

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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03-1116

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Sun Microsystems, Inc.,

Plaintiff-Appellee,

v.

Microsoft Corporation,

Defendant-Appellant.

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Appeal from the United States District Court for the District of Maryland

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**PROOF BRIEF OF APPELLEE SUN MICROSYSTEMS, INC.**

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## STATEMENT OF ISSUES

1. Did the district court properly exercise its equitable discretion in granting a preliminary injunction to preserve future competition pending trial where the court found that:

a. The balance of hardships sharply favors Sun because

(1) there is serious risk the market will tip to Microsoft's .NET platform in the near future if the injunction is denied;

(2) it is impossible to ascertain when tipping will occur in time to stop it or restore competition to the market;

(3) if the market tips, Sun cannot be adequately compensated in damages for the resulting harm;

(4) regardless of tipping, Microsoft's anticompetitive acts will continue to distort the competition between Java and .NET by depriving Java of the ubiquity, developer support and end-user adoption it would otherwise have enjoyed, and thus the ability to compete to its full potential; and

(5) issuance of the injunction will impose only a "slight" burden on Microsoft;

b. Sun showed a strong likelihood of success on the merits of its antitrust claim; and

c. The preliminary injunction serves the public interest by

preserving the ability of both Microsoft and Sun to compete vigorously on the merits?

2. Did the district court properly exercise its discretion in granting a preliminary injunction to prohibit Microsoft from infringing Sun's copyrights by distributing unauthorized copies beyond the scope of Microsoft's limited licenses?

## STATEMENT OF THE CASE

### A. Nature of the Case

Microsoft appeals from the January 21, 2003 preliminary injunction order (“Order”) of the U.S. District Court for the District of Maryland (Mutz, J.). The Order was entered after extensive discovery, briefing, and a three-day evidentiary hearing. The Order was carefully crafted to preserve vigorous competition between Microsoft’s .NET platform and the Java platform while preventing Microsoft from exploiting the competitive harm that its illegal acts have inflicted on the Java platform and Sun. The Order also prohibits Microsoft from infringing Sun’s copyrights by distributing copies of Microsoft’s Java Virtual Machine (“MSJVM”) beyond the scope of its limited licenses.

As a succession of federal courts have now found, the Java platform threatens to lower the barriers to competition that protect and sustain Microsoft’s PC OS monopoly. Rather than compete on the merits, Microsoft has chosen to attack and undermine the competitive appeal and commercial viability of the Java platform by unlawfully foreclosing its most important distribution channels, illegally fragmenting its programming environment, and unlawfully distributing an obsolete, incompatible version of the platform. Microsoft’s anticompetitive acts have “retarded, and perhaps altogether extinguished the process” by which the Java platform “could have introduced

competition” into the PC OS market.<sup>1</sup>

Seven years after Sun introduced the Java platform and Microsoft first began its anticompetitive campaign against it, Microsoft has finally developed a competitive alternative. Microsoft now seeks to exploit the competitive disadvantages that its anticompetitive acts have inflicted on the Java platform to propel its Windows-dependent imitation – .NET – to a new and even more powerful position.<sup>2</sup>

The early stages of the competition between .NET and the Java platform are characterized by a battle for developer “mindshare,” a battle whose outcome will prove critical to the long-term structure and competitive dynamics of the market in which Java and .NET compete. Since the utility and commercial appeal of software platforms, such as Java and .NET, are determined largely by the number and quality of the applications that can run on each platform, the choices that thousands of software developers make about which platform to target – Java or .NET – will prove decisive in the current competition between the platforms.<sup>3</sup>

While developers’ platform choices are influenced by a variety of factors,

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<sup>1</sup> *United States v. Microsoft Corp.*, 84 F.Supp. 2d 9, 112 (D.D.C. 1999) (“*Findings of Fact*” or “*FOF*”), *aff’d in part, rev’d in part*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>2</sup> Op.11-12,29.

<sup>3</sup> Op.15-19.

their expectations about the future prevalence of each platform can be dispositive because the platform with the greater expected prevalence provides the largest available market for developers' applications and the fastest possible return on their investment.<sup>4</sup>

The rapidly accumulating effect of the platform choices made each day by thousands of independent developers is already causing the market to shift. Because the emerging competition between the Java and .NET platforms is subject to a substantial "feedback effect" in which "one product or standard tends toward dominance,"<sup>5</sup> there is a "serious risk that in the near future" the aggregate effect of such choices will become a self-reinforcing avalanche of adoption that irreparably "tips" the market in favor of .NET.<sup>6</sup> But as the district court also found, it is impossible to ascertain when such tipping might occur in time to prevent it from happening.<sup>7</sup> If the market tips, Sun could not be adequately compensated in damages.<sup>8</sup>

Faced with powerful and accelerating market conditions that Microsoft has illegally skewed to its advantage, the district court granted "precisely

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<sup>4</sup> Op.19-23.

<sup>5</sup> Op.13.

<sup>6</sup> Op.20.

<sup>7</sup> Op.20.

<sup>8</sup> Op.20.

tailored” preliminary injunctive relief designed to let the market, not Microsoft’s unlawful conduct, decide the competition.<sup>9</sup> The court did not enjoin Microsoft from shipping .NET or from vigorously competing with the Java platform. Rather, to preserve the potential for future competition pending trial, it ordered Microsoft to include Sun’s Java Runtime Environment (“JRE”) in Windows XP if Microsoft also distributes .NET with Windows XP. Because any potential harm to Microsoft from distributing Sun’s JRE with Windows XP will be “slight,” the preliminary injunction is an equitable way to preserve competition as well as the court’s ability to grant relief after trial.

On appeal, Microsoft asks this Court to weigh the equities differently. Because the district court stated that it could not find at this precise moment that the market will tip imminently, Microsoft claims that courts are powerless to intervene, no matter how grievous the threatened harm. But Microsoft’s argument would turn equity on its head. As the district court found, there is a “serious risk” the market will tip in the near future, “it is impossible to ascertain when the market may tip in time to prevent it from happening, and if the market does tip in favor of .NET, Sun could not be adequately compensated in damages.”<sup>10</sup> In short, Microsoft asks this Court to wait until the harm has

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<sup>9</sup> Op.29-30.

<sup>10</sup> Op.20.

become certain, at which point it will be irremediable and intervention will be pointless. Where, as here, the harm confronting Sun is so egregious and irremediable, equity demands judicial intervention, particularly since the burden to Microsoft of that intervention is “slight” and “easily remediable.”

Ignoring the unambiguous text of the parties’ Settlement Agreement, Microsoft also seeks to infringe Sun’s copyrights by distributing its MSJVM beyond the scope of its limited licenses. As the district court found, such unlicensed distribution will further damage the Java platform by fragmenting the installed base of Java platforms in a manner that denies Sun the benefit of its bargain and tramples on Sun’s intellectual property rights.

## **B. Related Actions**

### **1. Sun’s First Lawsuit Against Microsoft**

In March 1996, Sun and Microsoft entered into a license and distribution agreement in which Microsoft agreed to distribute products that incorporated current compatible versions of the Java platform. In October 1997, Microsoft released a new browser called IE 4.0 that incorporated an incompatible version of the Java platform. Sun promptly sued Microsoft for breach of contract, copyright infringement, trademark infringement, and unfair competition. The court (Judge Whyte) granted a series of preliminary injunctions enjoining Microsoft from distributing incompatible Microsoft products implementing the

Java platform.<sup>11</sup>

In January 2001, Sun and Microsoft executed a Settlement Agreement in which Microsoft paid Sun \$20 million,<sup>12</sup> and Sun terminated all prior licenses granted to Microsoft. In their place, Sun granted Microsoft several carefully limited licenses to distribute products that incorporated Microsoft's existing MSJVM.<sup>13</sup> Sun also released certain claims, but specifically reserved and did not release its antitrust claims against Microsoft.<sup>14</sup>

## 2. *United States v. Microsoft*

In 1998, the United States and certain states sued Microsoft in the U.S. District Court for the District of Columbia alleging violations of federal and state antitrust laws. After a 76-day bench trial, the D.C. District Court (Judge Jackson) issued extensive findings of fact and conclusions of law, holding, *inter alia*, that Microsoft engaged in a series of anticompetitive acts directed against the Java platform and its primary non-Microsoft distribution vehicle, Netscape's Navigator browser, in order to illegally maintain its monopoly in the PC OS

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<sup>11</sup> See *Sun Microsystems, Inc. v. Microsoft Corp.*, 999 F.Supp. 1301 (N.D. Cal. 1998); *Sun Microsystems, Inc. v. Microsoft Corp.* 21 F.Supp. 2d 1109 (N.D. Cal. 1998), *vacated and remanded*, 188 F.3d 1115 (9th Cir. 1999); *Sun Microsystems, Inc. v. Microsoft Corp.*, 87 F.Supp. 2d 992 (N.D. Cal. 2000).

<sup>12</sup> PX3[¶5].

<sup>13</sup> PX3[¶¶6(a)-(d)]

<sup>14</sup> PX3[¶17(b)].

market.<sup>15</sup>

In August 2001, the Court of Appeals for the District of Columbia, sitting *en banc*, unanimously affirmed in part, reversed in part, and remanded in part the district court's final judgment.<sup>16</sup> After reviewing the record with "painstaking care," the D.C. Circuit affirmed all of the district court's factual findings.<sup>17</sup> It also affirmed the holding that Microsoft violated Section 2 of the Sherman Act by illegally maintaining its PC OS monopoly through the following anticompetitive acts:

- Prohibiting Original Equipment Manufacturers ("OEMs") from modifying the Windows desktop or removing Microsoft's Internet Explorer ("IE") browser;
- Requiring Internet access providers and software developers to promote Microsoft's IE as their exclusive or default browser;
- Threatening to cancel Microsoft Office for the Mac OS unless Apple used IE as the default Mac OS browser;
- Conditioning Windows support and technical assistance for software developers on their promise to make Microsoft's incompatible MSJVM the default JRE in the software they developed;
- Pressuring Intel to cease development and support for the Java platform; and

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<sup>15</sup> See *FOF* §§ 1-412; *United States v. Microsoft Corp.*, 87 F.Supp. 2d 30 (D.D.C. 2000).

<sup>16</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) ("*Microsoft III*").

<sup>17</sup> *Id.* at 118.

- Deliberately deceiving developers into creating Windows-dependent Java applications.<sup>18</sup>

The D.C. Circuit concluded, however, that the government had failed to rebut Microsoft's pro-competitive justification for development of its incompatible MSJVM, and reversed the district court's holding that development of the MSJVM was an anticompetitive act.<sup>19</sup>

On remand, Microsoft reached a settlement with the United States and nine states. The non-settling states pressed for additional remedies, including a remedy similar to the relief entered in this case.<sup>20</sup> After trial, the district court (Judge Kollar-Kotelly) rejected the non-settling states' proposed remedies, holding that it was limited under the mandate rule to the revised liability findings of the D.C. Circuit, that the effect of Microsoft's actions on markets other than the PC OS market were "more appropriately addressed as separate claims, in a separate suit," and that the antitrust injunction at issue here "is best resolved, if at all, through [Sun's] already-pending private lawsuit."<sup>21</sup>

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<sup>18</sup> *Microsoft III*, 253 F.3d at 118, 61-66, 68-77.

<sup>19</sup> *Id.*, 253 F.3d. at 74-75.

<sup>20</sup> *New York v. Microsoft Corp.*, 224 F.Supp. 2d 76 (D.D.C. 2002).

<sup>21</sup> *Id.* at 134, 260-62.

