

DIRECT TESTIMONY OF WILLIAM HARRIS

William Harris hereby declares as follows:

I. BACKGROUND

1. I am President and Chief Executive Officer of Intuit Inc. ("Intuit"). I assumed that position August 1, 1998, after having been Executive Vice President since December 1993. As Executive Vice President, I was responsible first for Intuit's tax preparation software business, and later both the tax and consumer software businesses. Prior to joining Intuit, I was President of ChipSoft, Inc., the predecessor to what became Intuit's tax business upon the acquisition of ChipSoft in 1993. In these roles, I have gained substantial experience overseeing the development, marketing and distribution of both software and online products, content and services.
2. Intuit operates in an industry where Microsoft has substantial power that affects the way we do business, develop and market our products and interact with other participants in the industry. The principal vehicle through which Microsoft has attained and exercised this power is through its dominant desktop operating system, Windows. Because the overwhelming majority of desktop PCs use Windows as the operating system to run the computer, Windows has become a "choke point" that software application vendors and providers of Internet related content and services must utilize in order to gain access to customers and through which most computer users access computer products and services, the Internet, and potentially all electronic commerce. The Windows operating system is to

most computer users and providers of software applications or Internet services what the dial tone is to businesses and customers using the telephone: it's the thing you must have access to if you are going to communicate with each other.

II. SUMMARY OF TESTIMONY

3. I intend to testify on the importance of the operating system and the ways in which Microsoft has used its control of the operating system to influence the way Intuit has conducted its business. I will explain how Microsoft obtained an exclusive distribution and promotion agreement with Intuit, to the exclusion of Microsoft's principal competitor in the browser business, Netscape. I will also describe the importance of the operating system to our business, and Microsoft's ability to extend its power over the Windows desktop to restrict the ability of software vendors and Internet content providers to reach potential customers in the emerging new market known as the Internet.
4. In the consumer software industry, Microsoft's Windows operating system is the dominant operating system running on personal computers. Because Microsoft owns the dominant operating system, Microsoft also controls the premier distribution mechanism for any software application, which is distribution with the operating system itself. With this unique method of distribution, Microsoft has the unparalleled power to favor one product over another by tying competitive products to the operating system, as it has done by distributing Internet Explorer with each copy of Windows.
5. With the recent growth in popularity of the Internet, various Internet related products

and services have emerged. Many companies, including Intuit and Microsoft, are using the Internet to offer a wide variety of products and services. Distribution of Internet Explorer with each copy of Windows is helping to extend Microsoft's control of the computing environment by making Windows a gate keeper for the Internet. As the distribution of Internet Explorer with the operating system becomes more widespread and entrenched, more and more companies which offer new products and services on the Internet will discover, as Intuit has, the need to pass through the Windows choke point to reach customers on the Internet.

6. Intuit entered into an Agreement to promote Microsoft Internet Explorer to the express exclusion of Netscape Navigator and to forego any business relationships with Netscape, because Microsoft guaranteed Intuit placement on the Windows desktop for Intuit's Internet-based products and services. However, during the negotiations it was made clear to me that promotion of Intuit's Internet content on the Windows desktop was conditioned on our agreement to forego business relationships with Microsoft's browser competitor, Netscape, including our then-existing arrangement to distribute and promote Navigator.
7. Now that Microsoft is gaining control of the Internet browser market, Microsoft has in its sole possession another prime piece of desktop real estate, the browser start page. Just as it used its Windows desktop to favor Internet Explorer to the detriment of Navigator, Microsoft has the exclusive ability to use the browser start page to favor its own Internet

content and services to the detriment of competitors. Microsoft has the power to be discriminatory (by giving preferred placement to its own web offerings or to those of favored partners, or by charging fees to gain access to this unique gateway to the Internet), or even exclusionary (by denying access altogether to certain products or companies).

8. Thus, I am testifying today both as a witness of Microsoft's ability to leverage its desktop to extract exclusionary agreements, and as a competitor of Microsoft. I have first hand knowledge about Intuit's experience with Microsoft's use of this operating system desktop to prevent Intuit from doing business with Netscape. Moreover, as a competitor of Microsoft, I am particularly concerned that Microsoft has managed to expand its operating system choke point to include the browser and the start page, and Microsoft's resulting power to limit customer choice by controlling Internet product and service providers' access to customers. Unless this Court limits Microsoft's ability to expand the Windows choke point into the Internet, Microsoft's ability to be the gatekeeper of the Internet will be unchallenged, and competition on the Internet will be constrained. Such a result will have implications far beyond the software industry, as the Internet is rapidly becoming a major conduit for communications and commerce generally. As Microsoft's control of the gateway to the Internet increases, the likelihood will decrease that new content or services will be successfully developed to compete with content or services that have been favored by Microsoft with preferred and near-ubiquitous access to customers.

9. I am further concerned about Microsoft's ability to continue to utilize the unique

distribution capabilities of its operating system through subsequent technological and market changes in the software industry. To be effective any remedy imposed by this Court cannot be specific to a narrow set of conduct presently being undertaken by Microsoft. Rather, it is my view that such remedy should be based on the broad principle of “operating system neutrality”: that Microsoft should not use its operating system control in a manner which is discriminatory or exclusionary in the development, marketing and distribution of either its own or third party content, services or products. Further, I believe this remedy should contain mechanisms to permit this principle to be applied against subsequent changes in Microsoft’s conduct in the context of then current market conditions. Without such a broad remedy, Microsoft’s ability to control customer access will continue to increase, and the competition and increased customer choice that would have otherwise resulted from future technological innovations will be substantially restricted and reduced.

III. DESCRIPTION OF INTUIT’S BUSINESS

10. Intuit is a leading provider of accounting, tax, and personal finance software and services for individuals, small businesses and accounting professionals. Intuit’s mission is to use interactive technology to revolutionize the way these customers manage their financial lives. Intuit sells a range of desktop software products, Internet-based products and services, and financial supplies, in three primary areas: (i) small business accounting software, financial supplies and related services; (ii) personal, professional and small business tax preparation software and services; and (iii) personal finance software and

services.

11. Intuit's products include QuickBooks, the most popular small business accounting software; TurboTax, the best-selling personal tax preparation software; and Quicken, the leading personal finance software. Intuit's Quicken.com web site on the Internet offers a comprehensive selection of personal finance news, information and tools.
12. Intuit distributes its products through direct, retail and OEM channels. Over the last few years, there has been an increasing recognition of distribution through OEMs as an important vehicle to reach new users. Moreover, our experience has shown that the relative prominence of an application's placement on a new computer system will significantly affect the likelihood of a user's trying the application, and such trials are a key determinant of ultimate adoption. Because every OEM must include Windows with its systems, Microsoft has direct power to influence Intuit's distribution on OEM machines. For example, Intuit has been directly prevented from implementing various placement and promotion strategies as a result of Microsoft's contractual restrictions on an OEM's ability to customize the Windows desktop.
13. In addition to traditional software distribution, the Internet has become essential to Intuit's continued long-term growth. A principal focus of Intuit's current strategic efforts has been to establish Intuit as a premier provider of personal and small business financial information and services on the Internet. While Intuit's revenue from Internet products and services was about 6% of the company's total revenue for fiscal 1998, the dramatic growth

of the Internet and of Intuit's Internet businesses promises to make the Internet a meaningful source of Intuit's revenues within a few years.

