## E. Microsoft entered into anticompetitive, exclusionary agreements with Internet Content Providers

258. As part of its strategy to eliminate the browser threat to its operating system monopoly, Microsoft also entered into agreements with Internet Content Providers (ICPs). The purpose of these agreements was similar to Microsoft's exclusionary agreements with ISPs and OLSs. Microsoft provided ICPs valuable consideration, including placement on the Windows desktop, in exchange for ICPs' agreement to promote and distribute Internet Explorer and to exclude and disadvantage browser rivals. Just as with its ISP and OLS agreements, the exclusionary restrictions Microsoft extracted can be explained only as part of a strategy to maintain its operating system monopoly.

### 1. Microsoft determined that ICPs could help it win the browser war

#### a. Internet Content Providers

259. ICPs develop the "content," i.e., web pages or web sites, that makes up the Web. ICPs create web content using a number of different technologies, such as HTML and Java.

ii. William Poole testified that the World Wide Web consists of web pages or sites that are displayed in particular formats, including, among others, the popular HTML protocols. Poole Dir. ¶¶ 15, 17, 23.

iii. Professor Franklin Fisher testified that "ICPs create program content for the World Wide Web." Fisher Dir. ¶ 193.

260. ICPs generate revenue in two principal ways.

260.1. First, like television networks, ICPs may derive revenue by charging third-parties a fee for advertising or promotion on the ICP's web site.

iv. Intuit's William Harris testified "the owner of a web site can sell advertising and sponsorships on the site." Harris Dir. ¶ 15.

ii. Harris further testified that, before it entered into its restrictive agreement with Microsoft, Intuit provided promotion for Netscape by including a "Netscape Now" button on its web site. Harris Dir. ¶ 71.

iv. According to Dean Richard Schmalensee, Netscape's Netcenter website is "highly trafficked;" hence, placement on Netcenter is extremely valuable--Sportsline agreed to pay Netscape $500,000 for ads on Netscape's site. Schmalensee Dir. ¶469.

260.2. Second, ICPs may also derive revenue by charging users who visit their sites a fee for viewing or using particular content.

i. William Harris testified that web site owners "can earn user fees directly from the customer." Harris Dir. ¶ 15.

ii. For example, "PC Data" (pcdata.com) charges users a direct fee for accessing "Retail Hardware Category Reports." DX 2495.

261. An ICP's success depends on the popularity of its web sites because the number of users who visit a particular web site affects both the ICPs' advertising rates and the fees it can charge users.

i. William Harris testified: "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 the web site owner." Harris Dir. ¶ 16.

ii. Professor Fisher testified "ICPs valued the opportunity to have a channel on the Microsoft desktop, because it encouraged users to visit the ICPs website, which in turn increased the ICPs ability to promote their own products and to sell advertising space on their web pages." Fisher Dir. ¶194.

262. Microsoft argues that there are literally millions of web sites and thousands of ICPs (Poole Dir. ¶¶ 24, 58-60, 78). However, users tend to visit sites with which they are familiar; as a result, a handful of the leading ICPs are of special commercial significance.

i. A 1996 ActiveX "Winning @ Internet Content Marketing Plan" explains, as part of its strategic rationale, "The top 100 commercial Internet Sites will drive 90% of the traffic." GX 407, at MS6 5005718.

**b. Microsoft determined that inducing leading ICPs to favor Internet Explorer and disfavor rivals would facilitate winning the browser war**

263. Microsoft concluded that influencing leading ICPs to favor Internet Explorer and disfavor rivals was important to its goal of winning the browser war for two principal reasons.

263.1. First, Microsoft determined that influencing the technologies that key ICPs implement in their web sites would increase Internet Explorer's market share.

263.1.1. Web sites can be designed to take advantage of technologies that work only (or better) with a particular browser. For example, web page content designed using Microsoft's "ActiveX" technologies -- an Internet Explorer-specific technology -- cannot be viewed with Netscape Navigator.

i. Dr. Warren-Boulton testified: "one of the Microsoft-specific technologies is known as 'ActiveX' . . . . The crucial feature of ActiveX for my purposes is that it is operating system (typically Windows) specific." Warren-Boulton Dir. ¶¶ 6-7.

ii. In a June 22, 1996 marketing plan, entitled "Winning @ Internet Content: Marketing Plan," Microsoft described that its "strategic objective" was to "gain leading share for ActiveX as the primary component architecture for the top 100 web sites . . . . Our ability to get these sites to adopt ActiveX technology will be vital to achieving our overall goal." GX 407, at MS6 500517.

263.1.2. Microsoft believed that web content developed with Microsoft's technologies would help drive and increase usage of Microsoft's browser and thus sought to induce ICPs to adopt Internet Explorer-specific technologies.

i. On November 1, 1995, Microsoft's Chris Jones sent Bill Gates an e-mail "about what Microsoft should do to get 30% browser share." GX 334, at MS98 0104679. In the attached memorandum, Jones wrote:

> "**3. Get 80% of Top Web Sites to Target Our Client**. Content drives browser adoption, and we need to go to the top five sites and ask them 'What can we do to get you to adopt IE?' We should be prepared to write a check, buy sites, or add features -- basically do whatever it takes to drive adoption."

ii. The "top hundred commercial Internet sites will drive 90% of traffic." GX 407, at MS6 505717.

263.2. <u>Second</u>, Microsoft believed that popular ICPs were an important vehicle for promoting Internet Explorer.

v. As part of a February 22, 1996, plan discussing ways Microsoft could increase Internet Explorer's share, Paul Maritz wrote that reaching agreements with ICPs, particularly with respect to "key sites," was an important component of Microsoft's strategy. GX 473, at MS6 6006248.

vi. In explaining the purpose of the ICP Platinum Agreements, Poole wrote "Microsoft sought to promote consumer use of IE because at the time these agreements were negotiated . . . Microsoft's share of browser usage was quite modest." Poole Dir. ¶ 65.

