03-1116

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

SUN MICROSYSTEMS, INC.,

Plaintiff-Appellee,

—against—

MICROSOFT CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PROOF BRIEF OF APPELLANT MICROSOFT CORPORATION

Michael F. Brockmeyer
PIPER RUDNICK LLP
6225 Smith Avenue
Baltimore, Maryland 21209
(410) 580-3000

David T. McDonald
Karl J. Quackenbush
PRESTON GATES & ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104
(206) 623-7580

Thomas W. Burt
Richard J. Wallis
Linda K. Norman
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
(425) 936-8080

David B. Tulchin
Counsel of Record
Steven L. Holley
Michael Lacovara
Marc De Leeuw
Brian T. Frawley
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Matthew L. Larrabee
Darryl Snider
A. Mari Mazour
HELLER EHRMAN WHITE & MCAULIFFE LLP
333 Bush Street
San Francisco, California 94104
(415) 772-6000

Attorneys for Microsoft Corporation

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INTRODUCTION

The mandatory preliminary injunction from which Microsoft Corporation ("Microsoft") appeals is unprecedented in the history of our antitrust laws. The district court intervened in what it described as a "new market" by ordering Microsoft to distribute, with every copy of its Windows XP operating system — and without compensation — software created by its arch-rival Sun Microsystems, Inc. ("Sun"), despite the fact that Microsoft is the new entrant in, and Sun now dominates, the alleged "new market." In addition, the preliminary injunction, which affects Microsoft's conduct around the world, interferes with market forces even though the alleged wrongful conduct took place long ago in a different market. Thus, the district court did not enjoin any threatened unlawful conduct, but entered a must-carry injunction designed instead to provide a remedy for alleged past wrongs — although Sun can recover damages from Microsoft on that account if, after trial, it prevails on its claims. Moreover, the principal conduct about which Sun complains was found by the D.C. Circuit Court of Appeals to be lawful. On top of all that, the evidence was clear — and the district court found — that the alleged harm Sun faces is neither imminent nor even likely to occur.

JURISDICTION

The U.S. District Court for the Northern District of California, where this action was filed, had subject-matter jurisdiction based on federal antitrust and copyright claims. 28 U.S.C. §§ 1331, 1337(a), 1338(a). Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation transferred this action to the District of Maryland on August 9, 2002. (Joint Appendix ("JA") __.) Microsoft timely filed its Notice of Appeal (JA__) from the district court's January 21, 2003 preliminary injunction order (JA__) on the same date. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in issuing a mandatory preliminary injunction despite finding that (a) there is no "imminent" threat of irreparable harm to Sun and (b) the alleged threat of harm — that an undefined software market will "tip" to a new Microsoft technology called .NET and away from a now "dominant" Sun technology called Java — is not even "more likely than not" to occur?

2. Did the district court err in concluding that Microsoft would suffer no harm if required to include Sun's Java in Windows XP, Microsoft's flagship operating system for personal computers ("PCs")?

3. Did the district court err in holding that Sun had demonstrated a likelihood of success on the merits by (a) concluding that the same Microsoft conduct found lawful by the D.C. Circuit Court of Appeals was unlawful in this case, (b) rejecting a 2002 D.C. District Court decision holding that Microsoft should not be required to distribute Java, (c) basing its injunction on a claim that Sun lacked antitrust standing to bring, (d) finding Microsoft's conduct to be actionable under the oft-rejected "monopoly leveraging" doctrine, and (e) ignoring Sun's failure to show that its alleged irreparable harm was caused by any wrongful Microsoft conduct?

4. Did the district court err in determining that the public interest would be served by a worldwide mandatory preliminary injunction when both the U.S. Department of Justice ("DOJ") and the D.C. District Court concluded that requiring Microsoft to distribute Java was an inappropriate manipulation of the market?

5. Did the district court err in entering a preliminary injunction based on Sun's claim that Microsoft violated Sun's copyright in Java where there was no actual harm to Sun and where Sun agreed by contract that Microsoft has the right to engage in the challenged conduct?

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal by Microsoft from an Order of the U.S. District Court for the District of Maryland (Motz, J.), entered January 21, 2003, pursuant to a December 23, 2002 Opinion (JA__), which, after a three-day hearing, granted Sun a preliminary injunction (1) requiring Microsoft to distribute Sun's Java with Windows (the "must-carry injunction"), and (2) enjoining Microsoft's distribution of its own Java implementation (the "copyright injunction").

1. The Must-Carry Injunction

In entering the must-carry injunction, the district court adopted Sun's theory that certain Microsoft conduct in 1996-98 in the Intel-compatible PC operating system market (the "PC-OS market") reduced distribution of Sun's Java on PCs and that, because Microsoft can eventually include its new .NET Framework (".NET") in Windows, Sun will be at a disadvantage in competing against .NET in a "new market" for "general purpose, Internet-enabled distributed computing platforms." Neither Sun nor the district court ever defined this alleged second market, but all agree that Java now dominates it and that Microsoft has just entered it with .NET. (Op.17.) According to the district court, Microsoft's distribution advantage on PCs creates a possible risk that the alleged second market may someday "tip" away from Java to .NET. "Tipping" is an economic theory — rarely, if ever, seen in the real world — in which a change in product attributes, consumer perceptions or market share can cause a sudden shift that drives most consumers to a single "winning" product.

The district court decided to intervene in the alleged second market to eliminate Microsoft's distribution advantage on PCs by ordering Microsoft to distribute Sun's Java with Windows. Sun did not accuse Microsoft of any wrong-doing in the alleged second market, and Microsoft's distribution advantage on PCs — the fact that it owns Windows — is not wrongful. The district court acknowledged (Op.31) that intervention to "re-balance" competitive dynamics on a preliminary injunction motion is unprecedented in the history of the Sherman Act.

The "critical predicate" of Sun's motion is its assertion that, without the injunction, the alleged second market "will 'tip' irretrievably in favor of .NET and drive Java into near extinction." (Op.12.) In this Circuit, the party seeking a preliminary injunction must make "a 'clear showing' that it will suffer an immediate irreparable harm." *Direx Israel, Ltd.* v. *Breakthrough Med. Corp.*, 952 F.2d 802, 815 (4th Cir. 1992) ("*Direx*"). Similarly, a preliminary injunction is available under the Clayton Act only upon a "showing that the danger of irreparable loss or damage is immediate." 15 U.S.C. § 26.

Despite these requirements, the district court did "not find at this precise moment there is an imminent threat that the market . . . will tip in favor of

.NET." (Op.20.) Instead, the district court found that (a) "[t]he evidence is overwhelming that within the coming years there will be intense competition between" Java and .NET in the alleged second market, (b) Java "would appear dominant" and "is presently in a strong position," and (c) "[h]aving just been commercially introduced, .NET has virtually no present share of the market." (Op.17, 39.) There was no evidence that Java faces "near extinction."

Sun based its motion on Claim One of its Amended Complaint, which alleges that Microsoft unlawfully maintained a monopoly in the PC-OS market. Sun claimed no injury in that market, but argued that it is threatened with harm in an entirely separate market. On January 10, 2003, the district court ruled from the bench that it would dismiss Claim One for lack of antitrust standing (1/10Tr.136), but *sua sponte* rescinded that dismissal on January 15 (1/15Tr.2-9).

Further, the district court recognized that the Microsoft conduct in the PC-OS market found wrongful by the D.C. Circuit in *United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (the "DOJ Case"), was insufficient to warrant entry of a preliminary injunction. (Op.29.) Instead, the district court based its decision on Microsoft's distribution of its own Java implementation (called the Microsoft Java virtual machine or "MSJVM") that was not fully compatible with Sun's (Op.28-29) — even though the D.C. Circuit held that this conduct was *procompetitive*, 253 F.3d at 74-75, and Sun agreed in January 2001 that Microsoft could continue to distribute the MSJVM until 2008.

Finally, the district court rejected the views of both the DOJ and the D.C. District Court that requiring Microsoft to distribute Sun's Java with Windows was the "antithesis" of competition and a "bold manipulation of the market."

2. The Copyright Injunction

In a prior action in 1997, Sun and Microsoft asserted claims against each other relating to Microsoft's implementation of Java. That case was settled in January 2001 with Sun granting Microsoft a license to "incorporate" the MSJVM in Windows and other products. Here, the district court concluded on a preliminary injunction motion that the license barred Microsoft from (1) permitting original equipment manufacturers ("OEMs") to pre-install the MSJVM on new PCs as an optional component of Windows XP, (2) distributing the MSJVM as part of the Windows XP Service Pack 1 Upgrade, or (3) making the MSJVM available to Windows XP users via Internet downloading.

B. Course of Proceedings

1. Sun's Preliminary Injunction Motion

On March 8, 2002, Sun commenced this action and filed its preliminary injunction motion. Despite claims of urgency, Sun had prepared a draft of its complaint five months before it filed suit. (12/4Tr.56 (Carlton).)

Shortly after the case was transferred to the District of Maryland in August 2002, the district court scheduled an evidentiary hearing for December 3-5 on Sun's preliminary injunction motion.

2. The Hearing

At the hearing, Sun called three witnesses: Richard Green (a Sun employee), Rick Ross (the president of a trade association advocating the use of Java), and an economist, Dennis Carlton. Microsoft called three of its executives, Andrew Layman, Chris Jones and Sanjay Parthasarathay, and an economist, Kevin Murphy.

Much of the hearing concerned what this Court has described as the "first requirement which must be satisfied if preliminary relief is to be granted" — whether Sun faces imminent, irreparable harm. *Direx*, 952 F.2d at 815. The evidence (described in greater detail at pp. 15-17, 21-26, *infra*) was that Microsoft's .NET is just now entering the alleged second market in which Java is dominant, and that "tipping" is at best "speculative" and "remote." *Direx*, 952 F.2d at 812.

In apparent recognition of these facts, the district judge asked Sun's counsel during his summation on December 5, "how do you get anywhere . . . close to tipping when your witnesses . . . say I can't tell you . . . that the tipping is going to occur, [or] when it's going to occur." (12/5Tr.269-70.) When Sun's counsel conceded that Sun's economic expert "can't tell you with any probability that [the market] will become tipped," the district court stated that the lack of any irreparable harm is "so blatant on the record" that "I'm sitting here thinking . . . maybe at the end of all of this I'll give an oral opinion saying, you just don't get anywhere near the standard." (12/5Tr.270.) The district court then intimated that perhaps no imminent harm was necessary given its view of proper "social policy" involving "the right to compete." (12/5Tr.272.) A minute later, the district court reiterated that "on this record, I can't find" that "tipping" will occur imminently "if I don't intervene." (12/5Tr.273-74.)

3. The Court's Opinion and Subsequent Proceedings

On December 23, the district court issued its Opinion. The court asked the parties to agree upon a form of order and report back on January 13, 2003. (JA__.)

In a January 10 oral decision, the district court dismissed Claim One, the only claim on which Sun's preliminary injunction motion was based. (1/10Tr.136.) The court reasoned that Sun lacked antitrust standing to assert that claim because its ownership of Java did not make it either a consumer or competitor in the PC-OS market in which Sun alleged that Microsoft unlawfully maintained a monopoly. (*See* 1/10Tr.130-33.) After Microsoft pointed out that a preliminary injunction cannot issue on a dismissed claim, the court *sua sponte* "retracted" its dismissal on January 15. (1/15Tr.2-9.)

The district court entered its Order on January 21 and stayed the injunction for 14 days. (JA__.) On February 3, this Court granted Microsoft's motion for a stay of the Order pending appeal.

STATEMENT OF FACTS

A. The Parties

Sun is one of the largest companies in the computer industry. (*See* DX21,1-49.) In its 2002 fiscal year, Sun had revenues of $12.5 billion, and at the end of the year had on hand about $5.8 billion in cash and cash equivalents. (DX21,21, 39.)

