits of network externalities and lawful competitive activity, including the company's investment in research and development, its unequalled and extensive support of ISVs to write applications for its OSs, its early commitment to and success in developing GUI-based software, the continued pursuit of a low price / high volume strategy, and other pro-competitive conduct.

32. In addition, the continuation of Microsoft's OS success was in part the result of several features of the information technology industry that naturally tend to a dominant standard for certain types of technologies, including: economies of scale (high fixed costs and low variable costs), economies of scope (fixed costs spread over production of several related products), large research and development expenditures but low distribution costs, and network effects including substantial network externalities. These characteristics of the information technology industry are extremely advantageous, and can generate and have generated significant benefits for consumers, including innovation and lower prices. But these features of the industry also mean that concentration for a particular OS on a particular type of hardware can arise naturally, not from unlawful conduct. The high market share of Microsoft's operating system for Intel-compatible PCs during the relevant time period resulted from these background economic factors and lawful strategies and conduct, not unlawful acts.

Microsoft's Conduct Was Lawful

33. The defendants deny that any of their conduct in developing, marketing, licensing and distributing Microsoft's operating systems was unlawful and deny the allegations set forth in **paragraphs 19-65** of the Statement of Claim, as further described below. The defendants deny the plaintiffs' allegations of unlawful conduct generally and against specific competitors and technologies in particular, which are addressed in more detail below. The defendants deny that any of their conduct was done with intent to harm or did harm the plaintiffs or class members.

The defendants further deny any knowledge that injury to the plaintiffs or class members was likely to result or did result from their conduct.

34. Microsoft did not conspire, within the meaning of the *Competition Act*, R.S.C. 1985, c. C-34 or at common law, with Microsoft Canada, OEMs, ISVs or internet access providers ("**IAPs**") to not support, purchase or license Microsoft's competitors' products or otherwise engage in unlawful conduct which would have the effect of eliminating its OS competitors as threats. Rather, to the extent that Microsoft's competitors were unsuccessful, it was for reasons unrelated to any unlawful conduct of the defendants. In some cases, they were the authors of their own demise. The competitors whose failure is relied upon in the Statement of Claim were unable to secure the interest in their products, from consumers, OEMs, ISVs, and IAPs, that was necessary for them to succeed in the high risk / high reward information technology market. It was not the result of any unlawful conduct by the defendants.

Microsoft's Licensing Agreements

35. Prior to 1994, Microsoft offered OEMs the choice of three types of licenses: per copy, per system, and per processor. Per copy licenses provided that an OEM would pay a royalty to Microsoft for every PC sold that had the Microsoft operating system covered by the licence installed on it. Per system licenses provided that the OEM would pay a royalty to Microsoft when the OEM sold a specific type of PC specified in the agreement. The "system" could be defined narrowly or broadly depending on the OEM's preference. Per processor licenses provided that the OEM would pay a royalty to Microsoft for every PC sold with the type of processor specified in the agreement, except for quantities carved out by the agreement.

36. Per processor licenses were essentially quantity discounts and provided, largely at the instance of an OEM, benefits to the OEM. These licenses eased an OEM's administration costs by removing the need to separately track and report sales for each PC shipped and lowered the price at which PCs could profitably be sold. They also permitted the OEMs to develop new types of PCs without concern that they needed to negotiate a new Windows license or uncertainty about the price of that license.

37. Microsoft included minimum commitments in some of its licenses, giving price discounts to OEMs in return for their commitment to buy a certain quantity of Microsoft's software. Minimum commitment licensing terms ensured that OEMs would not overstate their sales estimates to obtain undeserved higher volume discounts. At the expiry of the license, Microsoft would be entitled to at least the royalties calculated on the minimum commitment, rather than on the amount of Microsoft software actually sold by the OEM.

38. In some cases, Microsoft allowed OEM customers to apply the non-refundable, unearned minimum commitment royalties as credit towards a new license. This created a "prepaid balance" on the OEM's account, and was offered by Microsoft to maintain goodwill with its OEM customers.

39. Prior to 1994, some of Microsoft's licensing agreements were two or three years in duration. Two and three-year licenses provided benefits to and were requested by certain OEMs because they gave OEMs greater certainty about future product pricing.

40. In or around June 1994, pursuant to a consent decree entered into with the United States Department of Justice ("**DOJ**"), Microsoft ceased offering per processor licenses, licenses with a term of more than one year, licenses with minimum commitments, and prepaid balances for its operating systems. The DOJ acknowledged that these licensing practices had not caused competitive harm. Further, such licensing practices are not relevant to operating systems competition after 1994. Microsoft denies that these licensing practices caused any alleged damages to the plaintiffs or class members during any part of the class period.

41. Microsoft's standard licensing terms lawfully included restrictions on the modification or deletion of certain elements of Windows by OEMs to avoid performance issues, incompatibilities with other applications software, or customer confusion and disappointment. Microsoft used these licensing terms to improve and increase the uniformity of end-users' experience when using any Windows PC. Microsoft and its affiliates were and are lawfully entitled to provide licenses for Microsoft's software on terms that provide a consistent, reliable and high-quality experience for end-users and/or foster product recognition. Nevertheless, OEMs still had considerable flexibility to add icons and software to meet the demands of their

customers. Additionally, in a number of instances, Microsoft waived these licensing terms upon the request of an OEM.

42. Microsoft's licensing terms also lawfully prohibited reverse engineering of its software—its intellectual property—as one of the conditions of obtaining a license. Microsoft's operating systems, like other software products, are covered by copyright and other intellectual property rights. Microsoft is lawfully entitled to ensure protection of its intellectual property when licensing its products.

43. Microsoft's licensing agreements with OEMs were not designed or intended to eliminate the threat of competing operating systems, nor did they have the effect of unduly preventing, lessening, restraining or injuring competition, as alleged by the plaintiffs in **paragraphs 21, 25, 31, 34 and 47** or elsewhere in the Statement of Claim, all of which is denied. The defendants further deny that Microsoft or any OEM was aware, or should have been aware, that the effect of such licensing agreements or arrangements would have been to unduly prevent, lessen, restrain or injure competition. The licensing arrangements of which the plaintiffs complain served legitimate business purposes, were not unlawful, and were widely employed throughout the information technology industry at the time by Microsoft's competitors and considered normal industry practice.

Microsoft's Market Development Agreements

44. In or around the 1990s, Microsoft began offering Market Development Agreements ("**MDAs**") to OEMs, which provided discounts to OEMs for achieving certain milestones and targets for sales volume and/or providing support for the Windows platform. From 2001 onwards, pursuant to the terms of a consent decree (discussed in more detail at paragraphs 139 to 144, below), the terms of the MDAs were uniform and non-negotiable. No MDA was intended to or had the effect of unduly preventing, lessening, restraining or injuring competition, as alleged by the plaintiffs in **paragraphs 32 to 37** or elsewhere in the Statement of Claim. Rather, MDAs are pro-competitive and serve legitimate business purposes. They provide incentives to OEMs to make investments that increase the value to consumers of Windows and Windows PCs. The milestones or targets included in MDAs provide discounts to OEMs for activities that reduce

piracy, enhance customer support, improve hardware and peripheral support, promote updated versions, and preserve the consistency and integrity of the Windows interface and brand. These activities enhance the Windows platform and provide benefits to consumers.

45. The provision in some Microsoft MDAs that OEMs ship every PC with an operating system pre-installed—whether a Microsoft operating system or otherwise—was not unlawful and was intended to address a legitimate concern that end-users could install pirated copies of a Microsoft operating system if PCs were sold without any pre-installed operating system. This term (sometimes referred to as no "naked" PCs) could be satisfied by installing any operating system on a PC, including a non-Microsoft operating system. It did not prevent OEMs from installing competing operating systems.

46. The defendants deny that Microsoft's use of MDAs with OEMs was coercive, unlawful or was likely to unduly prevent, lessen, restrain or injure competition. The defendants further deny that they were aware, or ought to have been aware, that the effect of MDAs would be to unduly prevent, lessen, restrain or injure competition. The defendants deny that the MDAs caused the alleged damages to the plaintiffs or class members.

Microsoft's Marketing Strategies Were Legitimate Efforts to Compete in a Highly Competitive Market

47. The defendants deny that any of their marketing strategies, as described in **paragraphs 22, 34 and 41** of the Statement of Claim constitute unlawful conduct. In the face of aggressive competition from competitors, including IBM—then by far the biggest technology company in the world, Microsoft was entitled to use lawful, aggressive strategies in its fight for survival in the high risk / high reward information technology industry, like those its competitors were using against it. It was lawful for Microsoft to promote features exclusive to its own products and identify genuine flaws in its competitors' products.

