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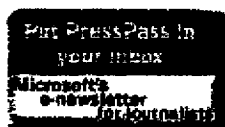
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XI.

Microsoft's OEM Agreements Do Not Limit OEMs' Ability To Promote and Distribute Non-Microsoft Web Browsing Software.

801. Plaintiffs contend that Microsoft's OEM license agreements are exclusionary because they improperly "limit[] the ability of OEMs to promote other browsers, or to substitute other browsers for IE." (Fisher ¶ 146; see generally Warren-Boulton ¶¶ 121-33; Fisher ¶¶ 144-52.) Plaintiffs also challenge the provisions of Microsoft's OEM license agreements that limit the ability of OEMs to modify the initial Windows startup sequence without Microsoft's permission. (Warren-Boulton ¶¶ 121-28.)
802. During their case-in-chief, plaintiffs presented no testimony from an OEM witness regarding Microsoft's OEM license agreements, relying instead on testimony from their economists and on anecdotal testimony from Netscape's Barksdale. (Soyring of IBM worked on the software side of IBM as opposed to the IBM PC Company.) During the rebuttal phase of the trial, plaintiffs presented testimony from Garry Norris of IBM, who worked in the IBM PC Company from March 1995 until March 1997. (June 7, 1999 A.M. Tr. at 5-6 (Norris).)
803. During Microsoft's case-in-chief, Joachim Kempin, a Microsoft senior vice president, and John Rose, a Compaq senior vice president, testified about Microsoft's OEM license agreements. (Kempin ¶ 1; Rose ¶ 3.) Kempin is in charge of Microsoft's OEM sales group and, in that position, has been responsible since at least 1991 for licensing all Microsoft products through the OEM channel. (Kempin ¶¶ 1-2.) Although plaintiffs contend that Kempin's testimony was "evasive, inconsistent, and not believable" (Pls.' Proposed Findings ¶ 191.5), none of the portions of Kempin's testimony cited by plaintiffs supports that contention. Rose was responsible for Compaq's Desktop Division from 1993 until June 1996 and, at the time he testified, was responsible for managing Compaq's relationship with Microsoft. (Rose ¶ 3.)

A. Microsoft's OEM License Agreements Generally

804. OEMs play a central role in distributing Microsoft's operating systems to customers. (Kempin ¶ 73.) Indeed, Microsoft distributes the vast majority of copies of Windows 95 and Windows 98 to customers through the OEM channel. (Kempin ¶ 73.) In total, Microsoft works directly with more than 500 so-called "royalty" OEMs that have entered into license agreements with Microsoft for Windows, and works indirectly with another approximately 80,000 smaller OEMs that purchase packaged copies of Windows from distributors. (Kempin ¶ 74; Feb. 24, 1999 P.M. Tr. at 41 (Kempin).) Plaintiffs challenge Microsoft's license agreements with the more than 500 so-called "royalty" OEMs.
805. Microsoft's OEM license agreements do not unreasonably limit OEMs' ability to distribute and promote competing Web browsing software. As Kempin testified, OEMs are free to install any non-Microsoft software they want on their computers, including Netscape's Web browsing software. (See Kempin ¶¶ 8, 15-24.) Plaintiffs do not challenge this fundamental (indeed dispositive) point. Microsoft's OEM license agreements also give OEMs the ability to promote competing Web browsing software and differentiate their machines from those of their competitors. (See Kempin ¶¶ 10, 36-51.)

<http://www.microsoft.com/presspass/trial/r-fof/XI.asp>

Plaintiff's Exhibit

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1. OEMs' Ability To Install Non-Microsoft Software

806. Microsoft's OEM license agreements, which are only one year in duration, do not require OEMs to preinstall Microsoft operating systems on all of their computers. (DX 2580 (Ransom Dep.) at 42-43; Jan. 12, 1999 P.M. Sealed Tr. at 55 (Fisher); June 23, 1999 P.M. Tr. at 67-73 (Schmalensee).) In fact, witnesses from major OEMs testified that they have evaluated, and continue to evaluate, alternatives to Microsoft's operating systems. (See, e.g., DX 2566 (Dunn Dep.) at 36-38; DX 2580 (Ransom Dep.) at 40.) They also testified that if they perceived substantial consumer demand for non-Microsoft operating systems, they would preinstall those operating systems on their computers. (Rose ¶¶ 16-17; Feb. 19, 1999 A.M. Tr. at 48 (Rose); DX 2580 (Ransom Dep.) at 40; GX 1462 (Von Holle Dep.) at 19; see also Pls.' Proposed Findings ¶ 15.1.1(iv).)
807. OEMs are free to add whatever software they like to computers they ship with Windows. (Kempin ¶¶ 6, 8, 17, 24, 45; Schmalensee ¶¶ 355-59; June 21, 1999 A.M. Tr. at 41-42 (Schmalensee).) In particular, Microsoft has never limited OEMs' ability to preinstall non-Microsoft Web browsing software on their computers and to make it the default Web browser. (Kempin ¶¶ 6, 45; Feb. 26, 1999 A.M. Tr. at 5 (Kempin); DX 2649; DX 2560 (Brownrigg Dep.) at 55; DX 2574A (Kanicki Dep.) at 76-77 (sealed); DX 2580 (Ransom Dep.) at 42-43; DX 2597A (Von Holle Dep.) at 134 (sealed).)
808. OEMs are also free to place an icon for non-Microsoft software directly on the Windows desktop and include it in the Windows "Start" menu—the primary means of launching applications in Windows—thereby making it quick and easy for customers to access that software with the click of a mouse. (Kempin ¶¶ 8, 17, 24, 45; Schmalensee ¶¶ 355-56; Chase ¶ 173; Feb. 26, 1999 A.M. Tr. at 5 (Kempin); June 21, 1999 A.M. Tr. at 41-42 (Schmalensee); DX 2574A (Kanicki Dep.) at 99-100 (sealed); DX 2575 (Kies Dep.) at 82.) Plaintiffs do not dispute these fundamental facts.
809. Indeed, the testimony of Rose of Compaq and Norris of IBM confirms that OEMs are free to install whatever software they like on their personal computers. Rose testified that Compaq's license agreement for Windows does not "prevent Compaq from installing other software programs, including Netscape's web browsing software, on Compaq's computers and displaying icons for those programs on the Windows default desktop and Start menu." (Rose ¶ 33.) According to Rose, Compaq takes full advantage of that freedom. (Rose ¶ 40.) Norris similarly testified that IBM's license agreement for Windows does not prevent IBM from adding icons to the Windows desktop for non-Microsoft software and listing such software in the Windows Start menu. (June 9, 1999 P.M. Tr. at 52-53 (Norris).)
810. The Windows desktop, as designed by Microsoft, typically includes only seven Microsoft-supplied icons, which occupy only a small amount of space on the left-hand side of the screen. (Kempin ¶ 19; Schmalensee ¶ 361; DX 2163.) Consequently, plenty of room on the Windows desktop (approximately 85%) is available for OEMs to add literally dozens of additional icons for non-Microsoft software. (Kempin ¶ 19; Schmalensee ¶¶ 355-56.) At a minimum, there is sufficient room on the standard Windows desktop for an OEM to place more than forty icons for non-Microsoft software. (Schmalensee ¶ 358.) Schmalensee explained:

On the lowest-resolution screen, there is room for about 49 icons of the standard *Windows* size. Microsoft requires that OEMs carry about 7 icons, leaving space for roughly 42 more icons. OEMs therefore have 85 percent of the *Windows* desktop available to them. If they use a higher resolution screen setting—as virtually all new computers are capable of doing—the amount of space available jumps dramatically.

(Schmalensee ¶ 361).

811. A visit to any computer retailer readily establishes that OEMs take full advantage of their freedom to install non-Microsoft software on their computers. (Kempin ¶ 6.) In fact, new personal computers today typically come with a great deal of non-Microsoft software. (Kempin ¶ 6.) OEMs decide what software to preinstall on their machines based on their assessment of

- consumer demand (as well as the cost of licensing that software). (Kempin ¶¶ 8, 21.) As a general matter, if an OEM believes there is sufficient consumer demand for particular software, it will preinstall that software on its machines, regardless of whether a feature of Windows provides the same or similar functionality. (Kempin ¶ 21.) Indeed, plaintiffs admit that "[b]ecause competition among OEMs is intense, they respond to consumer demand." (Pls.' Proposed Findings ¶ 15.1.1.)
812. With regard to Web browsing software, the evidence— including a Netscape internal analysis— shows that, if Netscape's Web browsing software were of a higher quality than Microsoft's, or if OEMs perceived substantial consumer demand for Netscape's Web browsing software, they would be more likely to preinstall it on their computers. (DX 2580 (Ransom Dep.) at 41-42; DX 812 at NSMS 64003 (Netscape analysis of Compaq's use of Web browsing software concluding that Netscape would need to use "clever marketing and sales tactics" to "convince Compaq that [Netscape] had quality parity with Microsoft" in delivering an HTML-based desktop like the one in Internet Explorer 4.0).)
813. In his written direct testimony, Fisher asserted, without any basis, that Microsoft's OEM license agreements "ensure[] that IE is the *only* browser on most PCs shipped by OEMs." (Fisher ¶ 152 (emphasis in original)) But when later confronted with evidence estimating that 22% of OEMs are shipping Netscape's Web browsing software, Fisher conceded that Barksdale's testimony—that Netscape was "basically out of the OEM channel— was an "exaggeration." (June 3, 1999 A.M. Tr. at 58 (Fisher).)
814. In fact, the evidence shows that most leading OEMs today preinstall non-Microsoft Web browsing software on a large portion of their new machines. (Kempin ¶ 6; DX 2649 (Internal IBM memorandum noting that Microsoft imposed "no restriction on bundling other browsers" and that IBM's "Aptiva line (as well as the Thinkpad and Commercial Desktop lines) carry both IE and Navigator".) OEMs do so notwithstanding the fact that Windows 95 and Windows 98 already provide Web browsing functionality. (Kempin ¶ 21.)
815. More specifically, the evidence establishes that major OEMs such as Compaq, Gateway, IBM, Fujitsu, Hitachi, Sony, Packard Bell/NEC, Acer and Hewlett-Packard currently preinstall Netscape's Web browsing software on certain of their machines. (Kempin ¶ 21; Feb. 18, 1999 A.M. Tr. at 57-58, 67, 69 (Rose); Feb. 19, 1999 A.M. Tr. at 49-50 (Rose).) Although plaintiffs note that Compaq began preinstalling Netscape Navigator on its Presario computers in January 1999 (see Pls.' Proposed Findings ¶ 380.3.1.1 (referring to "Compaq's mid-trial loading of Netscape Navigator")), they introduced no evidence that Compaq's decision to do so had anything to do with the trial of this action. In addition, OEMs such as Compaq, Sony, Acer and Hewlett-Packard recently have begun installing a shell browser developed by a company called Encompass that relies on the Internet Explorer components of Windows. (Kempin ¶ 22; Rose ¶ 34; Feb. 19, 1999 A.M. Tr. at 50 (Rose); DX 2564 (Decker Dep.) at 138-39.) In fact, plaintiffs do not dispute that "a number of OEMs install multiple browsers." (Pls.' Proposed Findings ¶ 185.2.)
816. What is more, OEMs are free under their license agreements with Microsoft to make Netscape Navigator or any other Web browsing software the "default" Web browser on their machines that launches automatically when a user invokes Web browsing functionality through various means. (Kempin ¶ 45; Chase ¶ 173; Feb. 26, 1999 A.M. Tr. at 5 (Kempin); June 4, 1999 P.M. Tr. at 18 (Fisher); DX 2560 (Brownrigg Dep.) at 54-55; DX 2574A (Kanicki Dep.) at 76-77 (sealed).)
817. Plaintiffs suggest that OEMs may be unwilling to "preinstall[] rival browsers on the PCs they sell" (Pls.' Proposed Findings ¶ 179) because "[i]ncluding icons for additional browsers on the Windows desktop increases clutter and customer confusion" (Pls.' Proposed Findings ¶ 179.1). As an initial matter, this suggestion is difficult to reconcile with the fact that so many OEMs currently preinstall either Netscape's Web browsing software or the Encompass shell browser on their machines. Although plaintiffs claim that "the Encompass browser is not a true web browser" (Pls.' Proposed Findings ¶ 185.2.1), they do not explain why the fact that the Encompass product is a shell browser makes the presence of an icon on the Windows desktop for that product any less confusing for customers than an icon for Netscape's Web browsing software supposedly is. Plaintiffs also argue that Compaq "stopped preinstalling Netscape on its PCs when Microsoft forced Compaq to restore the

- Internet Explorer icon to the Windows 95 desktop." (Pls.' Proposed Findings ¶ 179.2(ii).) Yet, Compaq preinstalls both Netscape Navigator and the Encompass product on its Presario computers today notwithstanding the fact that those computers also include an icon for Internet Explorer. (Feb. 19, 1999 A.M. Tr. at 49-50 (Rose).)
818. Moreover, plaintiffs' suggestion that OEMs may be unwilling to preinstall non-Microsoft Web browsing software on their machines for fear of increased clutter and customer confusion is inconsistent with the testimony of their own witnesses. Tevanian of Apple acknowledged on cross-examination that Apple has not found that including more than one Web browsing technology on the Macintosh results in any customer confusion. (Nov. 5, 1998 P.M. Tr. at 41-42 (Tevanian).) Soyring of IBM similarly testified that he is not aware of any concern at IBM that installing Netscape Navigator on IBM computers that include Internet Explorer will create confusion among customers. (Nov. 18, 1998 A.M. Tr. at 69 (Soyring).)
819. Plaintiffs further note that Scott Vesey of Boeing wrote in an internal Boeing memorandum that "[h]aving two web browsers on the desktop will confuse users." (Pls.' Proposed Findings ¶ 180(ii) (quoting GX 637 at TBC 000411).) As Jon Kies of Packard Bell explained, however, corporate customers like Boeing (and, for that matter, all end users) are free to remove the Internet Explorer icon from the Windows desktop of their computers. (DX 2575 (Kies Dep.) at 68.) This freedom gives such customers the ability to address any concerns about user confusion.
820. Plaintiffs also challenge the provision in Microsoft's OEM license agreements that limits the ability of OEMs to add icons to the Windows desktop larger than the icons Microsoft places there. (See Pls.' Proposed Findings ¶ 177.3.1.4.) For example, Warren-Boulton testified that "[t]he requirement that folders and icons added to the desktop must be the same size and substantially the same shape increases the exclusionary effect of the prohibition on removing the Internet Explorer icon." (Warren-Boulton ¶ 131.) Fisher likewise testified that the effect of this provision "is to limit the ability of OEMs to promote other browsers by . . . highlighting the existence of another browser with a large desktop icon." (Fisher ¶ 148.) Neither of plaintiffs' economists, however, cited any empirical evidence to support those assertions (Warren-Boulton ¶ 131; Fisher ¶ 148), which on their face torture the meaning of the word "exclusionary."
821. The evidence suggests that very few OEMs have ever sought the ability to place large icons on the Windows desktop. (Kempin ¶ 23.) OEMs have various other ways to give prominence to software, including non-Microsoft Web . . . browsing software, they install on their computers. (Kempin ¶¶ 19-20, 23.) For instance, OEMs are free to add multiple icons to the Windows desktop for a particular software product (Kempin ¶¶ 20, 23; Schmalensee ¶ 358.) Thus, an OEM installing Netscape Communicator could place separate icons on the desktop for Internet sign-up, Web browsing and e-mail features of that product, as well as an icon providing a direct link to Netcenter, Netscape's portal Web site (Kempin ¶ 20.) In addition, if an OEM elects to make Netscape's Web browsing software the "default" Web browser on its computers, then the most prominent links in Windows to the Internet will appear with Netscape's distinctive branding, including entries in the Favorites list in the "Start" menu and elsewhere. (Kempin ¶ 20; DX 2163.) On such a computer, Netscape's Web browsing software would have considerably more prominence than Internet Explorer. (Kempin ¶ 20.)
822. OEMs can also use the Active Desktop feature of Windows 98 to promote non-Microsoft software they install on their machines. (Kempin ¶ 23; Schmalensee ¶ 358.) As plaintiffs admit, the Active Desktop "permits OEMs to place on the desktop items that are both more interactive and significantly larger than the icons placed on the standard Windows desktop." (Pls.' Proposed Findings ¶ 177.4(i); see also Kempin ¶ 23.) Microsoft provided this greater flexibility in part to encourage OEMs to take advantage of Active Desktop technologies and thereby showcase this feature of Windows. (Kempin ¶ 49.) Very few OEMs, however, took full advantage of the flexibility provided to them by the Active Desktop, suggesting that plaintiffs' stated concern about limitations on the ability of OEMs to differentiate their machines is greatly exaggerated. (Kempin ¶ 49.)

