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NORTHERN DISTRICT OF CALIFORNIA

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10 GO COMPUTER, INC. and S. JERROLD KAPLAN

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 GO COMPUTER, INC., a Washington
15 corporation; S. JERROLD KAPLAN, an
individual,

16 Plaintiffs,

17 v.

18 MICROSOFT CORPORATION, a Washington
corporation,

19 Defendants.

C

Case No. **05 2661**

WDB

**COMPLAINT FOR VIOLATIONS OF THE
SHERMAN ACT, 15 U.S.C. §§ 1, 2**

**[JURY TRIAL DEMANDED pursuant to
Fed. R. Civ. P. 38 and 81(c)]**

20
21 Plaintiffs GO COMPUTER, INC. and S. JERROLD KAPLAN, complain of defendant
22 Microsoft Corporation ("Microsoft") as follows:

23 **NATURE OF ACTION**

24 1. GO Computer, Inc. and S. JERROLD KAPLAN bring this action under 15 U.S.C. § 15
25 to recover the damages they sustained as a result of Microsoft's collusive and exclusionary actions in
26 violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

27 2. GO Computer, Inc. is a corporation organized and existing under the laws of the State
28 of Washington, with its legal agent for service of process located at Unisearch, Inc., 1780 Barnes

1 Blvd. S.W., Bldg. G, Tumwater, WA 98512-0410. GO Computer, Inc. and S. Jerrold Kaplan are the
2 owners of all claims asserted herein as a result of a succession of assignments thereof from GO
3 Corporation to AT&T Co. ("AT&T"), from AT&T to Lucent Technologies, Inc., ("Lucent") and from
4 Lucent to GO Computer, Inc. and S. Jerrold Kaplan. GO Corporation was the original holder of the
5 claims asserted herein as it was the competitor of Microsoft that suffered the harm that resulted from
6 Microsoft's unlawful actions set forth hereinbelow. GO Corporation's claims were assigned to AT&T
7 in January 1994, when GO Corporation was merged into AT&T's subsidiary, EO Corp. GO
8 Corporation's claims were then assigned by AT&T to Lucent in April 1996 when AT&T spun off all
9 of its GO Corporation assets, including the claims asserted herein. Lucent assigned all of GO
10 Corporation's claims herein to GO Computer, Inc. and S. Jerrold Kaplan on April 14, 2005. Unless
11 otherwise indicated, all references to GO hereinbelow are to GO Corporation.

12 3. S. Jerrold Kaplan is a founder and CEO of GO, principal inventor of GO's patented
13 technology and a resident of Hillsborough, California.

14 4. Defendant Microsoft Corporation is a corporation organized and existing under the
15 laws of the State of Washington, with its principal place of business located at One Microsoft Way,
16 Redmond, Washington. At all relevant times Microsoft has sold and licensed and continues to sell and
17 license Intel-compatible operating system and applications software. Microsoft is the world's largest
18 supplier of computer software for personal computers ("PCs") and servers, which it supplies largely
19 through sellers of computers and independent distributors. Throughout the relevant period, Microsoft
20 has marketed its computer operating system software in California and elsewhere and has licensed it
21 to sellers of computers as well as software distributors, resellers and end users in California and
22 elsewhere.

23 5. For purposes of this action, the relevant market is the market for Intel-compatible PC
24 operating systems, which is the same relevant market that was alleged and established in *United States*
25 *v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) and 87 F. Supp. 2d 30 (D.D.C. 2000) (hereinafter
26 "*United States v. Microsoft*"). At all times relevant to this action, Microsoft possessed monopoly
27 power, i.e., the power to raise prices and exclude competition in the relevant PC operating system
28 market, as was alleged and proven in *United States v. Microsoft*. By 1990, Microsoft's share of the

1 relevant market was 65%. (See Govt. 1st Am. Compl. ¶ 25 [hereinafter "Govt. Compl."])

