1 MARC M. SELTZER (CA Bar No. 54534)
   SUSMAN GODFREY L.L.P.
2 Suite 950
   1880 Century Park East
3 Los Angeles, California 90067-1606
   Telephone: (310) 789-3100
4
5 STEPHEN D. SUSMAN
   CHARLES R. ESKRIDGE III
   SUSMAN GODFREY L.L.P.
6 1000 Louisiana, Suite 5100
   Houston, Texas 77002-5096
7 Telephone: (713) 651-9366
8 PARKER C. FOLSE III
   JONATHAN M. SHAW
9 IAN B. CROSBY
   EDGAR G. SARGENT
10 SUSMAN GODFREY L.L.P.
   1201 Third Avenue, Suite 3090
11 Seattle, Washington 98101
   Telephone: (206) 516-3880
12
   Attorneys for Plaintiff Be Incorporated
13

14
                    IN THE UNITED STATES DISTRICT COURT
15
                    NORTHERN DISTRICT OF CALIFORNIA
16   SAN FRANCISCO DIVISION

17
   BE INCORPORATED,
18
               Plaintiff,   **COMPLAINT AND JURY DEMAND**
19   vs.
20 MICROSOFT CORPORATION,   Case No. 02837MEJ
21   Defendant.

22

23

24   **COMPLAINT**

25   1.   Be Incorporated ("Be"), brings this action to recover damages under the antitrust laws

26 of the United States and the laws of California for the destruction of its business as a direct result

27 of the illegal and anticompetitive practices of Microsoft Corporation ("Microsoft"). Microsoft has

28 long held and willfully maintained monopoly power in the worldwide market for Intel-compatible

COMPLAINT AND JURY DEMAND - 1

personal computer ("PC") operating systems. Be developed and marketed its technically acclaimed operating system, BeOS, in an effort to enter that market. BeOS threatened to undermine the barriers to entry that protect the dominant position of Microsoft's Windows line of products (collectively, "Windows"). As a consequence, Microsoft exercised its monopoly power to exclude BeOS from the market, and forced Be to cease doing business. Sensing that BeOS posed a significant threat to its illegal monopoly, Microsoft smothered Be by using its dominant market position to prevent computer manufacturers from installing Be's technically superior operating system. Microsoft's exclusionary exercise of monopoly power has extinguished the value of Be as a going concern, deprived Be of future profits, and denied Be's shareholders the return of their invested capital. Be seeks relief for these and other injuries under Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act, the Cartwright Act, the Unfair Competition Act, and the common law of California, and alleges as follows:[1]

PARTIES

2.   Plaintiff Be Incorporated is a Delaware corporation. At all times relevant to this Complaint, Be's principal place of business has been in Menlo Park, California. Plaintiff will soon be relocating its principal place of business to Mountain View, California.

3.   Defendant Microsoft Corporation is a Washington corporation with its principal place of business at One Microsoft Way, Redmond, Washington, 98052.

JURISDICTION

4.   Plaintiff brings this action under the federal antitrust laws to recover damages for injury it has sustained to its business and property. Therefore, the Court has jurisdiction over this matter pursuant to Section 4 of the Clayton Act, 15 U.S.C. §§ 15, and 28 U.S.C. §§ 1331 and 1337. Plaintiff also seeks relief under California state law. The Court has supplemental jurisdiction over those state law claims pursuant to 28 U.S.C. § 1367. The Court also has jurisdiction over those claims pursuant to 28 U.S.C. § 1332 because this is an action between

---

[1]Except as to its own conduct, Be's allegations are based upon information and belief.

citizens of different States and because the amount in controversy substantially exceeds the sum or value of $75,000.

VENUE

5.   Venue is proper in this district under 15 U.S.C. §§ 15 and 22, and under 28 U.S.C. § 1391(b) and (c) because (i) defendant Microsoft transacts business and is found within this district; (ii) plaintiff's principal place of business is within this district; and (iii) a substantial portion of the events giving rise to plaintiff's claims occurred within this district.

INTRADISTRICT ASSIGNMENT

6.   Plaintiff requests that this case be assigned to the San Francisco Division of this District, pursuant to Civil LR 3-2(c) and (d). At all relevant times, plaintiff's principal place of business was located in San Mateo County, California, and a substantial part of the events that gave rise to this cause of action occurred in San Mateo County.

NATURE OF THE CASE

Development of BeOS

7.   Be was founded in 1990 for the purpose of creating a powerful, graphical, easy to use computer operating system capable of handling seamlessly on low-cost personal computers the vast streams of data that its founders foresaw would be unleashed by the multimedia revolution. This operating system, BeOS, was designed from the outset to be portable — that is, to be capable of being easily adapted to run on computer architectures other than that on which it was originally developed.