**2. To achieve its objective of gaining browser usage share, Microsoft entered into exclusionary agreements with ICPs**

264. In order to enlist ICPs in its objective of increasing its browser market share and disadvantaging its browser competitors, Microsoft pursued a strategy similar to the strategy it employed with ISPs and OLSs. Microsoft offered ICPs prominent placement and promotion within the Windows desktop, without charge, on the condition that ICPs agreed to exclude Netscape.

#### a. Microsoft developed the Channel Bar believing that it would generate substantial revenue

265. Microsoft developed the "Channel Bar" as a feature of the "Active Desktop," which Microsoft first released with its Internet Explorer 4 product in 1997. The "Channel Bar" appeared on the default Windows desktop and included icons that provided end-users with direct access to particular ICPs' web sites. The distinctive feature of the Channel Bar, apart from its placement on the Windows desktop, is its use of "push" technology, by which users can arrange with the participating ICP to receive certain Internet content automatically.

i. Mr. Poole testified that "Microsoft's push technology in Internet Explorer 4.0 enables computer users to set up a schedule for information from specified web sites to be downloaded to their computers automatically;" further, ICPs implement Microsoft's "push" technology by creating computer files that adhere to the "Channel Definition Format," or "CDF." Poole Dir. ¶ 48.

ii. According to Harris, "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." Harris Dir. ¶ 57.

266. Microsoft offered ICPs several different levels of placement on the Channel Bar:

266.1. The highest level of placement on Microsoft's Channel Bar was known as the "platinum" level, which included six ICPs whose icons were located directly on the Windows desktop.

i. The Microsoft Network, MSNBC News, Disney, Pointcast, Warner Bros., and America Online were the six websites initially visible--linked via icon--on the Channel Bar. Poole Dir. ¶ 49.

266.2. Microsoft's "platinum" partners also included those ICPs that Microsoft listed within certain pre-set categories (e.g., "Lifestyle & Travel," "Entertainment," "Sports," "Business," "News," and "Technology"). A user selecting one of these categories was presented with links to certain platinum-level ICPs.

i. For example, clicking on the "Sports" category reveals CBS Sportsline, CNNSI, ESPN SportsZone, and MSNBC Sports. Connected users can choose to "subscribe" to the selected web site, subsequently having related information downloaded on a regular basis. Poole Dir. ¶ 48.

267. Microsoft required OEMs shipping Windows 95 to install Internet Explorer 4 and ship the Channel Bar "active" to end users, i.e., "turned on" as part of the default Windows desktop, thus ensuring that the Channel Bar would be seen by millions of Windows users, who would then have an opportunity to invoke the channels and visit the included ICPs.

i. Poole conceded that OEMs shipping to consumers were not permitted to turn off the Channel Bar in Windows 95. Poole, 2/8/99am, 19:8-12. ICPs in the Channel Bar enjoyed "widespread consumer exposure to their content via links accessible through the channel bar." Poole Dir. ¶ 68.

ii. Dr. Frederick Warren-Boulton testified that: "Because the IE 4 Active Desktop was anticipated to be shipped on a substantial number of PCs, the channels — just like Microsoft's On-Line Service Folder and Internet Connect Wizard — provided ICPs with an attractive way of promoting their services." Warren-Boulton Dir. ¶ 114; see also Fisher Dir. ¶ 194.

268. Microsoft believed that the Channel Bar would be very valuable to ICPs and that Microsoft could generate millions of dollars in revenue by charging ICPs for placement on the Channel Bar.

i. Microsoft predicted that the Channel Bar would generate total annual revenues of "many tens of millions, maybe a hundred million" dollars. Poole, 2/8/99am, at 25:12-19. William Poole testified that Microsoft initially planned to charge for placement on the Channel Bar and estimated that each top-level channel might generate as much as $10 million annually and that other channels might generate a couple of million each. Poole, 2/8/99am, 22:16-21, 23:9 - 24:8, 24:22 - 25:5. Morever, ICPs approached Microsoft to determine what they would need to pay to appear on the Channel Bar. Poole, 2/8/99am, at 33:23 - 34:8.

ii. Microsoft entered into an agreement with Pointcast obliging Pointcast to pay $10 million a year for placement on the Channel Bar. GX 1804, at MS98 0100814 (section 3.3b).

iii. Poole, the Microsoft executive in charge of its ICP business, told ICPs that placement on the Channel Bar would be "invaluable." Poole, 2/8/99am, at 35:8 - 36:6.

iv. In an October 1996 e-mail, Yusuf Mehdi noted that there seems "like there is an oppty to get ALOT of money from sales to OEMs by having them purchase the 'default' channel or settings and reselling them to content providers. This is an easier way to get out of the business of brokering one-off deals and having the OEM pay for aggregation rights. You can charge yearly and they do the work. If they don't want to, we sell it." GX 98.

v. Microsoft told CNet, a platinum-level ICP, that "we're telling the consumer that these" default ICPs "are the very best sites on the Web. The thing you have to keep in mind is that we are offering the default ICPs tremendous amounts of distribution, which is worth a great deal." GX 207, at CNET 000464.

vi. Disney's Steve Wadsworth testified that Microsoft's Brad Chase and Bill Spencer pitched placement on the Windows desktop as highly valuable to Disney, and described the desktop as Microsoft's "crown jewel." Wadsworth Dep. (played 12/15/98 am), at 31:19 - 34:22.

#### b. Microsoft nonetheless decided not to charge ICPs for placement on the Channel Bar, but rather to use such placement as "strategic barter"

269. Instead of obtaining revenues from selling placement on the Channel Bar to ICPs, Microsoft opted to use the Channel Bar for what it called "strategic barter." Specifically, instead of charging ICPs, Microsoft conditioned Channel Bar placement on ICPs' agreement to terms that severely restricted their business dealings with Microsoft's browser rivals. ICPs agreed to these

restrictions because they determined, as had Microsoft, that Channel Bar placement would be extremely valuable.

i. Poole conceded that Microsoft, rather than pursuing revenue, characterized the purpose of desktop access as "strategic barter." Poole, 2/8/99am, at 34:9-19.