2 6. "In the succeeding years" (i.e., 1990-1995), Microsoft "eliminated all competition" in
3 the relevant market (Govt. Compl. ¶ 26) through a pervasive and protracted campaign of collusive and
4 exclusionary practices designed to eliminate all threats to its operating system monopoly. Companies
5 that Microsoft considered direct competitive threats to its monopoly were any that had developed a PC
6 operating system or had developed cross-platform "middleware" that had the potential of reducing the
7 entry barriers that protected Microsoft's operating system monopoly. Examples included: Netscape,
8 Sun Microsystems ("Sun"), Real Networks, Novell and – for purposes of this action – GO.

9 7. The actions Microsoft took to eliminate the competitive threats to its operating system
10 monopoly posed by Netscape and Sun were alleged by the Government and adjudged unlawful by the
11 Court in *United States v. Microsoft*. Microsoft took similar actions to eliminate GO from the PC
12 operating system market and for the same purpose: Microsoft acknowledged that GO had developed
13 its own PC operating system for "pen computers" (as defined below), that GO's PC operating system
14 was in many ways superior to Microsoft's operating system and that GO had to be eliminated so as to
15 enable Microsoft to preserve its operating system monopoly – which it was then able to deploy against
16 Netscape and Sun as alleged and found in *United States v. Microsoft*.

17 **GO'S ATTEMPT TO ENTER THE RELEVANT PC OPERATING SYSTEM MARKET**

18 8. GO was founded in 1987 to invent and develop a new type of personal computer
19 known as a "pen" or "tablet" computer that was used by writing directly onto a flat screen with a
20 special pen rather than by typing on a keyboard. GO's product initially consisted of two components:
21 (1) a thin lightweight computer similar to a notebook or pad of paper that could be held in one hand
22 while writing on it with the other and (2) an operating system called "PenPoint" designed to support
23 special application programs that would make this new type of PC easy to use. In order to establish
24 PenPoint in the market, it was necessary to convince other software developers to invest their
25 resources in writing new applications designed for pen computing and to run using PenPoint, so GO
26 contacted all the major PC application software developers for that purpose. One of the application
27 software developers GO contacted was Microsoft.

28 //

MICROSOFT'S RESPONSE TO GO'S MARKET ENTRY

1
2 9. As the internal records of Microsoft later revealed, Microsoft had no interest
3 whatsoever in writing applications for GO's operating system for use with pen computers. To the
4 contrary, Microsoft saw GO's PC operating system as a serious threat to its operating system
5 monopoly and took swift covert action to "kill" it just as it did the Netscape/Sun Java threat to its
6 monopoly. Microsoft considered its prime objective was to continue to be the dominant mainstream
7 PC operating system standard. Microsoft's CEO, William H. Gates III ("Gates"), personally saw GO
8 as a direct competitive threat to Microsoft's operating system monopoly, stating that "GO's primary
9 strategy is to create an operating system standard that is different than and incompatible with
10 Microsoft's (PX319)¹; that "there was an operating system conflict between GO and Microsoft"
11 (PX310); and that "GO is a Windows competitor" (PX310). Microsoft's other top executives agreed
12 with Gates, stating GO "competes with our OSs" (PX310). Gates therefore assigned Marlin Eller (a
13 senior developer in the Operating Systems Division of Microsoft during 1982-1995), among others,
14 responsibility of extinguishing the GO threat. Eller explained: "Everyone knew that [Microsoft's]
15 bread and butter came from DOS, and, eventually, they would realize it [came] from Windows. The
16 abiding rule was to kill anyone trying to take that revenue away. The number one mission of
17 Microsoft was to not let anyone else poach on its core asset – the operating systems business. And
18 GO was looking like a serious threat." Jennifer Edstrom and Marlin Eller, *Barbarians Led by Bill*
19 *Gates* at 120 (1998).