48. The defendants deny that they made any misrepresentation alleged in the Statement of Claim. In the alternative, if the alleged statements were made, the defendants did not knowingly or recklessly make representations to the public that were false or misleading in any material

respect. In particular, Microsoft did not deliberately misstate any fact when describing or characterizing a competitor's product, a Microsoft product, or its operational structure.

Disclosure of Technical Information to Competitors

49. Microsoft was successful in part because it chose to share significant technical information about its products broadly and it treated third party applications developers fairly. The defendants deny that they acted unlawfully by withholding technical information from competitors or disclosing certain information to Microsoft's own applications developers, or that such conduct would prevent, lessen, restrain or injure competition unduly in the operating systems and/or applications markets, as alleged by the plaintiffs in **paragraphs 26, 35, 46, 50, 55, 59, 64 and 74-75** or elsewhere in the Statement of Claim. Microsoft had no legal obligation to divulge confidential proprietary information, such as its source code, to its competitors.

50. The defendants deny that they entered into an agreement with one another or with any other person to unlawfully withhold technical information from their competitors as alleged.

51. Microsoft provided instructions and procedures to ISVs on how to use ("**documented**") thousands of APIs for its operating systems, but had legitimate business reasons for keeping certain interfaces private, including those designed to be internal interfaces between different parts of a product. Once an API is published, ISVs begin to develop programs relying on that API and it becomes more difficult for the operating system developer to change the API. Keeping an interface private allowed Microsoft to test, stabilize, and improve it before disclosing it as a public API to external product developers. For this and other lawful reasons, Microsoft did not disclose certain internal interfaces to ISVs.

52. Nevertheless, Microsoft received no competitive advantage in developing applications as a result of the alleged undocumented APIs because, almost without exception, the undocumented interfaces were not used by Microsoft's applications, had documented equivalents and/or were legacy APIs that were documented in a previous version of Windows. None of the undocumented APIs had any substantive impact on the ability of an ISV to develop high quality applications.

53. Microsoft was and is a unitary company and is permitted to share information within itself as it sees fit. Additionally, Microsoft had legitimate reasons for providing certain technical information to its own developers before third parties received that information, and it was not unlawful to do so. For example, Microsoft's language and tools developers received a pre-release beta version of Windows 95 for the legitimate purpose of assisting the systems group in writing and debugging the Windows 95 code, not for the purpose of gaining a competitive advantage over third party developers. In any event, any competitive advantage gained by such coordination within Microsoft is lawful. Microsoft's applications division also received information from the operating systems division for the purpose of giving feedback and development suggestions to improve Microsoft's operating system features and functionality. This sharing of information allowed Microsoft to develop a better operating system, which benefited both ISVs and consumers. The defendants deny that the confidentiality of Microsoft's intellectual property, or its access to its own intellectual property, is unlawful or, in any event, caused legally-cognizable damage to the plaintiffs or class members.

54. In any event, Microsoft provided unprecedented, extensive support and assistance for ISVs who were developing applications for its operating systems, and shared technical information with them to allow them to do so.

Microsoft Did Not Cause the Failure of DR DOS

55. The defendants deny that they unlawfully attempted to eliminate DR DOS as a competitive threat to MS-DOS, engaged in any unlawful conduct that may be alleged, or that their conduct caused DR DOS to fail, as alleged by the plaintiffs in **paragraphs 20-23** the Statement of Claim. OEMs chose not to license and pre-install DR DOS for reasons unrelated to Microsoft's conduct, including extra support costs and lack of customer demand for the product itself. DR DOS was essentially a clone of MS-DOS and was not recognized as a new or substantially better product than MS-DOS. It did not provide an incentive for existing PC users to switch from MS-DOS to DR DOS, given the cost to users of transitioning to a new system and potential incompatibilities with previously purchased software and hardware products. DRI also offered grossly inadequate technical support and engaged in weak and inconsistent marketing of its product, affecting end-user appeal. Fundamentally, DR DOS offered no development platform

or product roadmap to attract either developers or customers. It simply sought to mimic MS-DOS and add new utilities.

56. Further, although DRI and Novell (which for a time owned DR DOS) recognized the importance of GUIs, they abandoned any attempt to develop a GUI-based OS as too expensive and/or too difficult and never released a GUI-based OS. A CUI OS such as DR DOS could not compete with an integrated GUI-based OS like Windows in terms of user appeal and consequently, customer demand, and ultimately, OEM demand.

57. Without sufficient user appeal, consumer demand and OEM interest in the product, DR DOS was bound to fail. None of the defendants' conduct caused DR DOS to fail. None of the defendants' conduct relating to DR DOS unduly lessened or prevented competition or caused any of the alleged loss or damage to the plaintiffs or class members.

58. In any event, as the plaintiffs plead in **paragraph 23** of the Statement of Claim, the marketing and development of DR DOS ceased in September 1994. There was no conduct alleged after this date by either of the defendants relating to DR DOS that could have caused loss or damage to the plaintiffs or class members within the limitation period.

Microsoft Did Not Cause the Failure of OS/2

59. The defendants deny that they unlawfully attempted to eliminate OS/2 as a competitive threat to Windows, engaged in any unlawful conduct that may be alleged, or that their conduct caused OS/2 to fail, as alleged by the plaintiffs in **paragraphs 24-27** of the Statement of Claim.

60. In 1985, Microsoft and IBM entered into a joint development agreement for a new operating system, OS/2. Microsoft was committed to developing OS/2 as the next generation OS in partnership with IBM, a far bigger and more powerful company than Microsoft at the time. Indeed, Microsoft devoted the vast majority of its systems division development resources to the development of OS/2, not Windows. OS/2 was first released in 1987, three years before the release of Windows 3.0, which was the first commercially successful version of Windows.

61. In the late 1980s, IBM began to dedicate vast resources to undermine Windows and eliminate Microsoft as competition in the operating systems market. IBM aggressively promoted OS/2 and undermined Windows publicly. By late 1990, relations between the companies had soured and IBM and Microsoft officially ended their joint development agreement in 1991. Subsequently, IBM adopted an "IBM First" initiative, which involved publicly disparaging Windows and refusing to promote Microsoft's products. In the face of aggressive tactics and conduct from IBM, Microsoft was entitled to engage in lawful, hard-fought competitive conduct, including promotion of features exclusive to Windows and the identification of genuine flaws in OS/2. In particular, the defendants deny that they knowingly or recklessly spread false information or made false or misleading representations about OS/2.

62. Ultimately, OS/2 failed for reasons unrelated to Microsoft's conduct. A lack of consumer demand, lack of certain features and functionality, quality issues, price, design flaws, delays in development and release of certain versions of the product, the huge memory (RAM) requirements to run OS/2 (which was expensive and not found on most consumer PCs at that time), incompatibilities between OS/2 and non-IBM hardware, and IBM's position as a major OEM competitor caused OS/2's failure and a lack of interest from OEMs. IBM provided weak support to ISVs for OS/2, compared to Microsoft's developer support for Windows. OS/2 also had poor documentation and lacked capabilities that ISVs considered important to develop quality applications.

63. There was little consumer demand for OS/2. This was in part because IBM did not actively market OS/2 to home users and instead focused on business users. IBM was one of the largest PC OEMs at the time. It could have pre-installed OS/2 on its own PCs but IBM did not sell any PCs with OS/2 pre-installed from 1987 to 1991, and after 1991, only included OS/2 on a small percentage of the PCs that it sold.

64. The defendants specifically deny that they made modifications to Windows or Windows applications for the primary purpose of creating incompatibilities between Windows applications and OS/2, as alleged by the plaintiffs in **paragraph 26** of the Statement of Claim. Microsoft was entitled to compete with IBM on the merits of their respective operating systems, including by

using new and innovative Windows platform technology and improving Windows applications. Further, IBM had access to the technical information necessary to make OS/2 compatible with MS-DOS and Windows. In particular, pursuant to the joint development agreement between IBM and Microsoft, IBM had access to source code for MS-DOS and Windows through September 1993.

65. The defendants did not engage in unlawful conduct relating to OS/2 that caused OS/2 to fail, or unduly lessened or prevented competition. In any event, none of the defendants' conduct relating to OS/2 caused any of the alleged loss or damage to the plaintiffs or class members.

66. In any event, by the late 1990s OS/2 was not a significant competitor in the operating systems market. The last version of OS/2 (Warp 4) was distributed by IBM in 1996. There is no unlawful conduct relating to OS/2 alleged by the plaintiffs after that time that could have caused loss or damage to the plaintiffs or class members within the limitation period.