### (1) Microsoft's exclusionary agreements

270. In exchange for platinum-level placement twenty-four ICPs agreed, with regard to thirty-one separate web sites, to a number of restrictions. Although the precise terms of each "Platinum" agreement differed somewhat, the agreements generally included a contractual commitment by ICPs:[4]

270.1. To restrict severely their ability to promote and distribute "Other Browsers," typically defined as the "top two" competing browser companies, excluding Microsoft;

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[4] GX 1163, at CNET 000032 (7/14/97 MS/CNet ICP agreement, section 2.3); GX 1164, at p. 4 (7/15/97 MS/CondeNet ICP agreement, section 2.3); GX 1175, at AOL-0000149 (9/10/97 MS/AOL agreement, section 2.3); GX 859, at AOL-0000123 (AOL Summary of MS Active Desktop Agreement, dated 9/23/97, at AOL 0000149); Colburn Dir. ¶ 42; Colburn, 10/29/99pm 51:8 - 54:24 (explaining active desktop restrictions); GX 1156, at INT 00005 (6/6/97 MS/Intuit agreement, section 2.2); GX 206 (internal Microsoft email from Will Poole to Brad Chase, dated 4/17/97, in which Poole summarizes terms of Intuit agreement); GX 1176, at TWDC 0710 (7/3/97 MS/Disney agreement, section 2.3-2.5); GX 874, at TWDC 0299-300 (Disney Online and Microsoft Active Desktop Agreement Summary of Terms); GX 856, at MS98 0100299 (7/3/97 MS/Disney agreement, sections 2.3-2.4); Barksdale Dir. ¶ 182 (Disney prohibited from offering Netscape compensation of any kind); GX 776 (Wadsworth Decl. ¶5); GX 1163, at CNET 000032 (7/14/97 MS/CNet agreement, very similar to Intuit, section 2.3); GX 855, at WD 0004 (7/1/97 MS/Wired agreement, section 2.3); GX 1210, at p.4 (7/9/97 MS/Sportsline agreement; MS to put icon for Sportsline on sports channel, section 2.3); GX 1209, at p.4 (7/25/97 MS/MTV agreement; MS to put MTV icon in entertainment channel, section 2.3); GX 1211, at ZD 0005 (8/6/97 MS/ZDNet agreement; MS to put ZDNet icon in appropriate subchannel, section 2.3); GX 1170, at p.4 (8/15/97 MS/NBC agreement, section 2.3); GX 1174, at MS98 0100073 (sealed) ( , section 2.3); GX 1159, at TM 000057 (6/26/97 Hollywood Online agreement, section 2.3); GX 1164, at p.4 (7/15/97 MS/CondeNet agreement, section 2.3); GX 1165, at TWDC 0372 (7/17/97 MS/ESPN agreement, section 2.3); see also Fisher Dir. ¶ 195 (summarizing restrictions); Warren-Boulton Dir. ¶ 115 (same).

270.2. To implement IE-specific technologies (for instance ActiveX) in certain web pages, even if doing so would result in what Microsoft termed “acceptable degradation” when viewed with “Other Browsers”;

270.3. Not to pay “Other Browsers” any consideration to promote the ICPs’ content; and

270.4. To use Internet Explorer exclusively in any Windows or Macintosh client.

271. Microsoft also obtained exclusionary restrictions that applied to these firms’ promotion and distribution of browsers in channels that did not relate to their ICP businesses. In order to obtain placement on the Channel Bar, platinum partners that distributed software such as Intuit and PointCast had to agree to promote and distribute Internet Explorer almost exclusively.

i. Pointcast’s agreement with Microsoft stipulates that “Pointcast and its subsidiaries shall, <u>exclusive of any other browser</u>, market, promote and, to the extent of Pointcast’s distribution efforts in the ordinary course of its business, distribute (via download, OEM, retail and direct distribution) the combined Pointcast Network v2.0 and the Windows 3.xx and Macintosh Internet Explorer v3.0 to its end users on the appropriate platforms.” GX 1153, at MS98 0100811 (PointCast agreement, section 2).

ii. Intuit was required to “promote and distribute Internet Explorer (and no other browser) as the browser of choice for QFN, Intuit products, and Intuit web sites.” GX 1156, at INT 00005 (Intuit agreement, section 2.2).

271.1. Prior to entering into its ICP agreement with Microsoft, Intuit distributed Navigator with its most popular software titles, Quicken, Turbo Tax, and QuickBooks and served as an important distribution channel for Netscape.

i. William Harris testified that the Active Desktop agreement “precluded Intuit from further including Netscape Navigator in copies of Intuit’s applications;” moreover, it did not allow Intuit the ability to “enter into a business relationship with Netscape in order to direct potential Navigator users to Intuit’s web site.” Harris Dir. ¶¶ 72, 76.

ii. Jim Barksdale testified, "independent software vendors have also been an important distribution channel for Netscape software . . . Microsoft has tried to eliminate the ISVs as a meaningful distribution channel for Netscape." Barksdale Dir. ¶ 174.

271.2. Even before Microsoft offered Intuit placement in the Channel Bar, Microsoft tried to induce Intuit to distribute Internet Explorer instead of Navigator. In July 1996, Bill Gates offered Intuit's CEO, Scott Cook, a $1 million "favor" if he would switch browsers, an offer Mr. Cook rebuffed.

i. In reference to Cook, Bill Gates wrote: "I was quite frank with that if he had a favor we could do for him that would cost us something like $1M to do that in return for switching browsers in the next few months I would be open to doing that." GX 94.

ii. William Poole agreed that Microsoft wanted Intuit to ship Internet Explorer and that Gates sought to induce Intuit to switch browsers. Poole, 2/8/99am, at 38:19 - 41:23.