20 10. Microsoft undertook to "kill" GO by resorting to many of the same collusive and
21 exclusionary tactics Microsoft used against Netscape, Sun, Novell, original equipment manufacturers
22 ("OEMs"), independent software vendors ("ISVs") and others that were alleged by the Government
23 and adjudged unlawful by the Court in *United States v. Microsoft* – and for the same purpose: GO's
24 operating system was a serious competitive threat to Microsoft's operating system monopoly.
25 Microsoft began its mission in July 1988, when Gates showed up at GO's offices in Palo Alto,
26 California, ostensibly in response to GO's invitation to Microsoft and all other major PC applications

27
28 ¹ Documents referenced as "PX" are trial exhibits admitted in evidence during trial in *Gordon v. Microsoft*, Case No. 00-005994 (MN Dist. Ct., Hennepin Cty.).

1 developers to write applications for GO's PC operating system for use with tablet computers,
2 referenced in paragraph 8 above.

3 11. Gates expressed considerable interest to GO's management in exploring the prospect of
4 having Microsoft develop applications for PenPoint, as Microsoft had done in the past for the Apple
5 MacIntosh. He therefore executed a Nondisclosure Agreement ("NDA") and assigned a senior
6 executive (Jeff Raikes, Vice President of Applications) to work with GO. In February 1989, Raikes
7 signed a Joint Development Agreement with GO by which Microsoft was to devote resources to the
8 joint effort and GO was to provide confidential engineering designs, access to GO's engineering staff
9 and space in GO's office in which to work. The information was to be kept confidential, to be used
10 "only for the purpose of furthering this joint project," and no copies were to be made or disseminated
11 without GO's permission. (PX58) GO also relied upon Microsoft's well known public statements to
12 the software industry that it maintained a veritable "Chinese Wall" between its Applications and
13 Operating System Divisions that would prevent GO's valuable trade secrets, entrusted to Microsoft's
14 Applications Division (which Raikes headed), from being diverted to Microsoft's Operating System
15 Division for use in competition against GO. Raikes sent an engineer (Lloyd Frink, ostensibly from
16 Microsoft's Applications Division) to visit GO on several occasions over the ensuing months, during
17 which he was given extensive access to confidential documentation, engineers, prototypes and other
18 valuable proprietary resources.

19 12. GO provided its proprietary trade secrets to Microsoft in reliance upon Microsoft's
20 agreement not to disseminate or use them except for its possible development of applications for GO's
21 pen computer operating system in cooperation with GO. But that was not Microsoft's real purpose.
22 Lloyd Frink reported to Gates that his real "[p]urpose of [the] trip" to GO's offices was "for me to
23 learn in more detail [about] what GO is developing. . . . We can take this information into
24 consideration when putting Windows on similar types of machines." (PX115) Frink also told Gates:
25 "[t]he one key piece we need in order to put Windows on [tablet] computers made by other
26 manufacturers is the handwriting recognition software. The GO people wouldn't let me get near any
27 of their stuff (with good reason)." (PX115)

28 13. Undaunted, however, Frink continued to purloin valuable engineering designs from

1 GO, then reported to Gates and other Microsoft top executives on his success: "Attached is a packet
2 of information I have collected on GO. These are some of GO's very preliminary specs."
3 Acknowledging that GO's technology "has a lot of appeal," Frink assured Gates *et al.* "I think we can
4 whip something up in a year that embodies some of these [i.e., GO's] ideas." (PX355) Microsoft not
5 only stole GO's valuable trade secrets directly from GO (i.e., by entering GO's premises and poring
6 over GO's confidential records pursuant to an NDA that Microsoft honored only in its breach), but it
7 also got other developers to disclose trade secret information they obtained from GO under NDAs
8 they had signed with GO. Thus, in a report to Raikes, a Microsoft employee confided that Softview,
9 Inc. (an ISV beholden to Microsoft) "is quite eager to give us info [information] on GO," that it "has
10 access to technical documentation and will get more detailed information" (obtained from GO under
11 an NDA) and is "open to giving us info [information] on GO" in direct violation of its NDA. (PX370)
12 The report to Raikes then described GO's proprietary information in detail and promised even more
13 such information will be sent to Microsoft, adding: "Given that further information is probably more
14 technical, I think one of the [Microsoft] development team[s] should be here" to interpret it. (PX370)