8.   By 1997, around the time that BeOS was emerging from its development stages and approaching readiness for widespread commercialization, the Intel-compatible PC was by far the most powerful, least expensive, and most widely-adopted computing architecture for general consumers. That year, in collaboration with Intel, Be created a version of BeOS for the Intel-compatible PC. From the time of its release in Fall 1998, BeOS for Intel received widespread praise from journalists and opinion leaders for its technical capabilities, speed, and ease of use.

Microsoft's Monopoly Power

9.   As of 1998, and at all times relevant to this lawsuit, Microsoft (with Windows)

COMPLAINT AND JURY DEMAND - 3

possessed monopoly power in a product market consisting of the licensing of operating systems for Intel-compatible PCs. The relevant geographic market is world-wide in scope. In that market, Microsoft's market share is approximately 95%.

10. Throughout its dominance of this market, Microsoft's monopoly power has been protected by a durable barrier to entry to new competitors. This barrier, which has been termed the "applications barrier to entry," arises from the fact that few consumers will purchase an operating system that does not already possess a large variety of useful and widely compatible software applications, but few software developers will create applications for an operating system that is not already in wide use by a large number of consumers.

11. Through its own behavior, including but not limited to the behavior described in this Complaint, Microsoft has artificially raised barriers to entry into the relevant market in numerous ways. Microsoft's conduct, including the conduct described in this Complaint, has had a direct, substantial, and adverse effect on competition by foreclosing competition on the basis of price and performance and by stifling innovation. Buyers of PCs and software have thus been forced to pay higher prices for less innovative, inferior products.

Be's "Dual-Boot" Strategy

12. Be recognized that the applications barrier to entry described above would make any immediate attempt to replace Windows prohibitively expensive. Be therefore attempted to enter the market for Intel-compatible PC operating systems by first positioning BeOS as a complement to Windows.

13. As part of this strategy, Be offered to license BeOS to computer manufacturers (known in the industry as "original equipment manufacturers" or "OEMs") for preinstallation on PCs in a "dual-boot" configuration. A "dual-boot" configuration allows consumers to choose which operating system to load each time they start their computers. In such a configuration, consumers could, for example, launch BeOS at startup if they wished to use BeOS's unique capabilities to manipulate real-time audio and video streams, but could also launch Windows if instead they needed to write a letter or create a spreadsheet using Microsoft's popular Office suite, or wished to use some other Windows-supported application.

COMPLAINT AND JURY DEMAND - 4

14.   Be's "dual-boot" strategy was targeted at overcoming the applications barrier to entry in a number of respects. It would allow consumers to access the useful and superior capabilities of BeOS without having to choose irrevocably between BeOS and Windows. As a result, Be would not need to have application support for BeOS equivalent to that available for Windows right away in order for consumers to find it immediately useful alongside Windows.

15.   Most significantly, Be sought to ensure that, as BeOS became deployed more widely on dual-boot computers, its growing part-time user base would make it a more attractive target for application developers. More applications would attract more users of BeOS, in turn attracting more developers, and so forth. By using the dual-boot strategy to initiate this "virtuous spiral," Be intended that BeOS and its compatible applications ultimately would overcome the applications barrier to entry and compete in the market for Intel-compatible operating systems as a complete replacement for Windows.

The Importance of OEM Preinstallation

16.   Preinstallation by OEMs is the only effective channel for operating system distribution for a number of reasons. After-market installation of operating system software has historically been intimidating and complex to end-users and presents the inherent risks that data will be lost or that computers will be rendered inoperable. Even when the complexities of operating system installation are simplified by advanced configuration programs, end-users remain highly reluctant to tamper with the basic configuration of a functioning computer. Providing technical support to assist consumers in performing after-market installation also greatly increases the cost of supporting the operating system. Delivery of the many megabytes of software code required for installation via CD-ROMs or over the Internet further increases the cost disadvantage of after-market installation.

17.   Preinstallation by OEMs avoids all of these barriers to delivery and installation of an operating system for dual-booting alongside Windows. The code is delivered on the hard disk already installed and configured without the need for any user intervention or any risk of data loss or disabling the computer. With preinstalled dual-boot machines, the vast majority of consumers who would be reluctant to install a computer operating system themselves can

experiment with and experience an alternative to Windows without hassle or risk. Because OEMs control the selection of the hardware to be used in a computer preconfigured in this manner, compatibility concerns and related support costs can be essentially eliminated.