2. Limitations on OEMs' Ability To Make Unauthorized Modifications to

Windows

823. Fisher testified that Microsoft's OEM license agreements "typically require[] that licensees not modify or delete any part of the product" and that "[t]his prevent[s] OEMs from removing any part of IE, including the visible means of user access to the IE software, such as the IE icon on the Windows desktop or the IE entry in the 'Start' menu." (Fisher ¶ 147.) Warren-Boulton similarly testified that "[b]ecause of Microsoft's license agreements, OEMs must distribute Windows with the Internet Explorer icon on the desktop." (Warren-Boulton ¶ 130.) Both Fisher and Warren-Boulton contend that Microsoft's OEM license agreements are "exclusionary" because they "substantially inhibit OEMs from preinstalling non-Microsoft browsers on the Windows desktop." (Warren-Boulton ¶ 130; accord Fisher ¶ 146.)
824. As an initial matter, the limitation on the ability of OEMs— Microsoft's distributors— to delete the seven Microsoft-supplied icons from the Windows desktop does not apply to end users. The evidence shows that even technically unsophisticated users can delete any icon, including the Internet Explorer icon, from the Windows desktop with two simple mouse clicks. (Kempin ¶ 48; Schmalensee ¶ 360; Feb. 25, 1999 P.M. Tr. at 68-69 (Kempin); June 21, 1999 A.M. Tr. at 44 (Schmalensee).) Plaintiffs do not dispute this fundamental point.
825. And, as discussed above, OEMs are free to install whatever software products they like, including non-Microsoft Web browsing software, on their computers and to include icons for such products on the Windows desktop. (Kempin ¶¶ 8, 17, 24, 45.) Plaintiffs do not dispute this fundamental point either. For example, Fisher acknowledged in his direct testimony that Microsoft's "[] licensees were not contractually restricted from loading other browsers on the desktop." (Fisher ¶ 150.)
826. Even apart from OEMs' undisputed ability to preinstall non-Microsoft software on their computers, Microsoft's OEM license agreements are not exclusionary in failing to grant OEMs the right to make unauthorized modifications to the operating system. Like other software products, Windows 95 and Windows 98 are both original works of authorship covered by copyright registrations. (Kempin ¶ 2; DX 813; DX 814.) Because its operating systems are copyrighted, Microsoft distributes them to OEMs pursuant to license agreements. (Kempin ¶¶ 2, 9, 25.) Microsoft generally does not grant OEMs the right under their license agreements to delete elements of or otherwise modify those operating systems absent specific permission from Microsoft. (Kempin ¶¶ 9, 25.)
827. Microsoft's license agreements have never given OEMs the right to make unauthorized modifications to the operating system. (Kempin ¶ 25.) Microsoft is not alone in refusing to grant licensees the right to modify copyrighted software products without permission. (Kempin ¶ 25; see, e.g., DX 2567 (Frasca Dep.) at 64 (Lucent); DX 1661 ¶ 6A (SCO); DX 1777 ¶ 2.2(e) (Apple).)
828. Microsoft does not give OEMs the right to modify Windows without express permission from Microsoft for at least three related reasons. (Kempin ¶¶ 26-31.) First, if OEMs were allowed to disassemble Windows, installing some parts of the operating system but not others, Microsoft could not warrant that Windows would function as intended. (Kempin ¶ 27.) Windows is a highly complex product—for example, Windows 98 contains approximately 14 million lines of code—that was designed, developed and tested by Microsoft as an integrated whole. (Kempin ¶ 27.) Microsoft could not adequately test Windows if OEMs were free to make whatever modifications they liked to the operating system. (Kempin ¶ 28.) Given the "open" nature of the Windows platform, Microsoft must thoroughly test the operating system to ensure that it supports thousands of different hardware configurations and tens of thousands of different software products in use around the world. (Kempin ¶ 28.) The task of testing all of these permutations and combinations is so demanding that Microsoft generally has as many testers as it does developers working on new operating systems. (Kempin ¶ 28.) That task would become essentially impossible if each of the thousands of OEMs in the world were free to modify Windows as it pleased. (Kempin ¶ 28.)
829. Second, if OEMs were free to modify Windows as they saw fit, a central reason for the appeal of Windows—that it provides a stable platform for software development that works the same on a wide range of personal

- computers—would be destroyed, making Windows as balkanized as UNIX. (Kempin ¶¶ 29-30.) For instance, ISVs would not know whether the software code in Windows that provides functionality required by their products would be present on any given computer. (Kempin ¶ 29.) If various Windows applications failed to function properly because OEMs had modified the operating system, customer support costs incurred by OEMs, ISVs and Microsoft would increase. (Kempin ¶ 29.) Moreover, in the case of UNIX, the fact that applications written for one "flavor" of UNIX do not necessarily run on other flavors of the operating system has caused ISVs to write fewer UNIX applications and has made applications written for UNIX more expensive than they otherwise would be. (Kempin ¶ 30.) The same thing would likely occur to Windows applications if the operating system became fragmented. (See Kempin ¶ 30.) Although plaintiffs note that removing the Internet Explorer icon or making minor modifications to the initial Windows start-up sequence would not necessarily "involve removing or altering APIs" (Pls.' Proposed Findings ¶ 194.1(i)), if Microsoft were required to permit OEMs to modify Windows however they please, Microsoft would have no guarantee that OEMs would not make more dramatic changes that did alter or remove APIs.
830. Third, Microsoft seeks to preserve its reputation as a supplier of quality operating systems and to protect the value of the Windows trademark. (Kempin ¶ 31.) Microsoft obviously could not promote specific features of Windows if OEMs were free to delete those features before distributing Windows to their customers. (Kempin ¶ 31.) Customers learn about Windows through such things as beta testing, advertising, retail promotions and product reviews in magazines. (Kempin ¶ 31.) As a matter of common sense, substantial customer confusion and disappointment would result if OEMs were free to remove or hide features of Windows that customers expect to find when they purchase a new computer with Windows preinstalled. (Kempin ¶ 31.) Plaintiffs claim that such a concern about user disappointment is "inconsistent with the evidence" (Pls.' Proposed Findings ¶ 193) because Microsoft permits OEMs to ship their computers with the Channel Bar feature of Windows turned off by default (Pls.' Proposed Findings ¶ 193(i)). That Microsoft permits OEMs to turn off (not remove) a feature of Windows that has been largely ignored by users (Kempin ¶ 51) is hardly evidence that Microsoft's concern about user confusion and disappointment is pretextual.
831. Plaintiffs also attempt to downplay Microsoft's desire to protect the integrity of Windows by pointing out that OEMs bear the cost of supporting the operating system installed on their machines. (See Pls.' Proposed Findings ¶¶ 191.1(i), 194.2(i).) Although Microsoft's OEM license agreements typically require OEMs to bear product support costs, Microsoft still incurs substantial product support costs for Windows. (Kempin ¶ 32.) It is Microsoft's name that appears on the product, and thus, as a practical matter, Microsoft must help customers who are having problems with Windows if they do not receive satisfaction from the OEM's support personnel. (Kempin ¶ 32.) More importantly, it is Microsoft's reputation that would suffer if Windows did not perform as represented by Microsoft (Kempin ¶ 32.) Given the amount of time and money that Microsoft has invested in developing Windows, Microsoft has a keen interest in protecting the good will associated with its valuable Windows trademark. (Kempin ¶ 32.)
832. Warren-Boulton argued that Microsoft's concern about preserving the consistency of customers' experience with Windows is misplaced "[b]ecause the markets in which OEMs operate are competitive [and] OEMs have little incentive to take actions that disappoint their customers." (Warren-Boulton ¶ 181.) He contends that "[t]he market will serve to punish those OEMs that disappoint consumers by marketing sub-optimal product configurations." (Warren-Boulton ¶ 181.)
833. There is no evidentiary support for Warren-Boulton's assertion that the discipline of the market would prevent Windows from fragmenting if OEMs were free to modify Windows as they saw fit, and the experience of UNIX is to the contrary. As Maritz explained, if the ability to define the feature set of the operating system were transferred from its creator, Microsoft, to OEMs acting individually, a "tragedy of the commons" problem would likely result. (Maritz ¶ 169.) Each OEM, seemingly acting rationally in its own self interest, would modify Windows to claim some differentiation from competitors' versions of Windows, and before long, the very thing that made Windows useful in the first place—the compatibility it provides across hardware and software—would

be destroyed. (Maritz ¶ 169; see also June 21, 1999 A.M. Tr. at 39-41 (Schmalensee).)

834. Thus, although such an outcome might be desirable in the short term for a few OEMs individually, it would be bad for OEMs as a group. (Kempin ¶ 34; June 21, 1999 A.M. Tr. at 39-41 (Schmalensee).) Widespread modifications to Windows that undermined it as a stable development platform would likely retard the growth of the personal computer industry generally, thus injuring all OEMs as well as Microsoft. (Kempin ¶ 34.) Microsoft should not be forced to facilitate the fragmentation of Windows by permitting OEMs to modify Windows however they please. (Kempin ¶¶ 33-34.)
835. Plaintiffs claim that Microsoft has "construed its licenses to prohibit OEMs from removing the Internet Explorer icon from the desktop" (Pls.' Proposed Findings ¶ 177.1) in order to further "Microsoft's objective of gaining browser usage share" (Pls.' Proposed Findings ¶ 177). Yet, one of the documents on which plaintiffs rely (see Pls.' Proposed Findings ¶ 176.3(ii)) shows that Microsoft's concern is instead that Windows 95 be presented to users in a consistent fashion. In a September 28, 1995 letter to Hewlett-Packard objecting to Hewlett-Packard's removal of the MSN icon from the Windows 95 desktop— which had nothing to do with Netscape— Microsoft wrote: "MS must present a consistent product to our customers and not make exceptions to the OPK [OEM Pre-Installation Kit] requirements which are being complied with by all of MS Windows 95 OEMs." (GX 294 at HP-MSN 0801 (emphasis added).)

3. The Initial Windows Startup Sequence

836. Plaintiffs also argue that the provisions in Microsoft's OEM license agreements concerning the ability of OEMs to modify the initial Windows startup sequence (sometimes referred to as the "Windows Experience" provisions) have "significant exclusionary effects." (Warren-Boulton ¶ 125.) Warren-Boulton testified that "these restrictions substantially reduce both the OEMs' incentive to offer browser choice and the effectiveness of any such offering." (Warren-Boulton ¶ 125.) And Fisher testified that the effect of those limitations "is to limit the ability of OEMs to promote other browsers by . . . modifying the start-up sequence to give users an opportunity to make a non-IE browser their default browser or replace IE with a competing browser." (Fisher ¶ 148.)
837. To begin with, plaintiffs' focus on the initial Windows startup sequence is a red herring. As previously discussed, OEMs are free to install any non-Microsoft browsing software they like and make that software the "default" Web browser that launches automatically when a user invokes Web browsing functionality through various means. (See Kempin ¶¶ 8, 17, 45.)
838. Furthermore, the provisions of Microsoft's OEM license agreements relating to the initial Windows startup sequence are quite limited, applying only to the very first time a new personal computer is turned on. (Kempin ¶¶ 10, 39; Schmalensee ¶¶ 357-58; DX 2575 (Kies Dep.) at 83.) After that, the user can customize the boot-up process and Windows desktop anyway he or she likes. (Kempin ¶ 39; DX 2575 (Kies Dep.) at 83.)
839. Microsoft declined to grant OEMs the right to make unauthorized changes to the initial Windows startup sequence (as specified in its OEM Pre-Installation Kit or "OPK" (DX 1491)) because Microsoft believed that the initial Windows startup sequence provides a good, consistent experience for customers. (Kempin ¶ 10; Feb. 26, 1999 A.M. Tr. at 25 (Kempin); DX 2395 at MSV 0009378 A.) As Kempin put it, "we think we invented the product in a certain way, and we wanted the users to see it the way we invented it." (Feb. 24, 1999 P.M. Tr. at 61 (Kempin).)
840. Plaintiffs assert that "[t]he origins of the Windows Experience [provisions] demonstrate that Microsoft's purpose in enforcing and augmenting its OEM restrictions was to gain browser usage share . . ." (Pls.' Proposed Findings ¶ 178; see also Fisher ¶ 145.) In so doing, plaintiffs rely (see Pls.' Proposed Findings ¶¶ 177.2(i), 191.4(ii)) on a January 5, 1996 e-mail from Gates to Kempin in which Gates wrote: "Apparently a lot of OEMs are bundling non-Microsoft browsers and coming up with offerings together with Internet Service providers that get displayed on their machines in a FAR more prominent way than MSN or our Internet browser" (GX 295). After stating that concern, Gates asks what Microsoft "need[s] to do to convince OEMs to focus on our browser." (GX 295; see also Jan. 20, 1999 A.M. Tr. at 25-26

(Schmalensee); Feb. 25, 1999 A.M. Tr. at 28-29 (Kempin).) Gates' e-mail does not mention the Windows Experience provision or suggest that Microsoft should prohibit modifications to the initial Windows startup sequence in order to gain usage share in Web browsing software

841. Plaintiffs also contend that a January 16, 1996 e-mail from Maritz (GX 297) sets out the analysis requested by Gates' January 5, 1996 e-mail. (See Pls.' Proposed Findings ¶ 177.2(ii).) There is no apparent connection between the two e-mails, and none was established at trial. Rather than responding to questions posed in Gates' e-mail, Maritz's e-mail discusses an entirely different analysis performed by the Windows group in preparation for a meeting with Case of AOL to determine the effect of agreeing to AOL's request for placement on the Windows desktop:

In prep for the Steve Case meeting, the Windows group did some hands on analysis of current shipping Win95 machines (by buying five machines thru retail: Compaq Presario, IBM Aptiva, PB, HP, and NEC). The results were pretty illuminating—AOL and other internet solutions are not only on every hard disk, but are invariably positioned on the desktop more strongly by our OEMs than any MS offering. The reality is that the AOL request for presence in the Windows box will do very little to advantage AOL further.

(GX 297 at MSV 0009360 A (emphasis added).) Once again, Maritz's e-mail, which focuses on AOL's presence on the desktop, does not suggest that Microsoft should prohibit modifications to the initial Windows startup sequence in order to gain usage share in Web browsing software.