15 14. While purloining technical information about GO's proprietary technology, Microsoft
16 also secretly "blacklisted" GO from receiving Microsoft's "beta releases" of software required to
17 properly integrate PenPoint with Microsoft's dominant software products – "beta releases" that
18 Microsoft routinely made available to developers who did not seek to compete with Microsoft's
19 operating system. Microsoft also withheld technical information from GO that would enable GO's
20 software to remain interoperable with Microsoft's – information generally provided to third party
21 developers – unless GO would release Microsoft of any claims based upon Microsoft's previous
22 exposure to GO's proprietary technology. Microsoft's practice of "withholding crucial technical
23 information" was also found to be exclusionary by the Court in *United States v. Microsoft* (FF90 *et*
24 *seq.*, 84 F. Supp. 2d at 33) and was the subject of the Court's recently affirmed injunction against
25 Microsoft. *See* 373 F.3d 1199 (D.C. Cir. 2004).

26 15. GO unveiled PenPoint publicly for the first time to an "invitation only" audience of
27 software developers in San Francisco in early 1991 and the next day to the Boston Computer Society
28 in Boston. Microsoft had one of its developers gain access to the GO demonstration in Boston so that

1 he could secretly videotape it for Microsoft executives to view back in Redmond, Washington in
2 search of other features to copy. The GO demonstrations were a major success, resulting in glowing
3 press reviews and industry magazines' praise. It quickly became apparent to Microsoft that, despite
4 its best efforts to misappropriate GO's valuable technology so that it could replicate it in a Windows-
5 based computer (later to be known as PenWindows or WinPad), GO's pen computer operating system
6 was far superior to the Windows operating system that Microsoft used for its pen computer. One of
7 Microsoft's software engineers responsible for PenWindows concluded that "GO has a technically
8 superior solution" whereas "Windows is too complex and inappropriate for [pen computers]."
9 (PX859)

10 16. Recognizing that Microsoft could not replicate the quality of GO's pen computer on its
11 Windows operating system, even with information stolen from GO, Microsoft resorted to other
12 exclusionary measures -- all of which are similar to the exclusionary tactics which the Government
13 alleged and the Court declared unlawful in *United States v. Microsoft*. While Microsoft was gathering
14 confidential information from GO under the false pretense that it planned to develop applications for
15 GO's pen operating system, Gates learned that Intel planned to invest several million dollars in GO's
16 development efforts and to provide a public endorsement of GO. That endorsement and support
17 would have virtually guaranteed GO's success. Intel wanted to support GO for two reasons: first,
18 Intel believed GO's operating system was superior to Microsoft's operating system and, second, Intel
19 wanted to encourage GO to develop another operating system so that Intel would not have to be
20 dependent on the Microsoft operating system monopoly anymore.

21 17. As soon as Gates learned that Intel was planning to endorse and support GO, he
22 dispatched his subordinates to meet with Intel to tell Intel not to endorse or support GO. Microsoft
23 executives repeatedly told Intel that its public endorsement and financial support of GO "is an anti-
24 Microsoft move because it [GO's operating system] competes with our OSs [operating systems]."
25 (PX310) Gates himself reported that he told Intel management "there was an operating system
26 conflict between GO and Microsoft" (PX310) and that Intel therefore should not help GO. In an effort
27 to dissuade Intel from helping GO, Microsoft even showed Intel a prototype of Microsoft's
28 PenWindows that was implemented by Frink based on what he had secretly taken from GO. Intel