## C. Course of Proceedings

### 1. Sun's Preliminary Injunction Motion

On March 8, 2002, less than one month after Microsoft began distributing its .NET Framework, Sun initiated this suit and filed its preliminary injunction motion.<sup>22</sup>

In addition to reviewing the extensive evidentiary submissions and briefing of the parties, the district court made determinations regarding the collateral estoppel effect of the adjudications in *U.S v. Microsoft*, and held a three-day evidentiary hearing in December 2002.<sup>23</sup> During the hearing, Sun called three witnesses: Rick Ross (an independent Java developer and president of the Java Lobby), Dr. Dennis Carlton (an economist from the University of Chicago), and Richard Green (a Sun executive responsible for the Java platform). The district court found Mr. Ross's testimony to be "refreshingly independent and entirely credible," and Dr. Carlton to be "a person of probity, whose judgments are well considered and thoughtfully expressed."<sup>24</sup>

Microsoft called three of its executives: Andrew Layman, Chris Jones, and Sanjay Parthasarathy, and an economist that previously testified for

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<sup>22</sup> At Microsoft's request, the case was transferred from the Northern District of California to the District of Maryland in August 2002 for coordination with MDL proceedings before Judge Motz.

<sup>23</sup> Op.31n.17; *see also* 11/4/02MotzOp.l.

<sup>24</sup> Op.14n.8.

Microsoft in other cases, Dr. Kevin Murphy.<sup>25</sup> Regarding Dr. Murphy, the district court found “at times his responses to questions seemed overly quick and result-oriented,” and the court noted that Judge Kollar-Kotelly had “found some of his conclusions unsupported by the record.”<sup>26</sup> The district court found that the “testimony of Chris Jones and Andrew Layman gives me some pause” because “[b]oth of them seem to see the world according to Microsoft, and internal memoranda they have written suggest they share what some might characterize as their employer’s imperialistic inclinations.”<sup>27</sup>

## **2. The Court’s Opinion and Order**

On December 23, 2002, the district court issued its opinion granting Sun’s preliminary injunction motion, but deferred entry of the injunction pending further consultation with the parties.<sup>28</sup>

On January 10, 2003, the district court heard Microsoft’s motion to dismiss Sun’s complaint. After an extensive argument whether Sun had adequately pled damages as a competing operating system vendor,<sup>29</sup> the court stated that it was “going to grant the motion as to Counts One and Two with

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<sup>25</sup> Over 50% of Dr. Murphy’s total compensation in the past 12 months was from his work for Microsoft. 12/5/02HearingTr.139:7-15.

<sup>26</sup> Op.14n.8; *see New York*, 224 F.Supp. 2d at 151.

<sup>27</sup> Op.14n.8.

<sup>28</sup> Op.42.

<sup>29</sup> 1/10/03HearingTr.120:4-124:7,127:25-133:22.

leave to amend, so that we are clear, so the record is clear as to what the damage allegations are.”<sup>30</sup> Five days later, the district court clarified that it would not dismiss those claims.<sup>31</sup> As the court explained, it had mistakenly focused on the scope of Sun’s *damages*, not its antitrust standing to bring claims based on Microsoft’s unlawful monopolization of the PC OS market, which it had previously found to be sufficient in its December 23, 2002 opinion.<sup>32</sup>

On January 15, 2003, the district court heard argument regarding the form of the preliminary injunction order, resolved certain issues disputed, and instructed the parties to continue their negotiations. Six days later, the parties jointly submitted a stipulated form of order that substantially narrowed the relief originally proposed by Sun.<sup>33</sup>

The district court entered the Order on January 21, 2003, and temporarily stayed it to allow Microsoft to seek a stay pending appeal from this Court.<sup>34</sup> On February 3, this Court granted Microsoft’s motion for stay.<sup>35</sup>

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<sup>30</sup> 1/10/03HearingTr.136:13-15.

<sup>31</sup> 1/15/03HearingTr.8:8-9:20.

<sup>32</sup> 1/15/03HearingTr.2-9.

<sup>33</sup> *Compare* 1/20/03 Stipulated Order *with* 3/8/02 Proposed Order.

<sup>34</sup> Order¶14.

<sup>35</sup> The Court’s February 3 Order also denied WildTangent, Inc.’s motion to intervene, but accepted its motion as a brief *amicus curiae*. Sun responded to the substance of WildTangent’s objections to the Order in its opposition to the motion to intervene in this Court and in the district court. Since WildTangent’s

## STATEMENT OF FACTS

### A. The Sources of Microsoft's Monopoly Power

Microsoft's monopoly power in the PC OS market is protected by an "applications barrier to entry." Before Sun's introduction of the Java platform, applications written to run on an operating system like Microsoft's Windows PC OS would not run on other operating systems. This created a substantial barrier to competition because:

(1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. This "chicken-and-egg" situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems.<sup>36</sup>

This "phenomenon by which the attractiveness of a product increases with the number of people using it" is called a "feedback effect" or "network effect."<sup>37</sup>

The greater the number of consumers who have a platform, the greater the number of developers who will write applications for that platform. And as

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request to intervene and modify the Order is now pending before the district court, it would be premature for this Court to address the proposed modifications to the Order sought by WildTangent.

<sup>36</sup> *Microsoft III*, 253 F.3d at 55.

<sup>37</sup> Op.12-13; *FOF* § 39. For an overview of the economic theories underlying this phenomenon, see Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1995); Steve C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617 (1999).

more applications are written, the more attractive the platform becomes for consumers.<sup>38</sup> While Microsoft considers this reinforcing cycle “virtuous,” it is “vicious” for Microsoft’s competitors.<sup>39</sup>

## **B. The Competitive Threat Posed by the Java Platform**

### **1. The Java Platform**

Sun introduced the Java platform in 1995. The Java platform consists of a “Java virtual machine” and “Java class libraries” that together comprise a “runtime environment” upon which software applications, written in the Java programming language, can run.<sup>40</sup> By creating a common “middleware” runtime, the Java platform was designed to eliminate the applications barrier to entry between operating systems. Developers could write a single application that could run on every operating system or device that supported the Java platform, and consumers could switch between operating systems without replacing their Java applications.<sup>41</sup>

Unlike Microsoft’s business model for Windows, Sun licensed the right to make and distribute compatible versions of the Java platform and relinquished

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<sup>38</sup> Op.13; 12/4/02HearingTr.13:6-15:1; CarltonDecl.¶10; BehlendorfDecl.¶¶ 8-13.

<sup>39</sup> Op.13; *FOF* § 39; LinDecl.X28,47.

<sup>40</sup> Op.2-3; GreenSupp.Decl.¶12.

<sup>41</sup> *FOF* § 74.

control over the Java platform to an industry organization called the Java Community Process.<sup>42</sup> So long as each licensee that implements the Java platform maintains compatibility with the standard Java specifications, any licensee's implementation of the platform can be substituted for any other, and no licensee is shielded from competition by an applications barrier to entry or high switching costs.<sup>43</sup> In addition, the market for Java applications embraces every compatible system, thus giving developers a very large potential market for compatible Java applications and a very powerful economic incentive to create such applications.

Compatibility is indispensable to the competitive benefit and commercial appeal of the Java platform. As Microsoft's Bill Gates recently testified, if a software platform "fragment[s], the primary value it provides – the ability to provide compatibility across a wide range of software and hardware – would be lost."<sup>44</sup> If a platform fragments, it becomes difficult, if not impossible, to create a single application that can run on all versions of the platform. Developers are then faced with two incompatible platforms, each of which provides a market opportunity that is smaller than the original, compatible platform.

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<sup>42</sup> Op.3; HamiltonReplyDecl.¶33; HamiltonSuppDecl.¶¶24-26; 12/3/02HearingTr.136:7-38:20,142:9-43:7.

<sup>43</sup> 12/3/02HearingTr.296:14-297:5,302:18-303:1,328:1-3; GreenSupp.Decl.¶70-79.

<sup>44</sup> PX1[¶69].

Fragmentation not only diminishes the sales potential for each application, but it also increases the cost of application development.<sup>45</sup>

## **2. Threat to Microsoft's Monopoly**

Shortly after the Java platform was introduced, Netscape agreed to include the Java platform in every copy of its Navigator web browser. Because Netscape was then the leading browser supplier, its decision to incorporate the Java platform in Navigator placed enormous competitive pressure on Microsoft. As Microsoft's Chris Jones explained in 1995,

Our browser must support Java. . . . Netscape will add Java support in their Win95 version before the end of the year, and sites . . . will begin positioning Java content shortly thereafter. I believe there will be a proliferation of these objects regardless of what kind of competitor we introduce, and therefore Java will become a de facto standard we have to support.<sup>46</sup>

Senior Microsoft executives became increasingly concerned that the Java platform had “the potential . . . to diminish the applications barrier to entry protecting Microsoft's PC OS monopoly.”<sup>47</sup> As Chris Jones observed in August 1995:

We are so dominant in all other aspects of the market that we can never be displaced by a full frontal assault . . . The real threat to our business is solutions like Java, which present a different

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<sup>45</sup> 12/3/02HearingTr 99:11-100:7; 12/4/02HearingTr. 27:2-12; GreenSuppDecl. ¶¶ 101-02,112.

<sup>46</sup> Op.34n.18; PX30[MSS0065387].

<sup>47</sup> *FOF* § 75.

programming model than Windows and take developer and content provider mindshare.<sup>48</sup>

The Java platform was particularly threatening to Microsoft because it was designed and optimized for a new generation of emerging software applications in which computing was “distributed” across different devices connected through the Internet, and Microsoft “had no substitute (even on the drawing board).”<sup>49</sup>

In February 1996, Microsoft’s Senior Vice President Paul Maritz observed that “Netscape/Java is using the browser to create a ‘virtual operating system,’” and he worried that “Windows will become devalued, eventually replaceable.”<sup>50</sup> Or as Microsoft’s Bill Gates poignantly put it in September 1996:

This scares the hell out of me. It is still very unclear to me what our OS will offer to Java client applications code that will make them unique enough to preserve our market position.<sup>51</sup>

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<sup>48</sup> PX29[MS980103658]; *see also* PX30[MSS0065387] (“I think that every single one of our competitors is going to jump on Java as the way to beat Microsoft.”).

<sup>49</sup> Op.9, 29.

<sup>50</sup> LinDecl.X8[MSS0166187].

<sup>51</sup> Op.3; DayDecl.X1; *see* LinDecl.X6 (“Java represents a major threat to Microsoft’s architectural prerogatives and operating system business.... Microsoft will not win a head-on battle against Java.”).

### C. Microsoft's Anticompetitive Campaign Against the Java Platform

As outlined in a September 1995 email, Microsoft employed two anticompetitive strategies for attacking the Java platform:

As a company, we have two options for embracing and extending Java: (1) we take control of it and add Windows specific classes, or (2) we “sandbox” it, slow it down, and restrict it to a particular domain, betting that we can bring our technology to bear quickly enough to minimize the impact. While I would like to pick (2), my personal feeling is that we should strongly consider (1) – namely fully supporting Java and extending it in a Windows/Microsoft way.<sup>52</sup>

To gain control of the Java platform, Microsoft first had to obtain the right to make and distribute the platform. It did that by entering into an agreement with Sun in March 1996 that granted Microsoft the right to make and distribute products that incorporated the Java technology, provided such products passed Sun's Java compatibility tests.<sup>53</sup> But as the district court found, while “pretending to embrace the goal of compatibility, Microsoft intentionally took various steps to defeat that goal.”<sup>54</sup> As Bill Gates instructed the head of the Microsoft Java team, Microsoft's objective was to “wrest control of Java away from Sun” and “turn Java into just the latest, best way to write Windows

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<sup>52</sup> Op.24n.11; PX30[MSS0065387].

<sup>53</sup> Op.3; *FOF* § 388.