18.   For Be, the key to starting the "virtuous spiral" was the rapid deployment of BeOS on as many Intel-compatible PCs as possible. Indeed, Be eventually offered to licence BeOS for dual-boot preinstallation to major U.S. OEMs at no cost.

The Hitachi Experience

19.   In early 1998, Hitachi approached Be about including BeOS on a line of desktop PCs. In September 1998, Hitachi verbally committed to Be that it would load BeOS alongside Windows on a line of its personal computers.

20.   Be agreed to provide, and Hitachi agreed to install, "boot manager" software that would load before either operating system and allow users to choose which operating system to launch when the computer was turned on. In addition to the boot manager, Hitachi agreed to install an icon on the default Windows desktop screen which, when clicked, would shut down Windows in accordance with Windows procedures and launch BeOS.

21.   In October 1998, Hitachi informed Be that it was going to notify Microsoft of its intention to preinstall BeOS in a dual-boot configuration with Windows on its FLORA Prius line of computers.

22.   In November 1998, Hitachi informed Be that it could not install Be's boot manager or BeOS launcher icon on its computers, and that BeOS would have to be booted off a floppy disk.

23.   Hitachi eventually explained that the terms of its license with Microsoft prohibited preinstallation of another operating system in a dual-boot configuration. Hitachi also revealed that after it notified Microsoft of its intention to preinstall BeOS, Microsoft sent two U.S. managers to Japan who expressed their "anger" with Hitachi over its arrangement with Be, and "reminded" Hitachi of the terms of its Windows license.

24.   Hitachi eventually shipped a line of computers with BeOS preinstalled on the hard drive. However, those computers were not preconfigured to allow the user to boot into BeOS.

Indeed, nothing in the computer's start-up sequence indicated the presence of BeOS. To enable BeOS, the user was required to start the computer from a floppy diskette and follow an involved procedure to install the boot loader software and launcher icon manually. Hitachi's decision not to preinstall these items resulted directly from threats by Microsoft and restrictions in Hitachi's OEM license for Windows that prohibited alteration of the Windows boot process.

Microsoft's Restrictive Licensing Practices

25. In 1998, and at all times relevant to this lawsuit, Hitachi's license from Microsoft for Windows contained a number of interlocking restrictions that effectively prevented an OEM from preinstalling a competing operating system in a dual-boot configuration. Microsoft's licenses with all major OEMs contained similar provisions.

26. Microsoft's licenses required OEMs to install Windows only using Microsoft's OEM Preinstallation Kit ("OPK"), which wiped clean any operating systems already on the computer hard disk and installed the Windows operating system, along with Microsoft's boot loader software, which could only be used to boot Windows.

27. Microsoft's licenses also prohibited OEMs from deleting or altering any portion of the Windows installation, without exception for the boot loader, once it had been placed on the hard disk by the OPK.

28. Microsoft's licenses further prohibited alteration of the Windows startup sequence once Windows had begun to boot.

29. Finally, Microsoft's licenses prohibited the configuration of any portion of the Windows system to facilitate the launch of any program to run prior to booting Windows.

30. Together, the foregoing terms prevented an OEM subject to a Microsoft license from preinstalling a bootloader other than Microsoft's, or even from preinstalling a program that would allow users to install another bootloader themselves by clicking on an icon on the Windows desktop. Without the ability to install a competing bootloader, an OEM was precluded from preconfiguring a computer to dual-boot a competing operating system alongside Windows.

Microsoft's Exclusionary Pricing Practices

31. Microsoft did more than merely enforce the restrictive terms of its OEM licenses.

Microsoft threatened to raise the price of Windows to Hitachi if Hitachi installed Be's boot manager on its machines.

32. Microsoft grants discounts on Windows to OEMs who meet a variety of criteria. Achieving the highest level of discounts on Windows is crucial to major OEMs, because margins on hardware are very low. Microsoft offers its highest level of discounts only to those OEMs who configure their computers for a "no-operation" boot into Windows, i.e., those who configure their computers to boot straight into Windows after the power is turned on with no further intervention by the consumer.

33. Installation of Be's boot manager to allow dual-booting of BeOS thus would have risked Hitachi's eligibility for discounts on Windows from Microsoft.

34. In addition to imposing restrictive objective criteria on OEMs' eligibility for Windows discounts, Microsoft ultimately granted or withheld discounts according to its subjective discretion. As a result, Hitachi was reluctant to take any actions that Microsoft might deem hostile to its interests for fear of losing Windows discounts, even if Hitachi complied with all of Microsoft's stated licensing and eligibility restrictions.