271.3. In order to obtain placement on the Channel Bar, Intuit entered into an ICP agreement with Microsoft. In doing so, Intuit, among other things, was required to distribute Internet Explorer with all of its software products and not to distribute or promote rival browsers such as Netscape except in very limited circumstances.

i. William Harris testified that, because Intuit deemed Active Desktop placement vital to the success of their web sites, they "felt constrained to agree" to the conditions of the deal which required them to "forego business relationships with Microsoft's browser competitor, Netscape," including their existing promotion and distribution arrangements. Harris Dir. ¶¶ 6, 61, 71, 74, 75; <u>see also</u> Warren-Boulton Dir. ¶ 118.

ii. The Intuit/Microsoft agreement required that Internet Explorer -- and no other browser -- be promoted and distributed with Intuit products (such as Quicken 98, Turbotax Personal, and Quickbooks), including the integration of Internet Explorer 4 "on successor versions." (6/6/97 MS/Intuit agreement, section 2.2; adds obligation for Internet Explorer to be the exclusive browser in release of subsequent Intuit products) GX 1156, at INT 00005; see also, GX 868.

iii. William Poole, summarizing the terms of Microsoft's agreement with Intuit, wrote that Intuit would be obligated to bundle Internet Explorer with "all new 97 and 98 releases of Intuit products" and "not enter into marketing/promotion agreements with other browser manufacturers for distribution or promotion of Intuit content." GX 206; see also Poole, 2/8/99am, at 55:1-22 (testifying that GX 206 summarizes the "salient" terms of the Intuit/MS agreement).

272. Microsoft also entered into other agreements relating to the Active Desktop and Channel Bar that had a similar effect of restricting an ICP's ability to work with Microsoft's browser competitors.

272.1. Microsoft entered into approximately 30 to 50 second-tier "Gold Agreements," which provided for promotion in the Active Channel Guide but not on the Active Desktop. The Gold Agreements included "parity requirements" that required an ICP that promoted Navigator to also promote Internet Explorer on "equal footing"; in other words, the Gold ICPs could not make Netscape their preferred ICP.

i. Poole explained that Microsoft had "in the vicinity of 30 to 50" Gold Agreements, which he described as "second tier" deals. Poole, 2/8/99pm, at 36:24 - 37:6. Poole testified that Microsoft's "gold" agreements included "parity requirements" that necessitated "equal footing with Netscape." Poole, 2/8/99pm, at 37:7-19.

ii. Poole testified that the Gold agreements were "similar to the Platinum agreements" but "did not include promotion on the Windows desktop." Poole, 2/9/99am, at 13:24 - 14:9.

272.2. Microsoft also entered into approximately eight to twelve "IEAK Agreements" with ICPs, which restricted the dealings that an ICP could have with Netscape. In exchange for distribution of its icon with the Internet Explorer Administration Kit, participating

ICPs agreed to promote Internet Explorer as the preferred browser, to refrain from promoting other browsers on their web sites, and to create "differentiated" content (content that would work well only with Internet Explorer). The IEAK agreements also required ICPs that distributed a browser to distribute Internet Explorer exclusively.

i. Poole testified that Microsoft had approximately a dozen IEAK agreements, which he explained as "other agreements that had restrictions with ICPs and Netscape." Poole, 2/8/99pm, at 39:3-10. Poole agreed that the IEAK agreements restricted companies from dealing with Netscape, saying, "the partner would promote IE as its preferred browser, and it would not promote another browser on their web site." Poole, 2/8/99pm, at 39:11-21.

ii. Microsoft's IEAK agreement

GX 1174, at MS98 0100073-74 (sealed).

**(2) ICPs agreed to these restrictions in order to get placement on the Windows desktop**

273. In order to obtain access to the Channel Bar and placement within the Windows desktop, ICPs had to agree to Microsoft's restrictions, despite the ICPs desire to enter into promotional and distributional deals with competing browser companies, like Netscape.

i. Harris testified that, "if not for the restrictions imposed by the Active Desktop agreement, I believe that 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." Harris Dir. ¶ 79.

ii. Disney's Steve Wadsworth testified that "Netscape was specifically discussed in the context of Disney's desire not to have an exclusive arrangement with Microsoft." GX 776, at ¶¶ 7-8 (Wadsworth Decl. 4/23/98); <u>see</u> <u>also</u> Barksdale Dir. ¶ 182 ("Disney told us they would have liked to do a deal with Netscape, but as a condition of their Microsoft contract for placement on the Windows desktop, Disney was prohibited from offering Netscape compensation of <u>any</u> kind! Disney would also have been prohibited from promoting, even informing customers, or even letting us promote, the Disney.com placement on Netscape's products." (emphasis in original).

274. ICPs agreed to Microsoft's restrictions because they believed, as did Microsoft, that, by virtue of placement on the Channel Bar, promotion and distribution with every new PC preloaded with Windows would be "very valuable."

i. Poole conceded that he and others at Microsoft told ICPs that being on the Windows desktop was going to be a distribution advantage to them and that ICPs believed that placement on the Channel Bar would be "very valuable." Poole, 2/8/99am, at 34:23 - 25.

ii. Intuit believed that the Windows desktop would provide "unparalleled distributional advantages" and was thus prepared to pay a substantial fee for placement on the Channel Bar. Harris Dir. ¶ 60. Microsoft instead insisted on an agreement to restrict Intuit's business relationship with Netscape. Harris Dir. ¶ 65. It was because of placement on the Channel Bar that Intuit agreed to Microsoft's exclusionary restrictions. Harris Dir. ¶ 79.

iii. Disney's Steve Wadsworth testified that Disney agreed to limit its marketing and promotion of other browsers because "having the channel and getting the deal done and having the Active Desktop channel was worth giving up some abilities to do some other marketing and promotion on behalf of someone else. So we determined it was worth it, and we wanted to have the Active Desktop channel." Wadsworth Dep. (played 12/15/98am), at 43:23 - 44:6. Disney believed that desktop placement would be valuable because Windows "is highly distributed and holds a majority market share among operating systems for PCs." Wadsworth Dep. (played 12/15/98am), at 32:1-9; Wadsworth Dep. (played 12/15/98am), at 34:9 - 39:21 (OEMs can't change Windows desktop; Disney understood that Internet Explorer would be shipped with every PC); <u>see</u> <u>also</u> GX 776, at ¶ 4 (Declaration of Steve Wadsworth, Vice President of Business Development and Strategic Planning for Disney, 4/23/98; Disney believed desktop placement would be "highly valuable"; "Although Disney could have attempted to negotiate separate deals with numerous individual Personal Computer manufacturers in an attempt to match the level of distribution Microsoft could provide for the Disney channel, no single company other than Microsoft could have provided the same value in terms of ubiquitous distribution."); GX 776, at ¶ 5 (Microsoft told Disney "that the desktop is Microsoft's `crown jewel'"). Wadsworth further testified that the Channel Bar gave Microsoft tremendous "leverage." Wadsworth Dep. (played 12/15/98am), at 42:9-15 ("And it -- I was -- I felt like, yeah, these guys have all of the cards, because they have this broad distribution capability through the Windows operating system and the desktop. And you know, in the end, yeah, they have substantial market share with PCs. So in my mind that made them the 1000 pound gorilla of the industry.").