<sup>54</sup> Op.4.

applications.”<sup>55</sup>

To gain control of the Java platform, and reduce the appeal and value of the platform to developers, Microsoft fragmented the platform by distributing an incompatible version – the MSJVM. It made unauthorized modifications to the core Java classes;<sup>56</sup> excluded support and distribution for standard Java functionality;<sup>57</sup> altered its products to create and use Microsoft-specific Java applications;<sup>58</sup> and intentionally deceived developers to believe that applications they developed with Microsoft’s Java tools were compatible.<sup>59</sup>

The purpose of Microsoft’s incompatibility strategy was made plain by its internal documents. As Senior Vice President Jim Allchin wrote,

I think you are saying that whatever functionality is added by SUN you will add in a compatible way. They have you on a treadmill. I don’t understand how this is a winning course. ***I would explicitly be different – just to be different.*** . . . [W]ithout something to ***pollute Java*** more to Windows (show new cool features that are only in Windows) we expose ourselves to more portable code on other platforms....<sup>60</sup>

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<sup>55</sup> Op.4; DayDecl.X3; *see also* LinDecl.X15[MSS0097798] (“Screw Sun, cross-platform will never work. Let’s move on and steal the Java language.”).

<sup>56</sup> Op.5; *Sun Microsystems, Inc. v. Microsoft Corp.*, 999 F.Supp. 1301, 1309-10 (N.D. Cal. 1998).

<sup>57</sup> Op.4-5; *FOF* §§ 391-393.

<sup>58</sup> Op.4; *FOF* § 394; *Sun I*, 21 F.Supp. 2d at 1122-25.

<sup>59</sup> Op.5; *Microsoft III*, 253 F.3d at 76-77; *FOF* §§ 395-403.

<sup>60</sup> LinDecl.X20[MSS 0026457] (emphasis added).

Or, as Microsoft's developer tools group characterized its objective: "Kill cross-platform Java by grow[ing] the polluted Java market."<sup>61</sup>

Microsoft also used the power of its Windows distribution to induce developers and consumers to choose the version with the largest installed base: Microsoft's incompatible version. To ensure that its incompatible MSJVM achieved ubiquitous distribution, Microsoft bundled it into its Windows operating system, IE browser, and hundreds of other products. Because Microsoft incorporated its MSJVM in both Windows and Internet Explorer, "Microsoft endowed its Java runtime environment with the unique attribute of guaranteed, enduring ubiquity across the enormous Windows installed base."<sup>62</sup>

At the same time, Microsoft acted to destroy Sun's alternative distribution channels for compatible versions of the Java platform. In particular, "Microsoft undertook a number of anticompetitive actions that seriously reduced the distribution of [Netscape] Navigator . . . thereby seriously imped[ing] the distribution of Sun's JVM."<sup>63</sup>

Microsoft also acted to "sandbox" the Java platform to buy time to develop and distribute a competing platform.<sup>64</sup> It refused to upgrade the version

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<sup>61</sup> Op.5; LinDecl.X17[MSS5022826].

<sup>62</sup> *FOF* § 397.

<sup>63</sup> *Microsoft III*, 253 F.3d at 75-76; Op.5-6.

<sup>64</sup> 12/3/02HearingTr.115:1-117:2.

of the Java platform incorporated in Windows,<sup>65</sup> and prevented third parties from substituting upgraded, compatible JREs for the outdated, incompatible MSJVM bundled with Microsoft's Internet Explorer browser.<sup>66</sup>

Contrary to the wishes of consumers, developers, and PC OEMs, Microsoft dropped the MSJVM from Windows XP just as its .NET platform neared completion.<sup>67</sup> But even then, it still sought to control consumer access to Java platforms by engineering Windows XP to direct consumers who wanted a JRE to download and use only Microsoft's obsolete version.<sup>68</sup>

Microsoft's exclusionary conduct continues to this day by requiring industry participants to "abandon Java" or "twist the arms of OEMs" as the price they must pay for access to the .NET platform.<sup>69</sup>

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<sup>65</sup> PX61-62,71.

<sup>66</sup> 12/3/02HearingTr.306:9-307:15.

<sup>67</sup> LinDecl.X98 (Autodesk complaining the removal of Java VM from Windows XP is "not good for our customers"); LinDecl.X102 (Autodesk testifying *on behalf of Microsoft* that the decision to drop the MSJVM was "heavy handed" and "transparent way to try to get people to move to . . . .NET"); GarciaX16 (Compaq's complaining) & GarciaX17 (Yahoo! complaining); EbertDecl.¶¶ 18-22; HamelDecl.¶¶25-29; ManesDecl.¶¶12-17; MoskowitzDecl.¶¶19-24; SimonDecl.¶¶15-24.

<sup>68</sup> GreenReplyDecl.¶48,XJ-K.

<sup>69</sup> GarciaDecl.X19 (Microsoft's proposal to make .NET cross-platform if SAP would agree to "abandon Java"); GarciaDecl.X20 (Microsoft's attempt to co-opt Intel to "twist the arms of OEMs" to distribute .NET).

#### **D. Microsoft's Unlawful Advantage and the Continuing Harm to Competition**

Microsoft's illegal acts have substantially impaired the distribution, adoption, development, and competitive appeal of the Java platform.

By foreclosing Sun's alternative channels of distribution, Microsoft increased the relative importance of its own distribution channels, then used those channels to distribute an incompatible, Microsoft-dependent version of the platform. But for Microsoft's acts, "compatible implementations of the Java platform would have been ubiquitous on PCs."<sup>70</sup>

By distributing an incompatible version, Microsoft's also fragmented the platform, further decreasing its value to developers and end-users. When Microsoft became a distributor of the Java platform, its distribution, along with that of Netscape and the other Java licensees, made the market for Java applications larger than the market created by any other platform in the industry, including Windows.<sup>71</sup> This, in turn, gave developers a powerful economic incentive to create applications for the Java platform. It also gave Microsoft an important reason to nullify that incentive by reducing the appeal and value of the Java platform to developers.

By fragmenting the platform, Microsoft ensured that Java developers

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<sup>70</sup> Op.39.

<sup>71</sup> 12/3/02HearingTr.95:23-96:20.

could no longer expect to create a single application that would run on all versions of the Java platform.<sup>72</sup> Instead of a market opportunity that exceeded that of Windows or any other operating system, Microsoft's acts ensured that the market opportunity provided by the *compatible* Java platform on PCs would be less than that of Windows.<sup>73</sup>

By refusing to upgrade, Microsoft further reduced the incentive for developers to use the platform, and especially to target the latest, most innovative features of the platform, since applications that used such features could not execute properly on Microsoft's obsolete version of the platform.<sup>74</sup>

Not only did Microsoft's anticompetitive acts dramatically alter developers' and end-users' expectations about the value and future prevalence of the Java platform, "Microsoft bought time (seven years, as it turned out) to develop its own competitive product, and it is now bringing that product to a market its own antitrust violations have substantially distorted."<sup>75</sup>

#### **E. Emerging Competition Between Java and .NET Platforms**

Microsoft's .NET Framework copies much of the design and functionality

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<sup>72</sup> 12/3/02HearingTr.99:11-101:23,312:12-24.

<sup>73</sup> 12/3/02HearingTr.100:8-102:9,312:8-13:6.

<sup>74</sup> Op.36-37; *see* 12/3/02HearingTr.85-87,99-100,158-59,309-10,312-13.

<sup>75</sup> Op.29.

of the Java platform with one critical difference – it is available only from Microsoft and runs only on Windows.<sup>76</sup>

Currently, the Java and .NET platforms are the only competitors in the emerging market for general purpose, Internet-enabled distributed computing platforms.<sup>77</sup> These platforms are designed to enable a single application to execute on a wide range of devices, including PCs, servers, and various handheld devices (*e.g.*, PDA's, cell phones, and smart cards) connected via the Internet.<sup>78</sup> Microsoft has widely trumpeted its intention to “bet the company” on .NET by bundling it with Windows, Office, and software developer tools.<sup>79</sup> It has announced that it will ship the .NET Framework with every copy of its next major release of the Windows PC OS.<sup>80</sup> Microsoft first commercially distributed .NET in February 2002.<sup>81</sup> In August 2002, it made the .NET

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<sup>76</sup> Op.8; DayDecl.X12-15,18; LinDecl.X2,25-27; CarltonReplyDecl.¶¶13-17.

<sup>77</sup> Op.9; GarciaDecl.X2[TreadwellTr.137-38]; GarciaDecl.X3[AllchinTr.25]; LinDecl.X25[MSSSunII106122] (“Java is the competing platform. There are two developer platforms that can deliver a global web service platform: Java and .NET”).

<sup>78</sup> Op.9. While Microsoft publicly promises some degree of interoperability between the .NET and Java platforms through adherence to industry standards, Bill Gates instructed Microsoft's executives in September 2001 to make its web service interoperability proposals “technically unpalatable to Sun.” LinDecl.X65.

<sup>79</sup> Op.8; DayDecl.X4,17.

<sup>80</sup> 12/4/02HearingTr.232-33.

<sup>81</sup> Op.8.

Framework available as a “recommended” update through Microsoft’s Windows Update service and began including it in new copies of Windows XP as an optional component. Within one month, the .NET Framework had been installed on millions of PCs.<sup>82</sup>

#### **F. Irreparable Harm to Sun**

In markets where feedback effects are strong, “one product or standard tends toward dominance,” and “[c]ompetition in such industries is ‘for the field’ rather than ‘within the field.’”<sup>83</sup> As a result, early stage competition is particularly important because it is at this stage that feedback effects take hold, setting in motion a self-reinforcing cycle that can determine a market’s structure for years to come.<sup>84</sup> Once a market is “tipped,” the market leader becomes entrenched.<sup>85</sup>

Under these circumstances, developers are the first and most important platform customers because they create the applications that will drive end-user demand for a platform.<sup>86</sup> Developers’ expectations about the extent to which the

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<sup>82</sup> GarciaDecl.X2[TreadwellTr.9-13] (The .NET Framework is also part of default installation for Windows XP Media Center and Tablet Editions); 12/4/02HearingTr.232.

<sup>83</sup> Op.13.

<sup>84</sup> 12/4/02HearingTr.15:11-16:5.

<sup>85</sup> *Id.*

<sup>86</sup> Op.11; CarltonReplyDecl., ¶¶21-23; LinDecl.X31-34,87.

Java and .NET platforms will be distributed on PCs in the future will be a “critical factor” in influencing developers’ decisions because of the importance of the PC market to developers.<sup>87</sup>

As the district court found, there will be a “substantial feedback effect in the market for general purpose, Internet-enabled distributed computing platforms as the competition between .NET and Java unfolds” and, as a result, “.NET and Java will compete for the field rather than within the field.”<sup>88</sup>

Because Microsoft can distribute .NET with virtually every PC sold just by bundling it with Windows, Microsoft enjoys a “significant distribution advantage” over its competitors.<sup>89</sup>

By contrast, the level of distribution currently available to the .NET platform is simply unattainable by Sun because Microsoft has “seriously impeded”<sup>90</sup> distribution of the compatible Java platform, undermined expectations about its future prevalence, and reduced the economic incentives for developing or using the platform.<sup>91</sup>

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<sup>87</sup> Op.11n.7; CarltonReplyDecl.¶30-31.