35. In these circumstances, Hitachi tolerated an extraordinary degree of interference by Microsoft in its business relations with Be. Hitachi made clear that it would not license BeOS under any conditions without first informing Microsoft. Indeed, the day before Hitachi announced publicly that it would ship BeOS preinstalled on some of its machines, Microsoft executives met with Hitachi representatives and demanded to review and approve Hitachi's public announcement materials in advance.

36. In addition to restricting Hitachi's ability to preinstall BeOS, Microsoft also limited Hitachi's ability to promote it by imposing conditions on Hitachi's eligibility to use and display the Windows compatibility logo. Under Microsoft's eligibility criteria, Hitachi risked losing its Windows discounts if it displayed the BeOS logo on its products or packaging alongside the Windows logo.

37. As a result, Hitachi's FLORA Prius computers shipped with no indication that BeOS was preinstalled, except for the needlessly complicated floppy-disk based installation kit

that was placed in the bottom of the shipping carton.

Microsoft's Success in Precluding Dual-Boot PCs

38.   The same restrictions that deprived Be of the benefits it expected from the Hitachi contract precluded Be from entering into any preinstallation contracts at all with other major PC OEMs.

39.   From 1998 onward, Be, with the assistance of industry giant Intel, attempted to market BeOS to OEMs for dual-boot preinstallation on "Creativity PCs" targeted at professional and amateur multimedia content creators, for whom Windows video and audio handling capabilities are inadequate. Despite Intel's support, the technical superiority of BeOS for such multimedia applications, and the fact that Be eventually offered to license BeOS without royalty, Be was unable to convince even a single major OEM to risk Microsoft's displeasure by offering a dual-boot "Creativity PC."

40.   In meetings with Compaq representatives on March 11, 1998, and July 14, 1998, for example, Compaq personnel informed Be that Microsoft's licensing restrictions would prevent Compaq from offering preinstalled dual-boot computers.

41.   Gateway similarly informed Be that Microsoft would not allow it to dual-boot non-Windows operating systems.

42.   BeOS was not the only victim of Microsoft's restrictive licensing practices. For example, versions of the "open source" operating system called Linux run on Intel-compatible PCs. Because Linux was created, and is continuously updated, by a global network of software developers who contribute their labor for free, making Linux available to consumers in a dual-boot mode with Windows should have been viewed by many OEMs as an economically attractive option. Yet, during the time period relevant to this suit, no major OEM offered computers preconfigured to dual-boot Windows and Linux.

Be's Venture Into Internet Appliances

43.   At the same time that Microsoft's exclusionary licensing and discounting policies and threatening conduct towards major OEMs precluded Be from entering the market for Intel-compatible PC operating systems, Be was also positioning a version of BeOS in the then-

emerging market for operating systems for "Internet appliances." The Internet appliance was intended to be a simple, inexpensive, and easy to use computer that delivered Internet access and application functionality through a browser interface without the need for Windows.

44. Although Microsoft was a competitor in the market for Internet appliance operating systems with its Windows CE product, it did not at the time have a monopoly share of that market. Nevertheless, Microsoft viewed the Internet appliance, and the operating-system independent browser interface and cross-platform Java programming language that made it possible, as threats to its monopoly on the Intel-compatible PC.

45. Microsoft attempted to prevent the Internet appliance from developing into a fully functional platform that might compete with Windows-based Intel-compatible PCs by means of a strategy it referred to internally as "embrace, extend, extinguish." According to this strategy, Microsoft publicly embraced industry-standard cross-platform protocols and programming languages, such as Hypertext Markup Language ("HTML") and Sun's Java. It then extended those standards, often subtly or secretly, when implementing them in its own products such as the Internet Explorer browser, so that applications and Internet content created according to the standards as extended by Microsoft would only work with Windows or Windows-based browsers. The resulting fragmentation of the extended standards eventually resulted in those standards becoming extinguished as tools for easily developing cross-platform applications and content. This further reinforced the applications barrier to entry, and with it, Windows's dominant position in its own market.

The Java Experience

46. In one example of the "embrace, extend, extinguish" strategy, Microsoft developed its own version of the Java Virtual Machine ("JVM") to run applications written in Sun's cross-platform programming language on Windows. Microsoft also developed a suite of programming tools to allow Windows-based developers easily to write Java Applications. Microsoft did not disclose, however, that its Java programming tools by default produced Java applications that would only run on its own JVM for Windows, and not on JVMs designed for other operating systems on other platforms.

COMPLAINT AND JURY DEMAND - 10

47.   Similarly, Microsoft publicly embraced the public standard HTML format for Internet content delivered over the World Wide Web. But in fact, Microsoft designed its HTML development tools to produce web pages that often could be viewed correctly only on Microsoft's Internet Explorer browser for Windows.