Microsoft is the world's leading independent software company. Its Windows PC operating systems, including Windows XP, are used by hundreds of millions of people around the world. (DX18,914-15.)

B. Sun's 1996 License of Java Technology to Microsoft

In 1995, Sun announced its Java technology. (Op.2.) In 1996, Microsoft and Sun entered into a Technology License and Distribution Agreement ("TLDA") (PX56) pursuant to which Microsoft developed its own Java implementation for Windows, the MSJVM. (12/3Tr.93-94 (Green).) Under the TLDA, Microsoft was permitted, but not required, to distribute the MSJVM with certain products. (PX56, §8.2; Op.33 n.18.) The TLDA had a five-year term expiring in March 2001. (PX56, §11.1.)

Microsoft's MSJVM was optimized for use with Windows, and ran many Java applications faster than did other Java implementations. *See U.S.* v. *Microsoft*, 253 F.3d at 74-75. The MSJVM ran both "pure" Java applications that could run unmodified on other operating systems as well as Java applications written for use specifically with Windows. (*See* DX55,139.)

C. Sun's First Lawsuit Against Microsoft

In October 1997, Sun sued Microsoft alleging, *inter alia*, that the MSJVM and Microsoft's Java developer tools failed to comply with Sun's Java compatibility tests in breach of the TLDA. Sun contended that the MSJVM was "incompatible" because for a time it did not support certain new Sun technology. In 1998, the district court in California issued a preliminary injunction requiring Microsoft to add that Sun technology to the MSJVM and to warn Java developers that use of Microsoft's Java developer tools could result in applications that ran only on Windows. *Sun Microsystems, Inc.* v. *Microsoft Corp.*, 21 F. Supp.2d 1109, 1125-26 (N.D. Cal. 1998). Microsoft promptly complied. That injunction was vacated by the Ninth Circuit, 188 F.3d 1115 (9th Cir. 1999), and later reinstated in part on an unfair competition theory, 87 F. Supp.2d 992 (N.D. Cal. 2000). In reinstating the injunction, the district court held that Microsoft's addition of features to its Java implementation that enabled software developers to write both "Windows-specific" and "pure" Java applications did not constitute unfair competition or restrict the growth of Sun's standard Java. *Id*. at 1002. Recognizing that Microsoft's Java developer tools could be used to create Java applications that ran on any operating system, the court stated that those tools "may in fact promote Sun's standard programming environment." *Id*. at 1002 n.13.

On January 23, 2001, Sun and Microsoft entered into a Settlement Agreement pursuant to which (a) Microsoft paid Sun $20 million, (b) both parties released all claims except antitrust claims, (c) the TLDA was terminated, and (d) Sun agreed that Microsoft could distribute the MSJVM until 2008. (PX3, §§2, 5, 6.)

D. The DOJ Case

In May 1998, the United States and several states sued Microsoft under the Sherman Act. After a 76-day bench trial, Microsoft was found liable for unlawfully maintaining a monopoly in the PC-OS market. 84 F. Supp.2d 9 (D.D.C. 1999); 87 F. Supp.2d 30 (D.D.C. 2000).

On appeal, the D.C. Circuit affirmed in part and reversed in part, vacated the district court's judgment and remanded the action to a new judge (Hon. Colleen Kollar-Kotelly) for further proceedings. 253 F.3d at 118-19. The D.C. Circuit expressly held that Microsoft's development and distribution of the MSJVM did not violate the antitrust laws. *Id*. at 74-75. This holding reflected the principle that even "a monopolist does not violate the antitrust laws simply by developing a product that is incompatible with those of its rivals." *Id*. at 74.

Following remand, Microsoft reached a settlement with the DOJ and nine states. The non-settling states sought additional remedies, including — at Sun's urging, *see New York* v. *Microsoft Corp.*, 224 F. Supp.2d 76, 262 n.133 (D.D.C. 2002) — a Java must-carry injunction virtually identical to the one entered here.

After a trial in which 34 witnesses testified — including Richard Green, the only Sun employee to testify at the preliminary injunction hearing here — Judge Kollar-Kotelly rejected the Java must-carry injunction:

> [T]he artificial promotion of Java runs afoul of the goal of restoring competition because it "primarily is relevant for threats from six years ago." . . . [This proposed remedy] appears to be a bold manipulation of the market which provides a particular technology, indeed a particular format of this technology — the Sun-compliant format — with an artificial advantage over other non-Microsoft technologies which may now or in the future compete with Java.

Id. at 262; *see also id*. at 188-90, 260-62.

The D.C. District Court also "reject[ed] the contention that distribution of [Sun's Java] through Microsoft is imperative" for Sun's ability to compete, finding that other distribution methods are available to Sun. *Id*. at 260 n.130. Judge Kollar-Kotelly found that Sun would rather "use this litigation" to obtain free distribution instead of "attempt[ing] to obtain distribution through the OEM channel" in the usual commercial manner. *Id*.

E. Sun's Motion in This Case

1. The Allegedly Wrongful Conduct

Sun's preliminary injunction motion was based on its Claim One, that Microsoft unlawfully maintained a monopoly in the PC-OS market. (SunReply4 n.13; SunMotion1; Op.3-6; 1/15Tr.3-6, 137-38.) There is no dispute that Microsoft's monopoly power in that market was acquired lawfully. (12/4Tr.65-66 (Carlton)); *see United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1452 (D.C. Cir. 1995).

Sun asserted that Microsoft's wrongful conduct consisted of (a) the acts in 1996-98 found anticompetitive by the D.C. Circuit in the DOJ Case, and (b) Microsoft's development and distribution of the MSJVM. (SunMotion8-10, 13-15.) According to Sun, Microsoft "fragment[ed] the Java platform into two incompatible environments" leading "developers and consumers to choose the environment with the largest installed base: Microsoft's environment."

(SunMotion8.) This argument had been unanimously rejected by the D.C. Circuit, which "reverse[d] the District Court's imposition of liability for Microsoft's development and promotion of" the MSJVM. 253 F.3d at 75.

2. The Market in Which Sun Claims To Face Irreparable Harm

Although all of Microsoft's allegedly wrongful conduct took place in the PC-OS market, Sun did not seek a preliminary injunction based on alleged harm to competition there. Instead, Sun asked the court to "preserve competition" in another market (SunReply2) — the so-called market for "general purpose, Internet-enabled distributed application platforms." According to Sun, Microsoft's ability to include .NET in Windows gives Microsoft a distribution advantage on PCs that may cause software developers to abandon Java, thereby "tipping" the alleged second market "irreversibly" to .NET and driving Java "near extinction." (*See* SunReply9-12.)

Sun never defined the alleged second market, although Microsoft challenged it to do so. As a consequence, Sun never identified the products that compete in the alleged second market or what percentage of the market each has — except to say, as the district court noted, that .NET's share is close to zero and that Java is currently "dominant" (Op.17). As the district court also noted, Sun never proved a relevant antitrust market (in terms of demand-side and supply-side substitutability or barriers to entry) or that Microsoft engaged or was threatening to engage in any anticompetitive conduct in such a market. (1/15Tr.5-6, 8-9.)

The district court described distributed computing as enabling users and applications "to communicate information to one another" and "enable application programs to be executable across a wide range of devices, including PCs, servers, and various handheld devices (such as personal digital assistants, cell phones and smart cards)." (Op.9.) For example, a server might automatically notify a consumer's cell phone of a delay in the scheduled departure time of the consumer's airplane flight. (*See* 12/4Tr.149-51 (Layman).) The district court never identified actual and potential competitors in the alleged second market.

F. Nascent Competition in the Alleged Second Market

The alleged second market is, as the district court found, "an emerging market" (Op.9) in which the competition between Java and .NET is just beginning (Op.19). The competition extends far beyond PCs to include servers, cell phones and other non-PC devices. (Op.9.) Java is "the platform of choice" (Op.17) in all segments other than PCs, with Sun claiming that Java has a 96% share of application servers (DX13,14) and predicting that by 2006 more than one billion cell phones and other handheld devices will use Java (DX16,0126).

Microsoft's new .NET has no significant presence in these non-PC segments. (12/3Tr.186-87 (Green).)

In analyzing the relative strengths of Java and .NET, Sun concluded in 2002 that Java is significantly ahead, with an "advantage" in eight of 11 "key" areas. (DX14,046; DX89.) One of .NET's three advantages is distribution. There was no basis to conclude that Java faces "near extinction" due to Microsoft's advantage in one of the 11 competitive areas Sun identified as important.

G. Microsoft's Purported Distribution Advantage on PCs

Having Windows may be an advantage to Microsoft, but it is not wrongful. No court has found that Windows would have a substantially smaller market share than it currently enjoys but for wrongful conduct engaged in by Microsoft. *U.S.* v. *Microsoft*, 253 F.3d at 78; *New York* v. *Microsoft*, 224 F. Supp.2d at 185-86 n.81, 243-44 & n.121, 262. Sun did not contend otherwise. (12/5Tr.268; 12/4Tr.66-68 (Carlton); Op.27.)

Of equal importance, Sun's contention that Windows gives Microsoft a distribution advantage on PCs is off the point, because that purported advantage has not yet been exploited. .NET is not part of the default installation of Windows XP, meaning that OEMs can choose whether or not to install it on their new PCs (12/4Tr.198-99 (Jones)), and many large OEMs, including IBM, have indicated they will not (SunSupp.Reply22). As of the hearing, Microsoft did not plan to make .NET part of the default installation of Windows until the next major version of the operating system, expected to be released in late 2004. (12/4Tr.232-33, 239.) While .NET can now be downloaded from the Internet (*id*.239-40), the same is true for Sun's Java (12/3Tr.117 (Green)).

Even when .NET becomes part of the default installation of Windows, it will take years before .NET becomes "ubiquitous" on PCs. There are approximately 316 million PCs in use today, and about 130 million new PCs are sold every year. (12/3Tr.234-35 (Green); 12/4Tr.111 (Carlton); DX18,914, 924.) At that rate, assuming Windows remains very popular, it would take three years or more for the installed base of PCs to be replaced by those containing .NET.

H. Sun's Ability To Distribute Java

Sun's preliminary injunction motion was premised on the notion that Sun cannot distribute Java on its own. Yet the record shows that Sun can achieve widespread distribution of Java on PCs at modest expense by paying OEMs to pre-install it and by utilizing other available distribution channels. Sun admitted that it could distribute Java on "somewhere upwards of 70%" of all new PCs. (12/3Tr.125-26 (Green).) Thus, Sun could have distributed hundreds of millions of copies of its Java on PCs in the last 5-7 years, but made no effort to do so.

Indeed, Sun had a feasible and affordable plan for obtaining nearly "ubiquitous" distribution for Java, but elected not to pursue it. On May 9, 2002 — after moving for its preliminary injunction — a lengthy Sun memo described a "Java Plug-In Distribution Plan." (DX18.) This was a plan for "[e]nsuring that >95% of PCs have a Java enabled default browser," and it suggested several ways to "[s]olve" Sun's distribution needs. (*Id*.,0908.) The projected cost of putting Java on 95% of new PCs was $3.65 million per year. (*Id*.,0946.)

At the hearing, Richard Green of Sun testified that the May 2002 Plan had not been implemented because Sun had more recently developed a better plan that was just being "rolled out" and that costs Sun nothing — in fact, Sun is "being paid money" by OEMs under the new plan. (12/3Tr.239, 242.) Green conceded that he sought an order compelling Microsoft to provide free distribution on "a hundred percent of new PCs" even "before the outcome of the current plan becomes known." (12/3Tr.245.)