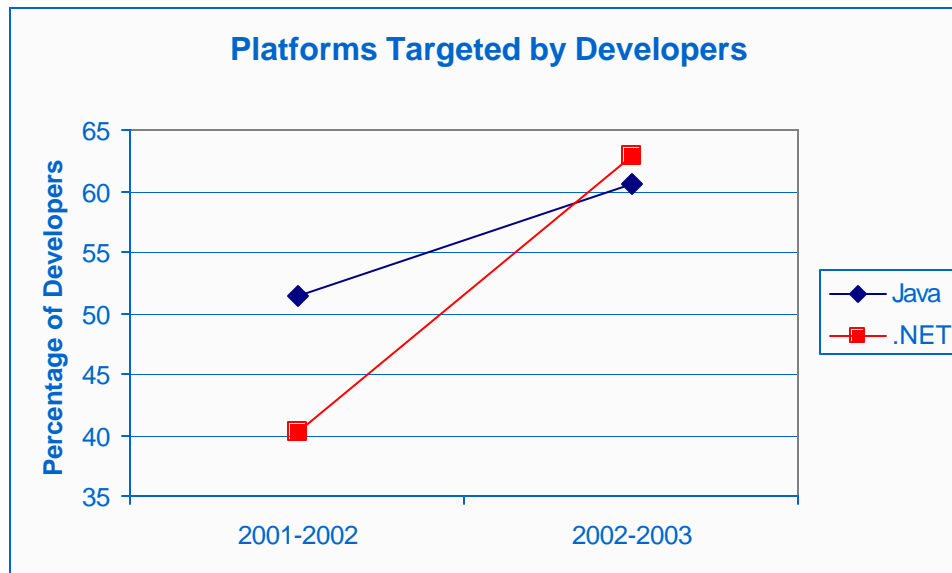
<sup>88</sup> Op.16; GarciaDecl.X2[TreadwellTr.139]; GarciaDecl.X3[AllchinTr.68-69,127]; GarciaDecl.X6[FrazierTr.65-67]; LinDecl.X1[MSSSunII152784].

<sup>89</sup> GarciaDecl.X2[TreadwellTr.126:12-21].

<sup>90</sup> *Microsoft III*, 253 F.3d at 76.

<sup>91</sup> 12/4/02HearingTr.25:24-27:12(Carlton);12/3/02HearingTr.309:20-311:25,332:1-335:7(Ross);12/3/02HearingTr.99:11-102:9(Green).

Despite the fact that the Java platform had a substantial head start and that Microsoft only recently began distributing the .NET Framework, developer adoption of .NET has been rapid and dramatic. According to an October 2002 developer survey depicted below, more developers will write for the .NET Framework in 2003 than the Java platform.<sup>92</sup>



As the survey demonstrates, Sun is losing developers to the .NET platform every day. That damage cannot be adequately compensated.<sup>93</sup> Moreover, as developers' expectations shift and applications proliferate, feedback effects are already taking hold. In the near future, there is a "serious risk" that the market will tip, and once tipped, will become entrenched for years to come.<sup>94</sup>

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<sup>92</sup> GarciaDecl.DX23.

<sup>93</sup> Op.20.

<sup>94</sup> 12/3/02HearingTr.360:19-362:4.

## **G. Microsoft's Copyright Infringement**

In October 2001 Microsoft began distributing Windows XP without the MSJVM. Rather than incorporate the MSJVM into Windows XP, Microsoft instead distributed the MSJVM separately from any licensed product to individual consumers via the Internet and to PC OEMs via standalone CD.

Microsoft's distribution was not licensed. The Settlement Agreement grants Microsoft a limited license to incorporate the MSJVM into certain specified products and to distribute the products that incorporate the MSJVM.<sup>95</sup> It does not grant Microsoft any license to distribute the MSJVM either on a standalone basis or for incorporation into Microsoft products by anyone other than Microsoft.<sup>96</sup>

By distributing the MSJVM for optional incorporation by end-users and OEMs, Microsoft ensured that the prevalence of the MSJVM would necessarily be less than the prevalence of Windows XP, and that there would be no way for developers to predict whether an end-user's machine would have an MSJVM.<sup>97</sup> This, in turn, reduced the size of the market for Java applications and increased both the cost and the risk to developers of creating Java applications, thus

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<sup>95</sup> GreenReplyDecl.¶36.

<sup>96</sup> GreenReplyDecl.¶¶37-40.

<sup>97</sup> 12/3/02HearingTr.156:25-58:9; Op.42.

further diminishing the value and competitive appeal of the Java platform for application development.

## STANDARD OF REVIEW

Microsoft bears the burden of showing that the district court abused its discretion in granting the injunction.<sup>98</sup> A district court's factual findings underlying a preliminary injunction, such as its finding of irreparable harm, must be accepted unless clear error is shown.<sup>99</sup> To overturn the findings made below, Microsoft must do more than show that the appellate court could reweigh the evidence differently than the district court did.<sup>100</sup> Rather, the Court must be left with "a definite and firm conviction that a mistake has been committed."<sup>101</sup> Where the factual findings rest on the district court's credibility determinations, even greater deference is required.<sup>102</sup>

Microsoft's challenge to the district court's interpretation of the Settlement Agreement is subject to *de novo* review.<sup>103</sup>

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<sup>98</sup> See *Giovani Carandola, Ltd. v. Bascon*, 303 F.3d 507, 511 (4th Cir. 2002).

<sup>99</sup> *Id.* See also *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994).

<sup>100</sup> *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

<sup>101</sup> See *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 358 (4th Cir. 1991) (same standard characterized as "clearly erroneous").

<sup>102</sup> *Anderson*, 470 U.S. at 574.

<sup>103</sup> *Williams v. Professional Transp. Inc.*, 294 F.3d 607, 613 (4th Cir. 2002).

## SUMMARY OF THE ARGUMENT

### A. The Antitrust Injunction

The district court's injunction serves the public interest in preserving competition while preventing Microsoft from continuing to exploit the competitive disadvantages its anticompetitive acts have inflicted on the Java platform.

It is based on the district court's well-supported findings that the balance of hardships tips sharply in Sun's favor; that Microsoft's illegal acts create the "serious risk that in the near future the market will tip in favor of .NET," rendering the Java platform, like the Navigator browser before it, "virtually extinct;" that "it is impossible to ascertain when such tipping might occur in time to prevent it;" that once it occurs, "Sun could not be adequately compensated in damages;" that even absent tipping Microsoft's illegal acts will continue to distort the competition between Java and .NET by depriving Java of the ubiquity, developer support, and consumer adoption it would otherwise have enjoyed; and that any harm to Microsoft from entry of the Order would be "slight" and "ephemeral or easily reversible."

The court's injunction also is based on the well-supported finding that Sun has demonstrated a strong likelihood of success on its antitrust claim. That finding rests on the affirmed findings of the government case (secured here by

collateral estoppel), findings of Judge Whyte in *Sun I*, admissions of Microsoft that its conduct was anticompetitive, and the district court's own findings on the anticompetitive effect of Microsoft's illegal distribution of an incompatible MSJVM. Sun's standing to bring this claim is undeniable, not only because Sun is the direct, intended victim of Microsoft's anticompetitive attacks on the Java platform, but also because Sun has sustained injury in the PC OS market where its Intel-compatible Solaris OS directly competes with Windows.

**B. The Copyright Injunction**

The copyright injunction is based on the district court's correct determination – after consideration of extensive parol evidence – that Sun is likely to succeed on the merits of its claim that Microsoft's distribution of its MSJVM falls outside the plain scope of the limited licenses granted by the Settlement Agreement. It is also based on the district court's well-supported finding that Microsoft failed to rebut the presumption of irreparable harm arising from Microsoft's infringement, particularly given that Microsoft's unlicensed MSJVM distribution “increased th[e] fragmentation” of the Java platform.

## ARGUMENT

### I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE BALANCE OF HARDSHIPS FAVORS SUN.

The “first step” in determining whether to grant a preliminary injunction is “to balance the ‘likelihood’ of irreparable harm to the plaintiff against the ‘likelihood’ of harm to the defendant.”<sup>104</sup> Here, the district court found the balance of hardships tips sharply in Sun’s favor.<sup>105</sup>

#### A. The District Court Appropriately Found a Likelihood of Irreparable Harm to Sun.

Citing this Court's holding in *Direx Israel Ltd. v. Breakthrough Medical Corp.*,<sup>106</sup> Microsoft argues that Sun failed to make a clear showing that it will suffer an immediate irreparable harm if the relief it seeks were not granted. In support of its argument, Microsoft points to the district court’s statement that it did “not find that at this precise moment there is an imminent threat that the market for general purpose, Internet-enabled distributed computing platforms will tip in favor of .NET.”<sup>107</sup> Microsoft also points to the testimony of Sun's economic expert, Dr. Carlton, who testified that given the uncertainties of the

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<sup>104</sup> *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 195 (4th Cir. 1977).

<sup>105</sup> Op.26.

<sup>106</sup> 952 F.2d 802, 815 (4th Cir. 1991).

<sup>107</sup> Op.20.

market, he could not say with certainty that the market would tip toward .NET if the injunction were denied.<sup>108</sup>

What Microsoft ignores, however, are the district court's findings that Microsoft's antitrust violations have created a "serious risk that in the near future the market will tip in favor of .NET, that it is impossible to ascertain when such tipping might occur in time to prevent it from happening, and that if the market does tip in favor of .NET, Sun could not be adequately compensated in damages."<sup>109</sup> Ample evidence supports all of these findings. Collectively, they demonstrate both the propriety and the necessity of the preliminary relief entered by the district court.

Where, as here, a court in equity finds a serious risk of irreparable harm in the near future unless an injunction is granted, and no way to detect the impending harm in time to stop it, equity demands judicial intervention, particularly if, as here, it also finds that the burden to defendant of such intervention is "slight" and "easily remediable."<sup>110</sup> If, as Microsoft argues, the rule were otherwise, a court in equity could intervene only after the irreparable harm had already occurred and could not be prevented. By then, however, as

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<sup>108</sup> 12/4/02HearingTr.35:4-9.

<sup>109</sup> Op.20. Microsoft also ignores the District Court's finding that tipping is not the only irreparable harm Sun will suffer if the injunction is denied. *See infra* at 42-48.

<sup>110</sup> Op.24.

the district court also found, such intervention would be pointless since the market will have irretrievably tipped to .NET, and Sun cannot be adequately compensated in damages for the harm it will have suffered.

What distinguishes the circumstances presented here from the facts in *Direx* are the district court's findings that Microsoft already is exploiting the competitive advantage its illegal acts have created, and that it is impossible to ascertain when tipping may occur in time to stop it. In *Direx*, by contrast, the defendant was “completely immobilized” from competing because it was legally precluded from entering the market to exploit its alleged wrongdoing until it received FDA approval and the plaintiff would have ample notice and opportunity prior to that approval to obtain judicial intervention to prevent the harm from occurring.<sup>111</sup>

*Scotts Co. v. United Industries Corp.*,<sup>112</sup> also cited by Microsoft, is similarly inapposite. In *Scotts*, the plaintiff sought a preliminary injunction barring a competing manufacturer of crabgrass control products from the market based on trademark infringement. This Court vacated the injunction granted by the district court because the record established that the threatened harm could not occur prior to the time of trial, and thus a permanent injunction after trial

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<sup>111</sup> 952 F.2d at 815-16.

<sup>112</sup> 315 F.3d 264 (4th Cir. 2002).

would “be more than sufficient to protect” plaintiff’s market share and reputation.<sup>113</sup> No such protections are possible here.

Pointing to Dr. Carlton’s acknowledgment that he “cannot determine whether tipping away from Java is more likely than not,”<sup>114</sup> Microsoft ignores the substance of Dr. Carlton’s analysis, which the district court credited over the opinions of Microsoft’s economist.<sup>115</sup> As the district court noted, the fact that Dr. Carlton, a highly respected economist specializing in industrial organization, was unwilling to predict outcomes with certainty in a highly complex, emerging market is a testament to his probity and analytical rigor, not a deficiency in Sun’s case.

While Dr. Carlton had “a general concern” about intervening in markets for fear of “creating inefficiencies,”<sup>116</sup> he concluded that prompt intervention was appropriate as an economic matter in this case because Microsoft’s anticompetitive acts gave it an illegitimate competitive advantage that “significantly impaired” Java’s competitive position relative to .NET.<sup>117</sup> As Dr. Carlton explained, the importance of that illegitimate advantage is increased,

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<sup>113</sup> *Id.* at 283-84.