Microsoft Did Not Cause the Failure of GO

67. The defendants deny that they unlawfully attempted to eliminate GO Corporation ("**GO**") as a competitive threat, unlawfully prevented OEMs from licensing GO's product, engaged in any unlawful conduct that may be alleged, or that their conduct caused GO to fail, as alleged by the plaintiffs in **paragraph 28** of the Statement of Claim. GO failed to deliver a product that was suitable for the mass market. At the time GO's software was developed, there were technical problems with pen computing, tablet computers were extremely expensive and heavy, and the quality of handwriting recognition technology was very poor. GO also failed to develop any real development platform to permit successful third party applications to be written for its operating system. The technology required to support effective and sufficiently inexpensive pen computing did not exist, which resulted in a lack of consumer demand for the product and, consequently, a lack of interest in GO's product from OEMs. This, in addition to poor management of the company, were the real reasons for GO's failure. Indeed, the failure of pen computing was not limited to GO; numerous companies that offered pen computing solutions failed, including Momenta, Apple and Microsoft. No company has been able to successfully develop a pen-based tablet computer.

68. Microsoft's development of its own pen-computing software was not the result of its use of any of GO's trade secrets or confidential information. GO did not pioneer the idea of pen-computing and the concept of pen computing was not patented. Further, Microsoft did not develop its own handwriting recognition technology, but rather purchased this technology from an unaffiliated corporation for use in PenWindows.

69. With respect to the plaintiffs' allegation that Microsoft interfered with GO's efforts to obtain financing and support from Intel, any attempts by Microsoft to persuade Intel that an investment in GO was a bad idea were lawful, and in any event, unsuccessful. Intel did in fact invest millions of dollars in GO and therefore any attempt by Microsoft to dissuade Intel from an investment in GO, which is not admitted, could not have caused GO's failure or any damage to the plaintiffs or class members.

70. None of the defendants' conduct caused GO to fail. None of the defendants' conduct relating to GO unduly lessened or prevented competition or caused any of the alleged loss or damage to the plaintiffs or class members.

71. GO ceased development of its product and exited the market no later than July 1994. There is no conduct relating to GO alleged by the plaintiffs after that time that could have caused loss or damage to the plaintiffs or class members within the limitation period.

72. Further, GO's product was not intended for the PC market that forms the basis for the plaintiffs' claims. GO intended to participate in a new pen-based mobile computing market. GO's product, even if it had been successful, would not have been a substitute OS for PCs that could have competed with MS-DOS or Windows in the market defined by the plaintiffs (that is, operating systems for Intel-compatible personal computers).

Microsoft Did Not Cause the Failure of BeOS

73. The defendants deny that they unlawfully attempted to eliminate Be Inc. ("**Be**") and/or its operating system BeOS as a competitive threat to Windows, engaged in any unlawful conduct that may be alleged, or that their conduct caused BeOS to fail, as alleged by the plaintiffs in **paragraphs 29-31** of the Statement of Claim.

74. Microsoft's licensing agreements with OEMs did not prohibit or restrict OEMs from pre-installing BeOS or any other non-Microsoft OS with Windows on the same PC, creating a DOS utility that allowed the user to launch an alternate OS, or adding a desktop icon that could be clicked to launch an alternative OS. Microsoft's licensing agreements were not the reason that OEMs did not pre-install BeOS along with Windows. Many OEMs were not willing to bear the increased manufacturing, compatibility testing, and technical support costs associated with the installation of BeOS on PCs, even if Be offered BeOS for free.

75. Some OEMs, including AST and Hitachi, did pre-install BeOS on PCs that they offered to consumers. The defendants deny that Microsoft increased the price of Windows to OEMs that installed both Windows and BeOS on the same PC.

76. No conduct of the defendants caused BeOS to fail. None of the defendants' conduct relating to BeOS unduly lessened or prevented competition or caused any of the alleged loss or damage to the plaintiffs or class members.

77. As the plaintiffs plead in **paragraph 31** of the Statement of Claim, Be sold its intellectual property and other technical assets and exited the market in November 2001. There is no conduct relating to BeOS alleged by the plaintiffs after this date that could have caused loss or damage to the plaintiffs or class members within the limitation period.

Microsoft Did Not Engage in Unlawful Conduct Against Linux

78. The defendants deny that they unlawfully attempted to eliminate Linux or other open source projects as competitive threats, engaged in any unlawful conduct directed at Linux or other open source projects, pressured Intel and OEMs to boycott Linux, or otherwise unlawfully interfered with the ability of Linux-based OSs to distribute their product to OEMs, as alleged by the plaintiffs in **paragraphs 34-36** or elsewhere in the Statement of Claim. The failure of Linux and other open source operating systems to attract users was not due to any unlawful conduct of the defendants. Many OEMs chose not to preinstall Linux-based OSs, such as Linspire, on PCs because there was little consumer demand. Linux OSs were complicated to use and required a level of knowledge and familiarity with computing that many end-users simply did not have. Without sufficient end-user appeal or demand, few OEMs were willing to preinstall a Linux OS

on its PCs. Some OEMs have offered PCs with a Linux OS, but sales of such PCs to consumers have been limited to date. Operating systems based on versions of Linux are widely used today in many computing devices.

79. Further, contrary to the allegation in **paragraph 34** of the Statement of Claim, Microsoft does not limit the use of Microsoft's applications to its own OSs (*i.e.*, MS-DOS and Windows). Microsoft's Word and Excel applications were first made available for use on MacOS (before Microsoft's own operating systems) and continue to be available for use on MacOS as well as other platforms. Microsoft's Word and Excel applications were also available on OS/2, even before they were available on Windows 3.x (or Windows 95).

80. None of the defendants' conduct caused Linux or any other open source operating system to fail. None of the defendants' conduct relating to Linux or any other open source operating system unduly lessened or prevented competition or caused any of the alleged loss or damage to the plaintiffs or class members.

MIDDLEWARE AND CROSS-PLATFORM TECHNOLOGIES

Middleware Did Not Evolve to Compete with Operating Systems

81. Middleware and other software which could run on multiple types of computer systems (known as "**cross-platform**" technologies), such as Netscape Communications Corporation's ("**Netscape**") Navigator browser and Sun's Java technology, have not evolved to pose actual as opposed to potential competitive threats to OSs for PCs and other computing devices.

82. The technologies underlying Navigator and Java did not have the competitive potential that was thought possible by Judge Jackson in *United States v. Microsoft Corp.*, No. 98-1232, in the 1990's. Despite near costless distribution of competitive browsers through internet downloads, effective ubiquity of Java, and a large number of developers and ISVs writing applications for Java, neither browsers nor Java have emerged as cross-platform middleware threats to Windows or any other operating system. Thus, the middleware technologies that the plaintiffs allege posed a competitive threat to Windows did not actually have the potential to compete effectively with Windows or to affect the price of Windows. Microsoft denies the

allegations in the Statement of Claim relating to middleware and cross-platform technologies (including **paragraphs 38-65**).

83. In the alternative, Microsoft denies that the alleged conduct was unlawful, that it unduly restrained or prevented competition, and that it caused the damages alleged by the plaintiffs and other class members.

Microsoft Did Not Engage in Unlawful Conduct Against Cross-Platform Development Tools (Micrografx's Mirrors and Borland C++)

84. The defendants deny that they used Micrografx Inc.'s ("**Micrografx**") intellectual property in developing Microsoft's own developer tool, WLO, or that the development of WLO unduly lessened or prevented competition, as alleged by the plaintiffs in **paragraphs 38-39** of the Statement of Claim. The defendants did not unlawfully use Micrografx's intellectual property to develop WLO to compete with Micrografx Mirrors. Indeed, Micrografx's own technical evaluation of WLO demonstrated that the product had a different code base than Mirrors. Further, since Microsoft's WLO tool had the same function as Mirrors—to facilitate the porting of applications between different operating systems—Microsoft's conduct, even if it caused harm to Micrografx (which is expressly denied), did not prevent the porting of applications between different operating systems and did not cause any harm to consumers.

85. As the plaintiffs plead in **paragraph 38** of the Statement of Claim, the conduct related to Mirrors that the plaintiffs rely on occurred in the late 1980s. There is no conduct relating to Mirrors alleged by the plaintiffs after that time that could have caused loss or damage to the plaintiffs or class members within the limitation period.