842. In any event, plaintiffs' assertion that Microsoft developed the Windows Experience provisions to gain usage share in Web browsing software is not borne out by the facts. Microsoft's OEM license agreements have always provided that all rights not specifically granted to OEMs are expressly reserved to Microsoft. (Kempin ¶ 39.) Although Microsoft's OEM license agreements never granted OEMs the right to alter the initial Windows startup sequence (Feb. 26, 1999 A.M. Tr. at 26-27 (Kempin); DX 2395 at MSV 0009379 A ("MS did not originally grant the OEM the right to alter the boot sequence"), several OEMs began in 1994 and 1995 to do so (Kempin ¶ 36; DX 2395 at MSV 0009378 A ("OEM[s] improperly interrupted the boot process of Windows with poor quality software, causing user concerns and confusion")). In particular, a few OEMs began shipping their own user interface (or shell) on top of Windows that started automatically when the computer was turned on and covered up the screen during the initial Windows startup sequence. (Kempin ¶ 37.) Customers who thought they were buying a computer running Windows would not in the first instance even see the operating system as it was designed by Microsoft. (Kempin ¶ 37.)
843. Many of the OEM shells were of poor quality, and some of them obscured basic functionality of the operating system. (Kempin ¶ 37; DX 496; DX 2117.) For example, the Packard Bell shell called "Navigator" (no relation to Netscape Navigator) hid the Windows "Start" button—the most basic way of invoking functionality from Windows—and disabled the many useful functions enabled by clicking on the right mouse button. (Kempin ¶ 37; DX 2117.)
844. Microsoft believed that these OEM shells were causing concern and confusion among customers, degrading the overall customer experience of using Windows and causing product support costs to increase. (Kempin ¶ 36; DX 496.) John Rose of Compaq testified that Compaq stopped using its shell, initially called Tabworks, in part because it "generated significant support costs." (Rose ¶ 20.) Although plaintiffs assert that "Microsoft viewed alternative OEM shells as an important facet of the threat non-Microsoft browsers posed to its operating system monopoly" (Pls.' Proposed Findings ¶ 178.4), none of the evidence cited by plaintiffs supports that assertion (see Pls.' Proposed Findings ¶ 178.4(i)-(iii)).
845. To ensure that customers see the Windows desktop as designed by Microsoft at least once when they first turn on their new computers, Microsoft began including provisions in its OEM license agreements expressly stating that OEMs are not granted any right to modify Windows without authorization. (Kempin ¶ 38.) In particular, since late 1996, Microsoft's OEM license agreements have expressly provided that the very first time a consumer turns

- on his or her computer, Windows must be allowed to go through the initial startup sequence as designed, developed and tested by Microsoft and to display the Windows desktop without any aspect of that screen having been deleted by the OEM. (Kempin ¶ 38.)
846. Microsoft believes that customers benefit from the fact that personal computers from a wide variety of OEMs that come with Windows preinstalled all provide the same basic initial user experience. (Kempin ¶ 40; DX 496.) Customers value the ability to mix and match personal computers produced by several different OEMs in an office environment, or to move from one personal computer at work to another at home, and know how to operate each of them. (Kempin ¶ 40.) As Don Hardwick of Microsoft explained, "the success of Windows is [attributable to] the fact that end users can get on any machine using Windows and know how to use that machine without having to learn some new interface. That's the Windows experience." (DX 2570 (Hardwick Dep.) at 72-73.)
847. Substantial customer confusion and disappointment also would result if new personal computers arrived with various advertised features of Windows deleted or altered in ways unintended by Microsoft. (Kempin ¶ 40; DX 496.) Microsoft believes that when customers buy a new computer with Windows preinstalled, it is fair to assume that they want to receive the operating system the way Microsoft designed it. (Kempin ¶ 40; see also GX 2193 at IBM 0000011627 (notes reflecting that Kempin told IBM that Windows Experience provisions were intended to "preserve genuine MS GUI" and "let the user decide how he wants to configure his system").)
848. Plaintiffs challenge Kempin's testimony that the Windows Experience provisions were developed to "preserve a 'consistent experience' for end users." (Pls.' Proposed Findings ¶ 189 (quoting Kempin ¶ 10).) An internal Microsoft document describing those provisions, however, supports Kempin's testimony. (See DX 2395 at MSV 0009378A-84A.) That document states: "The Windows Experience Initiative was primarily designed to maintain a consistent, reliable and high quality experience for end users." (DX 2395 at MSV 0009378A.) Significantly, the document also makes no mention whatsoever of Netscape Navigator or any other competing Web browsing software. (Feb. 26, 1999 A.M. Tr. at 25-26 (Kempin).)
849. Although Microsoft is concerned with maintaining the overall consistency of Windows, Microsoft does permit OEMs to run certain configuration programs and utilities during the initial Windows startup sequence to ensure that the machine is functioning properly. (Kempin ¶ 44.) For instance, OEMs can—and do—run the following software programs during the initial Windows startup sequence: (i) battery monitoring software for portable computers, (ii) anti-virus software, (iii) diagnostic software to ensure that the computer's sound system is working, and (iv) background software that logs the number of boots and hours of usage in case a customer returns the computer to the store from which it was purchased. (Kempin ¶ 44; Schmalensee ¶ 359; June 9, 1999 P.M. Tr. at 54 (Norris); DX 1491.)
850. Norris testified that IBM does not value the consistency of user experience that Microsoft seeks to promote. Indeed, he complained that Microsoft's Windows Experience provisions prevent IBM from differentiating its machines from those of other OEMs. (June 7, 1999 P.M. Tr. at 46-49 (Norris).) Norris testified:

And what we mean by differentiating IBM is that if we were restricted to not interrupt the sequence at all, it meant that IBM's front of screen, HP's front of screen, Packard-Bell's front of screen, would all look the same until we got to the desktop. And once it got to the Windows desktop, then you would begin to see differences.

(June 7, 1999 P.M. Tr. at 47 (Norris).)

851. The evidence shows that notwithstanding Microsoft's Windows Experience provisions, OEMs have great flexibility in branding their personal computers and differentiating them from those of their competitors. Even plaintiffs concede that "Microsoft permits OEMs to preinstall the third-party software of their choice (including lengthy tutorials, ISP sign-up and registration mechanisms) and other features in the start-up sequence, as well as user-

- activated features of all sorts (such as alternative OEM shells)." (Pls. Proposed Findings ¶ 191.2(i).) More importantly, plaintiffs failed to show that Microsoft imposes any limitation on OEMs' ability to distribute and promote Netscape's Web browsing software, the focus of their complaints.
852. On the question of whether OEMs are able to differentiate their computers from those of their competitors, Rose testified that "Compaq enjoys flexibility to differentiate the startup look of its personal computers in ways that do not compromise the stability and consistency of the Windows platform." (Rose ¶ 36; see also DX 2163; Feb. 24, 1999 P.M. Tr. at 15-21 (transcript of DX 2163).) The videotape demonstration submitted by Microsoft (DX 2163) demonstrated in graphic terms that OEMs are not prevented by Microsoft's OEM license agreements from branding their personal computers or differentiating them from those of their competitors. Plaintiffs put on no evidence contradicting the fact that OEMs have such flexibility and take advantage of it. A few of the ways in which OEMs can and do brand and differentiate their machines consistent with Microsoft's Windows Experience provisions are described below.
853. Each time a computer is turned on or reset, it begins a sequence of preprogrammed steps commonly referred to as the "boot" process. (Kempin ¶ 42.) As the first step of that sequence, a computer runs a program stored in the computer's read-only memory called the basic input/output system or "BIOS." (Kempin ¶ 42.) After the BIOS is running, it can display images on the computer screen or run other basic programs, all before the Windows boot process starts. (Kempin ¶ 42.) The computer next loads the operating system from its hard drive into RAM. (Kempin ¶ 42.) Microsoft's Windows Experience provisions apply only to the time after Windows starts loading from the hard drive into RAM. (Kempin ¶ 43; DX 2570 (Hardwick Dep.) at 147-48.) As a result, OEMs can do anything they want before Windows starts loading into RAM (Kempin ¶ 43; Schmalensee ¶ 358), a point plaintiffs do not dispute (see GX 292 at MSV 0006122 ("Microsoft agreed that Compaq can precede the Windows 95 start-up process with their own software to add Compaq welcome screens and non-MS advertisements . . .")).
854. OEMs take full advantage of this freedom. For example, OEMs use the BIOS to display their logo and brand names before Windows begins to load into RAM. (Kempin ¶ 43; Schmalensee ¶ 358; DX 2582 (Romano Dep.) at 56; DX 2575 (Kies Dep.) at 82.) Garry Norris admitted that IBM does this with its computers, and thus the first thing a user sees when he or she turns on a new IBM computer is the IBM logo. (June 9, 1999 P.M. Tr. at 54-55 (Norris).) Rose similarly testified that "Compaq displays its logo on the full computer screen on a so-called 'splash screen' displayed by the BIOS" and that, as a result, "[t]he Compaq logo is the first logo the user sees when he or she turns on his or her new Presario computer." (Rose ¶ 37.) These facts, confirmed by the videotape demonstration submitted by Microsoft (DX 2163), cannot be reconciled with Norris' assertion that, because of the Windows Experience provisions, "the first thing that a user saw on any PC manufacturers' system would be the Windows 95 start screen." (June 7, 1999 P.M. Tr. at 49 (Norris).)
855. OEMs also may run other programs from the BIOS, and a number of OEMs do so. (Kempin ¶ 43.) In fact, an OEM could run a small operating system such as Caldera's DR-DOS from the BIOS before Windows starts, and launch all sorts of programs from that supplemental operating system, including advertisements promoting Netscape's Web browsing software. (Kempin ¶ 43.)
856. Even after Windows begins to boot, OEMs are free in Windows 98 to include their logo on the screen that appears during the boot process—known as the Windows "splash" screen—and many OEMs do that as well. (Kempin ¶ 43.) Rose testified that Compaq "displays its logo as the 'wallpaper' that appears on the Windows 98 desktop after the initial boot-up sequence is completed." (Rose ¶ 40; see also DX 2564 (Decker Dep.) at 136-37.) And Norris testified that IBM also customizes the Windows desktop with wallpaper containing either the IBM logo or the logo of an IBM brand. (June 9, 1999 P.M. Tr. at 55 (Norris).) Other OEMs, including Dell, Packard Bell and Hewlett-Packard, are likewise aware, and have taken advantage, of these branding options. (DX 2574A (Kanicki Dep.) at 98 (sealed); DX 2575 (Kies Dep.) at 69, 82; DX 2582 (Romano Dep.) at 63-64.)
857. As previously noted, OEMs also can differentiate their machines by installing additional software programs and placing icons for them on the Windows

- desktop. (Kempin ¶¶ 17, 21, 45; Rose ¶ 40; DX 2564 (Decker Dep.) at 136.) For instance, although Norris testified that the Windows Experience provisions prevented IBM from running its "Welcome Center" program during the initial Windows startup sequence (June 7, 1999 P.M. Tr. at 41-65 (Norris); see also Pls.' Proposed Findings ¶¶ 178.1 (i), 192(i)), he admitted on cross-examination that IBM was free to, and did, include an icon directly on the Windows desktop for that program which stated "Your Aptiva Adventure Starts Here" (June 9, 1999 P.M. Tr. at 53-54 (Norris); see also GX 2141 at IBM 0000016682 (IBM "permitted to add icons to the desktop screen")). Once again, the videotape demonstration submitted by Microsoft (DX 2163) vividly illustrates how OEMs can—and do—differentiate their machines by including icons for non-Microsoft software on the Windows desktop.
858. In addition, OEMs are free to ship an alternative shell with their new computers and offer customers the option of reconfiguring their computer so it will boot directly into that alternative shell every time the computer is turned on. (Kempin ¶¶ 11, 46; Feb. 26, 1999 A.M. Tr. at 12-13, 37-38 (Kempin); June 21, 1999 A.M. Tr. at 42 (Schmalensee).) OEMs thus can include an icon on the Windows desktop that, if invoked by the customer, will boot the computer directly into an alternative shell on all subsequent occasions. (Kempin ¶ 46; Schmalensee ¶ 358; Feb. 26, 1999 A.M. Tr. at 12-13, 37-38 (Kempin).) OEMs also can do whatever they like to persuade customers to take advantage of such an option by including prominent notices in their manuals and packaging extolling the virtues of the alternative shell, or even putting a physical sticker on the computer screen pointing to the icon. (Kempin ¶ 46; Schmalensee ¶ 358.) All that OEMs cannot do is have the alternate shell launch automatically without any user intervention. (Kempin ¶ 46.)
859. Indeed, plaintiffs do not dispute that "OEMs are permitted to include icons on the desktop that enable the user, with a few mouse-clicks, to install Netscape as the default browser or to launch an alternative desktop featuring Netscape that appears each time the user subsequently boots the PC." (Pls.' Proposed Findings ¶ 185.4.) And, as noted above, OEMs can *themselves* install Netscape's Web browsing software and make it the default browser on their machines. (Kempin ¶¶ 6, 45; Feb. 26, 1999 A.M. Tr. at 5 (Kempin); DX 2560 (Brownrigg Dep.) at 55; DX 2574A (Kanicki Dep.) at 76-77 (sealed); DX 2580 (Ransom Dep.) at 42-43; DX 2597A (Von Holle Dep.) at 134 (sealed).)
860. OEMs such as Compaq, Hewlett-Packard and Packard Bell/NEC have also placed special-purpose buttons on the keyboards of some of their computers that take users to specified Web sites with which the OEMs have agreements. (Kempin ¶ 47.) For example, Rose testified that Compaq includes "Easy Access Buttons" along the top of the keyboard of its newest Presario line of computers that provide customers with one-touch access to the Internet and e-mail. (Rose ¶ 19.) On the Web sites associated with such buttons, an OEM can supply customers with all sorts of information about the OEM's products or services, as well as products and services offered by other companies, including Netscape. (Kempin ¶ 47.)
861. Windows 98 provides OEMs with even more opportunities to customize the Windows desktop. (Schmalensee ¶ 359.) For example, OEMs can use the Active Desktop feature of Windows to promote prominently their brand, products or services or to include introductory videos and information on how to obtain support. (Kempin ¶ 49; Schmalensee ¶ 359.) They also can add their own "channel" to the Windows 98 Channel Bar or, if they want, ship Windows 98 with the Channel Bar turned off by default. (Kempin ¶ 50; Poole ¶¶ 53-54; Schmalensee ¶ 359; DX 2110; DX 2575 (Kies Dep.) at 78; GX 231.)
862. In the first half of 1998, Microsoft allowed seven large OEMs (Acer, Compaq, Dell, Gateway, Hewlett-Packard, IBM and Packard Bell/NEC) to make two major modifications to the initial Windows 98 startup sequence. (Kempin ¶ 56; June 9, 1999 P.M. Tr. at 55 (Norris); DX 1886.) These OEMs are among the most technically capable OEMs in the world, and together they account for a large percentage of all computers sold to consumers in the United States. (Kempin ¶ 56.) The flexibility that Microsoft has afforded these OEMs is a good example of Microsoft's willingness to continue to work cooperatively with OEMs to address their needs and concerns (Kempin ¶¶ 52-55) and is acknowledged by plaintiffs (Pls.' Proposed Findings ¶ 186; Warren-Boulton ¶ 126; Fisher ¶ 152.)