<sup>114</sup> Op.16.

<sup>115</sup> Op.14 n.8.

<sup>116</sup> 12/4/02HearingTr.11:11-19.

<sup>117</sup> 12/4/02HearingTr.32:21-33:7.

particularly at such early stage competition, by the presence of feedback effects, which imbue seemingly small initial advantages with “detrimental and long-lasting consequences on the market structure that emerges,” ultimately becoming “entrenched” and “very hard to undo.”<sup>118</sup> By partially offsetting the illegitimate advantage seized through Microsoft’s anticompetitive acts, the preliminary injunction would “allow competition between .NET and Java to occur” without imposing large costs on Microsoft or anyone else, and that would simplify the future calculation of damages.<sup>119</sup>

In light of the record and findings here, equity requires prompt intervention, particularly given the enormous and irreparable harm Sun will suffer if the market tips toward .NET as a result of Microsoft’s illegal acts, the impossibility of ascertaining when that harm might occur in time to prevent it, and the virtual absence of harm imposed on Microsoft by the Order.<sup>120</sup>

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<sup>118</sup> 12/4/02 HearingTr.18:8-19:4,35:20-36:7.

<sup>119</sup> 12/4/02HearingTr.36:8-38:6.

<sup>120</sup> Op.23-26. *See Multi-Channel*, 22 F.3d at 551 (permanent loss of customers is irreparable harm); *see also Lorain Journal Co. v. United States*, 342 U.S. 143, 148-57 (1951) (affirming mandatory injunctive relief to prevent the “dangerous probability” that monopolist would succeed in eliminating an emerging competitor); *Microsoft III*, 253 F.3d at 79 (“It would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will – particularly in industries marked by rapid technological advance and frequent paradigm shifts.”); *ES Dev., Inc. v. RWM Enter., Inc.*, 939 F.2d 547, 558 (8th Cir. 1991); *Foremost Int’l. Tours, Inc. v. Qantas Airways, Ltd.*, 379 F.Supp. 88, 97 (D. Haw. 1974) (“An award of only

**1. Sun Faces the Serious Risk that Competition Will Tip in the Near Future in Favor of .NET.**

While Microsoft argues the district court erred by finding there is a “serious risk that in the near future the market will tip in favor of .NET,”<sup>121</sup> the record fully supports that finding.

Relying on the testimony of Microsoft’s own witnesses and documents,<sup>122</sup> the district court found that the competition between Java and .NET is marked by a “substantial feedback effect,” that such effects tend to drive one product or standard “towards dominance,”<sup>123</sup> and that, as a consequence, “.NET and Java will compete for the field rather than within the field.”<sup>124</sup>

The district court found that developer expectations about the relative prevalence of competing platforms will play a key role in the creation of a feedback effect in the competition between the Java and .NET platforms.<sup>125</sup> If

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money damages in lieu of preserving a competitor disserves the public interest.”), *aff’d*, 525 F.2d 281 (9th Cir. 1975).

<sup>121</sup> Op.20;OB32-36.

<sup>122</sup> Op.15 (citing TreadwellTr.139:13-25); *see also* LinDecl.X47[MSSunII23290] (seeking “to drive the same virtuous demand cycle for .NET among both technical and business audiences that drove the adoption and success of Windows”); LinDecl.X28[MSSunII24503].

<sup>123</sup> Op.13 (quoting *Microsoft III*, 253 F.3d at 49).

<sup>124</sup> Op.16 (citing *Microsoft III*, 253 F.3d at 49; *FOF* §§ 36-42).

<sup>125</sup> Op.20-23.

both platforms are of roughly equal quality, the expectation that .NET will be distributed ubiquitously would cause developers to write more and more .NET applications unless developers also expect the Java platform to enjoy similar ubiquity.<sup>126</sup>

As further support for its finding of a “serious risk” the market will tip toward .NET in the near future, the district court explicitly relied on October 2002 survey data showing a clear trend of developer migration to .NET, and noted two “highly pertinent” facts in the data:

“First, it is remarkable that as many as 40 percent of the developers are now targeting .NET because commercial distribution of the .NET framework is just starting. Second, within just one year, more developers say they will be targeting .NET than Java.”<sup>127</sup>

Additional record evidence supporting the district court’s finding includes the hearing testimony of Carlton,<sup>128</sup> Green,<sup>129</sup> Ross,<sup>130</sup> Jones,<sup>131</sup> and Layman,<sup>132</sup> as

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<sup>126</sup> Op.20-23. These findings dispose of Microsoft’s argument that Sun could cure the distribution disparity by distributing the Java platform itself. OB18-21. The district court cited credible evidence in support of its findings that (1) “approximate parity” is needed to avert tipping, (2) the .NET platform will be distributed ubiquitously, and (3) even by spending millions of dollars, Sun could not achieve anything close to “approximate parity.” Op.21-23.

<sup>127</sup> Op.18.

<sup>128</sup> *See, e.g.*, 12/4/02HearingTr.35:25-36:18,33:1-7(Carlton).

<sup>129</sup> 12/3/02HearingTr.138:23-139:17.

<sup>130</sup> 12/3/02HearingTr.309:20-311:25,332:1-335:7.

<sup>131</sup> 12/4/02HearingTr.229:2-19.

<sup>132</sup> 12/4/02HearingTr.176:20-25.

well as the declaration testimony of Brian Behlendorf and Steven Banfield.<sup>133</sup>

Microsoft argues that the district court should have weighed the evidence differently, placing more emphasis on analyst predictions and Sun documents addressing the general issue of developer interest in “Java” across all sectors of the market, including servers and handheld devices.<sup>134</sup> Microsoft overlooks the district court’s finding that it is the PC sector that threatens to tip the competition: “the extent to which a platform is distributed on PCs will be a critical factor in determining the outcome of this competition because PCs, in light of their universal usage, provide a limitless market for software application programs.”<sup>135</sup>

Microsoft misleadingly argues that the district court’s finding of a “serious risk” the market will tip “in the near future” cannot be squared with its statement that “within the coming years there will be intense competition between the Java platform and the .NET framework for dominance in the market.”<sup>136</sup> As is clear from its context, the district court’s reference to intense

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<sup>133</sup> BehlendorfReplyDecl.¶¶8-45; BanfieldDecl.¶¶9-16,29-35.

<sup>134</sup> OB16,22-25.

<sup>135</sup> Op.11 (citing 12/3/02HearingTr.370:8-23(Ross); 12/3/02HearingTr.266:11-267:21(Green)).

<sup>136</sup> OB33,21.

competition in the coming years was a reference to the market *after the antitrust injunction took effect*.<sup>137</sup>

## **2. Tipping Is Not The Only Irreparable Harm Confronting Sun**

In addition to the “serious risk” the market will tip in favor of .NET, the district court also found with “absolute certainty” that Sun will forever lose “the right to compete, and the opportunity to prevail, in a market undistorted by its competitor’s antitrust violations” if the injunction were denied, thereby causing Sun to suffer an injury for which “damages are difficult to ascertain or are inadequate.”<sup>138</sup> By fragmenting the Java platform, foreclosing Sun’s alternative distribution channels, and reducing the expected prevalence of the compatible Java platform on PCs, Microsoft’s anticompetitive acts have undermined the value of the compatible Java platform to developers and end-users, deprived Sun of the benefits of its ingenuity, and deprived the consuming public of the benefits of Sun’s invention.<sup>139</sup> Its anticompetitive acts also bought Microsoft much-needed time to bring a competitive product to market, thus insulating itself from the vicissitudes of competition on the merits in the interim.<sup>140</sup>

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<sup>137</sup> Op.39.

<sup>138</sup> Op.20(internal quotations omitted).

<sup>139</sup> Op.29.

<sup>140</sup> Op.29.

As the district court found, the harm caused to Sun's ability to compete on the merits is immediate and irremediable.<sup>141</sup> Each day that Microsoft is allowed to exploit the competitive disadvantages its illegal acts have inflicted on the Java platform, Sun continues to lose developers, end-users and good will in the marketplace.

Microsoft can hardly deny that the district court's Order serves appropriate antitrust objectives. The district court entered the Order both to prevent Microsoft from benefiting from its illegal behavior and to preserve future competition.<sup>142</sup>

Microsoft argues that Sun's loss of developers and consumers as a result of Microsoft's antitrust violations cannot constitute irreparable harm because, if it did, "the irreparable harm requirement would be eliminated from all antitrust cases" since "every antitrust violation 'distorts' the market in some fashion."<sup>143</sup>

Microsoft's argument ignores the fact that not all antitrust violations produce ongoing market distortions after the illegal behavior is terminated. In many cases involving an illegal merger or acquisition, for example, a forced

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<sup>141</sup> Op.20.

<sup>142</sup> Op.29.

<sup>143</sup> OB37.

divestiture undoes the distortion and restores competition.<sup>144</sup> The same is true of many illegal tying cases, in which the distortion is largely corrected by eliminating the tie.<sup>145</sup> Here, by contrast, the illegal behavior was found to produce ongoing effects that materially advantage the .NET platform and disadvantage the Java platform in a competition “for the field rather than within the field.”<sup>146</sup> When the ongoing effects of an antitrust violation threaten to distort competition in such a critical manner to benefit the wrongdoer and materially disadvantage its principal competitor, injunctive relief is warranted.<sup>147</sup>

Contrary to Microsoft’s suggestion, neither *Spectrum Sports, Inc. v. McQuillan*<sup>148</sup> nor *Murrow Furniture Galleries, Inc. v. Thomasville Furniture*

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<sup>144</sup> See *United States v. Von’s Grocery Co.*, 384 U.S. 270, 279 (1966); *United States v. El Paso Gas Co.*, 376 U.S. 651, 662 (1966).

<sup>145</sup> See *Northern Railway Co. v. United States*, 356 U.S. 1, 4 (1958); *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 314-15 (1949).

<sup>146</sup> Op.16.

<sup>147</sup> See *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 245-252 (1968) (ensuring injunctive relief sufficiently forceful “to restore workable competition in the market” ten years after court first imposed a variety of restrictions to recreate a competitive market); *Ford Motor Co. v. United States*, 405 U.S. 562, 572-78 (1972) (affirming mandatory injunction to create “an adequate distribution system” needed to “re-establish” competitor and maintain its viability until forces at work within the market weaken the effects of its violation); *International Salt Co., Inc. v. United States*, 332 U.S. 392, 400-01 (1947); *Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616 (4th Cir. 1979); *City of Chanute v. Kansas Gas and Elec. Co.*, 754 F.2d 310 (10th Cir. 1985).

<sup>148</sup> 506 U.S. 447, 458 (1993).

*Indus.* holds otherwise.<sup>149</sup> Neither case addresses, let alone undercuts, the well-established principle that injunctive relief is warranted when the ongoing effects of an antitrust violation threaten to distort competition in a manner that materially benefits the wrongdoer and disadvantages its principal competitor.

Microsoft also argues that its distribution of .NET is not an antitrust violation, and Sun should not be permitted to “shield itself from competition from a new entrant.”<sup>150</sup> Microsoft’s argument misses the point. It is reminiscent of Tonya Harding arguing that all she wanted to do was skate in the Olympics after her henchmen knee-capped Nancy Kerrigan. As the district court explained, the Order “corrects a distortion in the market that Microsoft itself has unlawfully ‘engineered;’”<sup>151</sup> it neither distorts the market nor shields the Java platform from competition.

The extreme difficulty in calculating the damages inflicted each day on Sun as a result of the illegitimate competitive advantage created by Microsoft’s antitrust violations further supports the district court’s holding that Sun would suffer irreparable harm if the injunction were denied. As the district court found, developers are important customers of software platforms because they create the applications that fuel the reinforcing cycle of demand for platform

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<sup>149</sup> 889 F.2d 524, 527 (4th Cir. 1989).