14. For the type of Internet-based products and services that Intuit sells -- that is, Internet content products and services -- the most critical factors for competitive success are speed in getting those new products and services to market, the ability to distribute them effectively, the ability to generate web site traffic, and the quality of the products and services.
15. An Internet web site generates income in three principal ways. First, the owner of a web site can sell advertising and sponsorships on the site. Second, the owner of a web site can earn transaction fees from third parties that sell services through the web site. Third, the owner of a web site can earn user fees directly from the customer. Intuit does all three.
16. Volume of customers at a web site is the single most important factor in determining advertising rates that the web site owner can charge for space on the web site. Similarly, customer volume will normally bear directly on the volume of transaction and user fees that can be earned by a web site owner. Thus, the success and viability of an Internet web site depends on the ability to draw computer users to that site.
17. One of the most valuable tools for drawing customers to a web site is the placement of a message, icon or logo on an active computer screen that permits a computer user to move directly to a web site without the need for intermediate steps or general searches on the Internet. Such product placement does more than advertise a web site, it provides a direct

link to the web site and the content and services of that site. It is well understood in our industry, as in others, that customers are generally more likely to access what they see and can easily reach than what they need to search for. The more steps that must be taken to reach a web site, the less likely it is that a customer will travel to the web site.

18. The importance to Intuit of product placement for its web sites is reflected in the business deals the company has made to ensure such prominent placement. For example:
19. On February 17, 1998, Intuit announced a three-year agreement with America Online, a prominent provider of online services, pursuant to which Intuit will pay America Online \$30 million for the right to have America Online promote to its members Intuit's web sites and online services. Among other things, the agreement provides that icons and messages for Intuit's web sites and services will appear on the "front pages" of AOL and AOL.com (the default home page for Internet access by AOL members). That is, Intuit has become a major "anchor tenant" of AOL's Personal Finance and WorkPlace Channels.
20. On June 11, 1997, Intuit invested \$40 million in Excite, a leading content aggregator and navigation hub, or "search engine," on the Internet. An agreement between the companies provided, among other things, that Intuit would become the primary provider and aggregator of financial content on Excite's Internet search services, thereby helping to direct computer users to Intuit web sites and services. Within one month of implementing the Excite agreement, our web traffic more than doubled.
21. Given the nature of its businesses, Intuit can be characterized as both an independent

software vendor, or "ISV," and a provider of Internet content (an "ICP" as defined in the Plaintiff's Complaint in this action).

IV. INTUIT'S BUSINESS DEPENDS UPON THE WINDOWS OPERATING SYSTEM

22. The operating system is (a) essential and (b) unique. It is essential, because all other software applications depend upon it to operate. It is unique, because no other piece of software has the same centrality and necessity. Software developers are dependent upon the operating system not only for basic functionality but, increasingly, for distribution and promotion as well.

23. The operating system is the essential foundation upon which all other software functionality is built. It controls the basic operations of a computer, and it defines and regulates what can be done and how it can be done. Intuit, and other software application developers, are dependent upon the operating system for the basic facilities necessary for the operation of our products and services. Without the operating system, none of our applications can run.

A. Microsoft Windows is the Dominant Personal Computer Operating System

24. Windows, the proprietary operating system developed by Microsoft, now operates an overwhelming majority of the personal computers operating worldwide. I thus believe, and it is my experience, that consumer software vendors such as Intuit have no practical choice but to focus software product development primarily -- if not exclusively -- on software for use with Windows.

25. This is so because the economics of software development make high volume sales critical to profitability. The fixed costs of developing software -- including, among other things, research, development, programming and testing -- are very large and can only be offset by high volume sales. By contrast, the variable costs of manufacturing software once it has been developed are quite low. Thus, it is essential for profitability of most PC-based software products that the product be compatible with Windows. At Intuit, compatibility with Windows is so critical that the company will focus on such compatibility even if this requires slowing or abandoning development of software for use with other operating systems.
26. For example, Intuit has discontinued DOS-compatible versions of its major software products (Quicken, QuickBooks and TurboTax), has abandoned development of Macintosh-compatible versions of QuickBooks, and has dramatically reduced development of Macintosh-compatible versions of Quicken and TurboTax. In our most recent fiscal year, more than 95% of Intuit's revenues came from users of the Windows operating system. Intuit is therefore highly dependent upon Windows from a business, as well as a technical, point of view.
27. The development of software that is compatible with the Windows operating system itself reinforces the dominance of Windows, because consumers seek to purchase the operating system that is compatible with the greatest number of software applications. In turn, software producers want their products to be compatible with the operating system

that is most widely used by consumers. This creates a self-reinforcing cycle (sometimes referred to as a “network effect”), which tends to perpetuate and enhance the dominance of the leading operating system.

28. Intuit’s dependence on the Windows operating system creates additional dependence on the supplier of the operating system, Microsoft. We depend on Microsoft for the information, specifications, training, development assistance and development tools necessary to develop our products in an effective and timely manner.
29. Over time, increasing functionality has been included with Microsoft’s operating system. Early versions of Microsoft DOS (which stands for “Disk Operating System”) had only basic operating system functionality, such as facilities for managing processor instructions, memory and input-output devices. Subsequent versions of DOS and Windows (which is an incremental evolution of DOS) included various functionality which had previously been developed and distributed separately, such as disk defragmentation and disk compression.
30. Such functionality can be either (a) distributed separately from the operating system or (b) distributed with the operating system. To the extent that it is distributed with the operating system, and particularly when it is distributed with the operating system at little or no incremental cost, it tends to displace similar functionality distributed separately from the operating system. Therefore, distribution with the operating system – particularly the dominant operating system -- is a very important advantage to a software developer.

B. The Windows Desktop Provides Unmatched Distribution and Promotion Opportunities

31. With the shift from DOS to Windows, which includes its own graphical user interface, a new dependency began to arise. Because the operating system can determine the initial interface presented to the user, that interface can be used to preferentially promote various products or services. Because Windows is so dominant, the value of preferential promotion in the Windows operating system is also a very important advantage.
32. Technology changes quickly, and the form of that initial interface has changed as well. The Windows Desktop (the default interface presented upon starting a PC), the Active Desktop (an Internet-style interface alternatively presented upon starting a PC), and the Start Page (the default interface presented upon starting the browser bundled with the operating system) are all examples of initial interfaces presented to the user as he or she initiates a computing session.
33. The ubiquity of these initial interfaces create great advantage for products and services which are promoted on them. It is well understood in our industry, as in others, that customers are more likely to purchase or use what they see first and what they see by default (without making an explicit choice). For example, in the magazine industry in which I used to work, large sums of money were paid to obtain product placement at the supermarket checkout stand, which is analogous to the initial interface on the PC in that it is

the one place through which all customers must pass. Similarly, the makers of breakfast cereal, soft drinks and other retail products strategically place their goods on store shelves and end-caps for immediate visibility. Indeed, the three most important success factors often cited by many types of retailers in the physical world are “location, location, location”.