86. The defendants deny that they unlawfully attempted to eliminate Borland International, Inc.'s ("**Borland**") as a developer of programming tools for C++ or other languages as a competitive threat, as alleged by the plaintiffs in **paragraphs 40-42** of the Statement of Claim. Indeed, Microsoft has been a leading user of C++ for many years and the leading provider of developer tools for C++. Microsoft did not pre-announce tools in a deliberate attempt to freeze demand for C++; any later delays in the release of Microsoft's product were the result of the inherent uncertainties involved in product development. Further, Microsoft's software

development kit licensing term requiring C++ to carry and support Microsoft's competing tool, Microsoft Foundation Class Libraries, was intended to address a legitimate concern that the use of different class libraries could cause incompatibility problems with Windows. Indeed, Borland itself considered the licensing requirement reasonable and agreed that it was the best way to ensure complete compatibility with Microsoft's operating systems.

87. The plaintiffs' allegations in **paragraphs 40-42** of the Statement of Claim related to Borland's C++ occurred in the early to mid-1990s. The final independent release of C++ took place in 1997. There is no conduct relating to C++ alleged by the plaintiffs after that time that could have caused loss or damage to the plaintiffs or class members within the limitation period.

Microsoft Did Not Cause the Failure of Netscape's Navigator

88. The defendants deny that they unlawfully attempted to eliminate Netscape Navigator as a competitive threat or engaged in unlawful conduct that caused Navigator to fail, as alleged by the plaintiffs in **paragraphs 43-51** of the Statement of Claim. Navigator failed because of Netscape's own strategic errors, lack of innovation, and poor business planning. Netscape never developed a componentized browser (to permit a browser to be embedded within an ISV's software products), or one that could support full-featured applications, and otherwise failed to meet the needs of ISVs, IAPs and potential business partners such as AOL, Intuit and Lotus Development Corporation ("**Lotus**"). It did not provide the lawful incentives to OEMs, ISVs and IAPs that were expected in the market at the time; rather, Netscape charged ISVs for Navigator, and hoped to charge end-user customers for it as well. Netscape did not invest sufficiently in marketing and ISV/IAP development and promotional support.

89. Microsoft's inducements to OEMs, ISVs and IAPs to use and promote Internet Explorer were lawful. Microsoft licensed Internet Explorer for free, thereby reducing the costs that could be passed onto customers. It also offered other lawful inducements to OEMs, ISVs and IAPs, including reductions in royalties, free tools and customization, and branding and promotional opportunities.

90. Microsoft did not seek Netscape's agreement not to supply browsers for Microsoft OSs. Further, Netscape did not agree to any such arrangement and therefore, any such conduct could not have caused any harm to Navigator or class members.

91. As pleaded above, Microsoft had legitimate reasons for withholding certain APIs from Netscape for a short time period after it learned of Netscape's interest in them.

92. The defendants deny that any agreements with ISVs or IAPs that provided for incentives or exclusivity with respect to IE were unlawful or unduly lessened or prevented competition. In any event, Microsoft's agreements with ISVs and IAPs were not the reason that many ISVs chose to develop applications using IE instead of Navigator or that many IAPs chose to use IE as their standard browser. Rather, ISVs chose IE because of its superior product quality and because it had features and capabilities that Navigator lacked. Similarly, the majority of IAPs would have used IE over Navigator in the absence of any exclusivity agreement with Microsoft, because Microsoft licensed IE for free and offered lawful financial incentives to IAPs to use and promote IE, as well as free tools that provided customization, branding and promotional opportunities to IAPs that were not available with Navigator. Further, some IAPs used IE because it was a componentized browser while Navigator was not.

93. On November 24, 1998, AOL agreed to acquire Netscape in a stock acquisition then valued at $4 billion. AOL was at the time the world's largest on-line services provider, with more than 16 million subscribers to its flagship service and approximately 2 million subscribers to CompuServe, also owned by AOL. AOL's acquisition of Netscape provided the means and opportunity for even more widespread distribution of its Navigator browsing software, as well as to develop Navigator into a viable platform for applications. However, Navigator never even attempted to evolve into such a platform, despite having the support and resources of AOL.

94. None of the defendants' conduct caused Navigator to fail. None of the defendants' conduct relating to Navigator unduly lessened or prevented competition or caused any of the alleged loss or damage to the plaintiffs or class members.

Microsoft Did Not Cause the Failure of Sun's Java

95. The defendants deny that they unlawfully attempted to eliminate Java as a competitive threat, engaged in any unlawful conduct, or that any of their conduct deterred ISVs from developing applications using Sun's Java standard, as alleged by the plaintiffs in **paragraphs 52-58** of the Statement of Claim.

96. The purpose of developing a Microsoft-specific Java runtime environment was not to deter the development of cross-platform Java applications, but rather to improve the quality and performance of Java technology on Windows, which Microsoft succeeded in doing. Microsoft did not "corrupt" Java by creating Microsoft-specific Java development tools and JVM runtime environment. In fact, Microsoft's JVM technology ran both "pure" cross-platform Java applications as well as Windows-specific Java applications, and Microsoft's Java tools could be used by ISVs to write both types of applications. Indeed, Microsoft's JVM was the fastest and most 'compatible' JVM according to tests. For these reasons, Microsoft's development of Microsoft-specific Java technology did not make porting applications between OSs more difficult or compromise the ability of ISVs to write "pure" Java cross-platform applications, either with Sun's tools or Microsoft's tools.

97. ISVs decided to use Microsoft's JVM technology because there were inherent technical limitations to Sun's cross-platform Java standard, not because ISVs were precluded by Microsoft from developing for Sun's Java standard (which they were not). Sun's Java applications were slower than native applications and could not support all the features and functionality of native applications. Microsoft's JVM technology performed better because it eliminated the technical limitations of Sun's cross-platform Java standard.

98. The defendants deny that any of their conduct prevented companies from cooperating with Sun or caused them to stop supporting Java technology. For example, Intel continued to support Java and continued to use the technology. Microsoft's agreements with ISVs with respect to exclusive use of Microsoft's version of Java had little or no effect on the development, adoption or distribution of Sun's Java technology, and any such "first wave" agreements were in

effect for only a short period of time. Microsoft's conduct did not cause any harm to the plaintiffs or class members within the limitation period.

99. The defendants deny that their conduct undermined or caused the failure of Netscape's Navigator, as pleaded above, or undermined the distribution of Java as a result. Netscape's Java implementation was poor and inconsistent with Sun's own Java standards. Netscape failed to keep up with Sun's Java innovations and support new Java standards as they were released by Sun. Further, Netscape's Java did not offer cross-platform compatibility.

100. In any event, exponential growth in internet access and connectivity has made internet downloads of software a low or free method of distribution. The decline of Netscape has had no appreciable effect on the ability of Sun to distribute Java widely to consumers or ISVs. Rather, Sun's Java has obtained widespread distribution through other means and still has not evolved into a platform for robust applications, as a result of its own limitations, as pleaded above, and not the conduct of the defendants. None of the defendants' conduct has caused Java to fail, and it has not in fact failed. None of the defendants' conduct relating to Java unduly lessened or prevented competition or caused any of the alleged loss or damage to the plaintiffs or class members.

Microsoft Did Not Engage in Unlawful Conduct Against Media Technologies (RealNetworks and Burst)

101. The defendants deny that Microsoft unlawfully bundled its media software with Windows for the purpose of eliminating RealNetworks, Inc. ("**RealNetworks**"), a developer of media streaming software, as a competitive threat or has unlawfully withheld technical information from RealNetworks, as alleged by the plaintiffs in **paragraph 59** of the Statement of Claim. Indeed, Microsoft's inclusion of multimedia capabilities in Windows predated RealNetworks' existence. As pleaded above, Microsoft's addition of multimedia capabilities to Windows was pro-competitive and Microsoft was entitled to withhold certain technical information from competitors. Moreover, the inclusion of multimedia functionality with Windows did not prevent or discourage OEMs or users from installing or using non-Microsoft multimedia software on PCs, as the subsequent success of other media players and multimedia software, such as iTunes and Flash Player for example, demonstrates.

102. The defendants deny the allegations that they misappropriated Burst.com Inc.'s ("**Burst**") intellectual property or unlawfully used it to develop and release software products to compete with Burst's video streaming technology, as alleged in **paragraph 60** of the Statement of Claim.