<sup>150</sup> OB37.

<sup>151</sup> Op.30.

usage and adoption.<sup>152</sup> In the present competition for developer mindshare and support, the district court found that Microsoft’s anticompetitive acts have “achieved their intended purpose of destroying software developers’ confidence and expectation that Java would become prevalent on PCs.”<sup>153</sup> As a result, Sun is being threatened with the loss of an important class of customers – developers – at a stage in the competition when their loss can prove dispositive to the ultimate structure of the market.

Based on the market survey data and testimony of record, that loss is substantial and increasing. Such loss of customers and good will plainly constitutes irreparable harm. Indeed, this Circuit has found irreparable harm under fact scenarios involving far less devastating or complicated harm than that sustained by Sun here.<sup>154</sup>

Given the importance of developer support to the competition between the Java and .NET platforms, the loss of developers to .NET as a result of Microsoft’s illegal acts irreparably harms Sun by creating damages whose

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<sup>152</sup> Op.12-16.

<sup>153</sup> Op.5,36-37.

<sup>154</sup> See *Multi-Channel*, 22 F.3d at 546, 551-52 (4th Cir. 1994) (irreparable harm based on lost cable service revenue to three apartment buildings); *Blackwelder*, 550 F.2d at 197 (irreparable harm based on the termination of one of many furniture lines sold by plaintiff retailer); see also *Ross Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19-20 (1st Cir. 1996).

monetary estimation is both complex and difficult.<sup>155</sup> Sun's Java platform-based damages claim is especially difficult to measure because it derives not only from lost Java platform licensing revenue, but also from lost sales of other Sun products (such as hardware and operating systems) whose sales would have been enhanced by the Java platform but for Microsoft's illegal acts.<sup>156</sup>

Microsoft argues Sun's injury is compensable in monetary damages because Sun could have paid "modest sums" of money to secure the distribution for the Java platform necessary to prevent tipping.<sup>157</sup> But weighing the evidence, the district court squarely found that was not the case,<sup>158</sup> and Microsoft fails to show that finding clearly erroneous.

Microsoft also argues that Sun's loss of developer support and end-user adoption constitutes easily calculable harm, in light of *Merrit v. Marsh*.<sup>159</sup> According to Microsoft, *Merrit* stands for the proposition that "the loss 'of the opportunity to bid on an undetermined number' of potential customers is not

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<sup>155</sup> Op.30 n. 15.

<sup>156</sup> See, e.g., Sun's First Amended Complaint ¶¶247-312; *Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27 (2nd Cir. 1995) (affirming mandatory preliminary injunction because damages will be more difficult to quantify where injury is to a product that "increases business of the plaintiff beyond sales of that product . . . by attracting customers who make purchases of other goods while buying the products in question.")

<sup>157</sup> OB39-40.

<sup>158</sup> Op.20-23.

<sup>159</sup> 791 F.2d 328 (4th Cir. 1986).

irreparable harm.”<sup>160</sup>

*Merrit* stands for no such thing, and is readily distinguishable. In *Merrit*, this Court reversed the district court’s preliminary injunction because plaintiff was unlikely to succeed on the merits and fell short of the elevated showing required to show irreparable harm. Indeed, as the court found, the plaintiff in *Merrit* failed to submit evidence sufficient to support *any* of the allegations underlying its irreparable harm claim.<sup>161</sup>

**B. The District Court Did Not Abuse its Discretion by Finding the Potential Harm to Microsoft was “Slight” and “Ephemeral or Easily Remediable.”**

Based on its thorough review of the evidence, the district court did not abuse its discretion by finding that “Microsoft’s potential harm is slight if the injunction is granted.”<sup>162</sup> As carefully detailed in the district court’s opinion, the record fully supports its determination that the potential problems identified by Microsoft were “ephemeral or easily remediable.”<sup>163</sup> The district court carefully considered and rejected each and every one of the potential harms raised by

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<sup>160</sup> OB38-39.

<sup>161</sup> *Merrit*, 791 F.2d at 331 n.4.

<sup>162</sup> Op.26.

<sup>163</sup> Op.23-26;Order¶5.

Microsoft based on the evidence of record and the credibility of Microsoft's witness regarding potential harm – Christopher Jones.<sup>164</sup>

The district court found that the preliminary injunction would not threaten the shipping dates for Windows because the injunction expressly provided adequate time for Microsoft to comply, and additional adjustments could be, and in fact were, made in the final Order.<sup>165</sup> The district court determined that Microsoft's argument that it would be exposed to intellectual property infringement claims was "fully" remedied by Sun's offer to provide indemnification, which the Order expressly provides.<sup>166</sup> Microsoft's claim that the injunction would impose no limit on what Sun could include in the JRE Software was addressed by compatibility test requirements as well as additional restrictions included in the final Order.<sup>167</sup> Similarly, its claim of substantial support costs was belied by Microsoft's past experience and expressly addressed in the final Order.<sup>168</sup> Microsoft has not shown these finding were clearly erroneous.

The district court found Microsoft's arguments that the preliminary

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<sup>164</sup> Op.14n.8&24n.11.

<sup>165</sup> Op.24; *see* Order¶1 (120 days to comply with additional time for various language versions), Order¶12 (extensions available for good cause).

<sup>166</sup> Op.24; Order¶7(d),XA.

<sup>167</sup> Op.24; Order¶¶7(a),10(d).

<sup>168</sup> Op.25-26.

injunction would affect the quality or security of Windows to be unconvincing.<sup>169</sup> Microsoft's complaints were "only generalized in nature" with no specific evidence of quality or security problems.<sup>170</sup> Microsoft's offer during settlement negotiations to ship Sun's JRE with Windows indicated it did not have genuine concerns with the quality and security of Sun's software.<sup>171</sup> Similarly, Microsoft's internal analysis indicated that inclusion of a third-party JRE "would be fairly straightforward."<sup>172</sup> The final Order provides additional protections, including conditioning the Order on Sun's providing reasonable engineering assistance and notification of security vulnerabilities to Microsoft as well as the posting of a \$25 million bond.<sup>173</sup>

Unable to demonstrate any clear error in the district court's findings, Microsoft falsely represents that the district court "rejected [Microsoft's] concerns . . . because 'of the strong evidence demonstrating that it is Microsoft's misconduct that has poisoned its relationship with Sun.'"<sup>174</sup> But that is *not* what the district court said or did. The district court referred to the "poisoned" relationship only in the context of rejecting Microsoft's argument that it was

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<sup>169</sup> Op.25.

<sup>170</sup> Op.25; 12/4/02HearingTr.233-34.

<sup>171</sup> Op.25; GreenReplyDecl.¶¶15-23.

<sup>172</sup> Op.25; PX37[MSSunII21459]; 12/4/02HearingTr.239.

<sup>173</sup> Order¶¶1,6,7(b),7(c),12,13.

<sup>174</sup> OB40.

willing to ship an IBM JVM, but not a Sun JVM, because Microsoft had poor relationship with Sun.<sup>175</sup> On that point, the district court was justified in considering Microsoft's role in poisoning the relationship.

Given Microsoft's unique monopoly position and past anticompetitive acts, some degree of cooperation is necessary to effectuate relief. But Microsoft should not be allowed to point to its animosity towards Sun born of past illegal acts as an excuse for evading injunctive relief.<sup>176</sup> The fact that the parties were able to negotiate and stipulate to a final form of Order suggests that cooperation is not impossible. Rather than requiring undue judicial supervision, the district court found that the remedy was "elegantly simple."<sup>177</sup> This Court should defer to such a determination regarding the scope of injunctive relief and the need for judicial supervision, particularly since the district court retains the authority to modify or dissolve the preliminary injunction in the future.<sup>178</sup>

**II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT SUN IS LIKELY TO SUCCEED ON THE MERITS OF ITS ANTITRUST CLAIM.**

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<sup>175</sup> Op.25.

<sup>176</sup> *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 335 (8th Cir. 1983) (rejecting argument that injunction enforcing duty to deal would require undue supervision because "those caught violating the Sherman Act must expect some fencing in").

<sup>177</sup> Op.29.

<sup>178</sup> *Int'l Salt*, 332 U.S. at 400-402.

**A. Sun’s Likelihood of Success is Strong Given the Prior Adjudication Establishing Microsoft’s Illegal Acts of Monopoly Maintenance.**

Microsoft is collaterally estopped from re-litigating the findings of fact decided against it and affirmed by the D.C. Circuit in *United States v.*

*Microsoft*.<sup>179</sup> As a result, it has been conclusively established that: (1)

Microsoft has monopoly power in the PC OS market, (2) it engaged in a series of illegal, anticompetitive acts against the Java platform and Sun, and (3) those acts substantially impaired the competitive viability of the Java platform.<sup>180</sup>

**B. The District Court Did Not Abuse Its Discretion in Finding that Microsoft’s Distribution of Incompatible Java Products To Be Anticompetitive.**

Microsoft contends that the district court abused its discretion by reaching a different conclusion than the D.C. Circuit in *U.S. v. Microsoft* regarding Microsoft’s distribution of incompatible Java products.<sup>181</sup>

Unlike Microsoft, however, Sun is not bound by any adverse determinations in *U.S. v. Microsoft* because it was not a party to that litigation,

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<sup>179</sup> Op.26; *see also* 11/4/02MotzOpinion1; *Parklane Hoisery Co. v. Shore*, 439 U.S. 322, 328-31 (1979).

<sup>180</sup> *Microsoft III*, 253 F.3d at 54-56, 75-78; *FOF* §§ 76-77,386-90,394-95,397-99,401,404-07,409,411.

<sup>181</sup> OB43-46; *compare* Op. 4-5,28-29 (distribution of incompatible MSJVM anticompetitive) *with Microsoft III*, 253 F.3d at 74-76 (government failed to rebut Microsoft’s pro-competitive justification for development of incompatible MSJVM).

and thus did not have the opportunity to present its case.<sup>182</sup>

Moreover, unlike the district court here, the D.C. Circuit never decided whether Microsoft was precluded by contract from doing what it did. While a breach of contract by itself is not an antitrust violation, where, as here, it is motivated by anticompetitive intent and has an anticompetitive effect, it can form the basis of such a claim.<sup>183</sup>

Nor did the D.C. Circuit address the issue decided by the district court here: whether a pro-competitive justification existed for Microsoft to exclude Sun's standard Java interfaces like JNI, and if so, whether the justification outweighed its anticompetitive affect. The district court found, on balance, that Microsoft's acts were anticompetitive<sup>184</sup> because Microsoft could have supported both the standard Java interfaces and its own private interfaces. Whatever procompetitive justification Microsoft may have had to add Microsoft-dependant interfaces, it has no such justification to exclude standard Java interfaces, particularly since it had promised to support them. Microsoft's exclusion of Sun's standard Java interfaces therefore lacked pro-competitive

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<sup>182</sup> See Op.2; *Parklane Hoisery Co. v. Shore*, 439 U.S. at 327 n.7.

<sup>183</sup> See *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 510-11 (3d Cir. 1976); *De Voto v. Pacific Fidelity Life Ins. Co.*, 516 F.2d 1, 5 (9th Cir. 1975).