The same holds true in the electronic world.

34. In fact, I believe that the importance of prominent placement is even greater in the electronic world than in the physical world. This is because the Internet is an interactive medium, which can provide both advertising and fulfillment functions. In other words, a customer can both learn of and order a product on the Internet. Thus, for instance, it can serve the functions of both television advertising and supermarket distribution in the traditional physical world.
35. It is a primary goal of Intuit, and other Internet content providers, to ensure that the message, icon or logo of its web site appears as soon as possible after a computer user logs on to his or her computer. Generally, the first opportunities for such a web site prompt to appear are in the screens generated by the computer’s operating system or the screens that appear when a user first accesses an Internet browser.
36. Through its Windows operating system and the Internet Explorer browser, Microsoft has the power to control product placement for access to Internet web sites. Creating a "bias" on the screen in front of the computer user gives Microsoft substantial power to direct users to particular products, services and web sites

37. Thus, Microsoft's control of the operating system give it substantial power over other software developers and Internet content providers not only in terms of utilizing operating system capabilities, but also in terms of preferential distribution and preferential promotion.

C. The Characteristics of the Operating System Market make Microsoft's Windows Operating System Unique

38. The operating system is unique, because it is essential and central to all other computing. Because the operating system creates an environment in which all other functionality operates, it is extremely rare that end users would operate more than one operating system. In addition, computers are not useful for any relevant purpose without an operating system, whereas they can be and are useful without any individual application, such as Quicken.

39. Once an operating system is established – and particularly if it becomes dominant – the network of dependencies which are built upon it by both end users and developers make it difficult to switch to a different operating system. Therefore, for most users and developers, there are no practical substitutes for Windows.

40. For example, let me compare Windows to our own Quicken product. A high proportion of users of personal finance software use Quicken, just as a high proportion of PC users run the Windows operating system. However, the switching costs are vastly different. To switch from Windows to the Macintosh operating system requires many hundreds or thousands of dollars in new hardware costs, a completely new set of software

applications, and the hassle of relearning both the new operating system and the new software. Because so many things depend upon the operating system, switching to a new operating system requires all those things to change as well.

41. By contrast, switching from Quicken to Microsoft Money requires only a copy of Money. In Microsoft's own words, Quicken data can "painlessly and seamlessly" be imported into Money, Microsoft "makes it a snap" for Quicken users to use Money, and Money is "easy to use and learn." Therefore, the barriers to switching are relatively low. (See, *Gov't Ex 1112*, www.microsoft.com/moneyzone/mrmon/quicken)
42. Because the switching barriers are low, Quicken must compete with Microsoft Money (or other personal finance software packages) on a price and performance basis. Whichever company delivers the better value will ultimately gain the most customers.
43. However, the network of external dependencies now surrounding the Windows operating system help insulate it from having to compete on a price and performance basis. Because so many things depend upon the operating system, switching to a new operating system requires all those things to change as well. Even if a software developer developed a comparable operating system and gave it away free, few users would adopt it because there would be few applications, and few software companies would write applications because there would be few users.
44. Because the switching cost are so high, there are no effective substitutes for Microsoft's operating system for most users. Therefore, there is scant competition in the

PC operating system market, and even less competition on price. Given the dramatic increase in the quantity of operating system licenses sold over the past eight years, the fact that the cost of an operating system license has not declined significantly during this period is one indication of the absence of effective price competition.

45. Another indication of the lack of effective competition is Microsoft's astonishing profitability. As a basis of comparison, I prepared an analysis of the average pre-tax profitability, as a percent of revenue, for the 473 U.S. companies with annual revenues greater than \$3 billion, based on the most recent public financial statements on file (See, *Gov. Ex 1216*, Financial data from PeerScape website). The average pre-tax profitability of these large companies is 9%. (Intuit's profitability is also in about this range.) Very few companies – less than eight percent of all large companies in America – exceed 20% profitability. Only five companies exceed 30% profitability. But Microsoft exceeds all the others with the record-high profitability for a large corporation in the modern era: 49%, and steadily climbing (See, *Gov. Ex. 1217*, Financial History Pivot Table). As a businessperson, I find it hard to explain such abnormally high profitability, except in a market substantially insulated from effective competition.

46. Thus, I believe the operating system is unique in that it is (a) necessary and central to all other computing functions, and (b) insulated from effective competition by an extensive network of dependencies.

V. INTUIT HAS BEEN DIRECTLY IMPACTED BY MICROSOFT'S EXERCISE OF

OPERATING SYSTEM LEVERAGE

47. Because Intuit (or any PC software developer) is so dependent upon the operating system, we have been concerned about the potential use of the operating system as a competitive weapon against our businesses for a number of years. This exists as a theoretical possibility at all times, but Intuit has experienced three major episodes during which we have been directly impacted by Microsoft's power to leverage their operating system control: (1) WinATM in 1994, (2) the Active Desktop in 1997, and (3) the Start Page in 1998.

A. Microsoft's Acquisition Attempt of Intuit and Planned Inclusion of "WinATM" in Windows

48. In 1994, Intuit was approached repeatedly by Bill Gates at Microsoft regarding his interest in acquiring Intuit. In our internal deliberations, important consideration was given to the ways in which Microsoft could compete with us if we resisted the acquisition offer. At that time, Microsoft already had a history of bundling into the operating system various software functionality that had previously been sold separately by other companies. This had seriously impacted the businesses of software developers such as Symantec, Central Point, Stac, and others.

49. We were therefore concerned that Microsoft might similarly bundle personal finance functionality with the operating system. In fact, we had heard rumors that they were working on such a project. Such bundling would have seriously impacted our ability to sell

Quicken, which was then our largest and most profitable business. In addition, we were then investing very significant resources in building an online banking network, which would electronically connect PC users to their financial institutions. If Microsoft bundled online banking functionality with the operating system, thereby making it the default service available to all Windows users, it would have seriously impacted our ability to attract PC users or financial institutions to our service.

50. Intuit's evaluation of an acquisition by Microsoft was influenced by these considerations. For instance, in a confidential memo to Intuit's Board of Directors in the summer of 1994, Intuit founder and chairman Scott Cook wrote the following: Microsoft "can attack us in either or both of two ways: (1) Traditional way: develop and market financial products reasonably independently of their other assets, and (2) All-out attack: make full use of their many and unique assets, such as the OS [operating system], other application software, and Marvel [the Microsoft Network]. We fear the second approach. That's the focus of this assessment."

51. Mr. Gates' acquisition proposal to Intuit came at about the time Microsoft was finalizing a consent decree with the Department of Justice which prohibited certain conduct by Microsoft. In his conversations with Intuit, Mr. Gates indicated that he felt his settlement with the government had cleared up potential uncertainty as to his ability to move forward aggressively on numerous fronts, including an acquisition such as Intuit. In the same memo to the Board, Mr. Cook said of Microsoft: "Recently overcame last barrier to

OS [operating system] monopoly. My judgement: Yet to see full benefits from OS monopoly.”