48.   Largely as a result of Microsoft's pollution of the Java and HTML standards, the Internet browser has failed to develop into a viable platform for consistently delivering high-quality applications and content on a variety of operating systems and hardware platforms. Consequently, the Internet appliance market failed to develop into a viable substitute for Windows-based Intel-compatible PCs, and has since been abandoned by virtually all major computer hardware manufacturers. All of Be's efforts to promote BeOS in this market have been frustrated as a result.

The Compaq Experience

49.   In addition to targeting the Internet appliance market in general, Microsoft targeted Be's efforts in that market specifically. In early 1998, Compaq approached Be about jointly developing a BeOS-based Internet appliance. Over the course of the year, Be successfully developed a working prototype of the Compaq machine.

50.   Compaq repeatedly assured Be of its enthusiasm for the project, and stated that only BeOS could meet the project's technical, cost, and delivery timeline requirements. Compaq assured Be that Windows CE was not suitable for the device.

51.   In October 1998, however, Compaq informed Be that it had disclosed information about the Be Internet appliance project to Microsoft. Later that same month, Microsoft Chairman Bill Gates visited Compaq CEO Eckhard Pfeiffer as part of a "Digital Appliances Review."

52.   In early November, under pressure from Microsoft, Compaq informed Be that it was no longer interested in licensing BeOS.

53.   Although Compaq eventually reengaged Be in late 1999 to license a later version of BeOS called "BeIA" on a line of Internet appliances, it distributed those appliances only on a very limited basis in Europe, and shipped Windows CE on all machines of the same model sold in the United States.

COMPLAINT AND JURY DEMAND - 11

Microsoft's Interference With Be's Financing Efforts

54. Microsoft not only closed off critical distribution channels for Be's products, it also impeded Be's ability to finance its business. Microsoft, in conjunction with third parties acting as its agents, succeeded both in artificially depressing the price at which Be was able to sell its initial IPO shares and in preventing Be from engaging in a post-IPO effort to raise investment capital through a private placement offering.

The Anticompetitive Effect of Microsoft's Practices

55. As a result of Microsoft's anticompetitive practices in the market for Intel-compatible PC operating systems, including its willful maintenance of its own monopoly power in that market, and in the related markets for Internet appliance operating systems and browsers, Microsoft has had a direct, substantial, and adverse effect on competition by artificially raising barriers to entry, foreclosing competition on the basis of price and performance, and stifling innovation. Buyers of PCs and software have thus been forced to pay higher prices for less innovative, inferior products. In addition, Microsoft's unlawful conduct has forced Be to cease doing business.

56. As a direct and proximate result of Microsoft's illegal conduct, nearly the entire market value of Be as a publicly traded going concern, which once exceeded one billion dollars, has been eliminated.

57. Microsoft's conduct has deprived Be of future profits from the licensing of BeOS and BeIA.

58. Microsoft's conduct has caused nearly all of the capital investment of Be's shareholders, as well as the money spent by Be in attempting to enter the relevant market, to be lost. Be has also spent substantial sums attempting to mitigate its damages.

59. These injuries may each be proved with reasonable certainty, and are compensable by treble damages under the antitrust laws of the United States.

THE GOVERNMENT'S CASE AGAINST MICROSOFT

60. The United States Department of Justice and the Attorneys General of nineteen (19) states brought suit against Microsoft in connection with many of the facts and issues

COMPLAINT AND JURY DEMAND - 12

described above in the United States District Court for the District of Columbia, in suits captioned *United States of America v. Microsoft Corp.*, No. 98-1232, and *State of New York et al. v. Microsoft Corporation*, No. 98-1233.

61.   In that litigation, Microsoft itself urged the District Court to find that BeOS posed a "serious threat[] to Windows' category leadership, and well could displace Windows over time." *See* "Microsoft Corporation's Revised Proposed Findings of Fact" ¶ 206 (Sept. 10, 1999).

62.   On November 5, 1999 and April 3, 2000, the United States District Court issued Findings of Fact (84 F. Supp. 2d 9) and Conclusions of Law (87 F. Supp. 2d 30) determining that Microsoft violated sections 1 and 2 of the Sherman Act, along with several state antitrust statutes, including California's Cartwright Act and California's Unfair Competition Act.