Microsoft Did Not Eliminate Intel's NSP Software

103. The defendants deny that Intel's native signal processing ("**NSP**") software was a competitive threat or that they unlawfully threatened to retract support for Intel's next generation of processors unless Intel ceased development of NSP, as alleged by the plaintiffs in **paragraph 62** of the Statement of Claim. NSP was a layer of software that interfaced with both the Windows OS and the PC hardware to support and improve audio-visual internet streaming. NSP had been designed by Intel to work specifically with Windows 3.1, a 16-bit OS, and the version that was available in the summer of 1995 (shortly before Windows 95—a 32-bit OS—was released), was not compatible with a 32-bit OS and would cause Windows 95 to crash. NSP had also not been subjected to extensive testing or beta releases. Microsoft had legitimate concerns regarding the installation of NSP on new computers, in particular that if OEMs preinstalled NSP on their PCs, end-users would blame Microsoft for any problems caused by the software. In any event, NSP was not intended to provide cross-platform or OS-independent APIs for competing operating systems or applications and therefore, could not have had a meaningful effect on competition in the OS or applications markets.

104. As the plaintiffs plead in **paragraph 62** of the Statement of Claim, Intel ceased its development of NSP in mid-1996. There are no allegations of unlawful conduct by the defendants regarding NSP or Intel's development of software after this date that could have caused loss or damage to the plaintiffs or class members within the limitation period.

Microsoft Did Not Engage in Unlawful Conduct regarding Workgroup Servers

105. The defendants deny that they have engaged in any unlawful conduct to eliminate competition in the workgroup server market or with respect to workgroup servers, as alleged by the plaintiffs in **paragraphs 63-65** or elsewhere in the Statement of Claim. In any event, even if non-Microsoft workgroup servers were or are not fully interoperable with PCs running Microsoft operating systems, it would not have had any impact on the competition for PC operating

systems or the price of PC operating systems, which are the products for which the class members claim to have been overcharged.

Integration of Additional Functionality into Microsoft's Operating Systems Was Lawful

106. The defendants deny that the integration of additional functionality into Microsoft's operating systems constituted unlawful conduct, as alleged by the plaintiffs in **paragraphs 49, 59 and 64** or elsewhere in the Statement of Claim. In general, adding functionality into a product increases its value to consumers and is the opposite of an overcharge, as alleged here.

107. Many software products, including operating systems, have absorbed other products and added their functionality and features over time (*e.g.*, spell checkers into word processors, disk utilities into operating systems). The integrated product often offers additional functionality to users than either product separately.

108. At the time that Microsoft added internet browsing functionality into Windows through Internet Explorer ("**IE**"), most vendors of operating systems (including IBM, Apple, Sun, and Red Hat) included internet browsing software with their operating system, because users expected and desired operating systems to include internet browsing functionality. Additionally, Microsoft's integration of Windows and IE has benefited software developers, OEMs and end-users. Software developers can call on the IE components of Windows to provide internet support in their products, without having to replicate complex functionality like HTML parsing and rendering in their products. OEMs can offer consumers a more functional OS and PC that facilitates easy access to the internet, includes features such as HTML-based help support and automatic Windows updates, provides seamless navigation between local and remote information/data sources, and facilitates internet-dependent applications that utilize the IE components of Windows. Many of these benefits could not be duplicated by combining an OS such as Windows with a stand-alone browser like Netscape's Navigator.

109. Similarly, at the time that Microsoft added multimedia functionality into Windows, primarily through Windows Media Player ("**WMP**"), all major vendors of OSs included media player functionality with their OS, because users expected and desired operating systems to include multimedia playback functionality. In Europe, Microsoft was compelled by an order of

the European Commission ("**EC**"), dated March 24, 2004, to offer a version of Windows without WMP, called Windows XP-N, which became available in June 2005. There was little demand for this product in Europe, and it represented an insignificant portion of overall sales of Windows in Europe.

MICROSOFT'S APPLICATIONS SOFTWARE SUCCESS

The Applications Market during the Class Period

110. In the late 1980s, most applications were written for a CUI. Microsoft was a minor player in the CUI applications market with limited share of the market. At the time, WordPerfect Corporation ("**WordPerfect**") was the market leader in CUI word processing applications, and Lotus was the leading CUI spreadsheet application developer. Both WordPerfect and Lotus generally adopted and maintained high standard prices for their products throughout the period of their dominance.

111. In the early 1980s, even before the Macintosh ("**Mac**") was released in 1984, Microsoft began to put substantial resources into developing GUI applications for the Mac OS, including Word and Excel. These applications were generally considered to be of high quality and quickly became the leading applications in their respective categories for the Mac (a platform where Microsoft had no special knowledge or access to the OS).

112. Thereafter, Microsoft focused its applications development effort on GUI applications. Microsoft adopted a multi-platform strategy, developing GUI applications for the Mac OS, OS/2, and Windows, which left the company well-positioned regardless of which of the three platforms succeeded. Microsoft's experience in developing GUI applications for the Mac helped Microsoft to develop better applications for the other GUI platforms, including Windows.

113. In contrast, the incumbent CUI applications developers at the time opposed or resisted the market shift to GUI. CUI applications developers, including WordPerfect and Lotus, also lacked the expertise and experience to produce high quality GUI applications. As a result of its competitors' resistance to market change, Microsoft gained a crucial timing advantage, allowing it to lawfully develop and market high quality GUI applications before its competitors.

The Reasons for Microsoft's Success in Applications Software

114. The growth of Microsoft's applications business was propelled by its cross-platform applications strategy (described above), the production of high quality and better performing applications, the adoption of a high volume and low price strategy, the investment of significant resources in the development of applications, and key marketing decisions, particularly the innovation of marketing the Office suite of productivity applications.

115. Microsoft made highly rated, high quality GUI applications, and used focus groups, "instrumented" versions (versions which monitor or measure the applications' performance), usability labs and product support call monitoring to improve the usability of its applications and ensure that they met consumer needs.

116. Microsoft adopted a suite strategy for its GUI applications that was immensely successful and shifted the market for productivity applications from standalone products to a suite of integrated applications. In 1990, Microsoft bundled together Word, Excel PowerPoint, and MS Mail into a single package called Office. Initially, the bundle was primarily a marketing strategy, intended to improve sales by delivering better value to the consumer. However, over time the applications were integrated in many ways, improving the quality and performance of the applications themselves. Bundling applications into a suite allowed Microsoft to offer consumers consistency among menus, dialog boxes, and tool bars, as well as increased integration of applications, including the ability to share text, data, and graphics between applications or with other people in a work group.

117. Microsoft also succeeded in the applications market by adopting a high volume / low price strategy. Microsoft offered consumers lower prices for applications, and in particular, Office was offered at a low, attractive price to compete against Lotus and WordPerfect, the dominant single application vendors at the time. Microsoft consistently priced Office at a significant discount to the cost of buying the component applications separately, and reduced the price of Office a number of times despite its position as market leader in productivity application suites and despite significant advances in the quality of the applications being developed and the addition of applications into the Office package. Such innovation and price reduction is the

essence of pro-competitive conduct and benefited consumers by lowering the price of applications, by improving quality and performance of applications, and through indirect network effects such as improving convenience and ease of use.

Microsoft's Conduct Was Lawful

118. The defendants deny that any of their conduct with respect to development, marketing or distribution of applications software was unlawful or was done with intent to harm the plaintiffs or class members, as alleged by the plaintiffs in **paragraphs 70-82** of the Statement of Claim or otherwise. The defendants further deny any knowledge that injury to the plaintiffs or class members was likely to result from their conduct. Indeed, defendants have provided high quality products to customers at fair prices, enabling to enjoy increased productivity and empowering them to do more.

OS/2

119. The defendants deny that they misled Lotus or WordPerfect into writing applications solely for OS/2, as alleged by the plaintiffs **in paragraphs 71-73** of the Statement of Claim. Microsoft repeatedly and publicly stated that it would develop applications for both Windows and OS/2 (as well as the MacOS), and did so. Microsoft released key applications for OS/2, including Excel and Word, before Lotus or WordPerfect. Microsoft also encouraged ISVs (including both Lotus and WordPerfect) to develop software for both Windows and OS/2. Individuals within Lotus and WordPerfect also urged those companies to develop software for Windows as well as OS/2.

120. Lotus and WordPerfect had the capacity to develop applications software for Windows, but made deliberate decisions, in part out of a desire to suppress the popularity of Windows, not to develop applications for Windows initially and instead focused on developing applications for OS/2.

Microsoft's Applications Competitors Failed on Their Own Merits

121. Microsoft's applications competitors, particularly Lotus and WordPerfect, employed business strategies that led to their eventual failure. Lotus and WordPerfect each had dominant

applications in the CUI environment that they sought to maintain. Each resisted the shift from CUIs to GUIs and delayed development of any GUI-based applications until it was clear that GUI was the future of applications. By that time, other applications developers such as Microsoft had substantial experience and expertise in developing GUI-based applications, while Lotus and WordPerfect lacked the experience to effectively develop high quality GUI applications.