52. Intuit signed a definitive agreement to be acquired by Microsoft in October 1994. Microsoft’s settlement with the Department of Justice was subsequently and unexpectedly challenged by Judge Sporkin, which re-ignited public and regulatory concern over Microsoft’s conduct. In the heat of this re-ignited concern, the Department of Justice challenged Microsoft’s proposed acquisition, which Microsoft decided to abandon.
53. After Microsoft abandoned its attempt to acquire Intuit, we were told by Pete Kight, the CEO of CheckFree Corporation, that Microsoft had in fact approached CheckFree and MasterCard International with plans to create a product they called “WinATM”. Mr. Kight disclosed this information to me because Intuit subsequently became CheckFree’s largest shareholder, and I am Intuit’s representative to the CheckFree Board of Directors. According to Mr. Kight, WinATM was to have been created by starting with Microsoft Money, Microsoft’s personal finance software, and stripping away some non-essential features. In fact, the WinATM project was run by the Microsoft Money team. WinATM was to include (1) checkbook register functionality (the fundamental customer benefit in a product such as Microsoft Money or Quicken), (2) electronic data download functionality (the ability to get account balance and statement data electronically from financial institutions), and (3) electronic bill payment functionality (the electronic equivalent of writing a check). WinATM was to be bundled with the operating system, so that it would

be universally and freely available and be the default option for personal finance and online banking and payment activities for all users of the Windows operating system.

54. Mr. Kight told us that, in early 1994, there had been numerous meetings at Microsoft's headquarters in Redmond between representatives of Microsoft, CheckFree and MasterCard. The most senior level meeting was attended by Nathan Myrvold and, briefly, Steve Balmer of Microsoft; Pete Hart, CEO of MasterCard; and Mr. Kight. Microsoft proposed to connect to MasterCard's national ATM network for electronic data access and to CheckFree for electronic bill payment services. Microsoft representatives explained to Mr. Kight that, by bundling this functionality into the operating system, they would automatically enable every Windows PC user with the functionality, thus: (1) making any competitive offerings irrelevant, and (2) giving the banks "no choice" but to work with them. The Microsoft representatives wanted to move quickly, in order to be able to bundle the functionality into the upcoming "Win95" version of the operating system, which was ultimately released in August 1995.
55. According to Mr. Kight, after the Intuit acquisition agreement was announced, representatives from the Microsoft Money team said that Mr. Gates had decided that, if Microsoft was going to bundle personal finance functionality with the operating system, he preferred to do so using the most popular such product (Quicken).
56. During the period Microsoft's proposed acquisition of Intuit was under review, both Intuit and Microsoft avoided sharing non-public information on their business or plans.

Therefore, Intuit did not have any direct conversations with Mr. Gates or others at Microsoft about their plans for the marketing and distribution of personal finance functionality. Mr. Kight's later disclosures, though, were consistent with our assumptions and experience. In fact, during the acquisition negotiations, Mike Maples of Microsoft had informed us that Microsoft had another deal very close to consummation with MasterCard that they would need to delicately unravel as a result of the agreement to acquire Intuit. Consequently, we believed – and continue to believe -- that the information provided by Mr. Kight regarding WinATM was true, and our subsequent actions have been based on that belief. Specifically, our belief in the likelihood of Microsoft's bundling or promoting its own financial functionality with the Windows operating system was one of the prime motivations for our entering the Active Desktop agreement.

B. Microsoft's Use of Its "Active Desktop" to Prevent Intuit from Working with Netscape

57. In a move that was publicly described as an attempt to make the desktop interface of the Windows operating system become the primary gateway to the Internet, in 1997 Microsoft developed a feature in Internet Explorer called the Active Desktop. The Active Desktop was intended to be a new user interface for Windows that would, among other things: (a) permit direct access to the Internet; (b) provide a choice of Internet web sites that could be directly accessed from the desktop; and (c) permit the user to view Internet content on the desktop itself without separately opening the browser. With the Active Desktop,

Microsoft aimed to turn the Windows desktop into a Microsoft-controlled gateway to the Internet – a gateway that would be seen by almost every PC user.

58. The Active Desktop would promote select web sites by placing icons and links to the web site's content and by distributing select content and functionality from Microsoft and its favored partners with the operating system itself. The icons were located in a pre-configured "channel bar" that was placed directly on the Windows desktop. The channel bar included direct links to Microsoft content as well as various third party content providers selected by Microsoft, such as Disney and Time Warner. The channel bar also included "category channels" such as News, Business, Technology, and Entertainment, that contained links to topic-specific content from select ICPs. Distribution of select content with the operating system was by inclusion on CD-ROM and OEM versions of Windows.
59. For Intuit, this represented the same threat we had considered during the WinATM episode – the possibility that Microsoft would bundle its own financial products with the operating system. We believed it was critical for us to have our financial products distributed with the operating system, as well.
60. Because the channel bar provided a direct link between web sites and the Windows desktop, and thereby to the vast majority of PC users, this feature offered Microsoft and a select few ICPs unparalleled distributional and promotional privileges. Intuit recognized the compelling potential value of such prominent placement, and expected that placement on the Active Desktop would promote Intuit web sites to every PC user running Windows 95 with

Internet Explorer 4.0 or running what ultimately became Windows 98. Appearance of a Quicken.com logo on the Active Desktop would not only promote Intuit's web site, but would also permit every PC user simply to "click" on the logo and go directly to the Quicken.com site. Microsoft's proprietary control of the Windows operating system gave Microsoft the unique opportunity to offer this Active Desktop service.

61. Placement on that portal was critical to Intuit because it meant potentially having access to millions of PC users. Also, not having such placement would mean that Intuit would no longer be on equal footing with the competing financial sites of Microsoft or its favored partners. During negotiations of an agreement by which Intuit could obtain priority placement for its web sites on the Active Desktop, however, Intuit learned that any such agreement would require, as a condition, that Intuit forego any business relationships with Netscape, Microsoft's principal competitor in the browser market. Because placement on Microsoft's Active Desktop was believed by Intuit at the time to be critical to the success of its web sites, Intuit felt constrained to agree to this condition.

62. As part of the arrangement, Microsoft also offered to distribute one megabyte of our code with the operating system. We tried to negotiate for more space, because we knew our existing financial products required more. Ultimately, we were unable to reduce our existing products down to a size that would fit within the limit, so we had to build new and highly simplified functionality for such distribution.

(i) Negotiations Leading Up to the Agreement

63. On June 14, 1997, Intuit and Microsoft entered an agreement which granted Intuit's web sites prominent placement in the Active Desktop's channel bar (the "Active Desktop Agreement"). (See, *Gov't. Ex. 1156* Internet Explorer Marketing, Distribution & Promotion Agreement). Eric Dunn, Intuit's Chief Technical Officer, and I negotiated the agreement on behalf of Intuit, and I signed the agreement on behalf of Intuit in my then-current capacity as Intuit's Executive Vice President.