In fact, it is not necessary to use Windows to distribute software widely on PCs. Software companies have succeeded in distributing hundreds of millions of copies of their software on PCs without any assistance from Microsoft. (12/4Tr.197 (Jones); 12/5Tr.20-26 (Murphy).) Apple Computer Inc., for example, distributed more than 125 million copies of its QuickTime media player (which competes with the Windows Media Player component of Windows) in a single year by Internet download alone, and "tens of millions" more copies through other channels. (DX50.) Similarly, RealNetworks has distributed its competing media player to 285 million PC users. (BanfieldDep.139-40.)

The district court mistakenly concluded that Sun's plans referred to obtaining distribution through 70% of OEMs, which themselves constitute 70% to 80% of distribution. (Op.23 n.10.) This was clear error. The court wrongly focused on just one part of Sun's larger plan, which had an "immediate goal[]" of "ensur[ing] that >95% of PCs have a Java enabled default browser" (DX18,0908) and estimated that "95% [t]otal [p]enetration" of "new PCs" could be achieved through a variety of widely used channels (DX18A,0065).

Sun's concession that it is now "rolling out" a program to achieve widespread distribution of Java was brushed aside by the trial court based on speculation that such distribution may not be enough — that Sun must have "approximate *parity* in the distribution of the two competing products." (Op.21 (emphasis in original).) But the evidence shows that Sun can achieve "approximate parity" — *i.e.*, 95% of all PCs — on its own. In any event, Sun's economic expert testified that "100% parity of distribution" is *not* necessary to avoid the risk of "tipping" (12/4Tr.116); he testified instead that Sun needs only "to achieve sufficient distribution so that [it] can attract developers" to Java (12/4Tr.40-41). Likewise, Rick Ross admitted at his deposition that distribution on two-thirds of PCs would be sufficient to secure developer interest in a platform (RossDep.395-96), and even if developers might "have a strong incentive to go with the more widely-distributed technology," that incentive arises only if the distribution disparity is "significant" (Op.21).

I. Future Competition in the Alleged Second Market

Although Sun never defined the alleged second market — and thus failed to identify a wide range of existing and potential competitors — Java and .NET will, as the district court found, be competing against one another for years to come.

1. Views of Industry Analysts

Independent industry analysts unanimously predict that Java will continue to thrive. For example, Gartner Group opined in an October 6, 2002 report that, over the next five years, "neither the Microsoft nor the Java platform will dominate" and "both platforms will garner roughly equal market shares." (DX25,3.)[1]

[1] In a March 2002 report, Gartner gauged the probability that ".NET kills Java" at "0.1." (RewinskiEx.140,460.) Gartner explains that a "0.1" probability means that an event "will definitely not happen, barring incredible industry turnaround." (DX25A.) Rather, what Gartner believes "will definitely happen, barring incredible industry reversal" (DX25A) is either "a two-standards (Java and Microsoft) world" or "a world of many proprietary vendor solutions." (RewinskiEx.140,456.)

The October 2002 Evans Data survey singled out by the district court (Op.18) is not to the contrary. It reports that by the end of 2003, Java and .NET each will be used by more than 60% of software developers. (DX23,102, 105.) This proves a critical point missed completely by the district court. Competition among platforms is not a zero-sum game — increased use of one platform will not necessarily result in decreased use of another. Software developers can — and do — write to multiple platforms. This is confirmed by Giga Information Group, which reported in July 2002 that while software developers "expect to dramatically increase their use of Microsoft .NET" in the period 2003-05, "[t]his growth [for .NET] is not expected to reduce the commitment to [Java] platforms, instead, both will increasingly come to dominate the scene." (DX36,1.)

2. Sun's Own Analysis

Sun's counsel acknowledged during summation that Sun's economic expert "can't tell you with any probability that [the market] will become tipped." (12/5Tr.270.) In fact, Sun itself unequivocally predicts a healthy future for Java.

According to a September 2002 Sun press release, "[t]he pervasive-ness of Java technology is becoming a worldwide phenomenon." (DX37.) Indeed, the head of Sun's software business told Sun's President in early 2002 that the "most important thing to know" is that "Java won." (DX29,1.) And Sun's CEO Scott McNealy stated publicly in September 2002 that, among software developers, Java is "gaining share faster" than Microsoft's platforms. (Op.17 (quoting DX39A).) There was no basis for finding that .NET poses a grave danger to Java when Sun is publicly proclaiming the opposite.

3. Developer Interest

According to the district court, the current behavior of software developers may be a predictor of a platform's future success and, "[i]f developers begin to anticipate that one platform will become dominant," they may "quickly shift to that platform." (Op.19.)

There was no evidence, however, that software developers believe that .NET "will become dominant" or that interest in Java is decreasing. In 2002, three million software developers used Java. (Op.17.) Sun expects this number to *increase* by 40% this year, to 4.2 million. (DX14,36.) The October 2002 developer survey cited by the district court (Op.18) found that software developers "expect to increase the percentage of Java-based targets in the coming year" and, "[w]hile 51% of developers currently write for Java . . . by next year 61% will do so." (DX23,102.) According to Sun's CEO, Java is "gaining share" among developers by the "millions," while Microsoft's share of developers has remained stagnant. (DX39A.)

No witness testified that software developers are abandoning Java on a wholesale basis. The software developer relied on by the district court (Op.16) testified that "the world will remain forever heterogeneous," and that he knew no one who intended to abandon Java in favor of .NET. (BehlendorfDep.40, 133-34; *accord* LimpDep.11-13.) Another Sun declarant agreed: "I don't expect Java to die any time in the near future. Java developers like Java, and they will continue to develop to Java." (ManesDep.211; *accord* OwensDecl. ¶¶ 24-32.)

4. The Second Market Is Not Susceptible to "Tipping."

Economists have sometimes posited that "tipping" can occur, but only in markets with strong "network effects." Stan J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSP. 133, 146-49 (1994). That latter phrase, sometimes called "feedback effects," refers to a "phenomenon by which the attractiveness of a product increases with the number of people using it." (Op.12-13.) Sun never demonstrated that the alleged second market is susceptible to "tipping." Indeed, in view of the district court's finding that Java is now "dominant" in the alleged second market, and assuming that "tipping" is more than a theoretical possibility, that market should already have tipped in *Java's* favor.

There is no reason to believe that the alleged second market is a "winner-take-all" market, because, as the district court recognized, "[i]t is likely that the development of interoperability standards will allow cross-platform communication of data and other information." (Op.9 n.5; *see* 12/5Tr.13-15

(Murphy).) The fact that such standards will permit .NET and Java applications to interoperate with one another (12/4Tr.149-53 (Layman)) — *e.g.*, that a server or cell phone running Java will be able to communicate with a PC running .NET — undermines the notion that software developers or consumers will be forced to choose one "winner."

Sun's economic expert did not testify that the alleged second market is characterized by sufficiently strong feedback effects to make "tipping" possible, much less inevitable. In fact, Dr. Carlton offered no opinion "on the relative strength of those feedback effects" in the alleged second market (12/4Tr.118) and acknowledged that, given Java's current dominance, feedback effects should favor Java (12/4Tr.113-15 (Carlton)).

In sum, Sun failed even to show that the alleged second market is susceptible to "tipping," much less that such "tipping" is about to occur.

5. "Tipping" Is Not Likely.

Although seemingly fatal to Sun's motion, Dr. Carlton testified that he had not even "attempted to come up with a probability estimate of tipping" (12/4Tr.115-16), and that he "cannot determine whether tipping away from Java is more likely than not" (Op.16). Instead, he acknowledged that the future is full of "a lot of uncertainties." (12/4Tr.35 (Carlton).) Even the district court concluded that "[i]t is possible that .NET and Java will both survive as competing platforms and that the new market will be a heterogeneous one." (Op.17.)

J. The District Court's Decision

In granting the unprecedented must-carry injunction, the district court stated that unless Microsoft was forced to provide free distribution of Sun's Java with Windows, (a) Sun faced a "risk" that in the future the alleged second market might "tip" from Java to .NET, and (b) Sun would be forced to compete in a market "distorted" by antitrust violations. (Op.20.)

The district court recognized that "tipping" was neither "likely" (Op.16) nor "imminent" (Op.20). Instead, the court speculated that Microsoft's purported distribution advantage on PCs (just one of 11 competitive factors Sun had identified (DX89)) might — perhaps years from now — affect the outcome of competition between Java and .NET (Op.16-20).

Anomalously, the district court stated that it would have rejected the must-carry injunction, as did Judge Kollar-Kotelly in *New York* v. *Microsoft*, (a) if such relief had been requested by state attorneys general rather than Sun, or (b) if the court had accepted the D.C. Circuit's holding that Microsoft's development and distribution of the MSJVM was lawful. (Op.29.)

STANDARD OF REVIEW

Although a district court's decision to grant a preliminary injunction is reviewed under the "abuse of discretion" standard, this Court has cautioned that "it is simplistic to say or imply, as we sometimes do, that it will be set aside only if an abuse of discretion can be shown. For there is, of course, the possibility that the court below has either failed to exercise its discretion in some respect or else exercised it counter to established equitable principles." *Blackwelder Furniture Co.* v. *Seilig Mfg. Co.*, 550 F.2d 189, 193 (4th Cir. 1977) (citations omitted). The review must be undertaken "[r]emembering that preliminary injunctions are 'extraordinary remedies' involving the exercise of 'very far-reaching power' to be granted only 'sparingly' and in 'limited circumstances.'" *Direx*, 952 F.2d at 816. Thus, as this Court has emphasized, "[i]t is not a rule of perfunctory appellate review but one of careful scrutiny." *Id*. at 815.

While a district court's factual determinations are to be reviewed for clear error, its legal conclusions are reviewed *de novo*. *Safety-Kleen, Inc. (Pinewood)* v. *Wyche*, 274 F.3d 846, 859 (4th Cir. 2001).

The district court's failure to require Sun to show imminent and irreparable harm, and its erroneous analysis of the antitrust laws, are subject to *de novo* review. Similarly, the preliminary injunction on Sun's copyright claim, based on an erroneous interpretation of a license agreement, should be reviewed *de novo*. This Court has "repeatedly held that interpretation of a written contract is a question of law subject to *de novo* appellate review." *Scarborough* v. *Ridgeway*, 726 F.2d 132, 135 (4th Cir. 1984).

SUMMARY OF ARGUMENT

A. The Must-Carry Injunction

Immediate Irreparable Harm. Sun did not make the requisite "clear showing" of immediate irreparable harm. Sun's assertion — that the alleged second market would "tip irretrievably" to .NET and drive Java "into near extinction" — was unsupported by the evidence. The district court found that Java dominates the alleged second market and no witness testified that "tipping" is "more likely than not." Sun's economist expressly testified that he could not so opine. This alone required denial of Sun's motion.

Moreover, the district court did not find that any irreparable harm was "immediate." The court stated explicitly that it could "not find" that there is "an imminent threat" of "tipping." This too required denial of Sun's motion.

The court's alternative theory of harm — that Sun should not be forced to compete in a market "distorted" by antitrust violations — would obliterate the Clayton Act's express requirement that a party seeking a preliminary injunction must show immediate irreparable harm. Moreover, Sun's alleged harm is compensable in money damages, because — among other reasons — Sun can obtain widespread distribution of Java at modest cost.

Harm to Microsoft. The district court improperly discounted the serious harm to Microsoft resulting from the must-carry injunction. Microsoft should not be forced to distribute with Windows a product created by one of its fiercest competitors.

Likelihood of Success on the Merits. Sun has no likelihood of success on the merits for at least five reasons. *First*, the district court's decision was based on its erroneous rejection of the unanimous, *en banc* D.C. Circuit's decision that Microsoft's development and distribution of its MSJVM was procompetitive.