1 resisted, telling Microsoft that Intel was “very impressed with GO’s software and with GO in
2 general,” (PX310) whereas the Windows operating system was “too complicated.” (PX310) Given
3 that Intel continued to resist Microsoft’s pressure, Gates finally wrote Intel’s CEO (Andrew Grove)
4 directly to insist that Intel not support GO:

5 GO’s primary strategy is to create an operating system standard that is
6 different and incompatible with Microsoft’s. . . . An Intel investment in
7 GO would send a strong message to both OEMs and ISVs. . . . Intel’s
8 investment in GO will be seen as an endorsement of GO’s platform and
9 system software. This will be a very powerful effect which you should
10 not discount – in fact it is almost certainly a stronger effect than the
11 value of the actual money that GO receives. . . . I guess I’ve made it
12 very clear that we view an Intel investment in GO as an anti-Microsoft
13 move, both because GO competes with our systems software and
14 because we think it will weaken the 386 PC standard. . . . I’m asking
15 you not to make any investment in GO Corporation.

16 (PX319)

17 18. As a result of Microsoft’s pressure, Intel substantially reduced its investment in GO
18 and, more importantly – because Gates convinced Grove that any investment in GO “will be seen as
19 an endorsement of GO’s platform and system software” and would “almost certainly [have] a stronger
20 effect than the value of the actual money that GO receives” – also prohibited GO from publicly
21 disclosing the fact that Intel had made any investment in GO. Microsoft’s pressures on Intel to
22 withhold its endorsement of GO are similar to the pressures it exerted on Intel and others to refrain
23 from helping its competitors, as the Government alleged and the Court found unlawful in *United*
24 *States v. Microsoft*. It was “Microsoft’s corporate practice to pressure other firms to halt software
25 development that either shows the potential to weaken the applications barrier to entry or competes
26 directly with Microsoft’s most cherished software products.” (FF93, 84 F. Supp. 2d at 34) In
27 particular, “Microsoft successfully pressured Intel, which was dependent in many ways on Microsoft’s
28 good graces, to abstain from aiding in Sun’s and Netscape’s Java development work” (87 F. Supp. 2d
at 43). The Court found that “Microsoft’s interactions with Netscape, Intel, Apple and Real Networks
all reveal Microsoft’s business strategy of directing its monopoly power toward inducing other
companies to abandon projects that threaten Microsoft and toward punishing those companies that
resist.” (FF132, 84 F. Supp. 2d at 43) GO was a direct target of that business strategy because GO’s
operating system directly threatened to erode Microsoft operating system monopoly.

1 19. Intel, Apple, Netscape and Real Networks were not the only developers who, the Court
2 found, were pressured by Microsoft to abstain from helping Microsoft's rivals erode its operating
3 system monopoly. Microsoft also "targeted individual ISVs, directly extracting from them
4 commitments" to write applications for Microsoft exclusively (FF337, 84 F. Supp. 2d at 93).
5 "Microsoft's exclusive deals with the ISVs," the Government claimed and the Court found, "had a
6 substantial effect in further foreclosing rival browsers from the market" (253 F.3d at 72). GO was the
7 brunt of this exclusionary tactic as well. Determined to "stop GO," Microsoft strategized that it could
8 do this by "making sure they sign up no OEMs or ISVs, hence have no customers." (PX443)
9 Microsoft did this by launching a project that was expressly designed to destroy GO by locking up
10 almost 500 ISVs to work exclusively on Microsoft's pen computer so as to make certain GO had no
11 ISVs to write applications for GO's pen computer – leaving GO with "no customers."