863. First, Microsoft permitted these seven OEMs to replace the registration wizard in the Initial Windows 98 startup sequence with the OEM's own software that registers the customer jointly with the OEM and Microsoft. (Kempin ¶ 57; Schmalensee ¶ 359; DX 2574A (Kanicki Dep.) at 100 (sealed); Pls.' Proposed Findings ¶ 186(ii).) The seven OEMs have taken advantage of this right to varying degrees. (Kempin ¶ 57; see, e.g., DX 1886 (IBM).) Rose testified that "Compaq includes its own end user registration wizard that permits the user to register with both Compaq and Microsoft during the initial Windows boot-up sequence." (Rose ¶ 38.) If the user registers through the Compaq registration wizard, he or she need not register with Microsoft. (Rose ¶ 38.) According to Rose, "[t]his registration sequence takes several minutes, and Compaq's brand is prominently displayed throughout the process, which involves a rich multimedia presentation of graphics and sound." (Rose ¶ 38; see DX 2163.) Garry Norris testified that Microsoft also allowed IBM to replace the registration wizard in Windows 98 with IBM's own registration wizard. (June 9, 1999 P.M. Tr. at 55 (Norris).)
864. Second, Microsoft permitted these seven OEMs to add their own software for customers to sign-up for Internet access with one or more ISPs selected by the OEMs and to have that software run automatically prior to any customer opportunity to use the standard Internet Connection Wizard feature of Windows 98. (Kempin ¶¶ 12, 58; Schmalensee ¶ 359; Feb. 26, 1999 A.M. Tr. at 10 (Kempin); DX 2597A (Von Holle Dep.) at 131-32 (sealed); Pls.' Proposed Findings ¶ 186(ii).) This flexibility is discussed elsewhere in these findings in greater detail. Since Microsoft granted this exception, a number of OEMs, including both Compaq and IBM, have added to the initial Windows startup sequence their own ISP sign-up software. (See, e.g., Rose ¶ 39.)
865. Although Microsoft gave permission in the first half of 1998 to make these two modifications to only seven OEMs, Kempin testified that Microsoft has not rejected a request by any OEM to do the same things those seven OEMs are doing. (Feb. 24, 1999 P.M. Tr. at 35, 41-42 (Kempin).) At the time he testified, Kempin stated that between 12 and 15 OEMs have now been given permission, either by letter or by an amendment to their OEM license agreement, to make these two modifications to the initial Windows startup sequence. (Feb. 24, 1999 P.M. Tr. at 41-42 (Kempin).)
866. Although Warren-Boulton claimed that Microsoft still does not permit OEMs to "promote third party browser brands in the startup sequence" (Warren-Boulton ¶ 128), Kempin testified that he gave Gateway permission to offer "browser choice" by inserting a ballot screen during the Initial Windows 98 startup sequence, but that Gateway has not yet taken advantage of that ability (Feb. 24, 1999 P.M. Tr. at 69-71, 79-80, 88 (Kempin); Feb. 25, 1999 A.M. Tr. at 6 (Kempin); DX 2560A (Brownrigg Dep.) at 54 (sealed); DX 2577 (McClain Dep.) at 83-86; DX 2597A (Von Holle Dep.) at 131-33 (sealed).) In fact, plaintiffs now concede that Microsoft gave Gateway "permission to offer users the choice of Netscape in the Gateway.net ISP sign-up process." (Pls.' Proposed Findings ¶ 187.3.) Kempin further testified that if other OEMs had asked for similar permission, he would have given it to them. (Feb. 26, 1999 A.M. Tr. at 8 (Kempin).)
867. Plaintiffs nevertheless contend that Microsoft "told Gateway that its featuring of Netscape would harm its relationship with Microsoft." (Pls.' Proposed Findings ¶ 206.) James Von Holle of Gateway testified, however, that no one from Microsoft has ever told him that Gateway should not load Netscape's Web browsing software on its computers. (DX 2597A (Von Holle Dep.) at 133.) Von Holle also testified that he was not aware of any threats from Microsoft "as a result of Gateway's decision to allow users to choose their browser as part of the Gateway.net signup process." (DX 2597A (Von Holle Dep.) at 134.)
868. Based on the fact that Microsoft has "granted certain requests for exceptions" by OEMs (Pls.' Proposed Findings ¶ 178.3(ii)), plaintiffs argue that Microsoft has "selectively enforced its Windows Experience restrictions, further evidencing the anticompetitive purpose behind these restrictions" (Pls.' Proposed Findings ¶ 178.3). That Microsoft is willing to grant OEMs authority under their license agreements to modify Windows in various ways if the OEMs' requests are reasonable and consistent with Microsoft's overarching goal of providing a favorable experience for users and a stable platform for ISVs is not evidence of an anticompetitive purpose. (Kempin ¶ 54.) It is instead evidence of Microsoft's efforts to foster good relations with OEMs and

- of the give-and-take nature of those relations. (Kempin ¶ 54.)
869. Plaintiffs also assert that "Microsoft's prohibition on altering the start-up sequence . . . impeded Netscape's ability to promote its browser." (Pls.' Proposed Findings ¶ 181.) None of the evidence cited by plaintiffs in support of that assertion, however, has anything to do with Netscape's efforts to promote its Web browsing software. (See Pls.' Proposed Findings ¶ 181(i)-(viii).) Indeed, the only "evidence" that plaintiffs cite in support of their claim that the Windows Experience provisions "reduced OEMs' ability to promote Netscape in other ways" is the conclusory testimony of their two economists. (See Pls.' Proposed Findings ¶ 182.)
870. Of course, Microsoft's OEM license agreements do not in any meaningful way limit *end users'* ability to make changes to the operating system once the computer has been turned on the first time. (Kempin ¶ 48; DX 2575 (Kies Dep.) at 68.) Users thus have great flexibility to make changes to Windows (although they always run the risk that they might delete something that impairs the functioning of the operating system). (Kempin ¶ 48; June 9, 1999 P.M. Tr. at 53 (Norris).) Users also can add anything at any time to their computers, including alternative shells or other software (such as Netscape's Web browsing software) that will take over the full screen every time the computer is turned on. (Kempin ¶ 48.) As a Netscape analysis of OEM issues following Microsoft's release of Internet Explorer 4.0 concluded, "OEM bundling doesn't determine which applications users will install and use." (DX 879 at NSMS 48339.)

B. Compaq

871. Rose testified about Compaq's relationship with Microsoft. As discussed below, Rose's testimony was consistent with Kempin's on the issue of OEMs' ability to preinstall non-Microsoft software on their computers. Rose also contradicted Barksdale's hearsay testimony concerning the reason for Compaq's removal of the MSN and Internet Explorer icons from the Windows 95 desktop on certain Compaq computers. Notably, Rose's version of those events from 1996 is supported by Compaq's contemporaneous documents.

1. The Microsoft-Compaq Relationship

872. Compaq and Microsoft have entered into a strategic relationship referred to as the Frontline Partnership. (Rose ¶ 10.) Pursuant to the Frontline Partnership, Microsoft and Compaq have worked together over the years to develop new and innovative hardware and software products, increase customer demand for both companies' products and reduce each other's product support costs. (Rose ¶¶ 10, 12.) Although the Frontline Partnership gives Compaq a different relationship with Microsoft than other OEMs have, Rose testified that he understood that any other OEM that wants to invest with Microsoft to the same degree Compaq has in joint development and marketing can have the same relationship. (Feb. 18, 1999 A.M. Tr. at 10 (Rose).)
873. More so than any other OEM, Compaq has worked with Microsoft to expand the entire personal computer industry. (Rose ¶¶ 7, 11; Feb. 18, 1999 A.M. Tr. at 8-9 (Rose).) For example, Compaq has been closely involved in the testing and development of Microsoft operating system software such as Windows 95 and Windows 98. (Rose ¶ 10.) As an active alpha and beta test site, Compaq provides Microsoft with extensive feedback on Microsoft products throughout the development process. (Rose ¶ 10.) According to Rose, Compaq also performs the most thorough compatibility testing of any OEM in the industry. (Rose ¶ 10.) And through their market development efforts, Compaq and Microsoft have entered emerging markets and introduced personal computers to new customers. (Rose ¶ 12.)
874. In their proposed findings, plaintiffs note that Compaq "has a 'unique relationship' with Microsoft" (Pls.' Proposed Findings ¶ 198) and that Microsoft "has frequently granted Compaq more favorable terms than other OEMs" (Pls.' Proposed Findings ¶ 199). Plaintiffs claim that Compaq frequently receives more favorable terms than other OEMs because of "Compaq's acquiescence in Microsoft's exclusionary strategies." (Pls.' Proposed Findings ¶ 199.) That claim is not supported by the evidence, which instead shows that Compaq receives more favorable terms both because it is Microsoft's

largest OEM customer (Pls.' Proposed Findings ¶ 197; Rose ¶ 4) and because it does more than any other OEM to help Microsoft develop, test and promote new products (Rose ¶¶ 10, 12). Indeed, one of the documents on which plaintiffs rely (see Pls.' Proposed Findings ¶ 198(vi)) explains why Compaq receives favorable terms: "For the value provided by Compaq through partnership activities, including industry-leading joint initiatives aimed at developing new markets, Microsoft provides industry-leading economic value and business terms." (GX 462 at 5060 (sealed).) That is what that document meant when it used the phrase "Joined at the Hip." (GX 462 at 5060 (sealed).)

875. Plaintiffs further contend that "Compaq received confidential information about other OEMs' prices." (Pls.' Proposed Findings ¶ 199.2.) In support of that contention, plaintiffs cite a Compaq document stating that at a January 1995 meeting, Jan Claesson of Microsoft provided Compaq with "very confidential information about Windows 95 royalties in regards to other OEMs." (GX 230 at 5816 (sealed).) Under Compaq's existing license agreement, however, Compaq was entitled to a royalty rate for Windows.

As Rose explained, Compaq at the time therefore "had a right to information— royalty information about a group of OEMs" defined as Non-Strategic OEMs. (Feb. 18, 1999 P.M. Sealed Tr. at 93 (Rose).)

876. At several places in their proposed findings (see, e.g., Pls.' Proposed Findings ¶¶ 197(ii)-(iii), 211.2(ii)), plaintiffs point to a January 13, 1993 Compaq document entitled "Microsoft Meeting Preparation" (GX 433 (sealed)). The document, created before Rose began working at Compaq (Feb. 18, 1999 A.M. Tr. at 19-20 (Rose)), does not indicate who prepared it. At trial, Rose testified that he had not seen the document prior to his deposition in this case. (Feb. 18, 1999 A.M. Tr. at 20-21 (Rose).) Rose also testified that he had no independent knowledge of the matters discussed in the document. (Feb. 18, 1999 A.M. Tr. at 19-29 (Rose).) Without any foundation, the document is entitled to no weight.

2. Compaq's Decision To License Windows 98

877. Compaq currently preinstalls Windows 98 on the hard drives of all of its Presario computers and on some of its computers sold primarily to business customers. (Rose ¶ 14; Feb. 19, 1999 A.M. Tr. at 47 (Rose).) Rose testified that Compaq preinstalls Windows 98 on those computers because Compaq believes that Windows 98 has the features and functionality Compaq's customers want. (Rose ¶¶ 15-16; Feb. 19, 1999 A.M. Tr. at 47 (Rose).) Plaintiffs tried to make much out of Rose's testimony that Compaq presently believes it does not have a commercially viable alternative to Windows as an operating system for its consumer computers. (Feb. 17, 1999 P.M. Tr. at 17-18 (Rose).) Rose testified, however, that this is a function of customer demand, and that if there were sufficient customer demand for a non-Microsoft operating system, Compaq would consider licensing that operating system. (Rose ¶¶ 16-17; Feb. 19, 1999 A.M. Tr. at 48 (Rose).)
878. Rose further testified that Compaq has been able to license Windows from Microsoft at a reasonable royalty rate. (Rose ¶ 18.) According to Rose, as a percentage of total cost, the operating system remains one of the least expensive components of a personal computer. (Rose ¶ 18.) For a medium-functionality consumer computer that retails for approximately \$1,500, the operating system (in particular, Windows) accounts for less than 5% of the OEM's cost. (Rose ¶ 18.) Indeed, plaintiffs admit that "[a] PC operating system accounts for only a very small percentage of the cost of a PC system." (Pls.' Proposed Findings ¶ 19.3.1.) Although the price Compaq pays for Windows increased in 1998 when Compaq entered into a new OEM license agreement (Feb. 17, 1999 P.M. Tr. at 25-26 (Rose); see also Pls.' Proposed Findings ¶ 38.1.1(ii)), Rose testified that Compaq's Windows royalty had not increased a penny between 1992 and 1998 under Compaq's prior OEM license agreement (Feb. 19, 1999 A.M. Tr. at 46 (Rose)), a period that included the

Introduction of Windows 95.

879. Rose also testified that Compaq believes, based on various marketplace data, that one of the most important features of a personal computer today is easy access to the Internet. (Rose ¶ 19; Feb. 19, 1999 A.M. Tr. at 49 (Rose); see also Schmalensee ¶ 219.) In fact, given the strength of consumer demand for Internet access, Rose testified that Compaq would not ship a personal computer for consumers without Internet access capability. (Rose ¶ 19; Feb. 19, 1999 A.M. Tr. at 49 (Rose).) With respect to Windows 98, Rose testified that Compaq believes that inclusion of Internet Explorer in the operating system benefits Compaq's customers. (Rose ¶ 21.) Rose explained: "We believe that our customers enjoy using the Internet Explorer technologies in Windows because of the ease of use of those technologies and their interoperability with other elements of our consumer systems." (Rose ¶ 21.)
880. When asked whether he views Web browsing software as an application, Rose responded that he "consider[s] the browser to be a feature" of the overall computer system. (Feb. 18, 1999 P.M. Tr. at 48 (Rose); see also Rose ¶ 22.) He stated that based on his experience in the computer industry, functionality that might begin as a separate product or application may, over time, become a feature of a basic product offering as more and more customers demand that functionality. (Rose ¶ 23.) Rose explained:

For example, modems were until recently a separate add-on product that consumers purchased for use with their personal computers. Now, however, modems are generally included as a standard component of a personal computer and are now considered part of the hardware system. The same is true of software. For instance, in the past, consumers who wanted features such as hard-disc compression technology had to purchase separate products. In recent years, however, they have become a standard feature of every modern operating system.

(Rose ¶ 23.) According to Rose, the end result of this integration of more and more features into computer software and hardware has been to put more and more capability into the personal computer, to the benefit of customers. (Rose ¶ 23.)

3. Compaq's Removal of the MSN and Internet Explorer Icons

881. The parties spent considerable time discussing Compaq's removal of the MSN and Internet Explorer icons from the Windows 95 desktop on Compaq's Presario computers. (Kempin ¶¶ 70-71; Rose ¶¶ 24-31; Barksdale ¶¶ 5, 166; Fisher ¶ 147.) Although Barksdale admitted on cross-examination that he had no first-hand knowledge of the matter (Oct. 20, 1998 P.M. Tr. at 42-43 (Barksdale)), he testified that Compaq in 1996 had decided "to replace Internet Explorer with Netscape Navigator" on Compaq's Presario computers (Barksdale ¶ 5). According to Barksdale, Netscape "learned from a Compaq product manager that Microsoft had not wanted Compaq to put the Navigator icon on the desktop, even alongside the Internet Explorer icon." (Barksdale ¶ 166.) Barksdale testified:

Shortly after this decision was made, I heard that Microsoft threatened to cancel Compaq's Windows 95 license, which would effectively kill Compaq's OEM business. Although Compaq wanted to feature the Netscape Navigator icon on the desktops of Compaq computers, reflecting the popularity of Netscape Navigator with consumers, Netscape learned that Compaq no longer intended to put Navigator on the desktop shortly after Microsoft threatened to cancel Compaq's Windows license.

(Barksdale ¶ 5.) The clear import of Barksdale's testimony was that Microsoft threatened to cancel Compaq's Windows 95 license because Compaq wanted to include a Navigator icon on the Windows desktop of Compaq's Presario computers. This second- or third-hand account of the events of 1996, however, is inconsistent with Rose's testimony and contemporaneous Compaq documents.