Second, the district court rejected the conclusion of the D.C. District Court that a Java must-carry injunction is an improper "manipulation of the market." The basis for the district court's disagreement — that Sun seeks to "remedy a private wrong" — reflects a serious misunderstanding of antitrust law and remedies.

Third, as the district court at one point determined, Sun lacks antitrust standing to assert the claim on which the preliminary injunction was based because Java is neither a consumer nor competitor in the PC-OS market, and thus Sun did not suffer antitrust injury in that market.

Fourth, the district court's reliance on the "monopoly leveraging" doctrine, rejected by the Ninth Circuit and other courts, was also mistaken. At the very least, "monopoly leveraging" requires a plaintiff to define the second "leveraged" market, which Sun adamantly refused to do.

Fifth, the district court erred by issuing a preliminary injunction without any finding that the allegedly anticompetitive conduct *caused* the asserted irreparable injury.

<u>The Public Interest</u>. Both the DOJ and the D.C. District Court concluded that a Java must-carry injunction would be counter to the public interest. The district court's contrary determination, based on the notion that "this is a private antitrust action," ignored its obligation to consider harm to the public interest resulting from judicial interference in the free operation of markets.

B. The Copyright Injunction

The district court misconstrued the plain meaning of the January 2001 Settlement Agreement and improperly ignored evidence of the parties' shared understanding of that contract. It was improper to hold that various methods of distribution utilized by Microsoft were unlicensed and that Sun was irreparably harmed, particularly where Microsoft distributed the MSJVM only to those customers authorized to receive it under the Settlement Agreement.

ARGUMENT

In this Circuit, any preliminary injunction is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." *Direx*, 952 F.2d at 811 (internal quotations omitted). The standard applicable here is even more rigorous: "Mandatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances." *Taylor* v. *Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994).

Sun "bears the burden of establishing that each of [the following four] factors supports granting" the motion:

(1) the likelihood of irreparable harm to plaintiff if the preliminary injunction is denied,
(2) the likelihood of harm to defendant if the requested relief is granted,
(3) the likelihood that plaintiff will succeed on the merits, and
(4) the public interest.

Direx, 952 F.2d at 812 (quotations and citations omitted).

I. SUN DID NOT MAKE THE REQUIRED "CLEAR SHOWING" OF IMMEDIATE IRREPARABLE HARM.

When a preliminary injunction is sought, a district court must begin by asking: "Has the plaintiff made a 'clear showing' that it will suffer an immediate irreparable harm were such relief not granted it?" *Direx*, 952 F.2d at

815. "[W]here the harm is admittedly not present or immediate but merely problematic, conditioned on possible future events," the court should "dismiss[] the motion for preliminary relief because the plaintiff failed to establish that the denial would result in *present* irreparable harm." *Id.* at 816 (emphasis supplied); *accord Scotts Co.* v. *United Indus. Corp.*, 315 F.3d 264, 283-84 (4th Cir. 2002).

In antitrust cases, Section 16 of the Clayton Act also requires "a showing that the danger of irreparable loss or damage is immediate." 15 U.S.C. § 26.

Although recognizing that the "critical predicate" of Sun's motion was the assertion that the alleged second market "will 'tip' irretrievably in favor of .NET and drive Java into near extinction" (Op.12), the district court (a) did not find that "tipping" is likely, (b) expressly stated that it did "not find" any "imminent threat," (c) did not find when any "tipping" might (if ever) occur, and (d) did not find that the injury alleged by Sun was irreparable.

A. "Tipping" Is Not Likely.

"[A] finding that the plaintiff has failed to demonstrate any likelihood of irreparable injury would be sufficient to deny injunctive relief." *Manning* v. *Hunt*, 119 F.3d 254, 266 (4th Cir. 1997). Neither Sun's economic expert (Op.16) nor the district court (Op.20) ever found that "tipping" is likely, only that it is a "risk." *See* pp. 25-26, *supra*.

The notion that the alleged second market is susceptible to "tipping" in the near future was not supported by any evidence. *See* pp. 24-25, *supra.* To the contrary, as the district court found, "[t]he evidence is overwhelming that *within the coming years* there will be intense competition between the Java platform and the .NET framework for dominance in the market." (Op.39 (emphasis supplied).) Of course, encouraging such "intense competition" is what the antitrust laws are all about.

At the conclusion of the hearing, the district court acknowledged that the most Sun had shown "is the possibility of the risk of tipping." (12/5Tr.273-74.) That is entirely insufficient for a mandatory preliminary injunction that alters the *status quo* in a profound and irreversible way.

B. "Tipping" Is Not Imminent.

Sun has taken the untenable position that the threatened harm need not be immediate. In this Court, when opposing Microsoft's motion for a stay on January 28, Sun argued that "the 'imminence' requirement refers to the likelihood of harm occurring prior to trial (which is years away), not at the precise moment when the court hears the motion for preliminary injunction." (SunOpp.3; *see also* *id*.11.) Similarly, in the district court, Sun argued that "tipping" might occur prior to a "trial on the merits three to five years from now." (SunReply9-10.) These arguments mangle the plain meaning of the word "imminence"; in fact, a party seeking a preliminary injunction must make a "clear showing" of "immediate irreparable harm." *Direx*, 952 F.2d at 815; *see also* 15 U.S.C. § 26. If the harm is so remote as to be "years away," a preliminary injunction must be denied. *See Direx*, 952 F.2d at 815-16.

The district court stated that "I do not find at this precise moment there is an imminent threat" of "tipping." (Op.20.) Instead of a threat of immediate harm, the district court found that the competition between Java and .NET is just beginning (Op.13, 19); that Java is now "in a strong position" and "appear[s] dominant" (Op.17); and that ".NET has virtually no present share of the market" (Op.17).[2]

In *Direx*, plaintiff complained that defendant had wrongfully developed a competing medical device that would threaten plaintiff's "predominant position," although defendant had not yet secured the necessary FDA approval to market its device in this country. 952 F.2d at 816. The district court,

[2] The absence of any "imminent threat" can also be seen from the facts that (a) the district court's Order was entered four weeks after its December 23 Opinion and ten months after Sun filed its motion, and (b) Sun prepared a draft complaint in October 2001, but waited until March 2002 to bring its lawsuit.

"looking . . . over the long haul," recognized that the irreparable injury was "at least a year down the road, maybe two or three years down the road," but nevertheless granted the injunction on the theory that the harm might occur before a trial on the merits could be conducted. *Id*. This Court vacated the preliminary injunction for reasons equally applicable here:

> By the district court's own finding, any harm to Direx in this case is at this time problematical and uncertain. Remembering that preliminary injunctions are "extraordinary remedies" involving the exercise of "very far-reaching power" to be granted only "sparingly" and "in limited circumstances," the grant of such relief in this case, where the harm is admittedly not present or immediate but merely problematic, conditioned on possible future events, would seem contrary to our stated rule: A plaintiff, seeking preliminary relief, must show the present threat of irreparable harm.

Id. (citation omitted); *accord Scotts*, 315 F.3d at 283 ("actual and imminent injury" required).

Here, the alleged harm is even more "problematical and uncertain" than in *Direx*. Microsoft has not achieved "ubiquitous distribution of .NET" (Op.11-12) and cannot do so at least for several years. *See* pp. 17-18, *supra*. Java is on 96% of application servers, dominates cell phones, is used by millions of developers and is "gaining share faster" among software developers than Microsoft's platforms. Moreover, Sun is now implementing a plan to distribute its Java widely on PCs. Thus, an internal Sun March 2002 document predicted that, based on "what we have heard from the industry and from customers, there is a high likelihood that BOTH Java AND Microsoft.NET are going to be deployed in many/most/all organizations of significant size." (DX34.) This is confirmed by all industry analysts. *See* pp. 21-22, *supra*.

The district court downplayed evidence of active competition among a variety of software development environments as reflecting only a "snapshot picture of the existing market," noting that the "market is not static." (Op.17-18.) But the evidence did not reflect "static" conditions: The developer surveys (*see* DX23; DX25; RewinskiEx.140; DX36) and Sun's own statements all look "to the future," projecting that Java will remain strong. Even the survey singled out by the district court (Op.18) concluded that software developers "expect to increase the percentage of Java-based targets in the coming year" and that "[w]hile 51% of developers currently write for Java, . . . by next year, 61% will do so." (DX23,102.)

In *Dan River, Inc.* v. *Icahn*, 701 F.2d 278, 283 (4th Cir. 1983), this Court vacated a preliminary injunction because the movant would "have more than adequate opportunity to petition a court for injunctive relief when and if the fears mature into imminent danger." In the unlikely event that "tipping" ever becomes imminent, Sun would have the same opportunity.

C. "Losing an Opportunity To Compete" Is Not Irreparable Injury.

After finding no likelihood or imminent threat of "tipping," the district court sought to justify its decision on the ground that, without a mandatory preliminary injunction, "Sun will have lost forever its right to compete, and the opportunity to prevail, in a market undistorted by its competitor's antitrust violations." (Op.20.) This is unsustainable for three reasons. First, Sun's Java is "dominant" in the alleged second market, and Sun seeks to shield itself from competition from a new entrant. Second, Microsoft's alleged "antitrust violations" were in a different market — the PC-OS market — and Sun did not contend that .NET's entry into the alleged second market constitutes an "antitrust violation" or that *any* present or future Microsoft conduct is or will be unlawful.

Third, and most importantly, loss of a "right to compete" in a "market undistorted by . . . [past] antitrust violations" is not irreparable injury. Neither Sun nor the district court provided any authority to support such a proposition. If it were correct, the irreparable harm requirement would be eliminated from all antitrust cases because, by definition, every antitrust violation "distorts" the market in some fashion. *See Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993). A violation of the Sherman Act (and its accompanying market "distortion") is separate and distinct from the immediate irreparable injury requirement for issuance of a preliminary injunction. *See* 15 U.S.C. § 26; *Murrow*

Furniture Galleries, Inc. v. *Thomasville Furniture Indus.*, 889 F.2d 524, 527 (4th Cir. 1989).[3]

The district court's reliance on *Multi-Channel TV Cable Co.* v. *Charlottesville Quality Cable Operating Co.*, 22 F.3d 546 (4th Cir. 1994) (*see* Op.20) was misplaced. There, this Court affirmed a preliminary injunction that restored the *status quo ante* by prohibiting a competitor from entering into exclusive contracts that would have prevented plaintiff from continuing to provide service to pre-existing customers. 22 F.3d at 552. Here, the mandatory preliminary injunction would drastically alter the *status quo* in line with the district court's view of proper "social policy." (12/5Tr.272.) And Sun is not precluded from competing for customers in the absence of an injunction — for example, although noting Microsoft's distribution advantage, Sun's own analysis in January 2002 gives Java an advantage in eight of 11 competitive arenas. (DX89.) *See* p. 17, *supra*.

Given that Sun has not been disabled from competing, the relevant precedent is not *Multi-Channel* but *Merritt* v. *Marsh*, 791 F.2d 328 (4th Cir. 1986).

[3] Here, of course, the "violation" took place 5 or more years ago and the alleged "distortion" — the fact that Sun's Java is not as widespread on PCs as Sun would like — was something that Sun itself at any time could have remedied with modest efforts.

As this Court there held, the loss of "the opportunity to bid on an undetermined number" of potential customers is not irreparable harm. *Id*. at 331.

D. Any Harm to Sun Is Compensable in Money Damages.

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies," and thus "money, time and energy necessarily expended in the absence of" injunctive relief "are not enough" to establish irreparable harm. *Sampson* v. *Murray*, 415 U.S. 61, 88, 90 (1974); *see Hughes Network Sys.* v. *Interdigital Communications Corp.*, 17 F.3d 691, 693 (4th Cir. 1994). Money damages can compensate Sun if it prevails on the merits of its claim after trial.