63.   Microsoft appealed the judgment entered by the District Court. On June 28, 2001, the United States Court of Appeals for the District of Columbia Circuit issued an opinion that affirmed in part, reversed in part, and remanded in part the District Court's rulings. *United States of America v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). Among other things, the Court of Appeals affirmed the District Court's ruling that Microsoft has monopoly power in the market for Intel-compatible PC operating systems and that many of Microsoft's exclusionary business practices that harmed plaintiff constituted an illegal abuse of Microsoft's monopoly power in violation of Section 2 of the Sherman Act and state statutes. The Court of Appeals held that:

a.   The licensing of all Intel-compatible PC operating systems worldwide constitutes a relevant antitrust market, and Microsoft has monopoly power in that market. *Id.* at 51, 52, 56-57.

b.   "Because the applications barrier to entry protects a dominant operating system irrespective of quality, it gives Microsoft power to stave off even superior new rivals." *Id.* at 56.

c.   The applications barrier to entry is a characteristic of the operating systems market, not of Microsoft's popularity or Microsoft's efficiency. *Id.* at 56.

d.   Microsoft undertook unlawful actions to maintain its monopoly in the operating

1 system market and is liable under Section 2 of the Sherman Act for

2 monopolization of that market. *Id.* at 80-81.

3 e. Microsoft barred its rivals from all means of cost-efficient distribution. *Id.* at 64.

4 f. Microsoft's anticompetitive behavior includes its prohibition on OEMs from

5   modifying the initial boot sequence. *Id.* at 62.

6 g. "[W]ith the exception of one restriction prohibiting automatically launched

7   alternative interfaces, all the OEM license restrictions at issue represent uses of

8   Microsoft's market power to protect its monopoly, unredeemed by any legitimate

9   justification." *Id.* at 64.

10 h. Microsoft's deception of Java developers by making them think that the

11   Windows-dependent Java applications would be functional across platforms was

12   exclusionary and in violation of Section 2 of the Sherman Act. *Id.* at 76–77.

13 i. The causal link between anticompetitive conduct and the maintenance of

14   Microsoft's operating systems monopoly is inferred when exclusionary conduct is

15   aimed at producers of nascent competitive technologies. *Id.* at 79.

16 j. "[I]t would be inimical to the purpose of the Sherman Act to allow monopolists

17   free reign to squash nascent, albeit unproven, competitors at will." *Id.* at 79.

18   64. Although the Court of Appeals ordered a remand of the case as to the precise

19 remedies needed to redress Microsoft's illegal monopoly maintenance, the Court of Appeals

20 upheld the District Court's Findings of Fact and its Conclusion of Law that Microsoft violated

21 Section 2 of the Sherman Act. The Supreme Court denied Microsoft's petition for a writ of

22 certiorari.

23   65. In light of the Court of Appeals' final decision on liability in *United States v.*

24 *Microsoft*, and the binding and preclusive effect of that decision and the affirmed Findings of

25 Fact on subsequent claims for antitrust liability related to Microsoft's actions, Microsoft is

26 collaterally estopped and may not relitigate those findings in this litigation.

27

28

FIRST CLAIM FOR RELIEF
MONOPOLY MAINTENANCE OF THE INTEL-COMPATIBLE
PC OPERATING SYSTEM MARKET
(Sherman Act, Section 2)

66.   Be incorporates by reference and realleges the averments of paragraphs 1-65 as if fully set forth herein.

67.   There is a relevant world-wide market for the licensing of Intel-compatible PC operating systems.

68.   Microsoft possesses monopoly power in the relevant market for the licensing of Intel-compatible PC operating systems.

69.   Microsoft's monopoly power in the market for the licensing of Intel-compatible PC operating systems is protected by durable barriers to entry.

70.   Through the acts described above and similar conduct and practices, Microsoft has purposefully and wrongfully maintained its monopoly in the market for Intel-compatible PC operating systems by intentionally excluding Be from entering that market with its competing operating system, BeOS, and by undermining the development of alternatives to Windows-based Intel-compatible PCs.

71.   There are no legitimate business justifications for Microsoft's exclusionary and anticompetitive conduct. To the extent that Microsoft has sought to achieve any legitimate business purposes through its conduct, it has not used the least restrictive means for doing so, any claimed procompetitive benefit is outweighed by the anticompetitive harm, and any purported legitimate business justifications are mere pretexts for illegal monopoly maintenance.

72.   Microsoft's conduct has injured consumers and harmed competition.

73.   Microsoft's conduct has directly and proximately caused injury to Be's business and property. That injury is of the kind that the antitrust laws were intended to prohibit, and therefore constitutes antitrust injury.

SECOND CLAIM FOR RELIEF
EXCLUSIVE DEALING
(Sherman Act, Section 1, and
Clayton Act, Section 3)

74.   Be incorporates by reference and realleges the averments of paragraphs 1-73 as if

1 fully set forth herein.