882. To start, the evidence shows that Compaq removed only the Internet Explorer icon and not the underlying software that constitutes Internet Explorer. (Rose ¶¶ 24-25; Kempin ¶¶ 68-70; Feb. 19, 1999 A.M. Tr. at 25-26 (Rose).) As Rose explained, "[u]sers could still access Internet Explorer via the programs entry on the Start menu, even though the Internet Explorer icon had been removed from the desktop." (Rose ¶ 25.)
883. Rose further testified that Compaq removed the MSN and Internet Explorer icons from the Windows desktop because of an agreement Compaq had entered into with AOL in 1995. (Rose ¶ 26.) That agreement required Compaq to position AOL as its "featured online service provider" above any other online service and to position GNN, AOL's ISP service, as its "featured direct Internet service provider" above any other ISP. (DX 2261; see also Rose ¶ 26.) An "LOI Addendum" to the agreement between Compaq and AOL further provided that other than the AOL/GNN icons, "[n]o other online services will have icons on the desktop." (DX 2261 at COM-13-00060; see also Rose ¶ 26; GX 299 at COM-13-000085 ("Setting MS browser as the default . . . may violate the agreement with AOL to feature GNN.").)
884. The testimony of both Rose and Celeste Dunn, who was in charge of software for Compaq's consumer product division at the time, makes clear that Compaq's removal of the Internet Explorer icon in 1996 had nothing to do with a desire to feature Netscape Navigator. (Feb. 17, 1999 P.M. Tr. at 68 (Rose); Feb. 18, 1999 A.M. Tr. at 63-64 (Rose); Feb. 19, 1999 A.M. Tr. at 25-28 (Rose); DX 2566 (Dunn Dep.) at 81, 84-85.) As Dunn explained, Compaq removed the Internet Explorer icon because it had "made an agreement to feature the AOL icon." (DX 2566 (Dunn Dep.) at 84-85.) Similarly, Don Hardwick of Microsoft, who was responsible for the Compaq account at the time, testified: "Actually, I don't think it had to do with Netscape. I think it was more of a function[] of an AOL relationship that they had." (DX 2570 (Hardwick Dep.) at 26.)
885. Despite the clear testimony of Rose and Dunn of Compaq and Hardwick of Microsoft, plaintiffs contend that Compaq removed the Internet Explorer icon from the Windows 95 desktop "in order to feature Netscape." (Pls.' Proposed Findings ¶ 200.2; see also Pls.' Proposed Findings ¶¶ 128.1, 128.1.1.) Plaintiffs dismiss the contrary testimony of Rose on the ground that "Rose was not personally involved in the removal of the Internet Explorer and MSN icons." (Pls.' Proposed Findings ¶ 200.7.2.1; see also Pls.' Proposed Findings ¶¶ 200.7.1(iii), 201.5.1(iii).) Plaintiffs instead inexplicably rely on the testimony of Stephen Decker of Compaq (see Pls.' Proposed Findings ¶¶ 200.2(v), 200.7.2.4(i)), who testified at an *ex parte* deposition taken on October 17, 1997 as part of the DOJ's investigation prior to the filing of the Consent Decree action that Compaq removed the Internet Explorer icon because it "had a relationship with Netscape" (Feb. 18, 1999 A.M. Tr. at 47 (transcript of Decker's October 17, 1997 deposition)). This "testimony" is not admissible against Microsoft.
886. At his deposition taken as part of *this* case, moreover, Decker testified that he was not involved at all in Compaq's decision to remove the Internet Explorer and MSN icons, a question the DOJ neglected to ask him during his prior *ex parte* deposition. (DX 2564 (Decker Dep.) at 21-22, 125-26.) Likewise, Microsoft's Hardwick testified that he never spoke to Decker about this issue. (DX 2570 (Hardwick Dep.) at 30.)
887. As Decker explained, it was Compaq's "consumer product division, which was headed by Celeste Dunn," that made the decision to remove the Internet Explorer and MSN icons. (DX 2564 (Decker Dep.) at 23-24; see also Feb. 18, 1999 A.M. Tr. at 37 (Rose); DX 2570 (Hardwick Dep.) at 24-25.) In fact, plaintiffs themselves admit that Dunn was responsible for "software decisions on the Presario product line" (Pls.' Proposed Findings ¶ 200.2(iii)) and that she "was involved" in the decision to remove the icons (Pls.' Proposed Findings ¶ 200.7.1(iii); see also Pls.' Proposed Findings ¶ 200.7.2.4). Plaintiffs also deposed Dunn as part of discovery in this case, and they cite her deposition testimony throughout their proposed findings. (See, e.g., Pls.' Proposed Findings ¶¶ 197(i), 200.2(iii), 200.4.1(i), 200.4.2(iv).)
888. Despite their reliance on her deposition testimony, plaintiffs fail to mention that Dunn corroborated Rose's testimony on this subject, testifying that Compaq removed the Internet Explorer icon from the Windows 95 desktop because it had "made an agreement to feature the AOL icon." (DX 2566 (Dunn Dep.) at 84-85.) Indeed, when plaintiffs asked her whether it would

- "be fair to say that one reason that Compaq removed the icons was to feature non-Microsoft partners," Dunn responded: "It was to feature AOL." (DX 2566 (Dunn Dep.) at 85.) Plaintiffs completely ignore this testimony in their proposed findings.
889. Microsoft informed Compaq in 1996 that the removal of the MSN and Internet Explorer icons was a violation of Compaq's license agreements with Microsoft. (Rose ¶ 27; Kempin ¶ 71.) In particular, Microsoft sent Compaq a letter on May 31, 1996 stating that Microsoft intended to terminate Compaq's Windows license if Compaq did not restore the icons to their original position. (DX 2263; see also Rose ¶ 27.) According to Kempin, Microsoft and Compaq had discussed the issue of Compaq's removal of the icons for some time, and Microsoft ultimately sent Compaq the notice of intent to terminate Compaq's Windows license in an effort to get the attention of Compaq's consumer division and finally resolve the issue. (Kempin ¶ 71; see also DX 2570 (Hardwick Dep.) at 24 ("[I]t took many, many months before we actually responded with a letter where we told them we were going to terminate their agreement if they would continue removing components of the operating system."))
890. Rose testified that Compaq's removal of the icons was contrary to an understanding he had reached with Microsoft in August 1995. (Rose ¶ 28.) According to Rose, this understanding was reached during an August 8, 1995 conference call with representatives of Microsoft in which he agreed that Compaq would not "replace or modify the OPK install process in any way." (Rose ¶ 29.) That commitment is memorialized in Amendment No. 24 to Compaq's Windows license agreement and also in the August 15, 1995 letter from Don Hardwick of Microsoft to Steve Flannigan of Compaq that was attached to that amendment. (Rose ¶ 29; DX 2264.) As Rose explained, by removing the MSN and Internet Explorer icons from the Windows desktop, Compaq was "replacing or modifying" the OPK install process in violation of the agreement he had reached with Microsoft in August 1995. (Rose ¶ 29; Feb. 19, 1999 A.M. Tr. at 22 (Rose).) Rose's testimony is confirmed by a Compaq document summarizing the August 8, 1995 conference call, which states: "This is where we implied that we would not remove icons by agreeing to follow the initial sequences which placed the MSN and IE icons on the desktops." (DX 465 at 5444.)
891. Rose testified that issues surrounding Compaq's performance of its separate obligations to AOL and Microsoft were ultimately resolved after discussions between senior executives of (i) Microsoft and Compaq and (ii) AOL and Compaq. (Rose ¶ 30.) After those discussions, Compaq agreed to restore the MSN and Internet Explorer icons to the Windows 95 desktop, and Microsoft agreed to withdraw the notice of intent to terminate Compaq's license, as reflected in an exchange of correspondence between Compaq and Microsoft. (Kempin ¶ 71; DX 2265; DX 2266; DX 2377.)
892. Significantly, Compaq did not agree as part of those discussions not to include a Netscape Navigator icon on the desktop of its Presario computers. (Rose ¶ 30.) In fact, Compaq expressly pointed out to Microsoft in its letter announcing that it was restoring the MSN and Internet Explorer icons that "icons for America On-Line and Netscape are also on the Win95 desktop installed on our Presario systems." (DX 2266; see also Rose ¶ 30.) Microsoft never objected to Compaq's inclusion of the Netscape Navigator icon on the Presario desktop. (Rose ¶ 30; Feb. 19, 1999 A.M. Tr. at 32 (Rose); DX 2377.) Indeed, both Rose and Kempin testified that Microsoft's issuance of a notice of intent to terminate Compaq's license agreement had absolutely nothing to do with whether Compaq was also loading Netscape Navigator on Compaq's Presario computers. (Rose ¶ 31; Kempin ¶ 72.) As Rose explained, "[i]t had nothing to do with Netscape Navigator on the Presario machines. It had to do specifically with us not following the agreed-to OPK rules." (Feb. 19, 1999 A.M. Tr. at 31 (Rose).)
893. Plaintiffs nevertheless claim that Microsoft's "actual purpose" in notifying Compaq of its intent to terminate Compaq's license agreement "was to put a stop to Compaq's promotion of rival products and services, including Netscape Navigator, instead of Internet Explorer and MSN." (Pls.' Proposed Findings ¶ 200.4.) Yet, plaintiffs acknowledge that Dunn expressly pointed out in her letter informing Microsoft that Compaq was restoring the Internet Explorer and MSN icons (DX 2266; GX 645) that "icons for AOL and for Netscape were [also] on the Windows 95 desktop for Presario systems" (Pls.' Proposed

- Findings ¶ 200.5(i)). Plaintiffs also do not dispute that Microsoft did not object to Compaq's inclusion of those icons on the Presario desktop. (Rose ¶ 30; Feb. 19, 1999 A.M. Tr. at 32 (Rose); DX 2377.) If Microsoft's "actual purpose" in notifying Compaq of its intent to terminate Compaq's license agreement had been "to put a stop to" Compaq's promotion of Netscape Navigator, as plaintiffs claim, then Microsoft presumably would have objected to Compaq's inclusion of a Navigator icon on the Presario desktop
894. Compaq's Decker likewise testified that he was not aware of any instance in which a representative of Microsoft had suggested, "either explicitly or implicitly," that including Netscape's Web browsing software on Compaq machines would be inimical to the Compaq-Microsoft relationship. (DX 2564 (Decker Dep.) at 45.) Indeed, Decker did not recall the "issue of whether or not Compaq should be shipping Netscape Navigator" ever arising during the course of Compaq's various interactions with Microsoft. (DX 2564 (Decker Dep.) at 44-45; see also DX 2603 (Akerlind Dep.) at 114; DX 2566 (Dunn Dep.) at 176.)
895. In fact, the evidence shows that it was AOL, not Microsoft, that objected to placement of a Netscape Navigator icon on the Windows 95 desktop of Compaq's Presarios and that AOL ultimately notified Compaq of its intent to terminate its agreement with Compaq because Compaq was promoting Netscape Navigator. (Feb. 19, 1999 A.M. Tr. at 33 (Rose); DX 2375.) In May and June 1996, Compaq and AOL exchanged several letters in which they discussed whether Compaq's inclusion of a Netscape/SpryNet icon on the Windows desktop constituted a violation of Compaq's agreement with AOL to feature GNN. (DX 2374; DX 2376; DX 2378.) AOL took the position that the "positioning of the NetScape/Spry Internet service [did] not recognize GNN as the feature product." (DX 2376 at COM-13-000003.) In a subsequent letter, AOL further stated that "providing this icon to any other provider, including Netscape bundled with an ISP, would violate Part 2 [of Compaq's agreement with AOL] because the language contemplates placement of such a provider in an innocuous (i.e., 'Other') grouping." (DX 2374 at COM-6-000392.) In the end, Compaq and AOL were unable to resolve this issue, and thus on September 25, 1996, AOL notified Compaq of its intent to terminate its agreement with Compaq because "Compaq has . . . promoted Netscape (bundled with an Internet Service Provider) . . . as an icon on its desktop." (DX 2375 at COM-6-000394.)
896. Despite this evidence, plaintiffs argue that a November 12, 1996 Compaq e-mail (GX 758 (sealed); Pls.' Proposed Findings ¶ 200.4.2(ii)), written months after the issue of the removal of the icons had been resolved, shows that "Microsoft's true concern" was that "Compaq was assisting Netscape" (Pls.' Proposed Findings ¶ 200.4.2). In that e-mail, Bob Friedman of Compaq speculated that Microsoft was "offering to give Compaq a share of ISP revenues from the Microsoft referral server" because it was "expecting an exclusive arrangement that would prevent us from putting Netscape on the desktop." (GX 758 at COM-4-000083-84 (sealed).) When shown that e-mail at his deposition, Decker testified that "[q]uite frankly Bob is wrong here" and that Microsoft "never" proposed an exclusive arrangement for Internet Explorer. (DX 2564 (Decker Dep.) at 50.) Decker explained: "Bob liked to speculate a lot, and this was not his area of concern." (DX 2564 (Decker Dep.) at 56.) Although plaintiffs rely on Decker's testimony in their proposed findings, they do not cite this portion of his testimony.
897. Plaintiffs also refer to a Letter of Understanding ("LOU") that Compaq entered into with Microsoft in May 1996, which extended the companies' Frontline Partnership to the Internet/Intranet. (See, e.g., Pls.' Proposed Findings ¶ 200.4.2(ii) (referring to "extension of Frontline Partnership to the Internet/Intranet").) As part of that LOU, Compaq agreed to "[s]hip new versions of Internet Explorer as the default browser on all Compaq desktop and server platforms with each major Compaq product release." (DX 2267 at COM-2-000172; see also Rose ¶ 32.) Even the LOU did not, however, prohibit Compaq from continuing to install Netscape Navigator on its new computers. (Rose ¶ 32; Feb. 19, 1999 A.M. Tr. at 42-43 (Rose).) Indeed, Rose testified, and contemporaneous Compaq documents confirm, that the LOU did not in any way limit Compaq's ability to distribute Netscape's Web browsing software. (Feb. 19, 1999 A.M. Tr. at 44, 73-74 (Rose); DX 2373.)
898. Although plaintiffs assert that "Compaq removed Netscape once it was compelled by Microsoft to restore the Internet Explorer icon to the

desktop" (Pls.' Proposed Findings ¶ 168(iii)), plaintiffs offered no reliable evidence in support of that assertion. In fact, the evidence is uncontradicted that, subsequent to entering into the LOU with Microsoft and restoring the Internet Explorer icon to the Windows desktop, Compaq continued to ship Netscape's Web browsing software on some of its computers (DX 2564 (Decker Dep.) at 129), and that Compaq preinstalled Netscape's Web browsing software on all of its Presario computers at the time of trial (Feb. 19, 1999 A.M. Tr. at 45, 49-50 (Rose)). In addition, plaintiffs do not dispute that Compaq ships Netscape Navigator (as well as the Encompass shell browser) with its computers today, notwithstanding the presence of an Internet Explorer icon on the Windows desktop. (See Feb. 19, 1999 A.M. Tr. at 49-50 (Rose).)

4. Compaq's Decision Not To Preinstall QuickTime

899. Plaintiffs argue that "[i]n a further effort not to antagonize Microsoft and not to risk Microsoft's retaliation, Compaq decided not to preinstall Apple's QuickTime multimedia software." (Pls.' Proposed Findings ¶ 201.3.) In particular, they contend that "Stephen Decker of Compaq told Phil Schiller of Apple that Compaq was reluctant to preinstall QuickTime for fear of upsetting Microsoft." (Pls.' Proposed Findings ¶ 201.3(i).) Their only support for that contention is the deposition testimony of Phil Schiller.
900. Once again, plaintiffs fail to mention Decker's testimony on this subject, which shows their QuickTime contention to be false. Decker testified that at the time of Compaq's 1998 meetings with Apple, Compaq was shipping QuickTime for free (DX 2564 (Decker Dep.) at 110) and that Apple wanted to begin charging a royalty for it (DX 2564 (Decker Dep.) at 115-16). According to Decker, Compaq would have been "happy to continue to ship the QuickTime product for free, but Compaq was not about to pay Apple a royalty for that product." (DX 2564 (Decker Dep.) at 116.) Decker stated: "[T]he bottom line from a Compaq perspective is that we had a technology that in the past was provided free from Apple, and we were not about to incur additional cost in that type of a marketplace for that product." (DX 2564 (Decker Dep.) at 117.)
901. When plaintiffs asked Decker whether he "ever ha[d] any discussions with any representative from Apple about Microsoft or Compaq's relationship with Microsoft," Decker responded: "No, not at all." (DX 2564 (Decker Dep.) at 118.) In fact, when plaintiffs asked Decker whether he had ever mentioned to anyone that "the Microsoft relationship is so important to Compaq that Compaq would cease shipping QuickTime," Decker stated: "No, that is actually false. We would be shipping QuickTime if Apple gave it to us for free." (DX 2564 (Decker Dep.) at 119.) Decker's actual testimony cannot be reconciled with the statement attributed to him by Phil Schiller.