Sun's principal allegation of wrongdoing was that Microsoft years ago reduced the extent to which "compatible" Java was distributed on PCs, that Microsoft might in the future include .NET as part of Windows and that the resulting distribution disparity on PCs could somehow lead to "tipping." The fact that, by spending modest sums, Sun all along could have obtained the distribution it claims to need to maintain developer interest in Java shows the absence of irreparable harm. *See* pp. 18-21, *supra*. Sun, which has annual revenues in excess of $10 billion (DX21,21), could have purchased such distribution for about $4 million per year, and the uncontradicted evidence shows that other software vendors have distributed hundreds of millions of copies of their products without any assistance from Microsoft. *See* pp. 19-20, *supra*.

Sun's ability virtually to erase Microsoft's purported distribution advantage on PCs for a few million dollars per year demonstrates that there is no irreparable harm. *See*, *e.g.*, *Steakhouse, Inc.* v. *City of Raleigh*, 166 F.3d 634, 637-38 (4th Cir. 1999); *Triebwasser & Katz* v. *AT&T*, 535 F.2d 1356, 1360 (2d Cir. 1976); *Daniels Cablevision, Inc.* v. *San Elijo Ranch, Inc.*, 158 F. Supp.2d 1178, 1189-90 (S.D. Cal. 2001).

II. MICROSOFT WILL BE HARMED BY A MANDATORY PRELIMINARY INJUNCTION REQUIRING IT TO INCLUDE SUN'S JAVA IN WINDOWS.

The evidence from Microsoft was unrefuted that the forced inclusion in Windows of a large block of software code developed by Sun could inflict serious harm on Microsoft and its flagship operating system, Windows XP, which is distributed to tens of millions of customers throughout the world. The district court rejected these concerns as "ephemeral or easily remediable" and "unappealing" because "of the strong evidence demonstrating that it is Microsoft's misconduct that has poisoned its relationship with Sun." (Op.24-25.) Even if the district court were correct in its assessment of who poisoned the relationship (and it is not), this Court just two months ago rejected a similar rationale for ignoring harm to the party to be enjoined.

In *Scotts*, this Court "agree[d] with the defendants that the district court gave impermissibly short shrift to the question of the harm" to defendant's reputation because the district court "described [it] as of the defendant's own making":

> If self-made harm is given substantially less weight, as it was by the district court in this case, then the balance of the harms will almost always favor the plaintiff, thus transforming a preliminary injunction from an extraordinary remedy into a routine occurrence. And when the purpose behind the requirement that the court balance the harms is recognized, it becomes apparent that it is error to dismiss as self-inflicted the harms that might be suffered by a defendant if an injunction were to issue.

315 F.3d at 284.

Moreover, the district court's reference to the fact that in settlement negotiations in 2000 Microsoft offered to distribute Sun's Java with Windows and that Microsoft considered entering into a similar arrangement with IBM (Op.25) misunderstands the nature of the harm. As the testimony made clear, Microsoft includes third-party software code in Windows only under "very specific contractual arrangements" that ensure the quality and stability of Windows. (12/4Tr.202-03 (Jones).) The preliminary injunction entered by the district court contains no such guarantees. (*Id.*)

Courts have been extremely reluctant to force bitter rivals to work closely together. *See*, *e.g.*, *Corenswet, Inc.* v. *Amana Refrigeration, Inc.*, 594 F.2d 129, 134 n.3 (5th Cir. 1979) ("The Court should not be called upon to weld together two business entities which have shown a propensity for disagreement, friction, and even adverse litigation."); *Jack Kahn Music Co.* v. *Baldwin Piano & Organ Co.*, 604 F.2d 755, 764 (2d Cir. 1979). Indeed, the district court repeatedly referred to the need for the sort of ongoing judicial supervision that is generally disfavored (Op.24-25, 40), particularly over matters as technical as the inclusion of third-party software code in a large and complex operating system like Windows XP. *See*, *e.g.*, *Walgreen Co.* v. *Sara Creek Property Co.*, 966 F.2d 273, 276 (7th Cir. 1992) (Posner, J.); *Jack Kahn*, 604 F.2d at 764; *Bethlehem Eng'g Export Co.* v. *Christie*, 105 F.2d 933, 935 (2d Cir. 1939) (L. Hand, J.).

Finally, the mandatory preliminary injunction will alter drastically the *status quo* and confer an unjustified benefit on Sun that can never be undone. This Court has held that a balancing of harms requires the district court to gauge the harm that will be suffered by defendant if the injunction is "*improperly* granted or denied." *Scotts*, 315 F.3d at 284 (emphasis in original). If it is determined after trial that Microsoft should not have been required to distribute Sun's Java with Windows, there will be no way to address such free-riding by a competitor, which will put Sun's Java on tens of millions of PCs. Courts should be extremely reluctant to act when there will be no way to undo the impact of an erroneously granted injunction. *See*, *e.g.*, *Dan River*, 701 F.2d at 284; *Dorfmann* v. *Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969).

III. SUN DID NOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS.

To demonstrate a likelihood of success on the merits (Op.26), Sun had to demonstrate that it is likely to obtain the *requested relief* after trial.[4] The district court made no such finding, and in view of the rejection of Sun's legal theories by other federal courts, Sun's lack of antitrust standing, and the absence of any proof that unlawful Microsoft conduct caused Sun's alleged irreparable injury, no such finding could be made.

A. The Preliminary Injunction Rested in Large Measure on Conduct Found Lawful by the D.C. Circuit.

The district court justified the preliminary injunction by finding unlawful the very same Microsoft conduct found lawful and procompetitive by the D.C. Circuit when challenged by the DOJ and various states. The district court

[4] *See*, *e.g.*, *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 579 (1984) (vacating preliminary injunction that ordered "something that could not have been ordered had the case gone to trial and the plaintiffs" prevailed); *Iowa Protection & Advocacy Servs.* v. *Gerard Treatment Programs, L.L.C.*, 152 F. Supp.2d 1150, 1157 (N.D. Iowa 2001) ("movant's success on the merits must be at least sufficiently likely to support the kind of relief it requests").

also acknowledged that it would have denied Sun's motion — *i.e.*, "made the same decision as did Judge Kollar-Kotelly" — had it accepted the D.C. Circuit's decision (Op.29), but then entered the Java must-carry injunction based on its "different perspective[]" and the mistaken notion that an antitrust action seeking to "correct a private wrong" is governed by different standards. (Op.28-29.) This was clear error.

1. The D.C. Circuit Was Correct.

The unanimous, *en banc* D.C. Circuit correctly held — after reviewing the extensive trial record "with painstaking care," 253 F.3d at 118 — that Microsoft's development and distribution of the MSJVM did *not* violate the antitrust laws. 253 F.3d at 74-75. On an incomplete record after a three-day preliminary injunction hearing, the district court had no basis for reaching the opposite conclusion.

As this Court reaffirmed two months ago, "'[g]ranting a preliminary injunction requires that a district court, acting on an incomplete record, order a party to act, or refrain from acting, in a certain way. 'The danger of a mistake in this setting is substantial.'" *Scotts*, 315 F.3d at 284 (quoting *Hughes*, 17 F.3d at 693) (internal quotations omitted). Such a "mistake" was plainly made here.

In rejecting the D.C. Circuit's decision, the district court ignored the established principle that even a monopolist has no affirmative duty to assist its competitors.[5] Thus Microsoft had no *antitrust* duty to make its version of Java compatible with Sun's. To the contrary, by enabling software developers to write both Windows-specific Java applications and "pure" Java applications that could run on multiple operating systems, Microsoft was offering them an additional choice — precisely the sort of procompetitive conduct the antitrust laws are intended to encourage. *See*, *e.g.*, *Foremost Pro Color, Inc.* v. *Eastman Kodak Co.*, 703 F.2d 534, 542, 544-45 (9th Cir. 1983) ("[t]he creation of technological incompatibilities, without more, does not foreclose competition; rather, it increases competition by providing consumers with a choice among differing technologies"); *Sun*, 87 F. Supp.2d at 1002.

The district court wrongly concluded that conduct found procompetitive by the D.C. Circuit could be transformed into an antitrust violation because it found that Microsoft's intent was to "embrace[] Java for the purposes of destroying it." (Op.28-29.) The D.C. Circuit rejected this analysis, observing that in antitrust cases the proper "focus is upon the effect of that conduct, not upon the

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[5] *See*, *e.g.*, *N.C. Elec. Membership Corp.* v. *Carolina Power & Light Co.*, 995 F.2d 1063, 1993 WL 19367, at *3 (4th Cir. 1993) (unpublished opinion) (recognizing the general "'no-duty-to-help-competitors' rule"); *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.) (monopolist has "no duty to extend a helping hand to new entrants"); *USM Corp.* v. *SPS Techs., Inc.*, 694 F.2d 505, 513 (7th Cir. 1982) ("There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter.").

intent behind it." 253 F.3d at 59. As the Supreme Court has explained, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the antitrust laws." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993). It has long been understood that "[f]irms 'intend' to do all the business they can, to crush their rivals if they can," and thus "'intent to harm' without more offers too vague a standard in a world where . . . a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition." *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-02 (7th Cir. 1989).[6]

2. Conduct Found Lawful in a Government Enforcement Action Does Not Become Unlawful in a Private Action Where a Plaintiff Seeks To Protect Its Own Interests.

The district court sought to justify its disagreement with the D.C. District Court, which rejected a Java must-carry injunction as a "bold manipulation of the market," on the grounds that "the must-carry injunction is a means to correct

[6] The district court also stated, without citation or record support, that "the D.C. Circuit addressed only Microsoft's development and promotion of its own customized Java, not its exclusion of compatible Java on Windows." (Op.27-28.) This is simply mistaken. Judge Jackson found that Microsoft "refuse[d] to implement Sun's native method" for Java and "refused[] to include [Sun technology] RMI as a standard component of the Java runtime environment for Windows that it shipped with Internet Explorer 4.0." 84 F. Supp.2d at 105-06 (Findings 388 to 393). The D.C. Circuit reversed the district court's imposition of liability for this conduct, 253 F.3d at 74-75, citing conclusions referencing these same findings.

a private wrong . . . rather than as an external governmental mandate." (Op.29.) This analysis misunderstands antitrust law and remedies.

The antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis in original). Remedies in antitrust actions of any type must be designed to enhance competition, not to make life easier for particular competitors. *See*, *e.g.*, *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 109-10 (1986).

In *In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231 (9th Cir. 1976), the Ninth Circuit explained that "mak[ing] whole those who have been injured by" past antitrust violations is *not* an appropriate subject for an injunction:

> There are three major antitrust functions which injunctive relief granted under § 16 [of the Clayton Act] might serve: (1) putting an end to the illegal conduct, (2) depriving violators of the benefits of their illegal conduct, and (3) restoring competition in the market place. In our opinion, relief under § 16 that does not serve any of these antitrust functions is not appropriate. *We do not overlook a fourth function — to make whole those who have been injured by the conduct of the violators. That function is usually served by the § 4 remedy of treble damages.*

538 F.2d at 234-35 (emphasis supplied); *accord*, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969) (to obtain injunction, plaintiff must "demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur"). Here, of course, the alleged wrongful conduct took place years ago.

Sun does not contend that Microsoft's wrongful conduct of 1996-98 will recur, or that any current conduct by Microsoft violates the antitrust laws. Even if it was wrongful in the past for Microsoft to distribute the MSJVM — and the D.C. Circuit of course held otherwise — such "wrongdoing" ended by January 2001, when Sun expressly authorized Microsoft to continue such distribution. *See* p. 12, *supra*. Second, the consent decree in the DOJ Case (which Microsoft began complying with in December 2001) has been found sufficient to address the Microsoft conduct found anticompetitive by the D.C. Circuit, including conduct directed at Java. *United States* v. *Microsoft Corp.*, 231 F. Supp.2d 144 (D.D.C. 2002). Third, none of the Microsoft conduct challenged in Claim One took place in the relevant market — the alleged market in which Sun contends that Java is entitled to judicial assistance. Microsoft's current conduct, entering the alleged second market with .NET, is indisputably procompetitive.