<sup>184</sup> Op.4-5,28-29.

justification.<sup>185</sup> That finding was supported by testimony – not before the D.C. Circuit – from the head of Microsoft’s Java engineering team that Microsoft’s exclusion of JNI and RMI did not increase the speed with which the MSJVM executes applications.<sup>186</sup> Similarly, the court in *Sun I* held that Microsoft’s exclusion of JNI was “[w]ithout apparent technological or pro-competitive justification.”<sup>187</sup>

Microsoft also misses the mark in arguing that its anticompetitive intent is an insufficient basis for imposing liability.<sup>188</sup> The district court found that Microsoft violated the antitrust laws by distributing an incompatible implementation of the Java platform with the purpose *and effect* of maintaining the applications barrier to entry protecting its monopoly.<sup>189</sup>

**C. Sun has Antitrust Standing to Bring a Claim Based on Microsoft’s Unlawful Maintenance of its PC OS Monopoly.**

The district court did not err in finding that Sun has standing to bring an antitrust claim based on Microsoft’s illegal acts in the PC OS market.<sup>190</sup>

Contrary to Microsoft’s claim, antitrust protection is not limited to

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<sup>185</sup> Op.26-27.

<sup>186</sup> GarciaDecl.X43[MillerTr.233:20-234:2].

<sup>187</sup> *Sun Microsystems, Inc. v. Microsoft Corp.*, 87 F.Supp. 2d at 1000.

<sup>188</sup> OB45-46.

<sup>189</sup> Op.1-5,26-30.

<sup>190</sup> Op.32.

consumers or competitors in the restrained market.<sup>191</sup> Antitrust injury is “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”<sup>192</sup> As the Supreme Court explained in *Blue Shield of Virginia v. McCready*,<sup>193</sup> the Clayton Act “does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practice.”<sup>194</sup> The Java platform need not “compete” in the PC OS market or be a perfect substitute for Microsoft’s Windows PC OS in order to be entitled to antitrust protection.<sup>195</sup>

The injury that Sun has and will suffer is precisely the type of injury that the antitrust laws were designed to prevent. Microsoft attacked the Java platform because it could lower the applications barrier to entry, erode Microsoft’s monopoly power, and re-ignite competition within the PC OS

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<sup>191</sup> OB49; see *American Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1057 (9th Cir. 1999)(“Supreme Court has never imposed a consumer or competitor test but has instead held the antitrust laws are not so limited.”); *Crimpers Promotions, Inc. v. HBO, Inc.*, 724 F.2d 290, 296 n.6 (2d Cir. 1983).

<sup>192</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

<sup>193</sup> 457 U.S. 465 (1982).

<sup>194</sup> *Id.* at 472.

<sup>195</sup> *Microsoft III*, 253 F.3d at 54; *Bristol Tech., Inc. v. Microsoft Corp.*, 42 F.Supp. 2d 153, 164 (D. Conn. 1998).

market.<sup>196</sup> As the licensor of the Java platform, Sun was the direct, intended victim of that illegal conduct.<sup>197</sup> Sun's standing is further buttressed by the fact that it is a competing vendor in the PC OS market with its Solaris OS, making it both an actual and potential competitor in the restrained market.<sup>198</sup>

*Associated General Contractors v. California State Council of Carpenters*<sup>199</sup> is distinguishable because it involved a plaintiff (a union) which had only a peripheral relation to the restrained market, was complaining of an indirect injury, and was advancing interests designed to reduce competition in the market, not increase it. The direct and intentional link between Sun's injury and Microsoft's illegal attacks against the Java platform is a far cry from the attenuated interests of the union in *AGC*.

**D. Mandatory Injunctive Relief Requiring Unlawful Monopolists to Cooperate with Rivals is Well-Established in Antitrust Case Law.**

Microsoft claims that the Order is improper because it represents a "bold manipulation of the market" that was rejected by the *New York v. Microsoft*

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<sup>196</sup> *FOF* §§ 74-75,142,386,407,409,411.

<sup>197</sup> See *Blue Shield*, 457 U.S. at 484; *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 963 (10th Cir. 1970).

<sup>198</sup> Amended Complaint ¶¶ 74-75,117-118.

<sup>199</sup> *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

court and benefits a particular competitor, Sun.<sup>200</sup> But as the district court noted, the antitrust laws provide that not just the government, but “any individual threatened with injury by an antitrust violation may sue for injunctive relief.”<sup>201</sup> Public and private antitrust actions were “designed to be cumulative, not mutually exclusive.”<sup>202</sup> Like the injured competitors in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*<sup>203</sup> and *Lorain Journal Co. v. United States*,<sup>204</sup> Sun is not securing any special advantage from the injunctive relief. It is simply being protected from continuing irreparable harm in a competition whose structure has been profoundly distorted by Microsoft’s anticompetitive attacks against Sun. Sun is not denied the right to seek relief because it is a competitor.<sup>205</sup>

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<sup>200</sup> OB46-47.

<sup>201</sup> Op.28 (quoting *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972)).

<sup>202</sup> *United States v. Borden*, 347 U.S. 514, 518-19 (1954); see also *Battle v. Liberty Nat’l Life Ins.*, 493 F.2d 39, 52 (5th Cir. 1974) (“As the government may obtain an injunction in the public’s interest, even after the private plaintiff has settled his claim, likewise the private plaintiff’s action is not precluded by the government’s separate suit pursuing relief.”).

<sup>203</sup> 472 U.S. 585, 601-05 (1985).

<sup>204</sup> 342 U.S. 143, 155-56 (1951).

<sup>205</sup> *Andrx Pharm., Inc. v. Biovail Corp. Int’l*, 256 F.3d 799, 816-17 (D.C. Cir. 2001) (“[A] rival has clear standing to challenge the conduct of rival(s) that is illegal because it tends to exclude competition from the market.”) (internal quotations omitted).

**E. Microsoft Misrepresents The District Court’s Factual Findings Regarding Its Causation Holding.**

Microsoft argues that the district court erred by failing to find that compatible Java platforms would have been “ubiquitous” on PCs “but for” Microsoft’s illegal conduct.<sup>206</sup>

In fact, the district court made exactly that finding, stating that the preliminary injunction would, among other things, “restore the market to approximately what it would have been but for the commission of the unlawful acts: *a market in which compatible implementations of the Java platform would have been ubiquitous on PCs when the distribution of .NET commenced.*”<sup>207</sup> The record amply supports this finding because, before Microsoft’s anticompetitive acts, Sun had ubiquitous distribution through contracts with both Netscape and Microsoft (among others), exceeding the potential distribution available through the Windows channel only.<sup>208</sup> Similarly, the district court’s finding that “regardless of whether Microsoft was contractually obligated to do so, market conditions required it to distribute a Java implementation”<sup>209</sup> is supported by Microsoft’s contemporaneous

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<sup>206</sup> OB53.

<sup>207</sup> Op.39; *see also* Op.11-12 (emphasis added).

<sup>208</sup> 12/3/02HearingTr.95:23-97:17 (Green).

<sup>209</sup> Op.33-34n.18.

documents.<sup>210</sup> So long as Microsoft faced competitive pressure from Netscape's distribution of the compatible Java platform in Navigator – competition Microsoft illegally acted to foreclose – Microsoft would have been constrained to support the Java platform in order to remain competitive.<sup>211</sup>

Microsoft also admits that *if* Microsoft chose to include the Java technology in a product (which it has since it signed the Sun license in 1996), it was contractually required to include a current, compatible version.<sup>212</sup>

Finally, Microsoft's claim that it had no contractual duty to distribute a current version of the Java technology after the Settlement Agreement was signed in January 2001 is inapposite. Sun's claim is based on what the world would have looked like "but for" Microsoft's illegal acts, not what it actually looked like after Microsoft hobbled the Netscape Navigator browser and the Java platform on PCs. The fact that Sun was forced to enter into a Settlement Agreement as a result of Microsoft's illegal acts, while reserving its antitrust

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<sup>210</sup> See PX30[MSS 65387] ("Our browser must support Java. Java is already here. Netscape will add Java support..."); see also LinDecl.X10[MSS 168302] (head of Microsoft Java team, Ben Slivka, explaining why competitive landscape left Microsoft with "no choice" but to distribute Java).

<sup>211</sup> *Id.*

<sup>212</sup> See 12/5/02HearingTr.84:10-15.

claims, provides no insight into what the world would have looked like “but for” Microsoft’s illegal acts.<sup>213</sup>

**F. While the Order Will Prevent Harm in an Adjacent, Related Market, it Does Not Rest Upon a “Monopoly Leveraging” Theory of Liability.**

Microsoft mischaracterizes the district court’s opinion as resting on an allegedly discredited theory of “monopoly leveraging.”<sup>214</sup> Despite Microsoft’s representations otherwise, the principle of “monopoly leveraging” has long been recognized by the Supreme Court as a form of attempted monopolization of a market related to an already monopolized market.<sup>215</sup> But this Court need not decide whether monopoly leveraging is a basis for liability under § 2 of the Sherman Act separate from actual or attempted monopolization because the district court based its decision on Microsoft’s liability for illegal monopoly maintenance of the PC OS market.<sup>216</sup>

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<sup>213</sup> See SunReply18:8-12.

<sup>214</sup> OB52.

<sup>215</sup> See e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992)(unlawful to use monopoly over spare parts to monopolize separate market for servicing equipment); *United States v. Griffith*, 334 U.S. 100, 108 (1948)(unlawful to use monopoly of theaters to obtain exclusive movie distribution privileges).

<sup>216</sup> Op.32(“Microsoft’s anticompetitive acts against Java as a potential substitute for Windows were prohibited by § 2 of the Sherman Act”). Sun’s claim for attempted monopolization of the general purpose, Internet-enabled distributed computing platform market would also support the relief granted.

Under Section 16 of the Clayton Act, a private litigant may seek injunctive relief to protect against threatened loss or damage resulting from such violations.<sup>217</sup> Nothing in Section 16 requires the threatened loss or damage to be in the market where the violation occurred, or limits the scope of injunctive relief to that market.<sup>218</sup> Otherwise, products and activities in adjacent, related markets would not be entitled to protection from a monopolist's anticompetitive acts in the restrained market. Even though the Java platform was not a present substitute for Windows and thus not "in" the PC OS market, Microsoft's anticompetitive acts against Java were nevertheless prohibited acts of monopoly maintenance.<sup>219</sup> An appropriate remedy – including injunctive relief – thus would necessarily address products, activities, and injuries even when they may technically be outside the monopolized market.<sup>220</sup>

### **III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT ITS ORDER IS IN THE PUBLIC INTEREST.**

The district court correctly found that the antitrust injunction favors the public interest for at least three independent reasons.

First, the district court found that, "[i]n the final analysis, the public

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<sup>217</sup> 15 U.S.C. §26.

<sup>218</sup> See *United States v. United States Gypsum Co.*, 340 U.S. 76, 88-89 (1951); *Int'l Buying Club of N.Y. v. United States*, 358 U.S. 242, 262 (1959).

<sup>219</sup> *Microsoft III*, 253 F.3d at 54.

<sup>220</sup> *Cf. New York*, 224 F.Supp. 2d at 106-110.

interest in this case rests in assuring that free enterprise be genuinely free, untainted by the effects of antitrust violations.”<sup>221</sup> Recognizing that Microsoft had “successfully embarked upon a campaign to destroy Sun’s channels of distribution for Java,”<sup>222</sup> the district court found that the antitrust injunction would help to preserve competition and prevent Microsoft from exploiting the market distortions caused by the resulting distribution disparity.<sup>223</sup>

Second, the district court found that the antitrust injunction was narrowly crafted to fit the “special needs”<sup>224</sup> of this case, and thus an “elegantly simple remedy, precisely tailored to prevent Microsoft’s past wrongs from giving it an advantage in the forthcoming competition in the market for general purpose, Internet-enable distributed computing platforms.”<sup>225</sup> In contrast to an injunction barring distribution of the .NET platform, the antitrust injunction preserves competition and helps consumers by preventing Microsoft from exploiting the illegitimate competitive advantage created by Microsoft’s illegal acts.

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<sup>221</sup> Op.40.

<sup>222</sup> Op.5.

<sup>223</sup> Op.12.