122. After significant delay, when Lotus and WordPerfect finally developed Windows applications, their first releases were poorly reviewed, expensive, and suffered from quality and performance issues. Both companies were very slow to release a suite of applications in response to Office, and when they did, neither company offered consumers comparable applications functionality for a comparable price. Without sufficient consumer demand for their products, both Lotus and WordPerfect were bound to fail.

123. Lotus did not release any GUI applications until Lotus 1-2-3 was released for OS/2 in March 1990. Lotus did not begin serious work on Windows applications until late 1990 and Lotus 1-2-3 for Windows was not released until November 1991. It was poorly reviewed and more expensive than Microsoft's Excel spreadsheet for Windows, which had first been released in August 1987. Lotus was also slow to develop a high quality suite of productivity applications. When it released SmartSuite in April 1992, its word processor Ami Pro was weaker than Microsoft's Word and WordPerfect's word processor applications. Lotus was also plagued by, *inter alia*, high turnover of key personnel, serious product quality issues, weak end-user awareness and brand recognition, and declining resources for development and marketing of desktop software products.

124. WordPerfect was slow to develop GUI-based versions of its word processing software. It did not release its word processor on the MacOS until 1988, three years after Microsoft. It received weak reviews. WordPerfect did not release a version of its word processing software for OS/2 until June 1993. WordPerfect's first version of its word processing software for Windows, released in November 1991, was generally described by reviewers as slow and not as good as competing applications. WordPerfect was also slow to release a high quality suite of productivity applications and did not do so until May 1993 when it released its word processor bundled with

Borland's Quattro Pro spreadsheet as Borland Office. It was not well integrated, did not have consistent interfaces and did not provide users with comparable applications functionality to Microsoft's Office for a comparable price. WordPerfect was sold to Novell in June 1994, but Novell exited the applications software business only 18 months later and sold WordPerfect and Quattro Pro to Corel.

125. None of the defendants' conduct caused Lotus or WordPerfect to fail. None of the defendants' conduct relating to Lotus or WordPerfect unduly lessened or prevented competition or caused any of the alleged loss or damage to the plaintiffs or class members. Further, there is no conduct by the defendants with respect to WordPerfect or Lotus pleaded by the plaintiffs after the mid-1990s that could have caused any loss or damage to the plaintiffs or class members within the limitation period.

No Other Conduct of the Defendants Was Unlawful

126. The defendants deny that they attempted to eliminate competition posed by other application developers through the selective disclosure of technical information, as alleged by the plaintiffs in **paragraphs 74-75** of the Statement of Claim, and deny that any such conduct was unlawful. As pleaded above (at paragraphs 49 to 54), Microsoft was not legally required to divulge confidential proprietary information, such as its source code, to its competitors and such information was not required by ISVs develop high quality applications. Microsoft had legitimate business and technical reasons for not disclosing or "documenting" certain interfaces. Microsoft also had legitimate reasons for providing certain technical information to its own developers before third parties. Microsoft did not receive an unlawful competitive advantage as a result of the confidentiality of or its own employees' access to technical information regarding Windows and its conduct did not unduly lessen or prevent competition or cause the alleged loss or damage to the plaintiffs or class members.

127. The defendants deny that they engaged in the conduct alleged by the plaintiffs in **paragraphs 76** of the Statement of Claim or that any such conduct was unlawful or unduly lessened or prevented competition. Microsoft did not unlawfully coerce OEMs into preinstalling Microsoft's application software or prohibit OEMs from distributing non-Microsoft applications

software. Rather, many OEMs voluntarily chose to preinstall Microsoft's applications over competing software because it was in their financial interests to do so. Support costs for Microsoft's applications were lower than its competitors and consumer demand was significantly higher for Microsoft's low-priced, consumer-oriented applications software than for the high-priced applications offered by Microsoft's competitors.

128. The defendants deny that the success or failure of Navigator or Java could have or would have had any meaningful effect on the success of Microsoft's applications, as the plaintiffs allege in **paragraphs 77-78** of the Statement of Claim. Java has near ubiquitous distribution and no fully featured word processor or spreadsheet applications have been written for the Java platform; it simply does not have sufficient technical capabilities for such applications.

129. The defendants deny that Microsoft controls or uses its applications to maintain a dominant position in the operating systems market as alleged by the plaintiffs in **paragraphs 79-82** or elsewhere in the Statement of Claim. In particular, the defendants deny that Microsoft unlawfully uses the success of its Word and Excel applications or its position in the applications market to bolster the position of Windows in the operating systems market in a manner that is unlawful or that unduly lessens or prevents competition in the operating systems market. Microsoft continues to have a cross-platform strategy with respect to its applications software and Word and Excel applications are available not only for Windows and MacOS, but also in online versions (accessible with any internet browser) and on mobile devices including iOS and Android.

130. By developing and marketing both OS and applications software, Microsoft gains some competitive advantages that it would not otherwise have and different incentives from firms that only develop operating systems or applications. However, the fact that developing both types of software creates advantages or different incentives is not unlawful. Indeed, it is procompetitive and results in lower prices and more rapid innovation that benefits consumers.

THE PLAINTIFFS AND CLASS MEMBERS HAVE SUFFERED NO LOSS OR DAMAGE AS A RESULT OF MICROSOFT'S CONDUCT

131. Much of the conduct of which the plaintiffs complain in this action was not anti-competitive and had important pro-competitive effects. Microsoft's adoption of an open platform strategy for its operating systems materially contributed to the increase in competition amongst hardware and applications software developers, and contributed to a fundamental technological revolution in the way that people use computers, as well as a reduction in prices. Thus, much of Microsoft's conduct in fact had the positive effects of promoting innovation and competition and delivering increased functionality and choice to consumers.

132. Integrating new features into the Windows operating system, including adding internet browsing, networking, and media player capabilities and other functions and features has provided significant additional functionality to consumers at a lower overall cost. Critically, integration into the operating system allows functionality that a separate operating system and software could not accomplish, and provides significant benefits to consumers and class members.

133. The innovation of the Office suite dramatically altered the applications landscape and resulted in substantial price reductions for consumers that endure to this day. Overall, the benefits to consumers from Microsoft's business strategy and conduct have been substantial.

Price of Microsoft's OS and Applications Software

134. The defendants deny that any of the alleged conduct unlawfully maintained or increased the price that the plaintiffs, class members or consumers paid for Microsoft operating systems or applications software. The defendants deny that that any of the alleged conduct unlawfully maintained or increased the price that the plaintiffs, class members or consumers paid to purchase a PC that had a Microsoft OS and/or Microsoft applications software preinstalled.

135. Most Microsoft software, including OSs and applications, that was purchased by residents of British Columbia during the class period, was acquired through multiple tiers of distributors and resellers in a series of transactions. Retailers, distributors, OEMs, and system builders may either purchase Microsoft software directly from one of the defendants or indirectly

from another reseller. Resellers and distributors are independent of Microsoft and set their own prices for products. Microsoft's software is frequently bundled with other products and services (such as a PC), which are priced collectively as a package, often with hardware, installation, technical support, extended warranties and/or training. The prices, implied or stated, the end-consumers pay for Microsoft's software vary widely.

136. The prices paid by resellers of Microsoft's software to Microsoft also varied widely, depending on the type of reseller, the location of the reseller, whether the reseller qualified for volume discounts, and whether the reseller qualified for rebates, which in turn varied by distribution channel and may have changed quarterly. Microsoft also provided certain discounts and marketing funds to distributors of Microsoft software. Distributors decided independently of Microsoft whether to use all or part of their rebates, discounts or marketing funds to reduce the price of the Microsoft software that they sold.

137. In specific answer to **paragraphs 102 to 104** of the Statement of Claim, the defendants deny that the plaintiffs and other class members have suffered loss or damage as a result of any unlawful conduct by the defendants.

FINDINGS OF FACT AND LAW FROM FOREIGN PROCEEDINGS CANNOT BE ADOPTED OR RELIED ON

138. In answer to **paragraph 83** of the Statement of Claim, as set out in this Court's decision in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2014 BCSC 1281, the findings of fact and law from proceedings in the United States and Europe are not binding and have not been adopted by this Court in this proceeding. The defendants plead that the antitrust laws of the United States and Europe are not directly or indirectly enforceable by Canadian courts.