The preliminary injunction was thus inappropriate under Section 16. And that conclusion is unaffected by the identity of the party seeking such relief.

B. Sun Had No Antitrust Standing To Bring the Claim on Which the Preliminary Injunction Was Based.

Sun's motion was based solely on its Claim One — the claim that Microsoft unlawfully maintained a monopoly in the PC-OS market. The district court erred in finding that Sun was likely to succeed on that claim because, as a matter of law, alleged harm to the Java platform does not satisfy the antitrust injury requirement of *Brunswick*, 429 U.S. at 486-89.

It is well settled that only a consumer or competitor in the restrained market has standing to bring an antitrust claim. *Assoc. Gen. Contractors* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 538-39 (1983) (no antitrust injury if plaintiff "was neither a consumer nor a competitor in the market in which trade was restrained"); *see Thompson Everett, Inc.* v. *National Cable Adver., L.P.*, 57 F.3d 1317 (4th Cir. 1995), *aff'g*, 850 F. Supp. 470, 477 (E.D. Va. 1994) ("only a plaintiff qualifying as a competitor or consumer in th[e] [relevant] market could suffer antitrust injury"); *White* v. *Rockingham*, 820 F.2d 98, 103-04 (4th Cir. 1987).

Here, Sun specifically contends that the Java platform is not a PC operating system and competes instead in a separate market. (Am.Comp. ¶¶27, 56, 210-16; 1/10Tr.120-24.) Claim One pertains only to the PC-OS market and thus Sun lacks antitrust standing to assert it. Moreover, alleged harm to the Java platform in some undefined second market cannot give Sun antitrust standing to assert a claim addressed to the PC-OS market.

On January 10, the district court agreed, stating that it was "going to grant the motion [to dismiss] as to Counts One and Two with leave to amend" (1/10Tr.136) because the Java platform did not compete in the PC-OS market (*see* *id*.130-33). On January 15, the court *sua sponte* "retracted" that dismissal. (1/15Tr.2-9.)[7] The district court's explanation for its "retraction" is revealing:

> I ruled in the preliminary injunction hearing that . . . Sun had antitrust standing and that the mere fact that the damage which it suffered was in another market, not in the operating system market, did not mean that it didn't have antitrust standing. . . . Clearly, I had held, and I intend to hold, that *damage suffered outside the operating system market by Sun, it has antitrust standing*.

(1/15Tr.2-3 (emphasis supplied).) This is not correct. A plaintiff has standing to assert an antitrust claim only for injury suffered as a consumer or competitor in the restrained market. *Assoc. Gen. Contractors*, 459 U.S. at 538-39; *Thompson Everett*, 57 F.3d at 1322; *SAS*, 48 F.3d at 44-46; *White*, 820 F.2d at 103-04.

[7] In its December 23 decision, the district court ignored the "consumer or competitor" rule and found that Sun had antitrust standing to seek a preliminary injunction based on *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 472 (1982). (Op.32.) As the Supreme Court later explained, the plaintiff in *McCready* had antitrust standing because she was a *consumer* harmed by defendant's illegal boycott. *Assoc. Gen. Contractors*, 459 U.S. at 538. Thus, where a plaintiff (like Sun) is not a consumer, "*McCready* does not lend much support, especially in light of the later-decided *Associated General Contractors*." *Lucas* v. *Bechtel Corp.*, 800 F.2d 839, 846 n.9 (9th Cir. 1986). Courts have thus specifically rejected claims by alleged targets of anticompetitive acts because they were neither consumers or competitors in the relevant market. *See*, *e.g.*, *Barton & Pittinos, Inc.* v. *SmithKline Beecham Corp.*, 118 F.3d 178, 182-84 (3d Cir. 1997); *SAS of Puerto Rico, Inc*. v. *Puerto Rico Tel. Co.*, 48 F.3d 39, 41-42, 44 (1st Cir. 1995); *Legal Econ. Evaluations, Inc.* v. *Metro. Life Ins. Co.*, 39 F.3d 951, 954-56 (9th Cir. 1994).

C. The "Monopoly Leveraging" Theory Utilized by the District Court Does Not Justify Entry of a Preliminary Injunction.

The district court stated that Sun's theory was that "Microsoft, having unlawfully fragmented the Java platform and having destroyed Sun's channel of distribution for that platform, is now taking advantage of its past antitrust violations to leverage its monopoly in the Intel-compatible PC market into the" alleged second market. (Op.11.) The district court then found that the wrongdoing was that "Microsoft leveraged its PC monopoly to create market conditions in which it is unfairly advantaged." (Op.40.) Reliance on "monopoly leveraging" was apparently designed to avoid the problem that Sun sought a *status quo*-altering preliminary injunction in the alleged second market despite the fact that the Microsoft conduct supposedly justifying that preliminary injunction took place years ago in another market.

Although this Court has not ruled on the viability of the "monopoly leveraging" theory,[8] the Ninth Circuit, whose law will govern when this case is

[8] In 1990, this Court questioned whether "monopoly leveraging" constitutes an actionable offense under § 2 of the Sherman Act, but declined at that time to resolve the issue. *Advanced Health-Care Servs., Inc.* v. *Radford Cmty. Hosp.*, 910 F.2d 139, 149-50 & n.17 (4th Cir. 1990). On remand, the district court in that case rejected the monopoly leveraging theory because a "leveraging theory does not follow from the text of the Sherman Act" and "the anticompetitive dangers that implicate the Sherman Act are not present." *Advanced Health-Care Servs., Inc.* v. *Giles Mem'l Hosp.*, 846 F. Supp. 488, 496-97 (W.D. Va. 1994).

eventually tried in a California federal court, has expressly rejected "monopoly leveraging" as a "theory of liability under Section 2" of the Sherman Act. *Alaska Airlines, Inc.* v. *United Airlines, Inc.*, 948 F.2d 536, 547-49 (9th Cir. 1991). The Ninth Circuit requires that a plaintiff prove that the defendant unlawfully obtained, or has a dangerous probability of unlawfully obtaining, a monopoly in a second market. *Id*. There is of course no finding here that Microsoft has a monopoly (or a dangerous probability of obtaining one) in the alleged second market — indeed, Java is now "dominant" and .NET is a new entrant (Op.17).

Even if "monopoly leveraging" were a viable theory, such "a leveraging claim necessarily requires definition of two markets: the market that provides the leverage, and the 'leveraged' market the defendants seek to restrain trade in or monopolize." *Va. Vermiculite, Ltd.* v. *W.R. Grace & Co.-Conn.*, 108 F. Supp.2d 549, 580 (W.D. Va. 2000); *accord Thompson Everett*, 57 F.3d at 1326-27. Sun never defined the alleged second market (SunReply4 n.13), as the district court recognized on January 15 when it stated that the "Internet-enabled distributed computing market . . . has not been defined for antitrust purposes." (1/15Tr.8-9.) Plainly, a mandatory preliminary injunction cannot be predicated on a "monopoly leveraging" claim when the supposedly "leveraged" market has never been defined.

D. Microsoft's Conduct Did Not Cause Sun's Alleged Irreparable Injury.

As this Court has held, "[t]he purpose of interim equitable relief is to protect the movant . . . from being harmed" by "the illegality alleged in the complaint. Thus, a preliminary injunction may never issue to prevent an injury or harm which not even the moving party contends was caused by the wrong claimed in the underlying action." *Omega World Travel, Inc.* v. *TWA*, 111 F.3d 14, 16 (4th Cir. 1997). Accordingly, the plaintiff must demonstrate a "causal link" between the alleged irreparable injury and the defendant's wrongful conduct. *Manning*, 119 F.3d at 264-65; *accord*, *e.g.*, *Cargill*, 479 U.S. at 109-11.

Sun asserted that a risk of "tipping" results from an awareness by developers that Microsoft can obtain "ubiquity" for .NET on PCs by including it in Windows (although that has not yet happened), and that Java must have the same "ubiquity" to avoid the risk that developers move *en masse* to .NET. (Op.11-12.) This required, according to the district court, a finding that "if Microsoft had not committed its anticompetitive acts . . . , current and compatible Java would now be ubiquitous on PCs" (Op.11-12) — giving Sun not just "widespread" distribution of Java, but "approximate parity" with .NET's potential distribution (Op.21). The district court never found that "but for" Microsoft's conduct, Sun's Java would now be "ubiquitous" on PCs. And it could not so find, because Sun did "not attempt to prove . . . anything different from what the courts in the Department of Justice action found on the 'but for' issue." (Op.27.)

The necessary casual link is not supplied by showing that Microsoft's actions "seriously impeded distribution" of Sun's Java, as the district court said (Op.27), because Sun's theory required a showing that Java would be "ubiquitous" but for Microsoft's conduct.

To establish that Java would have been "ubiquitous" in the but-for world, Sun was required to show that Microsoft had some duty to distribute "compatible" Java with Windows. Microsoft had no such antitrust duty. *See* pp. 44-45, *supra.* Further, there was no contractual duty either, because (a) as the district court correctly held (Op.33 n.18), under the TLDA Microsoft had "no obligation to market, sell, license or otherwise distribute" Java at all (PX56, §8.2), and (b) any such contractual duty would have ended at least two years ago when Sun agreed to terminate the TLDA and *released* any such contract claim. *See* p. 12, *supra*.

Indeed, the D.C. District Court rejected the testimony of Sun's Richard Green that Sun's "Java technology [should be placed] 'on equal footing' with Microsoft's technology," squarely holding that "[t]here is no evidence that Java would today possess 'equal footing,' in terms of distribution, with Microsoft, but for Microsoft's anticompetitive conduct." 224 F. Supp.2d at 261-62. As stated above, Sun did nothing to supplement the record in this regard, and its economic expert testified that he had no basis to disagree with the D.C. District Court's analysis (12/4Tr.66-68, 78-80).

There was no proof that Java would be "ubiquitous" but for Microsoft's conduct, and thus there was no showing that the alleged irreparable harm to Sun, *i.e.*, that a disparity in distribution of Java versus .NET might lead to "tipping," was caused by Microsoft's conduct.

IV. THE PUBLIC INTEREST IS NOT SERVED BY THE MANDATORY PRELIMINARY INJUNCTION.

Both the DOJ and the D.C. District Court concluded that a Java must-carry injunction would be contrary to the public interest. The DOJ rejected such a remedy because "the promotion of consumer choice and the product innovation that comes along with that choice, *i.e.*, the promotion of competition and not specific competitors, is the goal of the antitrust laws . . . while mandatory distribution of a particular product is the antithesis of this goal." (RewinskiEx.141,215; *see* Op.38-39.) After a lengthy trial, the D.C. District Court held that a Java must-carry injunction would not "provide a substantial benefit to competition," *New York* v. *Microsoft*, 224 F. Supp.2d at 189, and was instead a "bold manipulation of the market which provides a particular technology" from Sun "with an artificial advantage," *id*. at 262 & n.133.

The district court wrongly rejected these well-reasoned conclusions. (Op.38-40.) It stated that because "the executive branch of government is not being asked 'to bless one competitor over others'" in this case (Op.39), the decisions of other federal courts could be ignored. There is no logic to this. As noted above, a must-carry injunction rejected as market manipulation when sought by state attorneys general on Sun's behalf does not become any less objectionable when it is sought by Sun itself.