<sup>224</sup> When confronting an antitrust violation warranting injunctive relief, “[t]he District Court is clothed with ‘large discretion’ to fit the decree to the special needs of the individual case.” *Ford*, 405 U.S. at 573.

<sup>225</sup> Op.29-30.

Third, the district court found that the antitrust injunction serves the public interest by “invest[ing] resources in actual competition” rather than “compensating economic experts and lawyers for constructing and arguing about hypothetical scenarios.”<sup>226</sup>

Microsoft does not address any of these three findings, arguing instead that the public interest would have been served only by an injunction that preserved the *status quo* created by its anticompetitive acts, rather than an injunction that prevents Microsoft from exploiting its wrongdoing and protects competition.<sup>227</sup> The Supreme Court rejected as “absurd” a similar argument advanced in *Ford Motor Co. v. United States*, where defendant contended that, after it had illegally obtained anticompetitive market power, “it must be left in possession of the power that it has acquired, with full freedom to exercise it.”<sup>228</sup>

Microsoft also argues that the district court’s public interest finding cannot be correct because, on a different record presented by different parties, another district court came to a different conclusion in the context of determining whether to approve a proposed consent decree. Microsoft’s

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<sup>226</sup> Op.30n.15.

<sup>227</sup> OB38.

<sup>228</sup> *Ford*, 405 U.S. at 574 n.9; see also *Schine Chain Theatres v. United States*, 334 U.S. 110, 128-29 (1948) (“In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of illegal conduct, those who had unlawfully built their empires could preserve them intact.”).

argument is meritless. The *New York v. Microsoft* court held that it was limited under the mandate rule to the revised liability findings of the D.C. Circuit, that the effect of Microsoft's actions on markets other than the PC OS market were "largely unconnected" to the liability theories at issue and therefore were "more appropriately addressed as separate claims, in a separate suit," and that the antitrust injunction at issue here "is best resolved, if at all, through [Sun's] already-pending private lawsuit."<sup>229</sup> That court also received far different and far less extensive evidence, briefing, written testimony, oral testimony and oral argument on the antitrust injunction than did the district court here. After a careful review of the ample record addressing the antitrust injunction, the district court here found that it favored the public interest for at least the three reasons set forth above, each of which is well supported by the record.

**IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ENJOINING MICROSOFT FROM INFRINGING SUN'S COPYRIGHTS.**

Microsoft does not dispute the validity of Sun's copyrights to Java software or that it copied Sun's copyrighted works in creating the MSJVM. Microsoft also does not dispute that it distributes the MSJVM in the manners in which Sun complains it does. The sole issue concerning Sun's copyright infringement claim before the district court was whether Microsoft's distribution

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<sup>229</sup> 224 F.Supp. 2d. at 134, 262.

was outside the scope of the limited licenses granted by the Settlement Agreement.

**A. The District Court Correctly Determined that Sun Is Likely To Prevail On Its Claim That Microsoft Acted Outside the Scope of the Settlement Agreement**

**1. Plain Meaning of Microsoft's Limited Licenses**

The plain language of the Settlement Agreement grants Microsoft a limited, narrowly tailored set of rights. The limited nature of the license grants are repeatedly emphasized throughout the agreement. The grant clauses of Paragraph 6 are titled "Limited Licenses," each license grant begins with the words "a limited license," and all of the license restrictions are referred to as "License Limitations."<sup>230</sup> Paragraph 7, which lists the "License Limitations," begins with the statement that "The basic intent of the licenses granted in paragraph 6 above is to permit Microsoft to continue to distribute its current products 'as is.'" Paragraph 16 provides that no express or implied licenses or rights are granted except those expressly stated in Paragraph 6.<sup>231</sup>

Nothing in the Settlement Agreement grants Microsoft any license to distribute its MSJVM separate from a licensed product. Paragraph 6(a) grants Microsoft a limited license to continue shipping its then-existing products that

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<sup>230</sup> PX3[¶¶6-7].

<sup>231</sup> See PX3[¶16].

incorporate Microsoft's then existing MSJVM. Paragraph 6(b) grants Microsoft a "limited license" to modify its then-existing MSJVM only to correct "Critical Customer Defects or Security Holes." Paragraph 6(c) grants Microsoft a limited license to incorporate the MSJVM licensed under paragraphs 6(a) or 6(b) in successor versions of products identified in Exhibit D.<sup>232</sup> Exhibit D lists a limited set of Microsoft products, including the Windows operating system and Internet Explorer.<sup>233</sup> Paragraph 6(d) grants Microsoft a "limited license" "to distribute the products identified in paragraph 6(c)."<sup>234</sup>

Consequently, Microsoft can "distribute" its modified MSJVM only by distributing a licensed product into which the MSJVM has been incorporated. Licensed Products are only those products identified in Exhibit D and their successors. Nowhere in Exhibit D is the MSJVM or a service pack listed.<sup>235</sup> Therefore, Microsoft is not licensed to distribute the MSJVM by itself or with Service Pack 1.

Microsoft's contention that it has the right to delegate its incorporation rights to third parties contradicts the plain language of the Settlement Agreement. The limited license of Paragraph 6(c) "to incorporate" is granted

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<sup>232</sup> PX3[¶6(c)],XD.

<sup>233</sup> See PX3[XD].

<sup>234</sup> PX3[¶6(d)].

<sup>235</sup> See PX3[XD].

only “to Microsoft,” and confers no right to delegate.

Because the plain language of the Settlement Agreement does not grant Microsoft the right to distribute the MSJVM by itself or bundled with bug fixes in Service Pack 1, or the right to delegate its right of incorporation, the district court correctly found that Sun is likely to prevail on its claim that Microsoft infringes Sun’s copyrights.

## **2. The District Court Gave Proper Consideration to the Parol Evidence**

Despite the unambiguous license limitations of Paragraph 6, Microsoft contends that the district court erred in interpreting the agreement because it “ignored” or “overlooked” parol evidence.<sup>236</sup> That is simply not true. The district court received and considered multiple exhibits and declarations submitted with the parties’ five briefs and heard the live testimony of witnesses from both parties.<sup>237</sup> After considering parol evidence submitted by Microsoft in support of its asserted interpretation that it is authorized to distribute the MSJVM outside of a Licensed Product,<sup>238</sup> the district court determined that Sun was likely to prevail in its claim that the agreement is not reasonably susceptible

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<sup>236</sup> OB57,59.

<sup>237</sup> See 12/4/02HearingTr.262:18; 263:9,264:15-265:10,267:2-268:2; 12/3/02HearingTr.152:19-53:9,153:18-55:13,156:13-58:9, PX4; GreenReplyDecl. ¶¶37-38,44.

<sup>238</sup> See, e.g., 12/4/02HearingTr. 263:21-64:14,274:5-22.

to Microsoft's asserted interpretation and is unambiguous.

That determination was proper. For example, while Microsoft claims that its construction of the Settlement Agreement is supported by the direct testimony of its lead negotiator, Sanjay Parthasarathy,<sup>239</sup> it fails to disclose that during cross-examination Parthasarathy admitted that:

- Paragraph 6 contains “the only licenses granted in this Settlement Agreement”;
- These licenses are “very limited in scope”;
- “When the parties were negotiating the license in paragraph 6, they drew a very clear distinction between distribution and incorporation”;
- Paragraph 6(c)'s license “to incorporate” is granted to “[o]nly Microsoft,” “[n]ot to anyone else”;
- “Paragraph 6(d) specifically covers distribution”;
- “[T]he MSJVM is not a product listed in Exhibit D,” so “paragraph 6(d) does not give Microsoft the right to distribute the MSJVM as a product”; and
- Microsoft's posting of the MSJVM on its website for downloading is “an act of distribution.”<sup>240</sup>

Microsoft's construction crumbles under the weight of its lead negotiator's own admissions.

Microsoft also misrepresents the parties' course of conduct. Microsoft

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<sup>239</sup> OB59-60.

<sup>240</sup> 12/4/02HearingTr.261:6-265:10.

asserts, for example, that “Sun never complained that the MSJVM was an optionally installable component of Internet Explorer 5.0 that could be downloaded by users from the Internet,”<sup>241</sup> despite the June 3, 1999 letter – shown to Parthasarathy in the Preliminary Injunction hearing – in which Sun directly addressed such conduct, telling Microsoft in no uncertain terms that “Microsoft has never notified Sun of any intention to exclude any portion of its JDK 1.1 Compatible Implementation from Internet Explorer, nor does it have any right to do so.”<sup>242</sup>

Microsoft similarly points to a letter in which it informed Sun that products listed on Exhibit D of the Settlement Agreement may be shipped via “service packs.”<sup>243</sup> But this letter lends no support to Microsoft’s argument that it can distribute the MSJVM via “service packs” because the MSJVM is not listed on Exhibit D.

**B. Sun is Entitled to the Presumption of Probable Success and the Presumption of Irreparable Harm.**

Because Sun has established a *prima facie* claim of copyright infringement, it is entitled to both the presumption of probable success on the merits of its copyright claim and the presumption of irreparable harm if

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<sup>241</sup> OB60.

<sup>242</sup> PX47.

<sup>243</sup> OB61, citing DX102.

infringing conduct is not enjoined.<sup>244</sup> Microsoft failed to rebut the presumption of probable success for the reasons set forth above. Microsoft also failed to rebut the presumption of irreparable harm, particularly given that Microsoft's continued infringement "increase[s] th[e] fragmentation" of the Java platform<sup>245</sup> by preventing developers from knowing what computers will include a JVM, and by forcing consumers to incur the time and expense of downloading the JVM before they can run an application written to the Java platform.<sup>246</sup>

But more than a mere presumption of irreparable harm, Sun is suffering actual harm as a result of Microsoft's unlicensed distribution. By distributing the MSJVM for optional incorporation by end-users and OEMs, Microsoft has ensured that the prevalence of the MSJVM is necessarily less than the prevalence of Windows XP, and that there is no way for developers to predict whether an end-user's machine would have an MSJVM.<sup>247</sup> This not only reduces the size of the market for Java applications, but increases both the cost and the risk to developers of creating Java applications, thus further diminishing

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<sup>244</sup> See *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680, 690 (4th Cir. 1992); *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1122 (9th Cir. 1999).

<sup>245</sup> Op.42.

<sup>246</sup> GreenReplyDecl.¶¶47-48; LanovazDecl.¶¶45-48; 12/3/02HearingTr.156:25-59:1.

<sup>247</sup> 12/3/02HearingTr.156:25-58:9; Op.42.

the value and competitive appeal of the Java platform for application development.

In contrast to Sun's harm, Microsoft would suffer little, if any, harm if enjoined from infringing Sun's copyrights because it has already ceased distributing the MSJVM by itself and with Service Pack 1.<sup>248</sup>

Dated: March 7, 2003

For the Plaintiff-Appellee

Sun Microsystems, Inc.

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<sup>248</sup> Parthasarathy Decl. ¶¶ 24, 39. Microsoft Corr. Opp. 35; MSSupp. Op. 35.

## CERTIFICATE OF COMPLIANCE

I, Lloyd R. Day, Jr., hereby certify pursuant to Fed. R. App. P. 32 (a)(7)(B), that the word count of Proof Brief Of Appellee Sun Microsystems, Inc. is 13,902, not including the proof of service, certificate of compliance, disclosure of corporate affiliations and other entities with a direct financial interest in litigation, table of contents, table of authorities, and statement of related cases. Microsoft Word XP was used to calculate the word count.

By: \_\_\_\_\_  
Lloyd R. Day, Jr.

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I hereby certify that on this 7<sup>th</sup> day of March, 2003, a true and correct copy of Proof Brief Of Appellee Sun Microsystems, Inc., was caused to be served by facsimile transmission and by forwarding two copies each via overnight courier upon:

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