2 75. Microsoft has coerced major OEMs to refuse to preinstall competing operating

3 systems alongside Windows on dual-boot enabled computers. That coercion has taken the form

4 of restrictions on the boot sequence, limitations on the use of Windows to enable other operating

5 systems to function, exclusionary and arbitrary discounting policies, and threats to reduce or

6 eliminate Windows OEM license discounts.

7 76. The effect of these practices has been to require major OEMs to preinstall

8 Windows exclusively on all computers. A substantial number of OEMs that otherwise would

9 have desired to license BeOS for dual-boot installation have been precluded from doing so as a

10 result of Microsoft's exclusive dealing requirements. Microsoft's illegal monopoly and

11 exclusionary practices meant that Windows, to the exclusion of all other operating systems, was

12 on virtually all Intel-compatible PCs. Microsoft thus foreclosed existing and potential avenues of

13 distribution for an Intel-compatible PC operating system. Moreover, Microsoft's illegal

14 monopoly and exclusionary tactics foreclosed competition in a substantial share of the Intel-

15 compatible PC operating system market.

16 77. Microsoft's exclusive dealing practices have substantially lessened competition

17 and elevated prices in the market for Intel-compatible PC operating systems. Microsoft's

18 conduct has also directly and proximately caused injury to Be's business and property. That

19 injury is of the kind that the antitrust laws were intended to prohibit, and therefore constitutes

20 antitrust injury.

21 78. There is no legitimate business justification for Microsoft's exclusive dealing

22 practices and any purported legitimate business justifications are mere pretexts.

23 **THIRD CLAIM FOR RELIEF**
THE CARTWRIGHT ACT

24 **(Calif. Bus. and Prof. Code §§ 16720 *et seq.*)**

25 79. Be incorporates by reference and realleges the averments of paragraphs 1-78 as if

26 fully set forth herein.

27 80. Microsoft has engaged in combinations of capital, skill, and acts with others with

28 the intent, purpose and effect of creating and carrying out restrictions in trade and commerce; and

COMPLAINT AND JURY DEMAND - 16

restraining and preventing competition in the relevant market of Intel-compatible PC operating

systems, thereby enabling Microsoft to perpetuate its monopoly of that market.

81.   As a direct and proximate result of Microsoft's unlawful combinations and

contracts to restrain trade and monopolize the relevant market, plaintiff has suffered injury to its

business or property and has been deprived of the benefits of free and fair competition on the

merits. That injury is of the kind that the antitrust laws were intended to prohibit, and therefore

constitutes antitrust injury.

<div align="center">

FOURTH CLAIM FOR RELIEF
UNFAIR COMPETITION ACT
(Calif. Bus. and Prof. Code §§ 17200 *et seq.*)

</div>

82.   Be incorporates by reference and realleges the averments of paragraphs 1-81 as if

fully set forth herein.

83.   Microsoft's violations of the federal antitrust laws, as well as its conduct in

engaging in combinations of capital, skill, and acts with others with the intent, purpose, and

effect of creating and carrying out restrictions in trade and commerce; and restraining trade and

preventing competition in the relevant market for Intel-compatible PC operating systems in

violation of California law, constitutes and was intended to constitute unfair competition and

unlawful and unfair business acts and practices within the meaning of California Business and

Professions Code § 17200.

84.   As a result of Microsoft's violation of California Business and Professions Code §

17200, Microsoft has unjustly enriched itself at the expense of plaintiff.

85.   To redress this unjust enrichment, Microsoft should be required pursuant to

Business and Professions Code § 17203 to disgorge its illegal gains for the purpose of making

full restitution to plaintiff.

<div align="center">

FIFTH CLAIM FOR RELIEF
TORTIOUS INTERFERENCE
(Common Law of California)

</div>

86.   Be incorporates by reference and realleges the averments of paragraphs 1-85 as if

fully set forth herein.

87.   Microsoft has tortiously interfered with Be's prospective economic relationships.

COMPLAINT AND JURY DEMAND - 17

Microsoft interfered with the formation of specific prospective contracts between Be and Hitachi, and between Be and Compaq. More generally, Microsoft intentionally interfered with Be's right to pursue its lawful business and employed unlawful means in doing so.

88. In the case of Hitachi and Compaq, Be had established economic relationships that held out the probability of future economic benefit to Be.

89. Microsoft knew of the existence of Be's relationships with Hitachi and Compaq.

90. Microsoft intentionally engaged in conduct designed to disrupt Be's relationships with Hitachi and Compaq and to prevent the formation of the kind of licensing agreements for BeOS and/or BeIA that Be had been discussing with them.