V. THE DISTRICT COURT ERRED IN GRANTING THE COPYRIGHT INJUNCTION.

In granting Sun's request for a preliminary injunction on its copyright infringement claim, the district court incorrectly interpreted the license granted by Sun to Microsoft in the January 2001 Settlement Agreement. That license permitted, but did not require, Microsoft to "incorporate" the MSJVM into Windows XP, which is precisely what Microsoft did by distributing the MSJVM as an optional component that (a) OEMs could choose to pre-install on new PCs or (b) users of Windows XP could choose to install by downloading it from Microsoft's Web site.

The district court correctly observed that Section 6(c) of the Settlement Agreement "grants Microsoft a limited license 'to incorporate . . . [the MSJVM] . . . in successor versions' of various Microsoft products listed on an exhibit to the agreement" and that "Windows and Internet Explorer are two of the listed products." (Op.41.) The court nevertheless granted Sun's motion based upon its erroneous view, reached at a preliminary stage of the case, that (a) the "settlement agreement authorizes only Microsoft to incorporate [the] MSJVM in one of its products and does not authorize Microsoft to delegate to a third party, such as an OEM, the power to make that decision," (b) Microsoft could not "grant[] permission to consumers" to install the MSJVM in Windows XP via Internet download, and (c) the Settlement Agreement "authorizes the incorporation of MSJVM only in a 'successor product'" and a "'service pack' does not fall within that category." (Op.41-42.)

The district court's erroneous interpretation of the term "incorporate" defeated a fundamental purpose of the Settlement Agreement: to allow Microsoft to distribute the MSJVM to licensees of certain products, including Windows XP. Indeed, as Sun's own conduct demonstrated, Sun has not been harmed by Microsoft's distribution, because the only customers who received the MSJVM were customers who had licensed Windows XP and therefore indisputably entitled to receive the MSJVM in Windows XP.

The district court was inconsistent about whether it was merely interpreting the language of the Settlement Agreement or relying on parol evidence. Although the court ignored testimony from Microsoft's witness about negotiations with Sun on the ground that the Settlement Agreement "can be interpreted without parol evidence" (Op.14 n.8), the district court later stated that its "construction blends comfortably with the background against which the agreement was negotiated." (Op.41-42.) In any event, the district court's construction — which is to be reviewed *de novo* by this Court, *Scarborough*, 726 F.2d at 135 — was erroneous. The language of the Settlement Agreement and the surrounding circumstances establish that Microsoft's distribution of the MSJVM was licensed by Sun. At the very least, given that parol evidence is relevant under California law (which governs interpretation of the Settlement Agreement[9]) it was error on a preliminary injunction motion to interpret the contract conclusively in Sun's favor.

The district court misread the plain language of the Settlement Agreement, which is a complete defense to a copyright infringement claim and eliminates any basis for issuing preliminary injunctive relief. *See Sun*, 188 F.3d at

[9] *See*, *e.g.*, *Van Dusen* v. *Barrack*, 376 U.S. 612, 639 (1964) ("the transferee district court [is] obligated to apply the state law that would have been applied if there had been no change of venue"); *Stonewall Surplus Lines Ins. Co.* v. *Johnson Controls, Inc.*, 17 Cal. Rptr.2d 713, 718 (Ct. App. 1993) (California courts apply the law of state with the most significant relationship to transaction). Under California law, the district court was required to consider Microsoft's parol evidence to determine whether the Settlement Agreement is "reasonably susceptible" to the interpretation urged by Microsoft (even if the district court believed it to be unambiguous on its face). Absent such a finding, never made by the district court, it is for the trier of fact to determine which of the parties' interpretations of the Settlement Agreement was intended. *Brobeck, Phleger & Harrison* v. *Telex Corp.*, 602 F.2d 866, 871 (9th Cir. 1979).

1122; *Service & Training, Inc.* v. *Data General Corp.*, 737 F. Supp. 334 (D. Md. 1990). The Settlement Agreement does not mandate that the MSJVM be included in the default installation of Windows and in no way limits the mechanisms Microsoft can use to distribute the MSJVM as an optional component of Windows XP. Consistent with the Settlement Agreement, the end-user license for Windows XP included the MSJVM as a licensed component, and the MSJVM was not licensed as a stand-alone product. (ParthasarathyDecl. ¶26.) And it is equally clear that the MSJVM, once installed (whether by an OEM or an end user), is integrated into Windows XP just as it was with previous versions of Windows. (MillerDecl. ¶52.)

The district court's conclusion that Microsoft may not "delegate" to OEMs or end users the power to decide whether to install the MSJVM (Op.41) is misguided. "Incorporation" of the MSJVM in Windows XP was accomplished *by Microsoft* through its design of the operating system. (12/4Tr.257 (Parthasarathay); MillerDecl. ¶52.) The fact that customers could install or uninstall the MSJVM does not distinguish it from other optional components of Windows, which can be included in Windows XP *only* as a result of Microsoft's design decisions.

The district court overlooked undisputed evidence that (a) components are often incorporated into software products in a manner that makes them optionally installable by the user (12/4Tr.190-91 (Jones)), (b) Microsoft regularly makes improved versions of Windows components available via Internet downloading and did so extensively at the time the Settlement Agreement was executed (MillerDecl. ¶52), (c) Sun never complained that the MSJVM was an optionally installable component of Internet Explorer 5.0 that could be downloaded by users from the Internet (12/4Tr.253-54 (Parthasarathay); MillerDecl. ¶52), and (d) Microsoft told Sun during negotiation of the Settlement Agreement that it intended to distribute the MSJVM in Windows XP via Internet downloading, and — here again — Sun raised no objection (12/4Tr.253-54 (Parthasarathay); MillerDecl. ¶54).

The district court also ignored the parties' course of performance. Sun knew that Microsoft would offer the MSJVM as an optional component of Windows XP as early as August 2001. (12/3Tr.188-89 (Green); DX13.) Sun viewed this as positive and never objected. (RewinskiEx.33 (OEMs "shipping the MS JVM is great short term"); DX2 (if OEMs "make a public commitment to ship the MS JVM in the long term, we're OK").) Sun waited eight months, until March 2002, to sue Microsoft for copyright infringement. Even then, Sun did not contend that giving OEMs the option to install the MSJVM in Windows XP was unlicensed (SunMotion10); instead, Sun contended only that permitting Windows XP users to download the MSJVM from the Internet was unlicensed (SunMotion23-24). Sun's current construction of the Settlement Agreement is inconsistent with Sun's prior conduct, and the district court erred by not considering those facts in construing the Settlement Agreement.[10]

Finally, with respect to service packs, the district court ignored undisputed evidence demonstrating the parties' shared understanding that Microsoft's inclusion of the MSJVM in service packs was licensed. As the district court noted (Op.41), the Settlement Agreement gives Microsoft a license to incorporate the MSJVM in "successor versions of the products identified in Exhibit D" (PX3, §6(c)). Microsoft alone had the right to specify those product versions (PX3, §8), and on March 8, 2001, Microsoft sent Exhibit D to Sun, expressly stating in the cover letter that service packs were included. (DX102.) Sun never objected. The terms of the March 2001 letter were incorporated by reference into the Settlement Agreement, which should have precluded Sun's copyright infringement claim as to

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[10] *See*, *e.g.*, *United States Cellular Inv. Co*. v. *GTE Mobilnet, Inc.*, 281 F.3d 929, 937 (9th Cir. 2002) ("The construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court."); *Reconstruction Fin. Corp.* v. *Sherwood Distilling Co.*, 200 F.2d 672, 676 (4th Cir. 1952); *Crestview Cemetery Ass'n* v. *Dieden*, 356 P.2d 171, 177-78 (Cal. 1960) ("even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced").

the Windows XP Service Pack 1 Upgrade. *See Slaught* v. *Bencomo Roofing Co.*, 30 Cal. Rptr.2d 618, 621 (Ct. App. 1994) ("parties may validly incorporate by reference into their contract the terms of another document").

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's preliminary injunction order.

Respectfully submitted,

David B. Tulchin
Counsel of Record
Steven L. Holley
Michael Lacovara
Marc De Leeuw
Brian T. Frawley
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Michael F. Brockmeyer
PIPER RUDNICK LLP
6225 Smith Avenue
Baltimore, Maryland 21209
(410) 580-3000

David T. McDonald
Karl J. Quackenbush
PRESTON GATES & ELLIS LLP
925 Fourth Avenue
SEATTLE, WASHINGTON 98104
(206) 623-7580

Thomas W. Burt
Richard J. Wallis
Linda K. Norman
MICROSOFT CORPORATION
One Microsoft Way
Redmond, Washington 98052
(425) 706-8080

Matthew L. Larrabee
Darryl Snider
A. Mari Mazour
HELLER EHRMAN WHITE & MCAULIFFE LLP
333 Bush Street
San Francisco, California 94104
(415) 772-6000

Attorneys for Microsoft Corporation

February 12, 2003

REQUEST FOR ORAL ARGUMENT

Microsoft respectfully requests oral argument. The issues raised by Microsoft's appeal of the district court's worldwide mandatory preliminary injunction are important to Microsoft, Sun and the software industry, and are of jurisprudential significance. Microsoft believes that oral argument will assist the Court in its consideration of these issues.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1116 **Caption:** Sun Microsystems, Inc. v. Microsoft Corporation

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(s) Brian T. Fitzgerald [signature]

Attorney for Microsoft Corporation

Dated: February 12, 2003

ADDENDUM

15 U.S.C. § 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals,
Fourth Circuit.

NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION; Haywood Electric Membership Corporation; Pitt & Greene Electric Membership Corporation; Four County Electric Membership Corporation; Piedmont Electric Membership Corporation; Halifax Electric Membership Corporation; Randolph Electric Membership Corporation; Harkers Island Electric Membership Corporation; Brunswick Electric Membership Corporation; Jones-Onslow Electric Membership Corporation; French Broad Electric Membership Corporation; Wake Electric Membership Corporation; Tri-County Electric Membership Corporation; Lumbee River Electric Membership Corporation; South River electric Membership Corporation; Carteret-Craven Electric Membership Corporation; Central Electric Membership Corporation, *Plaintiffs-Appellants,*
v.
CAROLINA POWER AND LIGHT COMPANY, *Defendant-Appellee,*
and
South Carolina Electric & Gas Company, *Defendant.*

No. 92-1517.

Argued: March 2, 1993
Decided: June 9, 1993

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Frank W. Bullock, Jr., Chief District Judge. (CA-77-396-C-G)

Jerry S. Cohen, Cohen, Milstein, Hausfeld & Toll, Washington, D.C., for Appellants.

Ray S. Bolze, Howrey & Simon, Washington, D.C., for Appellee.

Wallace E. Brand, Sean T. Beeny, Melvin G. Berger, Brand, Beeny, Berger & Whitler, Washington, D.C.; Edward L. Murrelle, Kenneth Kyre, Jr., Richard J. Votta, Nichols, Caffrey, Hill, Evans & Murrelle, Greensboro, North Carolina, for Appellants.

John C. Peirce, Joseph A. Ostoyich, Howrey & Simon, Washington, D.C.; Richard G. Bernhardt, Jr., Smith, Helms, Mulliss & Moore, Greensboro, North Carolina; Richard E. Jones, H. Ray Starling, Jr., Carolina Power & Light Company, Raleigh, North Carolina, for Appellee.

M.D.N.C.

AFFIRMED.

Before BUTZNER, Senior Circuit Judge, VOORHEES, Chief United States District Judge for the Western District of North Carolina, sitting by designation, and WILLIAMS, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

OPINION

****1** Plaintiffs, the North Carolina Electric Membership Corp. and sixteen of its member retail electric cooperatives (together, "NCEMC"), appeal the district court's grant of a directed verdict for defendant Carolina Power & Light (CPL) on NCEMC's claim under Section 2 of the Sherman Act. We find no error in the district court's decision and affirm.