64. During negotiations of the Agreement, Intuit had understood the extent to which Microsoft would seek to retain control of the Active Desktop, the features it would offer, and the web sites to which it would give placement. William Poole of Microsoft had told Mr. Dunn and me that Internet Explorer 4.0 ("Internet Explorer 4.0") would be shipped with next version of Windows. At the time, the next version of Windows was expected to ship at the end of 1997 and was called "Windows 97". The product actually shipped in the summer of 1998, and was called "Windows 98". Mr. Poole said that Microsoft planned to use the Active Desktop as the standard configuration for both Windows 98 and versions of Windows 95 containing Internet Explorer 4.0. Mr. Poole made clear that Microsoft, rather than OEMs, would determine what features would be included in the Active Desktop, with the exception of one sub-channel that would be offered to the OEM to communicate electronically with its customers. As a result, Intuit had understood during the negotiations that Microsoft would take steps to ensure that the Active Desktop channel bar would be turned on and visible to new Windows users. Additionally, Microsoft explained to Mr.

Dunn and me that the Active Desktop would eventually become the default desktop for Windows 98. This would mean, in short, that when a computer user would boot up Windows for the first time, Active Desktop and its channel bar would be the first screen visible to the user.

65. Under the agreement, Microsoft granted, among other things, placement of our Quicken.com service on the Active Desktop. Microsoft agreed to place the Quicken.com icon in a directory called "Business." The directory appeared in the channel bar and included other finance-related content providers, such as Microsoft Investor (Microsoft's web site dedicated to investing information and services), Fortune, and The Wall Street Journal. Although Quicken.com appeared in the folder with a number of competing services, Intuit still viewed Quicken.com's presence in the channel bar as very valuable because it allowed for a level playing field for it to compete with Microsoft and its partners on the basis of each site's quality and content. In fact, Intuit would have been prepared to pay a substantial fee for the placement, even greater than what Intuit has paid other portals and web sites for prominent position, but Microsoft offered us this placement instead in return for our agreement to forego future business dealings with Netscape.

66. Mr. Poole said he was not able to negotiate the placement of Intuit's Quicken.com channel on the Active Desktop without getting an approval from Microsoft's personal finance group, which was responsible for Microsoft Money, Microsoft Investor, and other financial products, many of which compete against Intuit's products and services. He later

came back and said that we could have a placement, but that he would have to give Microsoft Investor a similar placement next to ours on the “Business” Channel, in addition to their previously-determined position on the “Microsoft Network” Channel.

67. In addition, Microsoft offered as part of the Active Desktop Agreement to include one megabyte (and make reasonable efforts to include an additional one-half megabyte) of Intuit code with the next version of Windows. This would enable Intuit to get much broader distribution of some of our financial functionality, which would in turn drive customers to our products and content. As with placement on the Active Desktop, only Microsoft could provide such ubiquitous distribution.

68. During the negotiations, Mr. Poole advised me that Bill Gates had personally stated two preconditions for any agreements that would give an Internet content provider like Intuit access to preferential position on the Active Desktop. First, the agreement could only be one year in duration. (In an internal email to me from Eric Dunn dated March 27, 1997, Eric Dunn stated, “[Poole] claims that Bill Gates has ordained the “first year only” rule, and that [Poole] can’t consider anything longer. (See, *Gov. Ex. 1044*, March 27, 1997, Eric Dunn Email) Second, the agreement would have to preclude the Internet content provider from dealing with Netscape. (At the final meeting between Mr. Poole and myself, which took place in a conference room at the San Francisco Airport in April or May of 1997, I argued hard for a relaxation of the restrictions on dealing with Netscape – indeed, that was a major purpose of the face-to-face meeting. Mr. Poole reiterated that he had no ability to

negotiate on this point, because Mr. Gates had mandated that all preferred participants on the Active Desktop must agree to cease working with Netscape as a condition of that participation.)

69. At the time I negotiated the agreement, it was generally understood by me, and the industry generally, that Microsoft viewed increasing browser share as an important goal and that Microsoft sought to surpass Netscape in browser share. Microsoft executives had spoken publicly about the importance Microsoft placed on increasing browser share. At about that time, Bill Gates said in a public forum at which Intuit was represented, that there was one and only one measure of Microsoft Corporation's success in the coming year: "browser share". Moreover, during the course of the negotiations, Microsoft's representatives asked about the number of copies of Intuit's software that Intuit expected to distribute with Internet Explorer. My understanding was that Microsoft wanted to estimate the impact the agreement between Intuit and Microsoft would have on Microsoft's browser market share. For all of these reasons, I believed that the restrictions placed on Intuit in the agreement between Intuit and Microsoft related to Microsoft's goal of increasing its share of the browser market at Netscape's expense.

(ii) Description of the Active Desktop Agreement

70. The agreement between Intuit and Microsoft contained several specific restrictions concerning Intuit's ability to deal with Microsoft's competitors. Specifically, the agreement placed limitations on Intuit's ability to work and deal with "Other Browsers". Microsoft's

agreement defined "Other Browser" as: "Third Party software and related technology for any Platform that (i) is designed to view, render, browse, hear or otherwise interact with Content on the Internet, the Web and/or other public networks . . . ; and (ii) ranks in the top two (exclusive of Internet Explorer) most widely used browsers" (See, *Gov.t Ex. 1156*, Section 1.23) Netscape Navigator was certainly one of those top two browsers, and neither Will Poole nor I knew without checking which browser would be the second one to fall into that definition. As a practical matter, that other browser was not of any business significance. At the time of the agreement, and as remains true today, the principal browsers available to Internet content providers have been Microsoft Internet Explorer and Netscape Navigator.

71. The Active Desktop Agreement prevented Intuit from promoting Netscape on Intuit's web sites, or allowing Intuit's web site customers to access Netscape's products or services.. For example, prior to the agreement, Intuit had promoted Netscape by placing a Netscape Navigator download button and link on Intuit's web site. The agreement required Intuit to take those buttons and links off the web site, and replace them with download buttons and links for Microsoft Internet Explorer. In the absence of that requirement, Intuit would have continued to promote Netscape's download buttons and links on its web site.

72. The agreement also required Intuit to distribute "Internet Explorer and no Other Browser as an integral part of the release of any and all new and major releases of Intuit Products" (See *Gov.'t Ex. 1156*, Section 2.2(a)). Prior to this agreement, Intuit had

been distributing Netscape Navigator with Quicken, TurboTax, and QuickBooks, on both the Windows and Macintosh platforms. The agreement thus precluded Intuit from further including Netscape Navigator in copies of Intuit's applications.

73. The agreement also required Intuit to deploy certain Microsoft-specific technologies, such as Microsoft's Channel Definition Format, Dynamic HTML, and ActiveX. Content developed with those technologies can be viewed through Internet Explorer, but will not be accessible by other browsers. Intuit generally tries to design its web site so that it is accessible from any browser, to insure that it can be accessed by the largest possible number of customers. Thus, the requirement in the Active Desktop agreement to utilize Microsoft-specific technologies was an exception to Intuit's general practice of making its content broadly accessible.