U.S. DOJ Proceedings

139. The findings of fact and law from the US DOJ proceedings are irrelevant to any alleged overcharges for PC operating systems sold in British Columbia, as the proceedings were focused on the effect of Microsoft's conduct on its competitors, not the effect of such conduct on cost to consumers. The DC Circuit Court of Appeals' decision in the US DOJ proceedings applied a

different standard of causation than is applicable for private plaintiffs seeking recovery of damages.

140. In 1994, the DOJ commenced an investigation into Microsoft's licensing practices. The genesis was a competitor complaint, not complaints by consumers. In the same year, Microsoft agreed with the DOJ to restrict certain licensing practices pursuant to a consent decree. The 1994 consent decree did not represent a final judgment in a fully litigated case, but rather, was filed by the parties as a settlement of a concurrently filed DOJ complaint in the action *United States v. Microsoft Corp.*, Civ. No. 94-1564.

141. On May 18, 1998, the DOJ filed a complaint against Microsoft under sections 1 and 2 of the *Sherman Act* in the action *United States v. Microsoft Corp.*, No. 98-1232. The focus of the complaint was the effects of Microsoft's conduct on competitors, and the case largely concerned whether Microsoft's actions would preclude competition from competitors in the putative internet browser market. It largely ignored consumers and did not involve any claim of overcharge. Judge Jackson of the United States District Court for the District of Columbia issued his findings of fact in this action on November 5, 1999, and his conclusions of law on April 3, 2000. These findings of fact and law are irrelevant to the plaintiffs' claims in this action respecting consumer overcharges for PC operating systems in British Columbia. Further, to the extent these findings of fact and law were based on potential impacts on competition or markets, the defendants say that developments in the technology markets since the DOJ proceedings have demonstrated that the anticipated impacts did not occur and were not in fact likely to occur at the time.

142. On Microsoft's appeal, the DC Circuit Court of Appeals reversed or vacated many of Judge Jackson's conclusions of law and disqualified Judge Jackson from further proceedings in the matter, in *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). The case was remanded to another district court judge, who ordered the parties to enter into settlement discussions about a potential remedy.

143. On November 6, 2001, the DOJ, nine States and Microsoft agreed to the entry of a final consent decree by the United States District Court for the District of Columbia. The non-settling

States were granted certain injunctive remedies by the district court which were substantially the same as those agreed to by Microsoft in the consent decree ("2001 Consent Decree"). Pursuant to the 2001 Consent Decree, Microsoft agreed to certain restrictions on its future conduct, including *inter alia* a requirement that Microsoft use uniform licensing agreements for and offer discounts uniformly to Covered OEMs (the twenty OEMs with the highest worldwide volume of licenses of Windows OS products in the preceding fiscal year).

144. Microsoft's compliance with the 2001 Consent Decree was monitored by both a compliance officer at Microsoft and a technical committee established on behalf of the DOJ. On May 12, 2011, after a number of extensions, the 2001 Consent Decree expired in accordance with its terms.

European Commission Proceedings

145. The findings of fact and law from the EC decisions are irrelevant to any alleged overcharges for PC operating systems sold in British Columbia, as the proceedings related solely to competitors in different markets and no effect on cost to consumers was alleged. Further, the remedies imposed by the EC were confined to Europe and had no application in Canada.

146. In 1999, after a complaint filed by a competitor, the EC initiated an investigation into Microsoft's refusal to supply interoperability information to competitors in the workgroup server operating systems market and subsequently, initiated a further investigation into the tying of WMP to the Windows OS. The EC's Decision of March 24, 2004 (Case COMP/C-3/37.792 Microsoft) concerned the findings of those investigations: first, whether Microsoft was required by EU law to supply interoperability information and allow its use for the purpose of developing and distributing workgroup server operating system products from October 1998 to March 2004, and second, whether Microsoft was in breach of EU law by failing to offer for sale a version of the Windows operating system without WMP from May 1999 to March 2004. Microsoft's actions in relation to the interoperability of workgroup servers and WMP are irrelevant to the plaintiffs' claims in this action respecting PC operating systems in British Columbia. Likewise, the EC's Decision of 12 July 12 2006 to Impose Penalty Payments on Microsoft, relating to Microsoft's compliance with the EC's Decision of March 24, 2004, is irrelevant to this action.

147. Subsequently, the EC initiated an investigation into the tying of Internet Explorer with the Windows OS. Pursuant to the EC's Decision of 16 December, 2009 in Case COMP/39.530 — Microsoft (Tying), and its Decision of 6 March, 2013 in Case COMP/39.530 – Microsoft (Tying), the EC accepted voluntary commitments offered by Microsoft to make available a mechanism to disable IE, to allow OEMs to pre-install any web browser of their choice on PCs, and to distribute a browser choice screen software update to users of Windows PCs within Europe. Both Microsoft's voluntary commitments accepted by the EC in its Decision of 16 December, 2009, as well as the penalty fines imposed by the EC relating to Microsoft's compliance with the EC's Decision of 16 December, 2009, are irrelevant to this action.

148. The defendants plead that EU antitrust laws are not directly or indirectly enforceable by this Court. To the extent that the unlawful means tort may be based upon acts that were illegal in the jurisdiction in which they took place (which is denied), acts occurring in the United States would be adjudicated on the basis of US law, not EU law. The EC decisions pleaded in **paragraph 83** of the Statement of Claim relate to acts alleged to have occurred in the United States.

149. To the extent the EC proceedings were based on potential impacts on competition or markets, developments in the technology markets since the EC proceedings have demonstrated that the anticipated impacts did not occur and were not in fact likely to occur at the time.

RESPONSE TO PLAINTIFFS' LEGAL CLAIMS

No Unlawful or Illegal Conduct

150. In answer to **paragraphs 85, 86** and **93A** of the Statement of Claim, the defendants:

(a) deny that any of the alleged acts or agreements constitute an agreement to restrain trade,

(b) in the alternative, if there was an agreement in restraint of trade (which is denied), it was reasonable as between the parties thereto and in the public interest;

(c) deny that any of the alleged acts or agreements constitute a conspiracy to injure or a conspiracy to perform an unlawful act;

(d) deny that any of the alleged acts or agreements support civil actions for damages or compensation under, the *Competition Act*, R.S.C. 1985, c. C-34, the *Sherman Act*, 15 U.S.C. §§ 1-7 or Articles 101 and 102 of the *Treaty on the Functioning of the European Union*; and

(e) plead that assertion and protection of their intellectual property rights and the confidentiality of their proprietary information, designs and business plans are lawful.

151. In further answer to **paragraphs 86** and **93A** of the Statement of Claim, and in particular in answer to any allegation that the defendants breached s. 45 of the *Competition Act* by means of conduct of the defendants occurring prior to March 12, 2010, each of the defendants:

(a) deny that there was any conspiracy, combination, agreement or arrangement between the defendants or with any other person which would have had the likely effect of preventing, lessening, restraining or injuring competition unduly; and

(b) deny that they were aware, or ought to have been aware, that the effect of any conspiracy, combination, agreement or arrangement to which they were a party (the existence of which is denied) would be to unduly prevent, lessen, restrain or injure competition.

152. In further answer to **paragraphs 86** and **93A** of the Statement of Claim, and in particular in answer to any allegation that the defendants breached s. 45 of the *Competition Act* by means of conduct of the defendants occurring on or after March 12, 2010, each of the defendants deny that they entered into any conspiracy, agreement, or arrangement with a competitor to fix, maintain, increase, or control the price for the supply of a product, to allocate sales, territories, customers or markets for the production or supply of a product, or to fix, maintain, control, prevent, lessen, or eliminate the production or supply of a product. In the alternative, the

defendants plead that any conspiracy, agreement or arrangement (which is denied) is an ancillary agreement or arrangement falling within section 45(4) of the *Competition Act*.

153. The defendants plead that section 45 of the *Competition Act* does not apply to the agreements or arrangements alleged in the Statement of Claim as the alleged agreements, if entered (which is denied), were entered in the United States and/or lack a real and substantial connection to Canada.

154. The defendants, which are affiliated companies, plead and rely upon section 45(6) of the *Competition Act*.

155. In further answer to **paragraph 93A** of the Statement of Claim, and in particular in answer to any allegation that the defendants breached s. 52 of the *Competition Act*, the defendants deny that they made representations to the public that were false or misleading in any material respect, whether knowingly, recklessly, or at all. In the alternative, if the defendants made any materially false or misleading representations to the public, which is denied, the defendants were diligent in their efforts not to do so.

156. In further answer to **paragraphs 86 and 93A** of the Statement of Claim, the defendants plead that while the burden of proof is on a balance of probabilities, that burden is heavier — at the very least a high preponderance of probability — where conduct constituting an offence is alleged.