iv. David Colburn testified that AOL agreed to Microsoft's restrictions because of AOL's judgment that placement on the Channel Bar would be very valuable. Colburn Dir. ¶¶ 40-47; Colburn, 10/29/98pm, at 19:21 - 21:3, 21:19 - 22:1.

v. ZDNet believed that "a preferred position on the active desktop -- which means being bundled into the operating system -- is of almost incalculable value." GX 201.

275. The value ICPs placed on the Channel Bar, and the corresponding leverage it gave Microsoft, is also shown by ICPs' capitulation to demands by Microsoft that the ICPs restrict their dealings with Netscape even in ways not required by the ICP agreements.

i. Disney agreed to Microsoft's insistence that Disney could have a text link on either the Netscape browser or home page, but not both, and that Netscape could not use either the well-known Disney characters or its logos in connection with its browser technology. A contemporaneous Disney e-mail explains that Disney could not afford to resist Microsoft's insistence because: "Unfortunately, Microsoft has the upper hand from a business value perspective even though they don't have it from a contractual perspective" and "it seems crystal clear to me we are in the right on the contract, but even so, it's probably not worth it to take them on. The value of the Netcaster channel is low, and if they take us off the Active Desktop while this is being resolved in court, we lose substantial value." GX 213.

ii. Wired Digital agreed to restrictions (such as not splitting their contention between Internet Explorer and Netscape) that went beyond the terms of the ICP agreements. Poole, 2/8/99pm, at 54:19 - 55:20, 56:7-19. Wired Digital was told by Microsoft's Suzan Fine that, "despite the contract," Microsoft "would consider it counter to the `spirit' of the agreement with MS for us to have any Wired-branded presence on any Other Browser, even if the agreement as we've whittled it back doesn't technically prohibit it." GX 209.

### 3. Microsoft's ICP agreements were exclusionary

276. Microsoft expected its agreements, in particular its "Platinum" agreements, to further its goal of wresting substantial browser usage share from Netscape and protecting its operating

system monopoly. Although their exclusionary impact turned out to be less than Microsoft anticipated, the ICP agreements nevertheless contributed to Microsoft's anticompetitive campaign.

**a. Microsoft specifically intended and anticipated that its ICP agreements would deprive Netscape of revenue, exclude Netscape and other browser rivals, and protect Microsoft's operating system monopoly**

277. Microsoft entered into its ICP agreements in order to achieve two principal goals: (i) to gain browser share and (ii) through gaining browser share, to neutralize the threat to its operating system monopoly non-Microsoft browsers posed.

277.1. Microsoft's ICP agreements were capable of accomplishing these objectives in three ways.

277.1.1. First, Microsoft's ICP agreements inhibited the promotion and dissemination of "Other Browsers," defined by Microsoft to target only those browsers that posed a competitive threat to Microsoft, such as Netscape.

i. Dr. Frederick Warren-Boulton testified that Microsoft' agreements "directly inhibit the promotion and dissemination of non-Microsoft browsers in ways similar to the ISP restrictions." Warren-Boulton Dir. ¶ 116.

277.1.2. Second, Microsoft's ICP agreements contained terms designed to deprive Netscape of revenue by prohibiting ICPs from paying "Other Browsers" to promote ICPs' content, a typical way Netscape obtained revenue.

i. Poole testified that a "typical business model" was "for a content company to pay Netscape to promote their product, their content." Poole, 2/8/99pm, at 5:8-11.

ii. Dr. Warren-Boulton testified that the prohibition on ICPs' "paying compensation to 'Other Browsers'" inhibited "the continued development of Netscape's browser by depriving Netscape of

> important ICP partners and revenues from promoting those ICPs." Warren-Boulton Dir. ¶ 117.

277.1.3. Third, Microsoft's requirement that ICPs adopt Microsoft-specific technologies and create content viewable by other browsers with "acceptable degradation" was designed to bias users' choice of browser toward Internet Explorer and away from other browsers that employed technologies Microsoft did not control.

i. Dr. Warren-Boulton testified that, "by conditioning access to the Windows desktop on ICPs agreeing to use Windows-specific technologies in their web sites, Microsoft biases consumers' choice of browsers toward Internet Explorer and away from browsers that do no support their Microsoft-controlled technologies." Warren-Boulton Dir. ¶ 119.

277.2. Microsoft specifically anticipated that its agreements would have these effects and facilitate its objective of gaining substantial browser share:

i. Poole conceded that a primary purpose of the ICP agreements was to gain browser usage share. Poole, 2/8/99am, at 67:1-4, 67:18 - 68:1, 66:15-25.

ii. Harris testified in regard to the Microsoft/Intuit agreement that: "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." Harris Dir. ¶ 69.

iii. An October 18, 1996, internal Microsoft document entitled "IE 4.0 Business Model," identified "Increase IE market share" as the number one priority of the Internet Explorer 4.0 business pan. GX 852, at MS6 6005670; Poole 2/8/99pm, at 43:1-23 (testifying that one of the purposes of the ICP agreements was to increase Microsoft's browser usage share).

iv. In a February 11, 1997 "Internet Client & Collaboration: 3 Year Business Outlook" presentation, Microsoft explained that one of its "competitive levers" is its "integration with MS products," noting that "Shell integration, autoupdate, distribution" are its "primary 1997 weapons," as well as its "distribution and partnerships." GX 413, at MS6 6003212.

v. Brad Chase, upon learning that Microsoft had entered into an ICP agreement with ESPN, wrote that it was "a tremendous deal" because ESPN's "Sportszone is one of the top few sites on the internet." Chase specifically noted that the Sportszone web site must use Microsoft-specific technology, including ActiveX and "key IE 3 html extensions." GX 862.