12 20. Coercive strategies employed by Microsoft to foreclose rivals from access to the OEM
13 distribution channel, alleged by the Government and found unlawful by the Court in *United States v.*
14 *Microsoft*, were also employed against GO with extraordinary success. The Government alleged:

15 In the succeeding years [i.e., from 1990 to 1995], Microsoft effectively
16 eliminated all competition in the operating system . . . markets. It used,
17 *inter alia*, its market power in the operating system [market] to pressure
18 OEMs into agreeing to restrictive licensing terms for MS-DOS. These
19 terms included "per processor" operating system licenses, which
20 required OEMs to pay Microsoft an operating system royalty for every
computer they sold, regardless of whether the computer included
Windows/MS-DOS, thus discouraging sale of non-Microsoft GUIs and
operating systems. These licenses also included other restrictions, such
as tying Windows and DOS through licensing agreements, large
minimum commitments and long license terms.

21 (Govt. Compl. ¶ 26) Microsoft's "restrictive dealing agreements with OEMs," the Government
22 alleged and the Court found (Govt. Compl. ¶ 48), "prevented, or significantly handicapped, the
23 licensing, sale, distribution and promotion of technologies competing with Microsoft's" (*ibid.*) and
24 were a major cause of GO's ultimate expulsion from the PC operating system market. While the
25 Government "obtained a consent decree enjoining certain . . . practices" (Govt. Compl. ¶ 26), it
26 alleged that "by the time of the consent decree [entered in August 1995], the damage had already been
27 done." (Govt. Compl. ¶ 27; *see also* ¶¶ 54-69 ["Foreclosure Of The OEM Channel"; FF144, 84 F.
28 Supp. 2d at 46-47])

1 21. As the Government alleged and the Court found in *United States v. Microsoft*,
2 Microsoft “used incentives and threats in an effort to secure the cooperation of individual OEMs” in
3 helping Microsoft preserve its operating system monopoly. (FF230 *et seq.*, 84 F. Supp. 2d at 67)
4 Microsoft employed those same “incentives and threats” which the Government alleged and the Court
5 found to block GO from distributing its rival operating system for pen computers through the OEMs.
6 Gates was assured by his subordinates that “[o]ur primary mission right now is to stop GO” and that
7 “[w]e could do this” by “making sure they sign up no OEMs” and thus “have no customers.” (PX443)

8 22. Microsoft’s use of “incentives and threats” (FF230, 84 F. Supp. 2d at 67) to coerce
9 Compaq, Fujitsu, Toshiba and other OEMs into contracts that prohibited them from making pen
10 computers using GO’s operating system epitomizes the collusive and exclusionary strategy which the
11 Government alleged and the Court found (and finally enjoined). For example: by late 1992, Compaq
12 – then the leading PC manufacturer – decided to expand into the emerging PDA market. “PDA” (or
13 personal digital assistant) was the acronym used then for handheld portable computers, mainly pen
14 computers. The ubiquitous PDAs of today – Palm, Handspring, Microsoft “Tablet” – are the
15 conceptual descendants of GO’s pioneering technology of a decade earlier. During 1992-1993, GO
16 and Microsoft were competing head to head for Compaq’s PDA operating system business. Compaq
17 assembled a team of software engineers to conduct a complete technical analysis of both GO’s and
18 Microsoft’s pen computer operating systems. The results were unequivocal: “GO offers Compaq the
19 best opportunity to dominate the PDA market. . . . The potential for Compaq . . . with GO far exceeds
20 opportunities with Microsoft. . . . PDAs [using GO’s operating system] represent the most attractive
21 opportunity . . . [to] break-out of the Microsoft architectural prison. . . . GO solution appears to better
22 meet user needs as we can see them.” (PX1522) Conclusion: “Choice: GO’s PenPoint.”

23 23. GO thus won on the competitive merits but lost to Microsoft’s strategy of “incentives
24 and threats,” which the Court found and ultimately enjoined – in *United States v. Microsoft* (FF230,
25 84 F. Supp. 2d at 67). Compaq’s top management overruled its engineering team’s recommendation
26 of GO, listing as reasons: “What is at risk? What really are the risks of using alternative operating
27 systems in parts of our business? . . . Microsoft does not really want us developing software. . . . How
28 can Microsoft negatively impact our core business?” (PX1521) It could “sabotage our efforts.