157. In answer to **paragraphs 84, 86 and 93A** of the Statement of Claim, the defendants deny that any violation of foreign law by the defendants is sufficient to constitute unlawful conduct for purposes of the plaintiffs' claims of conspiracy or the tort of unlawful means in Canadian law. The defendants say that enforcement of any of the decisions pleaded would be contrary to law and public policy generally, and in particular where US or EU law prohibits conduct that is lawful in Canada, or not civilly actionable in Canada and/or in the US or EU.

158. In the alternative, if a violation of foreign law can constitute unlawful conduct for the purposes of the conspiracy or unlawful means tort in Canadian law, the conduct must be illegal in the jurisdiction in which it took place. To the extent that conduct of Microsoft occurring in

the United States was legal in the United States but illegal or subject to regulatory proceedings in the European Union (which is denied), the defendants plead that such conduct is not unlawful for purposes of Canadian tort law.

159. The defendants admit the fact of the decisions listed in **paragraph 83** of the Statement of Claim being issued. In further answer to **paragraph 84** of the Statement of Claim, the defendants say that the findings of violation of US or EU competition law are irrelevant and deny that any breach, if proven, was intentional or is relevant to any of the Canadian causes of action or damages alleged in this action.

160. In answer to **paragraphs 86, 93A** and **99** of the Statement of Claim, the defendants deny that any violation of the *Competition Act*, which is denied, would be sufficient to ground a claim of unjust enrichment or waiver of tort, or to constitute unlawful conduct for the purposes of the plaintiffs' claims of conspiracy or the tort of unlawful means.

161. In answer to **paragraph 86** of the Statement of Claim, the defendants deny that the tort of unlawful conspiracy, which is denied, could constitute unlawful conduct for the purpose of the plaintiffs' claim of the tort of unlawful means.

No Unlawful Means Tort

162. In answer to **paragraphs 85** to **89** of the Statement of Claim, each of the defendants:

(a) deny that any of their actions were unlawful;

(b) deny that they intended any of their actions to harm or injure the plaintiffs or other class members or, in the alternative, deny that harm or injury to the plaintiffs and other class members was a necessary means of enriching the defendants;

(c) deny that any of their actions interfered with the plaintiffs' economic interests by illegal or unlawful means; and

(d) deny that the plaintiffs or other class members suffered any economic loss as a result of the defendants' conduct.

No Conspiracy

163. In answer to **paragraphs 90** to **95** of the Statement of Claim, each of the defendants:

(a) deny that they breached s. 45 of the *Competition Act,* prior to or after March 12, 2010, as pleaded more particularly above;

(b) deny that they entered into any conspiracy or agreement with each other or third parties, as alleged;

(c) deny that any alleged conspiracy or agreement with each other (that is, between a parent corporation and its subsidiary), which itself is denied, could be the basis for a claim in common law conspiracy;

(d) if the defendants were party to an agreement as alleged (which is denied), deny that such an agreement was for the predominant purpose of harming the plaintiffs, consumers or class members, as alleged in **paragraph 92**;

(e) deny that they or their alleged co-conspirators carried out any acts in furtherance of the alleged conspiracy, as alleged in **paragraph 93** or elsewhere in the Statement of Claim;

(f) further and in the alternative, deny that the actions of the defendants alleged in **paragraph 93**, and the actions of their alleged co-conspirators, were unlawful or, in the further alternative, that any such actions were directed at the plaintiffs;

(g) deny that they and their alleged co-conspirators knew or ought to have known in the circumstances that injury, loss, or damage to the plaintiffs were likely to result from any of their conduct; and

(h) if they carried out any acts in furtherance of the alleged conspiracy (which is denied), deny that any loss or injury to the plaintiffs or other class members resulted from these acts.

No Unjust Enrichment or Waiver of Tort

164. In answer to **paragraphs 97** to **101** of the Statement of Claim, each of the defendants:

(a) deny that they have received an enrichment from the plaintiffs or class members; alternatively, any benefit received was too incidental, collateral or indirect to constitute unjust enrichment;

(b) deny that the plaintiffs or class members have been correspondingly deprived;

(c) if there was an enrichment, which is denied, then the plaintiffs or class members voluntarily intended to and conferred, without mistake, any enrichment on the defendants;

(d) assert that there exists a juristic reason for any enrichment of the defendants and deprivation of the plaintiffs, including but not limited to the contracts between Microsoft and direct purchasers, contracts between the plaintiffs or class members and OEMs, retailers, distributors and others, as well as the functionality value of the software that the plaintiffs or class members received;

(e) deny that the contracts between Microsoft and direct purchasers and the contracts between the plaintiffs or class members and OEMs, retailers, distributors and others were illegal and void;

(f) deny that there was any artificially induced overcharge on any of the defendants' operating systems;

(g) if there was any artificially induced overcharge, which is denied, then no such overcharge was passed on to the plaintiffs or class members;

(h) the defendants deny that any violation of Part VI of the *Competition Act*, of US antitrust law, the defendants' own corporate policies or restraint of trade, all of which is denied, would be sufficient to ground a claim of unjust enrichment or waiver of tort; and

(i) to the extent that the plaintiffs allege waiver of tort as an independent cause of action (which is denied), the defendants plead that waiver of tort is a potential remedy that is not available in the circumstances pleaded and is not, in itself, a reasonable cause of action. The defendants plead that an underlying tort, including proof of loss, must be established in order to sustain an action in waiver of tort, and put the plaintiffs and class members to the strict proof thereof.

No Harm or Damage

165. In answer to **paragraphs 102** to **104** of the Statement of Claim, the defendants deny that the plaintiffs or class members have suffered any damages cause by, or are entitled to any relief as a result of, any conduct or omission by the defendants. The defendants plead that the plaintiffs and class members have the burden of establishing damage caused by each and every allegedly unlawful act relied upon in the Statement of Claim and put the plaintiffs and class members to the strict proof thereof.

166. The defendants plead that double or multiple recovery is not available to the plaintiffs, class members or other direct or indirect purchasers of Microsoft software.

167. The defendants have no knowledge of whether any plaintiffs or class members purchased the defendants' operating systems. If the defendants' operating systems were purchased indirectly by any plaintiff or class member, the defendants have no knowledge regarding, nor control over, *inter alia*, the form in which they were purchased, who sold them, at what price they were sold, where the sales occurred (including whether such sales occurred in Canada), what the supply and demand conditions were for the various sales prior to the purchase by a plaintiff or class member, and any other information that would be required to establish the alleged overcharge, which is denied.

168. Any plaintiff or class member who purchased the defendants' operating systems did so on the basis of his or her own subjective decision-making process.

169. Further, or in the alternative, the plaintiffs or class members have not suffered harm because the amount paid by those to whom any alleged price increase, which is denied, was passed on, was trivial and/or does not justify an award of damages or any other relief.

170. Further, or in the alternative, the damages claimed by the plaintiffs or class members are excessive, remote and/or not recoverable in law.

171. Further, or in the alternative, any damages suffered by the plaintiffs or class members, which are denied, are not capable of being quantified on an aggregate basis. The defendants plead that an antecedent finding of liability, including proof of loss by each plaintiff and class member, is required before the aggregate damages provisions of the *Class Proceedings Act* is available. The defendants put the plaintiffs and class members to the strict proof thereof.

172. The defendants put the plaintiffs and class members to the strict proof of establishing that they purchased valid licenses to genuine Microsoft software and not counterfeit or mis-licensed software.

No Punitive Damages

173. In answer to **paragraphs 105** and **106** of the Statement of Claim, the defendants deny that any of the alleged acts or omissions, either individually or collectively, found any basis for an award of punitive damages.

Certain Claims Are Statute Barred

174. The defendants plead and rely upon the *Limitation Act*, R.S.B.C. 1996, c. 266 and the *Limitation Act*, S.B.C. 2012, c. 13.

175. The defendants plead and rely upon section 36(4) of the *Competition Act*.

176. The defendants plead and rely upon the doctrine of laches.

177. The defendants deny that the plaintiffs or class members are entitled to their costs of investigation of this matter.

178. Accordingly, the defendants respectfully request that this action be dismissed with costs.

DATED at Vancouver, British Columbia, on November 18, 2014.

Solicitor for the Defendants
D. Geoffrey Cowper Q.C.

This STATEMENT OF DEFENCE is filed by D. Geoffrey Cowper Q.C., of the firm of Fasken Martineau DuMoulin LLP, solicitors for the defendants, whose place of business and address for delivery is 2900-550 Burrard Street, Vancouver BC V6C 0A3.