277.3. Microsoft's specific purpose in seeking to gain browser share through its ICP agreements was to combat the threat that other browsers -- specifically Netscape -- posed to its operating system monopoly; indeed, the exclusionary restrictions were primarily targeted at Netscape.

i. Poole conceded that "one of the reasons that" Microsoft was "trying to gain browser-usage share was in order to combat what" Microsoft "viewed as the platform threat" that Netscape posed. Poole, 2/8/99am, at 18:12-15.

ii. Harris testified that Microsoft's William Poole told him that Bill Gates had decreed that Platinum partners must cease working with Netscape. Harris Dir. ¶ 68 ("Mr. Gates had mandated that all preferred participants on the Active Desktop must agree to cease working with Netscape as a precondition of that participation").

iii. Poole conceded that he told Intuit that Gates mandated that all preferred participants on the Active Desktop were required to agree to certain restrictions on working with Netscape as a condition of that participation, and that these restrictions were non-negotiable. Poole, 2/8/99 am, at 53:20 - 54:1.

iv. Steve Wadsworth of Disney Online stated: "In negotiating the contract with Microsoft, it was very clear that the `Other Browser' Microsoft was concerned about was Netscape Netcaster." GX 776, at ¶¶ 7-8 (Wadsworth Decl. 4/23/98).

v. Poole conceded that, although the agreements were framed in terms of "Other Browsers," "Netscape was the primary target" and any other existing browser competitors were "minor." Poole, 2/8/98am, at 69:5-11, 46:17-20.

278. Mr. Poole's testimony -- that Microsoft decided to give away placement on the Channel Bar because the technology was "unproven" and not in order to gain browser share to thwart Netscape (Poole, 2/8/99am, at 25:20 - 26:23) -- cannot be reconciled with the evidence and is not credible.

i. Contemporaneous Microsoft documents show that Microsoft decided to use the Channel Bar for "strategic barter." See supra ¶ 276.

ii. Several ICPs offered to pay Microsoft for inclusion in the Channel Bar; indeed, Microsoft's agreement with Pointcast specified that Microsoft was to be paid $10 million for the first year. GX 1804, at MS98 0100814 (section 3.3b). Poole's response — that this agreement reflected "no actual obligation to pay cash" because PointCast could offset the $10 million if it engaged in various marketing activities (Poole, 2/8/99pm, at 31:1-8, 32:16 - 33.11) does not refute the fact that ICPs were willing to pay for placement and Microsoft did not need to give this placement away.

iii. The PointCast contract, signed in November 1996, is also at odds with Poole's testimony that Microsoft decided to give away Channel Bar placement before that date. Poole, 2/8/99am, at 29:11 - 30:20.

iv. Poole's testimony is inconsistent with contemporaneous documents evidencing Microsoft's judgment that influencing the browser technologies ICPs employed would increase Internet Explorer's share. Compare Poole 2/8/99pm, at 48:12 - 49:8 with GX 407. Eventually, Poole conceded that Microsoft's agreements would increase browser usage share even though ICPs were not themselves significant browser distributors. Poole, 2/8/99pm, at 43:1-23.

279. Microsoft's ICP agreements were not only designed to exclude browser rivals, but also had the effect of disadvantaging those rivals. Intuit, for example, agreed to restrict its

distribution and promotion of Netscape and other browsers not only to users who learned about Intuit through Microsoft's Channel Bar, but also in other channels through which Intuit sells software. As a result, the number of copies of Netscape distributed by Intuit decreased dramatically.

i. Harris testified that "a total of over five million copies of Netscape Navigator were distributed with the 1997 versions of Quicken, Turbo Tax, and QuickBooks, but over five million copies of Internet Explorer were distributed with the 1998 versions of those products." Harris Dir. ¶ 80.

ii. Absent Microsoft's exclusionary restrictions, Intuit likely would have offered consumers Netscape Navigator in some "lightly integrated" way. Harris, 1/4/99pm, at 67:11 - 68:7; Harris Dir. ¶¶ 76-77; Harris, 1/5/99am, at 45:3-9 ("Netscape, first of all, had been a good partner of ours for some time and we wanted to be able to continue to deal with them. And, in a more self-interested manner, Netscape had access to a great deal of web-based traffic, which is, of course, the life blood to any Internet business. And we wanted and continue to want to work with Netscape to secure some of that traffic to our sites").

iii. Dr. Warren-Boulton testified that the anticompetitive impact of Microsoft's ICP agreements are "illustrated by Netscape's experience with Intuit." Warren-Boulton Dir. ¶¶ 117-18.

**b. Microsoft's contention that its ICP agreements were not capable of causing significant anticompetitive effects is unfounded**

280. Microsoft witnesses asserted that its agreements with ICPs were not capable of causing significant anticompetitive effects. Microsoft's contentions are unpersuasive.

280.1. First, Microsoft witnesses argue the Channel Bar did not turn out to be as popular as Microsoft and ICPs anticipated (Poole Dir. ¶¶ 54, 68). But the fact that the Channel Bar turned out not to be a popular feature of Windows, and thus that placement in the Channel Bar turned out not to be valuable to the ICPs, does not detract from the fact that the promise of placement within Windows induced ICPs to agree to restrictions that harmed Netscape.

i. Professor Franklin Fisher testified that "damage to the competitive process has already occured" even though the ICP agreements may not have been commercially successful. Fisher Dir. ¶ 197.

ii. Dr. Warren-Boulton testified "that the ICPs at the time that Microsoft offered the active desktop thought that being on the active desktop was just absolutely invaluable, or almost of incalculable value ." Even though being placed on the active desktop "wasn't such a great deal for them after all," "a lot of people who signed contracts or agreements entered contracts with Microsoft to -- agreed to exclusivity in return for being on the active desktop." Warren-Boulton, 11/30/98pm, at 32:16 - 33.6.