C. IBM

902. Norris of IBM testified on plaintiffs' behalf during the rebuttal phase of the trial. From March 1995 to March 1997, Norris was Program Director of Software Strategy and Strategic Relations for IBM's PC Company. (June 7, 1999 A.M. Tr. at 5-7 (Norris).) At the time, Norris was a relatively low-level IBM employee, approximately four or five tiers below IBM's CEO. (June 8, 1999 A.M. Tr. at 77 (Norris).)
903. As a threshold matter, the evidence suggests that Norris personally may have had a poor relationship with Microsoft during the time he was Program Director of Software Strategy and Strategic Relations. For example, in an April 9, 1996 e-mail, Norris' boss, Roy Clauson of IBM wrote:

I believe if we are going to keep Garry Norris involved with MS, he is going to have to move to Kirkland and establish a relationship with MS. HE HAS NONE NOW.

(DX 2673.) In fact, Norris's successor, Gregory Huber, expressly referred to the "improved relationship" between the companies in a December 1997 e-mail to Ted Hannum of Microsoft:

I very much appreciate the flexibility that you, Bengt, and perhaps others at Microsoft have shown in considering this significant IBM business issue and granting an MDA exception. In general, I feel that our improved relationship has led to a spirit of openness and honesty, a willingness to listen and cooperate, and a desire to be flexible in meeting each other's pragmatic business needs.

(DX 2654 at 86178.)

904. The overall theme of Norris' testimony was that from March 1995 to March 1997, Microsoft treated IBM less favorably than it treated other OEMs— particularly Compaq— because IBM competed with Microsoft. (See, e.g., June 7, 1999 A.M. Tr. at 49 (Norris); June 7, 1999 P.M. Tr. at 22 (Norris); June 8, 1999 P.M. Tr. at 4 (Norris).) At the outset, three fundamental points merit emphasis.
905. First, Norris' assertion that IBM received less favorable treatment than other OEMs is to a large extent conjectural because Norris admitted that he has never seen any other OEM's license agreement with Microsoft. (June 8, 1999 P.M. Tr. at 4-5 (Norris).)
906. Second, although he made numerous claims about Microsoft's purported reactions to IBM's shipment of competitive software, Norris admitted that Microsoft never told IBM that it would not give IBM a Windows license if IBM shipped competitive products. (June 9, 1999 P.M. Tr. at 56, 63 (Norris).) To the contrary, the evidence shows that IBM continues to this day to ship numerous non-Microsoft software products with its personal computers, and yet is able to license Windows at a very competitive royalty. (June 9, 1999 P.M. Tr. at 52-54 (Norris).)
907. Third, much of Norris' testimony had no apparent connection to the claims in plaintiffs' complaints. On the one issue relevant to plaintiffs' claims— the distribution of Netscape's Web browsing software— Norris admitted that Microsoft never said that it would not give IBM a license agreement for Windows if IBM shipped Netscape's Web browsing software with its computers. (June 9, 1999 P.M. Tr. at 63 (Norris).) In fact, Norris acknowledged that IBM began shipping Netscape Navigator with its computers in 1996 and continues to do so today. (June 9, 1999 P.M. Tr. at 63 (Norris).)

1. IBM's Royalty for Windows 95 and Its Participation in Microsoft "Enabling Programs"

908. Norris claimed that Microsoft licensed Windows 95 to IBM on less favorable terms than Compaq received because IBM competed with Microsoft. (June 7, 1999 A.M. Tr. at 49 (Norris); June 7, 1999 P.M. Tr. at 22 (Norris); June 8, 1999 P.M. Tr. at 4 (Norris).) Based on that testimony, plaintiffs argue that Microsoft "discriminated against IBM for featuring competing products." (Pls.' Proposed Findings ¶ 207.) According to plaintiffs, "[t]hese products included both IBM's OS/2 operating system, which competed against Windows, and various application programs." (Pls.' Proposed Findings ¶ 207.)
909. The evidence shows, however, that Compaq received the lowest royalties in the industry for Windows 95 for the very same reason that IBM previously had received the lowest royalties in the industry for MS-DOS and Windows 3.x. Prior to 1995, IBM had done joint development work with Microsoft on both MS-DOS and Windows 3.x, and as a result of that work, IBM paid the lowest royalty in the industry for those operating systems. (June 8, 1999 A.M. Tr. at 81-82 (Norris); see also June 7, 1999 P.M. Tr. at 12-13 (Norris); DX 2624 at 16348.) In fact, IBM paid only \$11 for a combination of add-on MS-DOS tools and Windows 3.x (\$2 for MS-DOS tools and \$9 for Windows 3.x), when Compaq was paying \$30 for that same combination. (DX 2624 at 16348; see also June 8, 1999 A.M. Tr. at 82 (Norris).)
910. Like IBM had done on MS-DOS and Windows 3.x, Compaq did joint development work with Microsoft on Windows 95. (June 8, 1999 P.M. Tr. at 5 (Norris).) In particular, Compaq and Microsoft worked together on Windows 95's plug-and-play technologies, an important feature of the new operating system. (June 8, 1999 P.M. Tr. at 5 (Norris).) Because of that joint development work, Compaq enjoyed the lowest royalties in the industry for

Windows 95. (June 8, 1999 P.M. Tr. at 5-6 (Norris).)

911. Indeed, IBM's own internal documents show that notwithstanding Norris' testimony, IBM understood that Compaq received the lowest royalties in the industry for Windows 95 because it worked closely with Microsoft on the new operating system. (DX 2624 at 16348; DX 2674 at 87690.) As one IBM document put it, "Compaq co-developed Windows 95 with Microsoft. As a result Compaq enjoys the best t's & c's [terms and conditions] and the lowest royalties in the industry." (DX 2624 at 16348.) By contrast, IBM did not do any joint development work with Microsoft on Windows 95, and thus it paid a higher royalty for that operating system than Compaq paid. (June 8, 1999 P.M. Tr. at 10-11 (Norris).)
912. Microsoft also made clear to IBM that it wanted to develop a closer relationship between the companies. For example, in a January 5, 1996 letter to Tony Santelli of IBM, Kempin wrote:

[W]e would like to see the IBM PC Company being more actively involved in assisting MS to bring key products to market, this means active Beta testing, early SCT engagement, cooperative marketing actions, bug testing, ongoing feedback, etc. To date the IBM PC Company has not always been an active participant in these areas

(GX 2142 at 5681-82.) Compaq worked closely with Microsoft in those areas (Rose ¶¶ 10-12), and Microsoft informed IBM that it could receive the same royalty as Compaq if IBM "made the same commitment that Compaq did" (GX 2180 at 13371).

913. Plaintiffs also complain that "[t]he IBM PC Company was denied access to Microsoft's so-called 'enabling programs,' in which IBM's competitors such as Compaq, HP, and DEC participated." (Pls.' Proposed Findings ¶ 209.2.2; see also June 7, 1999 A.M. Tr. at 77-78 (Norris); June 7, 1999 P.M. Tr. at 36 (Norris).) These programs included the Microsoft Authorized Support Center, the Microsoft Certified Solution Provider Program and the Authorized Technical Education Center. (See June 7, 1999 A.M. Tr. at 77-78 (Norris).)
914. On cross-examination, however, Norris admitted that although the IBM PC Company was not able to participate in those enabling programs, other parts of IBM were. (June 9, 1999 P.M. Tr. at 57-59 (Norris).) The evidence also shows that Microsoft excluded the IBM PC Company from the enabling programs for a legitimate reason. Microsoft was concerned that the IBM PC Company would get its foot in the door with customers "under the guise of the MS Solution Providers program" and then attempt to "bait and switch" the customers by selling IBM products instead of Microsoft products. (DX 2707 at 81393; June 9, 1999 P.M. Tr. at 62 (Norris).)

2. IBM's 1994 Rejection of Microsoft's Frontline Partnership Proposal

915. Plaintiffs assert that "in late 1994, Microsoft attempted to induce IBM to reduce or eliminate competition from IBM's rival operating system product, OS/2." (Pls.' Proposed Findings ¶ 209.1.) Plaintiffs base this assertion (see Pls.' Proposed Findings ¶ 209.1(i)) on Norris' testimony that in the second half of 1994, Microsoft proposed that IBM enter into a "Frontline Partnership" that would have required IBM to "reduce, drop, or eliminate" shipments of OS/2 (June 7, 1999 A.M. Tr. at 13-14, 18-19, 21-22, 73 (Norris); June 8, 1999 P.M. Tr. at 18-19 (Norris)).
916. Plaintiffs fail to mention, however, that Microsoft offered IBM a Frontline Partnership similar to the relationship between Compaq and Microsoft because IBM had requested such a relationship. (June 8, 1999 P.M. Tr. at 65 (Norris).) Moreover, Norris' testimony that IBM rejected Microsoft's Frontline Partnership proposal because it would have required IBM to "reduce, drop, or eliminate" shipments of OS/2 is inconsistent with the weight of the evidence.
917. As an initial matter, because Norris lacked any personal knowledge of the relevant events, his testimony concerning IBM's rejection of Microsoft's 1994 Frontline Partnership proposal was based entirely on information purportedly relayed to him in March 1995 by Dean Dubinsky, the IBM employee responsible for managing IBM's relationship with Microsoft in 1994. (June 7,

- 1999 A.M. Tr. at 11-14 (Norris); June 8, 1999 P.M. Tr. at 18, 53, 66 (Norris).) Accordingly, Norris' testimony on these matters is hearsay.
918. In addition, Norris' testimony concerning IBM's 1994 rejection of Microsoft's Frontline Partnership finds no support in the contemporaneous documents. (See June 8, 1999 P.M. Tr. at 42, 52, 54-55, 65-66 (Norris).) Those documents show that IBM went to Microsoft in 1994 with a request for a relationship on par with Compaq's relationship with Microsoft. (DX 2624 at 16332; see also June 8, 1999 P.M. Tr. at 13-15 (Norris).) In response to that request, Microsoft proposed a Frontline Partnership with IBM that would have been comparable to its arrangement with Compaq. (DX 2624 at 16332; see also June 8, 1999 P.M. Tr. at 17 (Norris).) Pursuant to that proposal, Microsoft and IBM would have performed joint sales, marketing and development work, and in exchange, IBM would have received future Microsoft products at the lowest royalty rates in the industry. (DX 2624 at 16332; see also June 8, 1999 P.M. Tr. at 17 (Norris).)
919. Drafts of the agreement implementing the proposed Frontline Partnership created in the summer of 1994 do not support Norris' assertion that IBM would have been required to "reduce, drop or eliminate OS/2" and "exclusively promote Microsoft products." (June 7, 1999 A.M. Tr. at 13-14, 18-19, 21-22, 73 (Norris); June 8, 1999 P.M. Tr. at 22-23, 42 (Norris).) For example, the earliest draft of the agreement admitted into evidence would simply have required IBM to "primarily promote MS desktop software platforms." (DX 2625 at 6012.)
920. Later drafts of the agreement were even less restrictive, expressly providing that IBM's commitment to promote "Microsoft software platforms" was "not exclusive to products offered by other divisions of IBM." (DX 2626 at MSC 00414639; DX 2627 at MSC 00415061; June 8, 1999 P.M. Tr. at 32, 42 (Norris).) The drafts similarly stated that the two companies would "reference each others products in a favorable but non-exclusionary way." (DX 2626 at MSC 00414639; DX 2627 at MSC 00415061.) Such language cannot be reconciled with Norris' assertion that IBM would have been required to "reduce, drop or eliminate OS/2" and "exclusively promote Microsoft products" if it entered into the proposed Frontline Partnership.
921. IBM and Microsoft representatives met to discuss the proposed Frontline Partnership in November 1994 at an industry conference called Comdex. (DX 2624 at 16333; DX 2628 at 82171; June 8, 1999 P.M. Tr. at 47-48 (Norris).) Prior to that meeting, IBM senior management, including IBM's executive committee, had reviewed the proposed Frontline Partnership. (DX 2624 at 16332; DX 2628 at 82171; June 8, 1999 P.M. Tr. at 45-46, 51-52 (Norris).) During that process, which took several months, IBM provided Microsoft with no information about the status of the review. (DX 2624 at 16332; June 8, 1999 P.M. Tr. at 45-47 (Norris).) Indeed, Microsoft had received no news from IBM about the proposed Frontline Partnership since mid-September 1994, when Tony Santelli, Bruce Claffin and Rick Thomann, three top executives of the IBM PC Company, had informed Microsoft that they liked the agreement that had been negotiated. (DX 2627 at MSC 00415057.)
922. With no advance warning, at the November 1994 Comdex meeting, which Bill Gates attended, IBM rejected the proposed Frontline Partnership that Kempin had negotiated with IBM at IBM's request. (DX 2624 at 16333.) IBM informed Microsoft that rather than enter into a Frontline Partnership with Microsoft, IBM was going to pursue an initiative it called "IBM First" or "IBM Products First." (DX 2624 at 16333; DX 2628 at 82171; June 8, 1999 P.M. Tr. at 68 (Norris).) IBM told Microsoft that pursuant to that initiative, IBM would not promote any Microsoft products and, indeed, was going to preload OS/2 on all of its computers. (DX 2624 at 16333; DX 2628 at 82171; DX 2675 at 81572; see also DX 2678 at 92408; June 8, 1999 P.M. Tr. at 68-69 (Norris).)
923. Needless to say, IBM's rejection of Microsoft's Frontline Partnership proposal in 1994 was a low point in the IBM-Microsoft relationship. (See DX 2676.) Senior Microsoft executives such as Kempin felt that they had "stuck their neck out" at Microsoft by "negotiating an alliance with IBM at IBM's request." (DX 2676 at 92296.) As Dubinsky later put it, by rejecting Microsoft's proposed Frontline Partnership at the November 1994 Comdex meeting in front of Gates, IBM had "'turned the tables' on Kempin." (DX 2677 at 90323.)
924. After the November 1994 meeting, Microsoft informed IBM that it would "treat IBM like any other OEM" and that IBM would receive the "standard

Win95 OEM agreement." (DX 2624 at 16333; June 8, 1999 P.M. Tr. at 69 (Norris).) In his direct testimony, Norris asserted that treatment "like any other OEM" meant that IBM received the same Windows 95 royalties and terms and conditions as a "white box" manufacturer that produced only 500 to 1000 computers a year. (June 7, 1999 A.M. Tr. at 75-76 (Norris); June 8, 1999 P.M. Tr. at 71 (Norris).) Relying on that assertion, plaintiffs contend that Microsoft treated IBM "not like other large OEMs such as Compaq, Dell and HP, but rather like any of the other hundreds of much smaller OEMs." (Pls.' Proposed Findings ¶ 209.1.2(ii).) The evidence shows, however, that IBM's Windows 95 royalties were "not out of parity with any OEM except Compaq." (GX 2180 at 13371; see also DX 2305 (sealed))

925. Plaintiffs also assert that because IBM rejected Microsoft's proposed Frontline Partnership, "IBM's beginning price for Windows 95 was \$75 per copy." (Pls.' Proposed Findings ¶ 209.1.2(iii) (citing GX 2132).) That assertion, however, is chronologically flawed. Microsoft informed IBM that its "base royalty for Windows 95 [was] \$75.00" on October 21, 1994 (GX 2132 at 81833), which was nearly a month before IBM rejected Microsoft's Frontline Partnership proposal on November 16, 1994 at Comdex (see June 8, 1999 P.M. Tr. at 47-48 (Norris).) As a result, contrary to plaintiffs' assertion, IBM's rejection of that proposal could not have had any bearing on "IBM's beginning price" for Windows 95, which was stated beforehand.
926. Plaintiffs also note that "[t]he royalties paid by the IBM PC Co. to Microsoft increased from approximately \$40 million in 1995 to \$220 million in 1996." (Pls.' Proposed Findings ¶ 209.2.1(ii).) As IBM's own documents make clear, however, the reason why IBM's operating system royalties increased significantly from 1995 to 1996 was because of the "obsolescence of Win 3.11 by Win 95." (GX 2194 at 90365; see also June 9, 1999 P.M. Tr. at 14-16 (Norris).) As noted above, IBM received the lowest royalty in the industry for Windows 3.11 because of its joint development efforts.