74. Finally, the agreement effectively precluded Intuit from entering into a business relationship with Netscape to promote or distribute Intuit's content through any Netscape Internet service or browser product. Specifically, the agreement required that Intuit not enter into any "Content Promotion Agreements." A content promotion agreement was defined as:

“an agreement with (i) a company (or its Affiliates) which produces Other Browsers or (ii) an agreement with any third party in which economic and other benefits are passed through materially unchanged to a company which produces Other Browsers and in which the third party performs no

substantive function with respect to the agreement except to be a pass-through entity . . . , which agreement is to exchange money or other material and valuable consideration (such as the promotion, marketing or distribution of Other Browsers) in return for distribution, transmission, marketing or promotion . . . of Intuit Content or logos” (See *Gov’t. Ex. 1156*, Section 2.2 (d)).

75. Thus, while the agreement on its face appears to permit Intuit to allow Netscape to distribute Intuit’s content, it made it uneconomic to do so, as it prohibited either party from conveying to the other, either directly or indirectly, any payment or other consideration.

(iii.) Access to the Active Desktop Precluded Intuit’s Ability to Deal with Netscape

76. If not for the terms of the agreement, Intuit would have worked very diligently to enter into an agreement with Netscape to provide financial content on Netscape web sites. Netscape’s Navigator has many users. Intuit would have strongly preferred to have had the ability to enter into a business relationship with Netscape in order to direct potential Navigator users to Intuit’s web site.

77. At the time Intuit began discussions with Microsoft concerning Active Desktop, Intuit was working with both Microsoft and Netscape on the possible inclusion of certain components of Internet Explorer or Navigator in the next release of its flagship product, Quicken 98, which components would enable Quicken users to access information from the Internet without leaving the Quicken application or Quicken interface. During the Quicken

98 development cycle, there were two build versions of Quicken, one which used Internet Explorer as the embedded browser and one which used the Netscape Navigator embedded browser. These parallel versions were maintained over at least a three month period, with quality assurance testing performed on both versions. Microsoft and Netscape each was eager to have Intuit use its browser, and at no time did Microsoft condition such use on Intuit's participation on the Active Desktop. Intuit would have been able to distribute Internet Explorer even if it had not entered the Active Desktop agreement. In fact, Microsoft grants royalty-free distribution rights of Internet Explorer to almost anyone who asks. However, in order to be granted preferential placement on the Active Desktop, Intuit had no option but to bundle Internet Explorer with our products, and not bundle Netscape Navigator. As a result, we discontinued testing of the Netscape navigator variant of Quicken 98 when the Active Desktop Agreement was signed.

78. At the time Intuit was considering a browser for Quicken 98, both Internet Explorer and Netscape Navigator had certain advantages and disadvantages. For example, Microsoft was further along than Netscape in its development of a solution that would address Intuit's desires for Quicken 98 – specifically to create “componentized” browser capability which would allow us to render an HTML screen within the Quicken interface rather than within the traditional browser window. Our technical evaluation was that both companies could deliver such functionality, but Netscape would be delivering this capability later in our development and would effect integration and testing. The recommendation from our

technical team was to use the Internet Explorer. On the other hand, there were significant business and strategic considerations in favor of Netscape. I preferred working with Netscape, because Netscape was not a competitor to Intuit while Microsoft was. Netscape Navigator enjoyed a larger installed base of customers than Internet Explorer, and Netscape had been a significant partner of Intuit for about two years. In addition, Intuit had distributed Netscape's Navigator with a number of Intuit software products, including Quicken.

79. However, only Microsoft could offer placement on the Windows desktop and distribution of our code with the operating system. No other company could provide that level of exposure to computer users. Because of this, I felt we had no practical alternative but to agree to Microsoft's restrictions in order to gain access to the desktop. If not for the restrictions imposed by the Active Desktop Agreement, I believe Intuit would have shipped both Netscape Navigator and Microsoft Internet Explorer with its products. However, Intuit was not permitted by the terms of the Active Desktop Agreement to ship both browsers.

80. At the most basic level, the exclusion of Netscape Navigator from Intuit's products resulted in a significant decrease in the number of units of Navigator distributed to consumers either directly or through retailers. For example, a total of over five million copies of Netscape Navigator were distributed with the 1997 versions of Quicken, TurboTax, and QuickBooks, but over five million copies of Internet Explorer were

distributed with the 1998 versions of those products. Further, these numbers do not include the copies of Netscape Navigator that were downloaded from Intuit's web sites prior to the time the download capability was removed pursuant to the Active Desktop Agreement.

(iv.) The Nature of Software Design Would Have Enabled Intuit to Use Either Internet Explorer or Navigator

81. For the reasons I have stated, Intuit ultimately designed the most recent versions of Quicken to utilize Internet Explorer's browsing capabilities. When a Quicken user accesses Internet-related functions from within Quicken, Quicken launches a browser window from within Quicken. The browsing functionality is actually provided by Internet Explorer, but the user continues to see the Quicken interface. The user might not realize that another application has just been executed because the user is viewing Internet content from within Quicken's interface, rather than the browser's interface.
82. Software development is inherently flexible. There are numerous ways in which to design a program to achieve the same functionality or effect. Similarly, a developer can combine, or separate, any two or more software products or components. It is typically the goal to combine such products or components in such a way as to appear "seamless" to the user, in other words to make the two products appear like one. A good example of this is what Intuit has done with Quicken and Internet Explorer.
83. Intuit designed Quicken to operate with Internet Explorer to provide our customers

with a seamless experience. Although the customer may not be able to tell where Quicken ends and Internet Explorer begins, neither Intuit nor Microsoft consider Quicken and Internet Explorer to constitute a single product, and it has always been the case that they are two distinct products developed by two distinct software companies.

84. In a similar vein, in the same way that a software developer can combine or link two or more products or components, the developer can design products in such a way as to make it difficult to separate the companion products or components from each other. Software applications are made up of bits of code; it is this code that provides the computer with the necessary instructions to enable the application to perform the intended functionality. Software developers can manipulate that code in countless ways--and one way is to do so in a way that makes divorcing the products or components from each other very difficult.

85. The combination, or separation, of software products or components will almost always have some potential advantages and some potential disadvantages. For Intuit, in particular, distributing a browser with our products, rather than as part of the operating system, has some real advantages. The fact that Intuit currently distributes a version of Internet Explorer with Quicken is illustrative of this point. Intuit has exerted hundreds of hours testing and verifying that Quicken will operate with the specific version of Internet Explorer that comes with Quicken. If a Quicken customer does not already have a compatible version of Internet Explorer, Quicken will install the version of Internet Explorer that comes with Quicken. This ensures that Quicken will work the way it was intended and

tested.

86. Moreover, removing an application does not mean removing all components of the application, in other words it does not require deleting components shared by other applications. Quicken, like most applications, utilize shared components of software code, or “DLLs”. Any time multiple applications share a DLL, and you remove one of the applications and the shared DLL along with it, the other application will no longer work properly. So for example, if Quicken called on a DLL that was used by another application, like Internet Explorer, and an end user removed Quicken and the shared DLL, the other application would not work properly. This is easily avoided, though, by retaining the shared DLL when removing or uninstalling an application.