280.2. Second, Dean Schmalensee's arguments that the ICP agreements did not adversely affect Microsoft's browser rivals are not sound and miss the point.

280.2.1. Because of scrutiny that preceded this litigation, Microsoft waived some of its restrictive agreements in April 1998. Dean Schmalensee thus argues that, even "if the contract terms with the ICPs had been anticompetitive, they were in force too short a time to have a significant impact" Schmalensee Dir. ¶ 470. But this contention ignores both Microsoft's expectations and the dramatic increase in Internet Explorer's usage share during the very period in which the restrictions were in place.

i. Poole conceded that the ICP agreements would have continued absent the pre-trial scrutiny on them. Poole, 2/8/99am, at 74:21-24.

ii. See infra Part VII.A.3; ¶ 369 (discussing the increasing in Internet Explorer's usage share during the period of the restrictions).

280.2.2. Dean Schmalensee argues that the ICP agreements did not affect the browser with which users viewed web sites covered by the agreements. Schmalensee Dir. ¶¶471-76. He also argues that the ICP agreements were not reasonably capable of causing anticompetitive effects because they affected only a small fraction of web sites and because Microsoft had only a tiny share of the browser market when those agreements were instituted.

Schmalensee Dir. ¶ 469. Both these arguments ignore the contemporaneous evidence that Microsoft entered into these agreements in the context of its other anticompetitive actions and with the expectation that they would impede its rivals and for the purpose of protecting its dominant position in operating systems.

i. Professor Fisher, on the subject of Microsoft's ICP agreements, testified: "Regardless of whether such provisions would be anticompetitive in themselves if put in place by a company with a small share of operating systems, they are certainly anti-competitive when Microsoft uses them to protect its dominant position in operating systems." Fisher Dir. ¶ 199.

280.3. Third, Microsoft asserted that the restrictions in the ICP agreements had no bearing on Intuit's decision to distribute Internet Explorer exclusively because Intuit intended to use and distribute Internet Explorer irrespective of the ICP agreement (Poole Dir. ¶ 130). Mr. Poole's argument misses the point because Intuit could have licensed Internet Explorer wholly apart from the ICP agreement. Intuit agreed to Microsoft's restrictions on its dealings with Netscape in order to obtain placement on the Windows desktop.

i. Harris testified that "the most likely outcome" in the absence of the restrictions "would probably have been to distribute both" browsers. Harris, 1/5/99am, at 49:23 - 50:11. Although Harris also testified that Intuit likely would have bundled Internet Explorer absent the restrictions, as he explained, that decision "was independent" of Intuit's decision to agree to Microsoft's demand that it not distribute Navigator. Harris, 1/5/99am, at 51:9-14.

ii. Indeed, Harris testified that both browsers "had certain advantages and disadvantages." Harris Dir. ¶ 78. In contrast, "only Microsoft could offer placement on the Windows Desktop" and thus Harris felt Intuit "had no practical alternative but to agree to Microsoft's restrictions in order to gain access to the desktop. Harris Dir. ¶ 79. "Had we decided to bundle the IE browser," Harris testified, "there's no reason that we couldn't have continued to work with Netscape in any number of ways, bundling their browser as well." Harris, 1/5/99, at 51:9-14. Harris further explained that

Intuit did not immediately ship Netscape with Quicken 99 because Quicken 99 was finalized during the period in which Microsoft's restrictions were in place. Harris, 1/4/99pm, at 71:18 - 72:13.

iii. Poole conceded that Intuit could have obtained Internet Explorer without agreeing to Microsoft's ICP restrictions. Poole, 2/8/99am, at 43:19 - 44:16.

**4. Microsoft's ICP agreements lacked justification**

281. Microsoft witnesses advanced a number of justifications for the ICP agreements. The nature of the agreements and the contemporaneous evidence demonstrate that the these justifications are pretextual. Microsoft's agreements can be explained only as part of an anticompetitive strategy designed to disable the threat Netscape posed to Microsoft's operating system monopoly.

281.1. First, Microsoft witnesses, in particular Mr. Poole and Dean Schmalensee, assert that the ICP agreements were simply "commonplace" "cross marketing agreements." Poole, 2/8/99am, at 55:23 - 56:7; Schmalensee Dir. ¶ 469. This assertion -- and Poole's testimony -- is not credible. Microsoft's agreements impose restrictions that, Poole ultimately conceded on cross-examination, have no known analogue in the industry and, in fact, have no conceivable purpose except to blunt Netscape.

281.1.1. Microsoft's agreements generally prohibit ICPs from paying "Other Browsers" to promote their content. By virtue of Microsoft's narrow definition of "Other Browser," this is a unique, naked restriction intended only to harm Netscape.

i. Poole conceded that he was "not aware of any analogous business relationship beyond these ICP deals within Microsoft." Poole, 2/8/99pm, at 14:8-16.

ii. Dr. Warren-Boulton testified that "one aspect of the ICP agreements -- the prohibition on ICPs" payment from Netscape for promotional services -- plainly serves no legitimate purpose. The only reason for that restriction is to impede Netscape." Warren-Boulton Dir. ¶ 184; Warren-Boulton, 11/30/99pm, at 39:19 - 40:13 ("it is just very difficult to see any reason why Microsoft would want to impose that restriction in terms of any sort of efficiency story").

iii. Professor Fisher testified that "Microsoft sought to further deprive Netscape of revenue by inducing ICPs to agree not to pay Netscape for carrying or promoting the ICPs' content or logos." Fisher further testified that the provision that mandates this "can have no purpose other than that of damaging those browser suppliers." Fisher Dir. ¶¶ 134, 199.

281.1.2. Microsoft's agreement with Intuit also lacks any industry analogue.

i. Poole conceded he was unaware of any other agreements in which "Microsoft agrees with one independent software vendor that Microsoft will give that independent software vendor things of substantial value, like placement on the desktop, in return for that ISV's agreement not to promote or market the products of another ISV." Poole, 2/8/99am, at 58:23 - 59:7.