3. IBM's 1995 Market Development Agreement

927. On direct, Norris also testified that Microsoft in October 1994 provided IBM with a draft market development agreement ("MDA") that offered to reduce IBM's Windows 95 royalty by \$8.00 if IBM would "reduce, drop or eliminate" shipments of OS/2. (June 7, 1999 A.M. Tr. at 18-22 (Norris); June 9, 1999 A.M. Tr. at 5 (Norris).) Based on that testimony, plaintiffs argue that Microsoft "sought to condition substantial MDA price discounts on IBM's ceasing to ship with its PCs products that competed with Microsoft's products." (Pls.' Proposed Findings ¶ 210.)
928. Once again, Norris' claim that the draft MDA would have required IBM to "reduce, drop or eliminate" shipments of OS/2 is contrary to the terms of the agreement itself. (GX 2132.) Norris identified four milestones in the draft MDA that purportedly would have required IBM to "reduce, drop or eliminate" shipments of OS/2. (June 9, 1999 A.M. Tr. at 8-10 (Norris).) As Norris admitted on cross-examination, however, none of those milestones would have required IBM to stop its shipments of OS/2, which is the impression Norris sought to create through his direct testimony. (June 9, 1999 A.M. Tr. at 10-14 (Norris).)

4. The Negotiation of IBM's 1995 Windows 95 License Agreement

929. Plaintiffs argue that "Microsoft delayed granting an essential Windows 95 license to IBM until 15 minutes before the product's launch because of IBM's preloading of competitive products," in particular, Lotus SmartSuite. (Pls.' Proposed Findings ¶¶ 208, 208.6.3.) The evidence shows, however, that Microsoft and IBM were unable to agree on the terms of a Windows 95 license agreement until the morning of the product launch for reasons unrelated to "IBM's preloading of competitive products."
930. In the spring and summer of 1995, when Norris was negotiating IBM's OEM license agreement for Windows 95, the IBM-Microsoft relationship was poor and contentious for several reasons. (June 7, 1999 A.M. Tr. at 12 (Norris).)
- o First, Microsoft and IBM previously had collaborated on development of a number of different operating systems, including MS-DOS, Windows 3.x and OS/2. (June 8, 1999 A.M. Tr. at 81-83 (Norris).) Those joint

development efforts ended in the early 1990s, and the breakup was very difficult for both companies. (June 8, 1999 A.M. Tr. at 83 (Norris); see also DX 2632 at 1.)

- o Second, IBM's 1994 rejection of Microsoft's Frontline Partnership proposal had seriously strained the relationship between the companies. (DX 2676 at 92296; June 7, 1999 A.M. Tr. at 13 (Norris).)
- o Third, at the time Microsoft and IBM were negotiating a Windows 95 license agreement, IBM was engaged in an overt and public campaign to disparage Windows 95 in an effort to benefit OS/2. (DX 2635 at 92194; DX 2636 at 92511.)
- o Fourth, by the summer of 1995, an ongoing audit of IBM's existing OEM license agreements had revealed that IBM had not paid Microsoft tens of millions of dollars in royalties that IBM owed Microsoft under the agreements. (DX 2642 at 92187.) IBM ultimately agreed to pay Microsoft more than \$31 million for under-reported royalties pursuant to a settlement agreement. (DX 2644 at 2.)

Those facts, particularly IBM's campaign to disparage Windows 95 and Microsoft's discovery that IBM had underpaid royalties by tens of millions of dollars, were the reason why Microsoft and IBM had such difficulty negotiating a Windows 95 license agreement.

a. IBM's Campaign To Disparage Windows 95

931. In 1995, IBM was critical of Microsoft in general and Windows 95 in particular as it sought to promote OS/2. As a news article from March 1995 notes, "[t]he gloves are off . . . as IBM and Microsoft gird themselves for the battle of the operating systems." (DX 2632 at 1.) IBM's documents from this time period show that IBM's hostile posture was adversely affecting IBM's relationship with Microsoft.
932. For example, a July 24, 1995 IBM memorandum summarizing a telephone conversation between Bill Gates and Rick Thoman of IBM stated that Gates had complained about "IBM's nonrespect for Microsoft." (DX 2635 at 92194; see also June 9, 1999 A.M. Tr. at 20 (Norris).) According to the memorandum, Gates cited a quote of Louis Gerstner, IBM's CEO, in *Business Week* that "Microsoft was a great marketing company, but not a great technology company." (DX 2635 at 92194.) Gates also complained about "smear campaigns' planned by Dan Lautenbach and others against the Windows 95 product" (DX 2635 at 92194.) Another IBM memorandum from this time period states that Thoman should be prepared to discuss with Gates "recent news releases in Latin America and Europe, where Reisinger and Ned Lautenbach are quoted on an open campaign to disparage Windows 95." (DX 2636 at 92511.)
933. In connection with its efforts to promote OS/2, IBM also distributed a white paper entitled "Warp vs. Chicago: A Decision Maker's Guide to 32-Bit Operating System Technology." (DX 2633.) As one news article from 1995 observed, what was unusual about the document was "the lengths it goes to in touting the superiority of OS/2 and the way in which it denigrates its competitor." (DX 2632 at 1.) For instance, the white paper stated:

As you can see, Microsoft's Chicago operating system is long on hype and somewhat short on technology. But if you've followed their product offerings over the past few years, this revelation should really come as no surprise. Microsoft has a track record of delivering 'cosmetically advanced' operating systems while ignoring the more important issues like robustness, capacity, and true object-orientation.

....

So what about Chicago? Good question! With one foot still buried in the DOS/Windows grave, Chicago is yesterday's technology dressed up to look like tomorrow's 32-bit OS. Why wait for an imposter?

(DX 2633 at MX 2110387.)

934. Given such public statements by IBM, Microsoft was unwilling to endorse publicly IBM's products. (June 7, 1999 A.M. Tr. at 74-75 (Norris).) Indeed, IBM's hostile public posture towards Microsoft explains why "Microsoft would not provide quotations for IBM to use in press releases for its PCs." (Pls.' Proposed Findings ¶ 209.3(v); see also GX 2193; June 7, 1999 P.M. Tr. at 24-27 (Norris).) As one IBM document put it, Microsoft would not make "public statements of cooperation/endorsement" because "our (IBM Corp.) public posture has been less than positive towards MS." (GX 2158; see also June 9, 1999 A.M. Tr. at 17 (Norris); DX 2645 at 92562; DX 2646.)

b. The Audit

935. Meanwhile, accountants were conducting an audit of IBM's royalty payments to Microsoft for several different operating systems. (June 7, 1999 A.M. Tr. at 31 (Norris); June 9, 1999 A.M. Tr. at 34-35 (Norris).) That audit had begun before Norris became Program Director for Software Strategy and Strategic Relations in March 1995. (June 9, 1999 A.M. Tr. at 36 (Norris).)
936. Norris testified that between March 1995 and June 1995, Microsoft and IBM were making "good progress" on a Windows 95 license agreement, having negotiated 38 open items "down to approximately ten items." (June 7, 1999 A.M. Tr. at 24-25 (Norris).) Norris stated, however, that negotiations began to "slow down" in mid-June (June 7, 1999 A.M. Tr. at 26 (Norris)) and that Mark Baer of Microsoft informed him on July 20, 1995 that "he had been instructed to cut off negotiations with IBM until the audit had been settled by executive management" (June 7, 1999 A.M. Tr. at 30-31 (Norris)).
937. In examining Norris, plaintiffs attempted to suggest that this suspension of negotiations was somehow related to IBM's 1995 acquisition of Lotus and, more specifically, to IBM's July 17, 1995 announcement that it was going to make Lotus SmartSuite the "primary desktop offering from IBM" in the United States. (June 7, 1999 A.M. Tr. at 42 (Norris); see also Pls.' Proposed Findings ¶¶ 208.3, 208.4, 208.5, 208.6.) That suggestion finds no support in the evidence.
938. For one thing, the evidence shows that it was IBM, not Microsoft, that first connected the audit to negotiation of a Windows 95 license agreement. Specifically, Jim Miller of IBM informed Microsoft during a July 14, 1995 telephone call— six days before Baber purportedly cut off negotiations— that IBM was not sure it could sign a Windows 95 license agreement until open issues relating to the audit were resolved. (DX 2638 at 2; June 9, 1999 A.M. Tr. at 37-38 (Norris).) This fact is memorialized in a July 14, 1995 letter from Neil Miller of Microsoft to Jim Miller of IBM summarizing the telephone call. (DX 2638 at 2 ("In today's phone call, you stated your feeling that MS is not accepting the 'spirit of the agreement,' that you think you may need to stop the audit until these issues are resolved, and that, due to these open issues, you are not sure you can sign the license for Windows 95 at this time."); see also GX 2370 at 2) Moreover, Baber expressly told IBM that "the reason the Win 95 contract was being tied to audits was that Jim Miller suggested if the audits could not be resolved, IBM would be unwilling to sign the Win 95 agreement." (GX 2195 at 92179.)
939. In response, plaintiffs point to Jim Miller's July 18, 1995 letter responding to Neil Miller's July 14, 1995 letter. (See Pls.' Proposed Findings ¶ 208.6.2.2(ii).) In that letter, presumably written after more senior executives at IBM (Bruce Clafin and Jerry Casler) had learned of his comments, Jim Miller stated: "With respect to your comments about the signing of the Windows 95 license agreement, we consider the Windows 95 contract negotiations to be completely separate and unrelated to the audit . . ." (GX 2371 at 3.) Notably, however, Jim Miller nowhere denies making the statement attributed to him in Neil Miller's July 14, 1995 letter. Jim Miller's letter thus does nothing to undermine Microsoft's showing that the timing of Microsoft's suspension of negotiations was related to Jim Miller's statement, not IBM's announcement regarding SmartSuite.
940. In addition, none of Norris' contemporaneous documents discussing the Windows 95 license negotiations attempt to connect Microsoft's actions to IBM's acquisition of Lotus or its July 17, 1995 announcement regarding SmartSuite. (See, e.g., GX 2199.) And when Norris was asked at trial whether he "mean[t] to suggest . . . that the timing of Mr. Baber's July 20th call was related to IBM's July 17th announcement about SmartSuite," Norris

responded: "I didn't suggest any timing, counselor." (June 9, 1999 A.M. Tr. at 37 (Norris).) Norris further testified that he did not mean to imply "there was a connection between those two events." (June 9, 1999 A.M. Tr. at 37 (Norris) ("I didn't imply anything.")) Thus, plaintiffs failed to show that the timing of Microsoft's suspension of negotiations was related at all to IBM's July 17, 1995 announcement as opposed to Jim Miller's July 14, 1995 comment that IBM was not sure it could sign a Windows 95 license agreement until the audit was resolved.

941. The evidence further shows that given the substantial underpayments that had been discovered, Microsoft was legitimately "concerned about IBM's ability to report accurately" under a Windows 95 license agreement. (DX 2642 at 92187; see also DX 2643 at 92528; June 9, 1999 A.M. Tr. at 60-61 (Norris).) IBM's own internal review had revealed "under-reported royalties of greater than 20%" on two different operating systems for the audit period (DX 2642 at 92187; see also June 9, 1999 A.M. Tr. at 60, 64 (Norris)), and Microsoft "estimate[d] \$50-100M in underpayments based upon past experience with IBM" (GX 2195 at 92178; June 9, 1999 A.M. Tr. at 41 (Norris)).
942. Jerry Casler of IBM, who took over responsibility for the audit from Jim Miller in August 1995 (see June 9, 1999 A.M. at Tr. at 43, 62 (Norris); GX 2195 at 92179), summarized the situation as follows in an August 16, 1995 memorandum:

Restating what everyone knows, MS is extremely upset with us and in my judgment with good reason. There is an unacceptable level of emotion and distrust. The root of this is lack of communication and sharing of information across the board. This has been exacerbated by late and inaccurate payments (most frequently underpayments); the length of time the audit is taking and the fact that, in their view, we have so tightly locked the auditors with the Confidential Disclosure Agreement that MS won't have reasonable ability to validate it has been paid accurately.

(DX 2643 at 92528.) Casler also referred in his memorandum to IBM's "history of inaccurate payments" and its "flawed/complicated process" of keeping track of software, noting that Microsoft was "very suspicious of our ability to report timely/accurate data." (DX 2643 at 92528.) Casler concluded his memorandum, however, by noting that Microsoft was "sincerely appreciative of the efforts made in the last few days" and that he believed "we've turned the corner." (DX 2643 at 92529.)