91. Microsoft's acts of interference were wrongful because those acts, including Microsoft's reliance on its license agreements with Hitachi and Compaq, were in violation of federal and state law as described in the First through Fourth Claims for Relief above. Microsoft did not act in good faith to protect any legitimate business interest, but instead with the improper motive of preserving its unlawful monopoly over Intel-compatible PC operating systems and preventing Be's entry into that market.

92. Microsoft's conduct actually disrupted Be's relationships with Hitachi and Compaq and prevented the formation of licensing agreements of the kind described earlier in this Complaint, which otherwise would have been entered into, thereby causing injury to Be.

93. Be has suffered damages as a proximate result of Microsoft's interference with its prospective economic relationships with Hitachi and Compaq.

94. Microsoft acted willfully and with malice, and is therefore liable for punitive damages as a result of its interference with Be's prospective economic relationships with Hitachi and Compaq.

95. In addition to interfering with those specific relationships, Microsoft more generally interfered with Be's ability to pursue its lawful business. In conducting that business, Be had a reasonable probability of obtaining future economic benefit from the licensing of BeOS, and later BeIA, both to OEMs and directly to end-users.

96. Microsoft knew that Be was attempting to enter the market for Intel-compatible

PC operating systems and to establish contracts with major OEMs for the distribution of BeOS (and later BeIA) through preinstallation of its operating systems on PCs and Internet appliance devices.

97.   As described previously in this Complaint, Microsoft engaged in a series of intentional acts designed to disrupt Be's prospective economic relationships and its ability to conduct its business. Among other things, Microsoft established terms of its Windows licensing agreements that precluded major OEMs from offering BeOS to consumers in a dual-boot configuration with Windows on PCs.

98.   Microsoft's acts of interference were wrongful because those acts, including Microsoft's implementation and enforcement of its restrictive license agreements, were in violation of federal and state law as described in the First through Fourth Claims for Relief above. Microsoft did not act in good faith to protect any legitimate business interest, but instead with the improper motive of preserving its unlawful monopoly over Intel-compatible PC operating systems and preventing Be's entry into that market.

99.   Microsoft's conduct actually disrupted Be's prospective relationships with OEMs and prevented the formation of beneficial licensing agreements for the distribution of Be's operating system products. Microsoft thereby destroyed Be's ability to carry on its business.

100.   Microsoft's acts of tortious interference with Be's ability to conduct its business proximately caused Be damage, in an amount to be proven at trial.

101.   Microsoft acted willfully and with malice, and is therefore liable for punitive damages as a result of its wrongful interference with Be's ability to pursue its lawful business.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury of all issues triable of right by a jury.

PRAYER FOR RELIEF

1.   For compensatory damages in an amount to be proven at trial.

2.   For an order trebling the amount of compensatory damages to be awarded pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15.

3.   For an order trebling the actual damages plaintiff has sustained pursuant to

California Business and Professions Code § 16750;

4.   For an order requiring Microsoft to make full restitution for its violations of § 17200, pursuant to Business and Professions Code § 17203.

5.   For an award of punitive damages.

6.   For the award to plaintiff of its attorneys' fees and costs of suit.

7.   For an award of pre-judgment and post-judgment interest on the above sums, to the extent permitted by applicable law and at the highest rate allowed by law.

8.   For such other relief as the Court may deem just and equitable.

DATED this 18th day of February, 2002.

MARC M. SELTZER
CA Bar. No. 54534
SUSMAN GODFREY L.L.P.
Suite 950
1880 Century Park East
Los Angeles, California 90067-1606
Telephone: (310) 789-3100

STEPHEN D. SUSMAN
CHARLES R. ESKRIDGE III
SUSMAN GODFREY L.L.P.
1000 Louisiana, Suite 5100
Houston, Texas 77002-5096
Telephone: (713) 651-9366

PARKER C. FOLSE III
JONATHAN M. SHAW
IAN B. CROSBY
EDGAR G. SARGENT
SUSMAN GODFREY L.L.P.
1201 Third Avenue, Suite 3090
Seattle, Washington 98101
Telephone: (206) 516-3880

By_____/s/_____
       Marc M. Seltzer
      [signed with permission]

Attorneys for Plaintiff Be Incorporated

CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Civil LR 3-16, the undersigned certifies that the following listed persons,

COMPLAINT AND JURY DEMAND - 20

associations or persons, firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding:

Microsoft Corporation
and its shareholders

Be Incorporated
and its shareholders

Currently, both Be and Microsoft are public companies with many thousands of shareholders.

_____
Attorney of Record for Plaintiff Be Incorporated