281.1.3. The Netscape agreements identified by Microsoft (Poole Dir. ¶ 61; Schmalensee Dir. ¶ 469) are very different from Microsoft's ICP agreements.

i. Netscape's agreements did not prohibit ICPs from receiving value from Microsoft for promoting Microsoft's content. Poole, 2/8/99pm, at 41:8-25 (agreeing that he did not mean to imply that "Netscape's agreements had the same kind of restrictions as Microsoft's agreements").

ii. In contrast to Microsoft's ICP agreements, the AOL/Netscape agreement contains no prohibition on, for example, AOL dealing with Microsoft in areas other than instant messenger. GX 1256.

281.2. <u>Second</u>, Microsoft argues that its ICP agreements are justified as a means of "associating" the Internet Explorer brand and technology with well-established other brands (Poole Dir. ¶¶ 62, 64-68, 84; Poole 2/9/99am, at 24:4 - 25:13). But Microsoft's "brand association" argument is also pretextual. It is belied by both Microsoft's conduct and the ICP agreements themselves. When these agreements are read as a whole it is apparent that they permit ICPs to associate with other brands, including other browser companies, and are designed, instead, simply to harm Netscape by inhibiting its ability to receive compensation, promotion, or distribution from leading ICPs.

i. The agreements permit ICPs to deal with Netscape (Poole Dir. ¶ 66), which is inconsistent with Microsoft's brand association rationale, but they prohibit ICPs from paying Netscape; this prohibition harms Netscape and is unrelated to brand association. Poole Dir. ¶ 84.

ii. The ICP restrictions apply only to "Other Browsers," which generally is defined to include only Netscape and one other browser and to exclude client software developed by PointCast, Marimba, AOL, and Chat or Pager clients, e.g., GX 1156, at INT 00003 (section 1.23).

281.3. Third, similarly pretextual is Microsoft's contention that its agreements were intended merely to "showcase new technologies," such as ActiveX and Dynamic HTML (Poole Dir. ¶¶ 62, 90-100; Poole, 2/9/99am, at 24:4 - 25:13). That rationale has nothing to do with Microsoft's insistence that ICPs such as Intuit not distribute Netscape apart from the Channel Bar or its prohibition on ICPs' paying Netscape for promotion. It is inconsistent with Microsoft's conduct and other provisions of the ICP agreements as well.

i. Poole conceded that Microsoft "did almost nothing to enforce the extent to which its Platinum ICP partners were taking advantage of these technologies" and therefore showcasing them. Poole Dir. ¶ 93. Although Poole testified that the "differentiated content" provisions, which required ICPs to implement Internet Explorer-specific technologies and to create content that could not be viewed well with Netscape, were central to Microsoft's brand associate justification (Poole Dir. ¶ 84), Microsoft did not enforce those provisions. Poole, 2/9/99am, at 54:15 - 55:8.

ii. Microsoft did not merely require ICPs to "showcase" Microsoft technologies; it extracted agreements that such content could not work well with other browsers -- in the words of the agreement, with "acceptable degradation." GX 1156, at

INT00018. Poole never explained why "showcasing" Microsoft technologies required "degrad[ing]" the experience of users employing other browsers. Harris Dir. ¶ 73 (Microsoft/Intuit ICP agreement required Intuit to deploy Microsoft-specific technologies such as Microsoft's Channel Definition Format, and Dynamic HTML, which conflicted with Intuit's general policy of making its Internet content broadly accessible).

281.4. Fourth, Microsoft argued that its agreements were designed to increase user interest in the Internet (Poole Dir. ¶¶ 64-68; Poole, 2/9/99am, at 24:4 - 25:13), but that justification finds no support in contemporaneous documents and is completely at odds with the evidence. If Microsoft were interested in increasing user interest in the Internet, it would permit, rather than restrict, ICPs ability to promote, market, and distribute its content and other browsers as widely as possible.

i. Professor Fisher testified that, if "Microsoft were really interested in selling windows, it wouldn't have any interest" in restricting Netscape "since people who wanted to use the Netscape browser with Windows would be happier" with Windows if Netscape was included. Fisher, 6/1/99am, at 66:8-25.

ii. Dr. Warren-Boulton testified: "Microsoft has a legitimate interest in ensuring that Windows users are able to acquire high quality browsers at low prices, because that would increase the demand for Microsoft's operating system. But even if achieving this objective were furthered by Microsoft's decision to offer a quality browser product, its further efforts to increase IE's share by excluding Netscape and making it more difficult for users to obtain Netscape's browser could only reduce the value of its operating system to consumers." Warren-Boulton Dir. ¶¶ 187, 189.

281.5. Fifth, Microsoft argues that ICPs entered into the exclusionary agreements only because "Microsoft offered them more value than Netscape was willing or able to offer" (Schmalensee Dir. ¶ 483). That argument, however, is simply another way of saying that Microsoft offered a very large bribe (that is, not charging for Channel Bar placement or the pertinent Microsoft technology) to induce these firms to limit their dealings with Netscape. It cannot justify the agreements' exclusionary restrictions

282. Microsoft's justifications for its restrictions are pretextual not only on their own terms, but also because Microsoft's expensive effort to gain browser usage share, of which its ICP agreements were a component, can be explained only as part of an effort to preserve its operating system monopoly.

i. Professor Fisher testified that Internet Explorer "was a product which Microsoft not only gave away for free, but basically bribed people to take. They gave them preferred places on the Desktop for which they could have charged. But beyond that, they also spent hundreds of millions of dollars on the development of this no-revenue product, and then they gave away the technology. That is not a profitable act, except for the protection of the operating system's monopoly." Fisher, 6/1/99am, at 39:22 - 40:4.

ii. Dr. Warren-Boulton testified that: "The available evidence indicates that Microsoft pursued " its browser-related practices "for the purpose of preserving its Windows operating system monopoly and gaining monopoly power in the browser market, and pursued them without regard to whether would have been were profitable in their own right." Warren-Boulton Dir. ¶ 185.