(v). Microsoft Subsequently Waived Certain Terms of the Active Desktop Agreement

87. On April 9, 1998, Microsoft informed Intuit that it was unilaterally waiving certain exclusivity portions of the Active Desktop agreement. Also, Microsoft informed Intuit that it plans to give OEMs the option to disable the Active Desktop channel bar and that the channel bar will no longer be a default feature in future revisions of Windows 98. I understood these actions to be a response to governmental inquiries into Microsoft’s conduct, in part because of two emails we received from Will Poole. In an email dated March 3, 1998, Mr. Poole stated that “At the Senate hearings today, Bill Gates was barraged with questions regarding the terms of Microsoft’s relationships with Active

Desktop content partners... [T]he DOJ, the Senate Judiciary and the press are searching for issues to highlight.”(See, *Gov’t. Ex. 871*, March 3, 1998, Will Poole Email) And in the April 9, 1998 email which contained the waiver notification, Mr. Poole stated that “Microsoft is amending these agreements in order to set aside any lingering questions regarding the business relationship between Microsoft and its [Internet Content Providers].” (See *Gov’t. Ex. 872*, April 9, 1998, Will Poole Email)

88. Shortly after receiving this waiver notification, Intuit began discussions with Netscape toward establishing promotional and distribution arrangements. In addition, Intuit has entered into an agreement with Excite to facilitate a relationship with Netscape.

89. Despite the waiver, Intuit continues to be concerned about Microsoft’s ability to use its control over the Windows desktop in order to get companies, like Intuit, to agree to terms which limit its ability to deal with Microsoft’s competitors. Placement on the Windows desktop remains tremendously valuable. Nothing prevents Microsoft from developing a new feature which leverages the value of the desktop to provide ICPs, or Microsoft exclusively, with prominent placement in front of the millions of PC users. ICPs that are not able to gain access to that placement, or that refuse to agree to Microsoft’s terms, will be placed at a disadvantage in the marketplace.

C. The Next Stage – Microsoft’s Use of Windows and Internet Explorer as a “Portal” to the Internet

90. Microsoft has announced that it is creating a new portal to the Internet called

"Microsoft Start," which will become Internet Explorer's new default home page. Recent news reports indicate that Microsoft recognizes the importance of such portals as points of entry to the Internet. In a recent interview reported in the TechWeb Internet site, Microsoft's lead product manager of its Interactive Media Group, Ed Graczyk, stated: "From our perspective, a portal is like the Windows desktop is to your PC computing experience. If you think of your Windows desktop as the place you go to start and manage what you do on your PC, a portal site is where you go to start and manage what you do on the Internet." Mr. Graczyk also stated that for Internet-related services provided by or through Microsoft, "Start will be the entry point for people who want to get to those services." (See, *Gov't. Ex. 1091*, TechWeb Interview of Ed Graczyk).

91. The creation of the new Start page reflects what Microsoft can do when it leverages the power of its ownership of the Windows operating system into successive adjacent positions of influence or control. First, Microsoft used its control over the PC desktop to position Active Desktop as a unique gateway between PC users and content providers. Second, Microsoft used agreements, like the Active Desktop Agreement, to help secure a substantial share of the Internet browser market at the expense of its competitors. Third, after obtaining a substantial share of the browser market, Microsoft created a new product, the Start page, that would enable Microsoft to use its new power in the browser market to direct customers to Microsoft proprietary or preferred web sites and services. Fourth, Microsoft announced that it is de-emphasizing the Active Desktop that was the vehicle

through which Intuit and others were to have maintained prominent product placement in the Windows and Internet Explorer environments. Fifth, when Intuit asked Microsoft about getting prominent placement for Intuit on the Start Page, I was told that prominence was being reserved for Microsoft's services and not our competing ones.

92. It has been the experience of Intuit, and it is generally understood in the computer industry, that consumers have a high proclivity to accept default settings and configurations on software and computer-based services. Even with the advent of many highly-advertised and content-rich sites on the Internet, three of the five most frequently visited sites, according to numerous industry market research services, have generally been the default pages that a user is directed to when launching the Netscape, Microsoft, or AOL browser.

93. As a result of Microsoft's bundling Internet Explorer with Windows 98, Internet Explorer will become the default browser and, in turn, the Microsoft Start page will become the default portal in the Windows operating system. Despite the fact that it is currently possible for a user to reconfigure Windows 98 to use a different browser or reconfigure the browser to use a different home page, it requires knowledge and extra work on the part of the user. Moreover, Microsoft now has an incentive over time to make such reconfiguration even less likely. One example of how they can do that is to promote proprietary web standards that will not operate in other browsers, as they have done in the Active Desktop Agreement. Another example is to create a warning, as they have done, when a user tries to remove Microsoft's Internet icon from the Windows desktop.

94. Moreover, with the rise in popularity of personalized start pages, Microsoft has the ability to affect the likelihood that even experienced computer users will change defaults. For example, by using the registration features of the operating system to automatically populate information in a user's Start page, Microsoft can raise the barriers to switching. This is because once a user has a personalized Start page, he or she would face the added hassle of retyping or transferring such information to a new portal.
95. The combination of Microsoft's new Start page and the bundling or inclusion of Internet Explorer in Windows thus will enable Microsoft to preferentially direct almost all personal computer users to its own web sites, or the sites of Microsoft's favored partners, and deny competitors such as Intuit similar favored access to such users.
96. This is of particular concern to Intuit because, among other things, Microsoft owns, in addition to Microsoft Money, several Internet web sites that provide content and functionality that compete directly with content and functionality provided by Intuit's products and web sites, including Microsoft Investor, TransPoint (the bill presentment and payment joint venture with First Data Corporation), Microsoft Money Insider and Microsoft HomeAdvisor.
97. This will become of particular concern to many, if not most, companies and organizations in America, as the Internet becomes more and more central to our lives. With rapid speed, the Internet is starting to alter the economic landscape. It is becoming the central artery for most electronic commerce and electronic communication in this country.

And while the importance of electronic forms of commerce and communication are still modest today, they are quickly starting to displace traditional forms.

98. Control of the dominant computer operating system can thus be leveraged into significant influence over and/or actual control of major areas of electronic commerce and communications. For example, by exclusively promoting MSNBC (Microsoft's news service) on the Start page, Microsoft has now made MSNBC the default news provider on the dominant operating system. This will enable Microsoft to preferentially direct almost all personal computer users to its own flavor of news coverage, and deny similar favored access to other news sources such as ABC, CBS, CNN, Knight Ridder, Time Warner, the New York Times, the Washington Post, and others throughout the country.
99. As further examples, by exclusively promoting Microsoft Expedia on the Start page, Microsoft has now made it the default travel booking service on the dominant operating system. By exclusively promoting Microsoft CarPoint, Microsoft has now made it the default car buying service. By exclusively promoting Microsoft HotMail, Microsoft has now made it the default electronic mail system. By exclusively promoting Microsoft Investor, Microsoft has now made it the default investment service. By stating that it will exclusively promote TransPoint (formerly MSFDC), Microsoft has indicated that it intends to make it the default electronic billing and bill payment service.
100. Today, there are no effective governors on the extent to which this power to promote, or even to exclude, will be used over time as computing – and the Windows operating

system -- becomes even more pervasive in our lives.