I

The retail electric cooperatives that are members of NCEMC purchase electric power at wholesale and sell it at retail in several areas of North Carolina. These cooperatives purchase their wholesale power from CPL, Duke Power Company, and Virginia Power Company, all of whom generate and transmit wholesale power. With some exceptions, CPL, Duke Power and Virginia Power serve different areas in

North Carolina; in the areas that CPL serves, for example, it supplied 97% of the wholesale electric power during the period at issue in this case. Each cooperative buys its wholesale power from the company that serves the area in which the cooperative is located.

In 1974, a new Rural Electrification Administration (REA) financing program became available to the cooperatives. NCEMC determined that it would attempt to use its members' new financing ability to acquire its own generation facilities and enter into the wholesale power market in those areas of North Carolina where its members operated at retail. Its idea was that by entering the wholesale power market and generating power itself, it could obtain cheaper wholesale power for its member retail cooperatives.

To this end, NCEMC initiated discussions with CPL in August, 1974, about purchasing a part interest in one or more of CPL's generation units. CPL, which had never before sold a part interest in one of its generation plants, responded that it was not interested in selling any plants currently in operation or nearing completion, but that it was willing to discuss joint ownership of a plant that would be constructed in the future. NCEMC and CPL continued talks about joint ownership of a generation plant for eighteen months until February, 1976, at which point NCEMC broke them off because it did not feel that CPL was serious about the possibility.

NCEMC and those member retail cooperatives that buy wholesale power from CPL filed suit against CPL in August, 1977, claiming that CPL had refused to sell NCEMC a part interest in one of its generation plants and that this refusal violated Section 2 of the Sherman Act. They sought treble damages of $1.2 billion. After an extensive pretrial period, NCEMC's case was tried before Judge Bullock in February, 1992. The following evidence was presented.

When NCEMC sought to produce its own power and enter the wholesale power market, two general alternatives were available to it: building its own generation plant or buying a part interest in another plant operated by another wholesaler. Testimony of NCEMC's employees indicated that it considered both alternatives. NCEMC's cooperatives only serve a small percentage of the retail markets in which they are located; those cooperatives that purchase wholesale power from CPL, for example, have an average market share of ten percent. If NCEMC were to build a generation plant to generate wholesale power only for its own retail cooperatives, the plant would have been relatively small. While generation plants of the size NCEMC required were built during the period when NCEMC was considering building one, [FN1] large economies of scale are available in generating electrical power. It appears that, as a result, NCEMC determined that it could generate its own power more efficiently by purchasing a part interest in a generation plant operated by a large wholesale company than by constructing its own plant.

**2 NCEMC, therefore, entered into the discussions with CPL that are the subject of this suit; it also initiated negotiations with Virginia Power Company, Duke Power Company, and Georgia Power Company about purchasing a part interest in one of their generation plants. The negotiations with CPL were unsuccessful, as described above.

NCEMC also elected not to purchase a part interest in one of Virginia Power's plants because the savings to its cooperatives of purchasing wholesale power that NCEMC would generate at this plant, rather than purchasing wholesale power under their existing arrangements, were too small. Negotiations between NCEMC and Georgia Power for NCEMC to purchase a part interest in one of Georgia Power's generation plants were similarly unsuccessful, although there was conflicting testimony as to why. CPL asserted that Georgia Power's asking price was too high for NCEMC; NCEMC offered testimony that in order for it to market wholesale power in North Carolina that it generated at the joint Georgia Power plant in Georgia, CPL would have had to supply NCEMC with "back-up power," which CPL declined to do because it did not have "back-up power" available at the time.

NCEMC's efforts to generate its own power and enter the wholesale power market through acquiring a part interest in a generation plant came to fruition, however, when it purchased a part interest in Duke Power's Catawba plant for $1 billion in 1980. After Catawba was completed, NCEMC used the power generated under its part interest there to enter the wholesale power market in all of the areas of North Carolina where its retail cooperatives are located. [FN2] At the conclusion of the NCEMC's evidence, the district court granted CPL's Fed. R. Civ. P. 50 motion for a directed verdict. Judge Bullock stated from the bench that NCEMC's claim failed because even if CPL had a monopoly in the market for wholesale power, it had no duty to sell NCEMC an equity interest in one of its plants. Judge Bullock supplemented his oral statement with a brief written opinion indicating that NCEMC had not presented evidence from which a reasonable jury could find:

> (1) that the relevant market was other than the generation market, (2) that Defendant possessed monopoly power in the generation market, (3) that Defendant caused injury or fact of damage to Plaintiffs in the generation market, (4) that Defendant's conduct improperly excluded Plaintiffs from the wholesale requirements power market, and (5) that Defendant's conduct was not as consistent with permissible competition as with the illegal exercise of monopoly power.

> NCEMC appeals from the district court's directed verdict.

II

NCEMC contends that the district court erred in granting a directed verdict for CPL. Taken in pieces, NCEMC's argument is as follows. CPL had monopoly power in the market for wholesale power in those areas of North Carolina where CPL operated. By initiating discussions with CPL about acquiring a part interest in one of CPL's generation plants, NCEMC sought to compete with CPL in this market for wholesale power. The failure of CPL and NCEMC to reach an agreement for NCEMC to purchase a part interest in a CPL generation plant constituted a refusal by CPL to sell it such an interest. Because this refusal was motivated by CPL's desire to avoid competition in its wholesale power market, CPL's actions violated Section 2 of the Sherman Act.

**3 We review *de novo* the district court's decision to grant a directed verdict for CPL, Gairola v. Virginia Dept. of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985), and find that its decision was correct. Even if NCEMC established that the relevant market in this case was the market for wholesale power in those areas of North Carolina where CPL sold wholesale power and CPL possessed monopoly power in this market, [FN3] NCEMC's claim must fail.

"[A] firm with lawful monopoly power has no general duty to help its competitors...." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 375 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). The lone exception to this"no-duty-to-help-competitors" rule is the "essential facilities doctrine." *Olympic Equipment Leasing Co.*, 797 F.2d at 376. For a monopolist to be liable under the essential facilities doctrine, a plaintiff must show: "(1) control by the monopolist of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the monopolist to provide the facility." *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544 (4th Cir.), *cert. denied*, 112 S. Ct. 64 (1991); *Advanced Health-Care Services v. Radford Community Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 113233 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). The plaintiff has the burden of proving each of these elements. *Laurel Sand*, 924 F.2d at 544.

We need not examine all of these elements because we find that NCEMC failed to meet the second one. To satisfy the second element, NCEMC had to show that, in seeking to generate its own power, it had no "economically feasible" alternative to purchasing a part interest in a CPL generation plant. *MCI Communications*, 708 F.2d at 1133. *See* Phillip E. Areeda and Herbert Hovencamp, *Antitrust Law* ¶ 736.2, at 808 (1991 Supp.) ("[A]n essential facility is, at minimum, a resource possessed by the defendant that is vital to the plaintiffs competitive viability.").

NCEMC failed to make this showing. One alternative for NCEMC to purchasing a part interest in a CPL generation plant was purchasing a part interest in a generation plant owned by one of the other large power companies in the region. NCEMC did not demonstrate that it was not economically feasible to purchase such a part interest from any of these companies; in fact, the evidence appears to have established that it was quite feasible. NCEMC conducted serious negotiations with both Virginia Power and Georgia Power over purchasing a part interest in one of their plants, and only in the case of the Georgia Power negotiations did NCEMC present any evidence that such a purchase was not feasible. [FN4] In addition, four years after CPL and NCEMC had failed to come to agreement, NCEMC actually purchased a part interest in Duke Power's Catawba generation plant. In light of this evidence, no reasonable jury could have found that buying a part interest in a generation plant from a company other than CPL was not economically feasible for NCEMC. *See City of Malden v. Union Elec. Co.*, 887 F.2d 157, 162 (8th Cir. 1989) (reasonable alternatives existed to a monopolist's transmission lines when neighboring companies had available, though more expensive, transmission lines). [FN5]

****4** In short, NCEMC's only possible claim that CPL violated section 2 of the Sherman Act by refusing to sell it a part interest in a CPL generation plant was under the "essential facilities" doctrine. NCEMC clearly did not have a valid claim under this doctrine because it failed to show that, in seeking to generate its own power, it had no economically feasible alternative to purchasing a part interest in a CPL plant. The district court, therefore, correctly dismissed NCEMC's claim. [FN6]

III

For the reasons stated, we affirm the district court's order dismissing NCEMC's claim.

AFFIRMED

FN1. CPL presented testimony that the City of Fayetteville, North Carolina built a generation plant during this period approximately the size that NCEMC would have required.

FN2. A negotiator for NCEMC, Robert Cleveland, testified that CPL, Virginia Power, and Duke Power all refused from 1974-1976 to sell NCEMC a part interest in one of their generation plants unless NCEMC would agree to sell the power generated from the joint plant only in those areas of the state where their company controlled the wholesale market. As a result, Cleveland stated that NCEMC was precluded from purchasing a joint interest in a single generation plant owned by CPL, Duke Power, or Virginia Power, and using that joint interest to generate power for all of its cooperatives throughout North Carolina. Retail cooperatives in CPL's areas, thus, were precluded from having NCEMC purchase a part interest in a Duke Power or a Virginia Power plant and sell the power from its part interest to them. The strength of the wholesale companies' refusal, however, is questionable given that Duke Power later sold NCEMC the part interest in its Catawba plant and allowed NCEMC to sell the wholesale power generated at Catawba throughout North Carolina. There was some evidence that Duke Power dropped its requirement that power generated at Catawba only be sold in areas of the state where Duke Power controlled the wholesale market when REA, which helped finance NCEMC's purchase of the part interest in Catawba, asked Duke Power to drop this requirement.

FN3. There are obvious problems with defining the areas in which CPL sold wholesale power as the relevant market, and the district court did not find that NCEMC presented evidence to establish such a market. Because NCEMC's Section 2 claim fails for other reasons, however, we need not address this issue.

FN4. NCEMC asserts that the reason it did not buy a part interest in a Georgia Power plant was that, in order to use the power generated at the Georgia Power plant, it needed CPL to supply it with"back-up power" and CPL could not supply this "back-up power" at the time it was requested.

FN5. NCEMC asserts that purchasing a part interest in one of Virginia Power's or Duke Power's generation plants and using it to produce power in the market at issue here, the market where CPL generated power, was impossible because Virginia Power and Duke Power refused to sell NCEMC a part interest in a generation plant that could be used to supply wholesale power in areas of North Carolina controlled by CPL. We find this assertion untenable because four years after NCEMC's claim arose, Duke Power agreed, without any great fight, to sell NCEMC a part interest in a generation plant that NCEMC could use to market wholesale power throughout North Carolina, including in areas controlled by CPL.

FN6. NCEMC also contends that the district court abused its discretion in not admitting a number of its exhibits. We find this contention without merit. In addition, we deny NCEMC's motion to strike a portion of CPL's brief.

995 F.2d 1063 (Table), 1993 WL 193637 (4th Cir.(N.C.)), 1993-1 Trade Cases P 70,264, Util. L. Rep. P 13,942 Unpublished Disposition

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February, 2003, I caused to be served two copies of the foregoing Proof Brief of Appellant Microsoft Corporation by overnight courier, with a copy by facsimile, upon:

Lloyd R. Day, Jr.
James R. Batchelder
Robert M. Galvin
DAY CASEBEER MADRID & BATCHELDER, LLP
20300 Stevens Creek Boulevard, Suite 400
Cupertino, California 95014

John B. Isbister
TYDINGS & ROSENBERG LLP
100 East Pratt Street
Baltimore, Maryland 21202

Counsel for Appellee Sun Microsystems, Inc.

Jennean M. Endres