943. On August 24, 1995, eight days after Casler wrote in his memorandum that the corner had been turned, IBM and Microsoft settled the audit. (See DX 2644.) Pursuant to that settlement, IBM agreed to pay Microsoft more than \$31 million. (DX 2644 at 2.) That same day, the launch date for Windows 95, IBM and Microsoft also signed a Windows 95 license agreement. (June 7, 1999 A.M. Tr. at 63 (Norris); June 9, 1999 P.M. Tr. at 8 (Norris).)
944. Norris testified that IBM was prejudiced by not signing a Windows 95 license agreement until the date when the new operating system was released. (June 7, 1999 A.M. Tr. at 64 (Norris).) His claim of prejudice, however, appears to be over-stated. For example, IBM complained that it was adversely affected by the "delay in obtaining the code." (GX 2196 at 92185; see also June 7, 1999 A.M. Tr. at 50 (Norris); Pls.' Proposed Findings ¶ 208.6 (Microsoft "cut off IBM's access to Windows 95 code that IBM needed for its PC product planning and development.")) But Norris admitted that IBM had previously received numerous beta versions of Windows 95 and that he was not aware of any OEM in the world that received the final Windows 95 code (the so-called Gold Master) without signing a license agreement for Windows 95. (June 9, 1999 A.M. Tr. at 59-60 (Norris).) Norris also acknowledged that, even though IBM did not sign a Windows 95 license agreement until the day of the Windows 95 launch, it was able to participate in the launch event (June 9, 1999 P.M. Tr. at 8 (Norris)), and Windows 95 was available on IBM's Aptiva 300 and 700 series and Thinkpad computers beginning in September 1995 (June 9, 1999 P.M. Tr. at 8-10 (Norris); DX 2685), in plenty of time for the important Christmas selling season (June 7, 1999 A.M. Tr. at 59-60 (Norris)).

c. Lack of Executive Contact

945. Norris stated that one of the reasons why the IBM-Microsoft relationship was so poor was because "there was very— little-to-no executive contact or minimal contact between the two companies." (June 7, 1999 A.M. Tr. at 12 (Norris).) This problem appears to have been one of IBM's own making.
946. The documents show that throughout the summer of 1995— when Microsoft and IBM were attempting to resolve the audit and negotiate a Windows 95 license agreement— Microsoft requested that a meeting be arranged between Bill Gates and Louis Gerstner, IBM's CEO. (GX 2153 at 92327; GX 2195 at 92179; GX 2204 at 92326.) For instance, Kempin told Tony Santelli of IBM in July 1995 that "[h]e felt strongly that a meeting with Gates and LVG [Gerstner] was crucial " (GX 2153 at 92327.) When Santelli suggested a "Thoman, Gates meeting" instead, Kempin "pushed back and said CEO's meet with Gates all the time." (GX 2153 at 92327.) Despite Microsoft's numerous requests, Gerstner never agreed to meet with Gates in the summer of 1995, exacerbating tensions that already existed between the two companies. (June 9, 1999 A.M. Tr. at 45, 56-58 (Norris).)

d. Lotus SmartSuite

947. Norris testified that Microsoft tried in the summer of 1995 to discourage IBM from shipping Lotus SmartSuite with its computers. (June 7, 1999 A.M. Tr. at 53-54 (Norris); see also Pls.' Proposed Findings ¶ 208.6.3.) To support that testimony, Norris referred to an IBM e-mail stating that on August 9, 1995, Kempin "suggested IBM not bundle Lotus SmartSuite on our systems for a minimum of six months to one year." (GX 2195 at 92178.) On cross-examination, however, Norris admitted that IBM immediately rejected Kempin's suggestion and, in fact, went on to bundle Lotus SmartSuite with all or nearly all of its computers. (June 9, 1999 A.M. Tr. at 39-40 (Norris).) Norris also conceded that, notwithstanding IBM's rejection of Kempin's suggestion, Microsoft did not seek to increase IBM's Windows 95 royalty in the remaining two weeks of negotiations before IBM signed its Windows 95 license agreement. (June 9, 1999 A.M. Tr. at 40 (Norris).)
948. Plaintiffs further contend that Microsoft again attempted to convince IBM not to ship Lotus SmartSuite in 1996 and 1997. (See Pls.' Proposed Findings ¶ 209.3.) Despite Microsoft's efforts to convince IBM to ship its application software instead of Lotus SmartSuite (see GX 2157 at 9713 (Kempin asking "why didn't Microsoft get a chance to compete")), Norris admitted that IBM continued to ship Lotus SmartSuite with its computers and still does so today (June 9, 1999 P.M. Tr. at 57 (Norris)).

5. IBM's 1996 Windows Desktop Family Agreement

949. Norris also testified about the negotiation of IBM's 1996 Windows desktop family agreement. (June 7, 1999 P.M. Tr. at 4-24 (Norris); see also Pls.' Proposed Findings ¶ 210.2.) As Norris explained, that agreement encompassed a number of Microsoft products, including Windows 3.11, Windows 95 and Windows NT 4.0. (June 7, 1999 P.M. Tr. at 8 (Norris); June 9, 1999 P.M. Tr. at 27-28 (Norris).) Although it is not clear how it is relevant to the claims in this case, plaintiffs elicited testimony from Norris that IBM was required to pay a "substantially higher" royalty for Windows 3.x under the Windows desktop family agreement than it paid under its existing OEM license agreement. (June 7, 1999 P.M. Tr. at 13 (Norris); see also Pls.' Proposed Findings ¶ 37 (Microsoft "force[d] IBM to accept a doubling of its royalty for Windows 3.11".))
950. Norris testified that Microsoft proposed the idea of a single license agreement that would cover several different Microsoft operating systems. (June 7, 1999 P.M. Tr. at 8 (Norris).) The contemporaneous documents suggest otherwise, however. Two months before IBM received a draft Windows desktop family agreement from Microsoft (June 9, 1999 P.M. Tr. at 27 (Norris)), Jane Jokl of IBM sent an e-mail to Tony Santelli of IBM proposing that IBM pursue "an 'across the board' Microsoft license for all of the products," including "Win95, NT Workstation and Windows." (DX 2647 at 10025.) Jokl wrote:

This kind of 'combination' licensing seems to be what the industry/Microsoft are heading toward for the future as Microsoft encourages the move to the 32bit OS. This gives customers flexibility and helps accommodate operating system diversity and evolving choice across small, medium and large businesses.

(DX 2647 at 10025; see also June 9, 1999 P.M. Tr. at 29-30 (Norris).)

951. Santelli, who was two levels above Norris in the IBM management structure, responded to Jokl's e-mail as follows: "Jane: Thanks for your creative input on this. We'll push it." (DX 2647 at 10024; see also June 9, 1999 P.M. Tr. at 28-33 (Norris).) Jokl's and Santelli's e-mails were ultimately forwarded to Norris by Ozzie Osborne, Norris' boss at the time, who described the "combo" license as Norris' "to do." (DX 2647 at 10024.) Norris' only response to this e-mail chain was that he had simply ignored what his boss and his boss' boss had told him to do. (June 9, 1999 P.M. Tr. at 33 (Norris); see also June 9, 1999 P.M. Tr. at 36 (Norris).)
952. Norris also testified that under the Windows desktop family agreement, "IBM would have to give up its favorable price for Windows 3.11, and the price would go from \$9 to \$62." (June 7, 1999 P.M. Tr. at 8 (Norris).) That testimony is misleading for two reasons.
953. First, IBM's explicit negotiating strategy was to agree to an increase in its Windows 3.11 royalty in order to obtain a low Windows NT royalty. For example, in an April 9, 1996 e-mail to Osborne, Santelli wrote:

Ozzie, we need to find a way to leverage our current Windows 3.11 royalties as an incentive to reduce Windows 95/NT royalties. It's in Microsoft's interest to move us from Windows 3.11 ASAP. This has value. We need to discuss how to best play this

(DX 2648.) Indeed, Windows NT 4.0 was the "biggest driving force for IBM to go to WDF [agreement]." (GX 2180 at 13372.) Norris testified: "The market had begun to catch on to Windows NT, and we were certainly beginning to understand that Windows NT would become an important factor in the market . . ." (June 7, 1999 P.M. Tr. at 14 (Norris).) As it turned out, IBM was quite successful in this strategy, reducing its Windows NT royalty from \$195 under its existing OEM license agreement to \$112.50 under the Windows desktop family agreement. (GX 2186; see also June 9, 1999 P.M. Tr. at 37-45 (Norris); DX 2624 at 16313.) Plaintiffs ignore this substantial reduction in IBM's Windows NT royalty in their proposed findings. (See Pls.' Proposed Findings ¶ 37.1(ii).)

954. Second, Norris greatly exaggerated the magnitude of the increase in IBM's Windows 3.11 royalty under the Windows desktop family agreement. As he admitted on cross-examination, IBM's royalty for Windows 3.11 under the Windows desktop family agreement was ultimately only \$19.50, not \$62 as Microsoft had originally proposed. (June 9, 1999 P.M. Tr. at 46-49 (Norris).) Even plaintiffs concede that "IBM was able to negotiate the originally offered \$62 royalty Microsoft proposed for Windows 3.11 down to an effective royalty of approximately \$19.50." (Pls.' Proposed Findings ¶ 37.1.4.) That amounted to an increase of only \$10.50 from IBM's existing agreement, a small price for an \$82.50 decrease in IBM's Windows NT royalty. In fact, Norris thought that his team had done such a good job in negotiating the Windows desktop family agreement that he proposed that they each receive a cash award. (June 9, 1999 P.M. Tr. at 52 (Norris); DX 2693.)

6. Early 1997 Discussions between Microsoft and IBM

955. Norris also advanced a number of miscellaneous allegations, most of which do not relate to the distribution of Web browsing software, and thus are irrelevant to any issue in the case. The majority of those allegations relate to two proposals that Microsoft purportedly made to IBM at meetings in February and March of 1997, right before Norris left the IBM PC Company.
956. To begin with, the purported descriptions of those proposals contained in

Norris' handwritten notes are very different from descriptions contained in contemporaneous IBM e-mail describing the very same meetings with Microsoft. (*Compare* GX 2163 and GX 2168, with DX 2708 and DX 2652; see also June 9, 1999 P.M. Tr. at 63-70 (Norris).) In any event, regardless of what was proposed by Microsoft at those meetings in February and March of 1997, the evidence shows that nothing ever came of the two alleged proposals.

a. Internet Explorer 4.0

957. Norris testified that Microsoft told IBM on March 27, 1997 that IBM could participate in the Internet Explorer 4.0 launch event (a brief event in which representatives of numerous companies got up on stage with Microsoft personnel to promote the launch of Internet Explorer 4.0) only if it agreed to stop shipping Netscape's Web browsing software with its computers. (June 8, 1999 A.M. Tr. at 49 (Norris); see also Pls.' Proposed Findings ¶¶ 205.2, 205.3.)
958. On cross-examination, however, Norris admitted that IBM ultimately did participate in the Internet Explorer 4.0 launch event in September of 1997, notwithstanding the fact that IBM was shipping Netscape's Web browsing software with its computers. (June 9, 1999 P.M. Tr. at 70 (Norris); see also DX 2703.) In fact, on August 18, 1997, a month before the Internet Explorer 4.0 launch event, IBM publicly announced a new license agreement for Netscape Navigator 4.0. (DX 2704; June 9, 1999 P.M. Tr. at 72-73 (Norris).)
959. Not only did Microsoft permit IBM to participate in the Internet Explorer 4.0 launch event, but Microsoft also gave IBM (i) a \$1 million reduction in its Windows 95 royalties in order to fund Internet Explorer promotional activities (June 9, 1999 P.M. Tr. at 71 (Norris); DX 2699), and (ii) permission to modify Windows so that if new users clicked on the Internet Explorer icon, they would be taken to IBM's ISP service, not Microsoft's Internet referral server (June 9, 1999 P.M. Tr. at 71 (Norris); DX 2701; DX 2702 at 01230 (IBM e-mail describing this "as a big win for IBM"). Microsoft made these accommodations even though, as noted above, IBM was shipping Netscape Navigator with its computers at the time. (June 9, 1999 P.M. Tr. at 70-71 (Norris).)
960. In view of this subsequent history, the significance of Microsoft's purported proposal concerning IBM's participation in the Internet Explorer 4.0 launch event is unclear. Assuming Microsoft made such a proposal, it was not on the table very long. As of April 21, 1997—less than a month after the alleged proposal was made—Scott Bosworth of IBM wrote that "[t]here is no proposal on the table from Microsoft to exclusively bundle IE on the PCCo. line." (DX 2649 at 93796.) Bosworth also noted that "there is no restriction on bundling other browsers." (DX 2649 at 93796.) When shown this document, Norris stated, "I guess after I left, they took it off the table." (June 9, 1999 P.M. Tr. at 75 (Norris).) Norris also admitted that IBM still ships Netscape Navigator with its computers today. (June 9, 1999 P.M. Tr. at 63. (Norris).)
961. Plaintiffs also contend that "[a]t a March 6, 1997 meeting with IBM, representatives of Microsoft threatened that, if IBM did not pre-load and promote Internet Explorer 4.0 exclusively on its PCs (in other words, to the exclusion of Netscape Navigator), it would suffer 'MDA repercussions.'" (Pls.' Proposed Findings ¶ 205.1; see also Pls.' Proposed Findings ¶ 49.3.1.3(iii).) To start, Norris' e-mail summarizing his March 1997 discussions with Microsoft makes no mention of a threat of "MDA repercussions." (See GX 2167.) More fundamentally, plaintiffs readily admit that "IBM ultimately refused Microsoft's proposal that it exclusively ship Internet Explorer 4.0 and stop shipping Netscape." (Pls.' Proposed Findings ¶ 205.3.) Despite this refusal, neither plaintiffs nor Norris claims that IBM suffered any "MDA repercussions." To the contrary, in August 1997, Microsoft gave IBM a \$1 million reduction in its Windows 95 royalties. (June 9, 1999 P.M. Tr. at 71 (Norris); DX 2699.)

b. Broadcast PC

962. Norris further testified that Microsoft told IBM in March 1997 that IBM could

- be Microsoft's "first chair" partner for something called the Broadcast PC initiative if IBM agreed to stop shipping certain "objectionable apps" such as Lotus SmartSuite with its Aptiva computers. (June 8, 1999 A.M. Tr. at 22, 25-26, 32-33 (Norris).) According to Norris, Microsoft also offered to license IBM a package of Microsoft software products (Word 97, Works 4.0, Encarta 97, Money, etc.) for only \$10.00 if IBM removed the "objectionable apps" from its Aptiva computers. (June 8, 1999 A.M. Tr. at 47-48 (Norris))
963. As an initial matter, Norris characterization of Microsoft's Broadcast PC proposal as relating to the entire Aptiva line rather than to the Broadcast PC itself is at odds with other evidence. The Broadcast PC was going to be a high-end machine that permitted users to view broadcast television. (June 9, 1999 P.M. Tr. at 76-77 (Norris).) IBM was going to provide the hardware for this product, and Microsoft was going to provide the software. (June 9, 1999 P.M. Tr. at 77 (Norris).) The two companies then were going to promote the product jointly, including possible co-branding. (June 9, 1999 P.M. Tr. at 77-78 (Norris).) According to the summary of the March 27, 1997 meeting prepared by Dean Dubinsky of IBM, Microsoft was concerned about promoting "BPC systems" if they included "competitive offerings." (DX 2652 at 83269 (emphasis added); see also June 9, 1999 P.M. Tr. at 78 (Norris).) Microsoft therefore "proposed a preload bundle" of Microsoft software "providing the functions requested by [IBM]." (DX 2652 at 83269.) As Norris admitted, Dubinsky's description of Microsoft's proposal was very different from his own. (June 9, 1999 P.M. Tr. at 81 (Norris).) The evidence, in short, shows that Microsoft simply did not want to put its brand name on the Broadcast PC if it contained competing software.
964. In any event, although IBM rejected Microsoft's proposal to replace certain competitive offerings in the "BPC systems" with Microsoft software, the two companies continued discussing the Broadcast PC Initiative. (June 9, 1999 P.M. Tr. at 81-83 (Norris).) In fact, an IBM document dated May 22, 1997 states: "IBM is currently Microsoft's 'first chair' partner for Broadcast PC." (DX 2653 at 86557; see also June 9, 1999 P.M. Tr. at 82-83 (Norris).) IBM became Microsoft's "first chair" partner for Broadcast PC notwithstanding the fact that IBM continued to—and, in fact, still does—ship Lotus SmartSuite with its computers. (June 9, 1999 P.M. Tr. at 57 (Norris).) Norris claimed to have no knowledge of discussions between IBM and Microsoft concerning the Broadcast PC that occurred after he left the IBM PC Company to assume his new position at IBM. (June 9, 1999 P.M. Tr. at 83-84 (Norris).) Nor was he aware that the companies' Broadcast PC initiative ultimately died because the technology was not going to be ready in time for the Christmas 1997 season. (June 9, 1999 P.M. Tr. at 84 (Norris).)

c. World Book

965. Plaintiffs contend that Microsoft "threatened to withhold public endorsements for and statements of cooperation with IBM because of the PC Company's decision to ship World Book, an electronic encyclopedia, with its PCs rather than shipping Microsoft's competing encyclopedia, Encarta." (Pls.' Proposed Findings ¶ 209.4.) In so doing, plaintiffs rely (see Pls.' Proposed Findings ¶ 209.4(i)) on a January 30, 1997 e-mail in which Roy Clauson of IBM wrote: "Gates is really mad now about the World Book deal we have and doesn't understand why it wasn't Encarta, given that we want a close relationship in this market with them" (GX 2158 at 81106). That e-mail makes no mention of any explicit threats. It simply notes Gates' disappointment that IBM had elected to license World Book rather than a competing Microsoft product.

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