1 ...Microsoft would withhold Chicago [WIN 95] information and SDK. . . . How retaliatory would
2 they get? [Listing 12 actions Microsoft might take to harm Compaq.]” (PX1521) “Attempts by
3 Microsoft to sabotage Compaq/GO integration to the desktop is likely.” (PX1522) A senior Compaq
4 executive briefed the CEO in advance of an upcoming personal visit by Gates as to “the effect of a
5 non-Microsoft decision [i.e., working with GO] on the rest of our business.” (PX1519) He
6 recommended against GO because “[i]f we . . . enter into an agreement with GO, Inc., we might stress
7 the Microsoft relationship to the breaking point.” (PX1519) Those were the “threats” of the
8 “incentives and threats” which the Government alleged and the Court found Microsoft used to bar
9 operating system competitors from the OEM channel. (FF230, 84 F. Supp. 2d at 67) The
10 “incentives”: The very next day, in preparation for Gates’ personal visit to Compaq, Microsoft’s
11 Vice-President of OEM Sales, Joachim Kempin instructed Compaq’s CEO to be prepared to
12 “[d]iscuss the ‘WinPad’ [PenWindows] project and outline the significance of our proposed
13 exclusivity and sustained market advantages to Compaq.” (PX1520) After the Microsoft/Compaq
14 meeting, Compaq cryptically informed GO that Compaq would not be using GO’s operating system
15 even though it prevailed on the merits. Microsoft and Compaq later publicly announced a “Strategic
16 Relationship” that included Microsoft’s inferior WinPad operating system on an exclusive basis.

17 24. Microsoft used similar coercive tactics to prohibit Fujitsu, Toshiba and other OEMs
18 from using GO’s superior operating system for pen computers. Microsoft’s Jeff Raikes instructed his
19 subordinates to “show no mercy” toward Fujitsu if Fujitsu supported GO’s operating system, referring
20 to Microsoft’s threat to withhold monies due Fujitsu for overpayments made by it for its Windows
21 license. Fujitsu was thus forced to forego a superior open computer operating system. Microsoft’s
22 exclusion of GO’s operating system from the OEM channel was so effective that GO was forced to
23 develop a means to port its operating system to a non-Intel processor, outside the market that
24 Microsoft had monopolized. That alternative was the “Hobbit” processor chip that AT&T had
25 developed as a low cost and low power alternative to the Intel processor that Microsoft used.

26 25. With backing and support from AT&T, GO shifted its focus and resources to the
27 development of its PenPoint operating system based on the Hobbit chip, resulting in two highly
28 acclaimed pen computer products – EO440 and EO880. Those products demonstrated how much

1 better GO's pen computers were than Microsoft's Windows-based pen computers. In response,
2 Microsoft continued to exert pressure on Toshiba and other OEMs to agree not to manufacture pen
3 computers for GO – even though GO was no longer able to use the Intel microprocessor that
4 Microsoft used as a result of Microsoft's previous blockade of the OEM channel from GO.

5 26. Seeing that GO was unable to gain a foothold in the Intel-compatible operating system
6 market and was financially constrained from circumventing Microsoft's barriers, AT&T acquired GO
7 in a non-cash merger for stock in its subsidiary (EO Corp.) in January 1994. However, because
8 Microsoft had already closed the OEM channel to any operating system competitor (whether it used
9 the Intel chip or the Hobbit chip), AT&T was forced to shut down EO Corp. (and thus GO) in July
10 1994. In November 1994, barely six months after GO was shut down, Microsoft quietly withdrew
11 PenWindows from the market before even shipping the final version. Microsoft accomplished its
12 goal. Microsoft's pen computer software engineer (Marlin Eller) explained:

13 [PenWindows] wasn't a thing about making money. This was all about
14 'Block that kick.' . . . We were preventing GO from running away with
15 the market. That was our job. . . . We weren't trying to sell software, we
16 were trying to prevent other people from selling software. From my
view, PenWindows was a winner. We shut down GO. . . . That
company is dead. They won't sell their [expletive deleted] anymore.
We did our job.