101. An un-level playing field in an area as increasingly pervasive as computing, is detrimental to businesses and consumers alike. For businesses, it tends to reduce effective competition by creating artificial barriers and conferring powerful advantage to one company. For consumers, it is my belief that this reduced competition will ultimately mean less choice and higher prices – even in the event that low prices are offered initially as a mechanism to creating dominant market positions more quickly. My colleagues and I at Intuit sincerely want a world that fosters innovation. But we would like to see a world that fosters innovation for all companies – not just one company – and for the benefit of all consumers.

VI. POSSIBLE REMEDIES TO ANTI-COMPETITIVE USE OF THE OPERATING SYSTEM.

102. Based on my experience in the software industry, I believe specific remedies targeted at a narrow set of conduct would be ineffective in moderating Microsoft's ability to exercise its power over the operating system to the advantage of its own initiatives in other markets. In my opinion, a remedy to preserve competition will only be effective if it removes the ability and/or the incentive for Microsoft to use its control of the operating system to restrict competitors in other markets, as they are today and as they will evolve.
103. There are probably a number of ways this goal could be accomplished. I understand

that one possible approach would be to require Microsoft to separate its operating system business from its other businesses in some fashion. Another approach that I believe could have a lasting effect, without requiring such separation, is a remedy based on the broad principle of operating system neutrality. This would include ensuring that all customers and users of the operating system – including – ISVs, ICPs, IAPs, OEMs and others – are afforded access to technology and placement on a basis that does not exclude, and does not discriminate.

A. The Principle of Operating System Neutrality

104. Since the operating system is essential to computing, and since the Windows operating system is the dominant PC operating system, access to the Windows operating system capabilities is essential for computing. Therefore, I believe it would be highly beneficial for all users – both consumers and companies – to have equal access to the dominant operating system. The only way to insure this is to guarantee the “neutrality” of the operating system; in other words, to insure that the operating system does not favor one competitive product over another.

105. The principle of operating system neutrality would protect against two general classes of anti-competitive behavior: (1) exclusion and (2) discrimination. Exclusionary behavior would not permit certain consumers or companies from utilizing particular capabilities of the operating system. Discriminatory behavior would treat certain consumers or companies less favorably than others with respect to such utilization.

106. To illustrate the meaning of these two classes of behavior, I will present some hypothetical examples. An example of exclusionary behavior would be Microsoft's addition of code to the operating system which prevented users from accessing any news other than Microsoft's own news service (or that of selected partners.) An example of discriminatory behavior would be Microsoft use of it's own news as the default screen shown every time a user turned on a PC. Users seeking other news sources would have to remember the appropriate URL (Internet address) from the infinite number of possible URL's on the net. Another example of discriminatory behavior would be Microsoft's imposition of access fees on other news providers for prominent placement on the operating system.
107. An example of exclusionary behavior in the area of electronic commerce would be Microsoft's addition of code to the operating system preventing the use of any credit card, other than Microsoft's own credit card (or credit cards from Microsoft's chosen partners), when a user purchased something over the Internet. An example of discriminatory behavior would be Microsoft's use of its own credit card as the default every time a user tried to make a purchase, while users seeking to use other credit cards would have to remember the credit card number and other details. Another example of discriminatory behavior would be Microsoft's imposition of access fees on other credit card providers for visible placement on the operating system.
108. It is my understanding that the Justice Department's 1995 consent decree was in part a recognition of the need to ensure that Microsoft's operating system not be exclusionary or

discriminatory with regard to other applications. The reasons for needing this neutrality have become self-evident, given the difficulties created by the fact that Microsoft is both the sole supplier of the dominant operating system and a provider of applications that run upon it.

109. With the growth of the Internet, I believe it is now important that the operating system (and its extensions, the browser and the Start page) be neutral not only with respect to applications, but also with respect to Internet-based content and services. Internet-based content and services increasingly offer functionality that either replaces, supplements or enhances traditional desktop applications. In my opinion, the 1995 consent decree's objective of application neutrality is subverted if Microsoft is permitted the unfettered discretion to place links on the Windows desktop (or on any browser or start page bundled with Windows) which direct users to specific Internet-based functionality that replaces functionality previously only offered by desktop applications.

B. Any Remedy Must Accommodate Change in Technology and Markets.

110. It is to be expected that Microsoft will continue to try to maintain its operating system choke point despite subsequent technological and market changes in the software industry. Its extension of that choke point from the operating system to the browser and soon to the Start Page is a reaction to the change in market conditions represented by the Internet.

111. While Microsoft's tactics adjust to industry change, the 1995 Consent Decree does not. In an apparent effort to preserve competition and customer choice in specific markets,

the 1995 Consent Decree was focused on the hardware OEM market and application products. It is my understanding that it prevented Microsoft from conditioning OEM's access to the operating system on the requirement that the OEM license a Microsoft product or not license a non-Microsoft product. The Internet now offers Microsoft the opportunity to condition an OEM's access to the operating system on the requirement that it distribute the operating system with mandatory links to Internet content or services. And the Internet now enables Microsoft to condition other industry participants (ICPs and IAPs) access to critical placement within the operating system on the requirement not to do business with Microsoft competitors (or on the requirement to otherwise favor Microsoft products and services).

112. While the software industry has broadened to include both products and services, and ICPs and IAPs now want access to placement on the operating system, one thing is the same as it was in 1995: OEMs and others cannot really negotiate with Microsoft for access to the operating system choke point, as there is still no practical substitute for the dominant operating system.

113. The 1995 Consent Decree was drafted to reflect current conduct exercised under then-current market conditions. To be effective, any remedy imposed by this Court cannot be specific to a narrow set of conduct presently being undertaken by Microsoft. Rather, such remedy must continually prevent Microsoft from using the operating system choke point as an exclusionary marketing and distribution vehicle to discriminate in favor of its own

content, services or products or as a bargaining chip in negotiations to otherwise obtain favorable terms for itself. This requires a remedy premised on the principle of operating system neutrality. Further, this remedy must contain mechanisms to permit this principle to be applied against subsequent changes in Microsoft's conduct in the context of the then-current state of the market and technology.

C. Summary

114. In my years of experience working with and competing against Microsoft, I have formed a genuine respect for the company and its employees. Those I have met are generally smart, hard-working people who make good products. And those products have contributed significantly to the technical advancement of this country and the world.

115. But Microsoft is, just as Intuit is, a profit-driven company. It will, and should be expected to, attempt to maximize its profits. In a competitive environment, the drive to maximize profits is channeled into more innovation and better value for consumers. But in the absence of effective competition, especially in a market where the product is essential and for which there are no practical substitutes, the drive to maximize profits has no natural regulator.

116. Computing is becoming a necessity in our society. Like electricity and telephone service, almost every business and every consumer depends upon access to computing capabilities in their daily lives. Accordingly, I believe that we must insure unbiased access to these fundamental computing capabilities, without exclusion and without discrimination.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed October 13, 1998.

_____/s/_____
William H. Harris, Jr.