17 Jennifer Edstrom and Marlin Eller, *Barbarians Led by Bill Gates* at p. 144 (1998).

18 **MICROSOFT'S HARM TO COMPETITION, TO CONSUMERS AND TO GO**

19 27. Microsoft's exclusionary combinations and other exclusionary acts in furtherance
20 thereof have caused substantial harm to competition in the relevant PC operating system market,
21 enabling Microsoft to strengthen and preserve the monopoly it had unlawfully acquired by 1995. Its
22 conduct has suppressed innovation and extinguished competition by foreclosing competitors from the
23 resources and outlets they needed to compete and it has denied consumers the benefit of new
24 technologies by preventing those new technologies from competing with Microsoft' inferior products
25 on the merits.

26 28. Through its unlawful conduct, Microsoft has also destroyed GO. But for Microsoft's
27 violations, GO would have acquired a going concern value of more than \$200 million by the date of
28 its demise in July of 1994 and a much higher going concern value by the time of trial.

1 **THE STATUTE OF LIMITATIONS REMAINS TOLLED BY MICROSOFT'S ONGOING**
2 **UNLAWFUL CONDUCT AND BY SECTION 5(i) OF THE CLAYTON ACT**
3 **(15 U.S.C. § 15(i))**

4 29. Microsoft's exclusionary combinations and other exclusionary acts in furtherance
5 thereof, as well as their harmful effects on competition and consumers, have been perpetrated by
6 Microsoft on a continual basis from the late 1980s to the present. This alone tolls the statute of
7 limitations. Moreover, GO's discovery of Microsoft's exclusionary combinations and covert acts in
8 furtherance thereof was delayed by Microsoft's fraudulent concealment and affirmative denials of its
9 unlawful conduct to the present day. GO could not, in the exercise of reasonable diligence, have
10 discovered Microsoft's fraudulently concealed violations alleged herein any earlier than it did.
11 Consequently, the statute of limitations was tolled as to Microsoft's fraudulently concealed violations
12 until GO could be reasonably deemed to have discovered them shortly before commencing this action.

13 30. On May 18, 1998, the United States commenced its action against Microsoft, alleging
14 that Microsoft had combined to restrain trade in violation of § 1 of the Sherman Act and to
15 monopolize the relevant PC operating system market in violation of § 2 of the Sherman Act. GO's
16 claims under §§ 1 and 2 of the Sherman Act are based in major part upon the matters alleged in the
17 Government's complaint. Consequently, the statute of limitations was and remains tolled as to
18 Microsoft's violations until one year after the Government action terminated no earlier than June 30,
19 2004, when the Court of Appeals for the District of Columbia affirmed the lower court's judgment.
(373 F.3d 1199 (D.C. Cir. 2004))

20 **FIRST CLAIM FOR RELIEF:**
21 **COMBINATIONS IN RESTRAINT OF TRADE**
22 **[Violation of 15 U.S.C. § 1]**

23 31. Plaintiffs incorporate herein by reference the allegations contained in paragraphs 1-30
24 above.

25 32. Microsoft's conduct alleged herein constituted numerous combinations in restraint of
26 trade in violation of § 1 of the Sherman Act (15 U.S.C. § 1), resulting in substantial harm to GO's
27 business and property.

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DEMAND FOR JURY TRIAL

Pursuant to Rules 38 and 81(c) of the Federal Rules of Civil Procedure, plaintiffs in the above-captioned action hereby request a trial by jury on all issues so triable.

Dated: June 28, 2005

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL P.L.L.C.

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