APPENDIX A

The Court should give preclusive effect to the following statement of liability rulings made by the United States Court of Appeals for the District of Columbia Circuit. The introductory sentence is taken from the United States Court of Appeals for the Fourth Circuit opinion *In re Microsoft Corp. Antitrust Litigation*, 355 F.3d 322 (4th Cir. 2004). The descriptions of individual types of illegal conduct are taken from the United States Court of Appeals for the District of Columbia Circuit opinion *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

> Microsoft illegally maintained a monopoly in the market of licensing of all Intel-compatible personal computer ("PC") operating systems worldwide through various specified acts of anticompetitive conduct. 355 F.3d at 328.
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> Microsoft possessed monopoly power in the market for the licensing of Intel-compatible PC operating systems. 253 F.3d at 51-52.
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> The relevant market is the licensing of all Intel-compatible PC operating systems worldwide because there are currently no products, and there are not likely to be any in the near future, that a significant percentage of computer users worldwide could substitute for these operating systems without incurring substantial costs. *Id.* at 52.
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> Microsoft's license restrictions that prevented original equipment manufacturers ("OEMs") from removing visible means of user access to Internet Explorer ("IE") prevented many OEMs from pre-installing a rival internet browser like Netscape's Navigator and, therefore, protected Microsoft's monopoly from the competition that middleware might otherwise present. Therefore, the license restriction at issue was anticompetitive. *Id.* at 61.
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> Microsoft's license provision prohibiting OEMs from modifying the initial boot sequence has the effect of decreasing competition against IE by preventing OEMs from promoting rivals' browsers like Netscape's Navigator. Because this prohibition has a substantial effect in protecting Microsoft's market power, and does so through a means other than competition on the merits, it is anticompetitive. *Id.* at 61-62.
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> Microsoft's license restrictions prohibiting OEMs from adding icons or folders different in size or shape from those supplied by Microsoft and

from using the "Active Desktop" feature to promote third-party brands have the anticompetitive effect that OEMs are not able to promote rival browsers, like Netscape's Navigator, which keeps developers focused on the application programming interfaces ("APIs") in Windows. Microsoft reduced rival browsers' usage share not by improving its own product but, rather, by preventing OEMs from taking actions that could increase rivals' share of usage. *Id.* at 62.

Microsoft's intellectual property rights did not confer a privilege to violate the antitrust laws, *id.* at 63, and Microsoft could not justify these license restrictions on the grounds that it was simply exercising its rights as the holder of valid copyrights, *id.* at 62-63.

Microsoft's decision to exclude IE from the "Add/Remove Programs" utility in Windows 98 reduced the usage share of rival browsers not by making Microsoft's own browser more attractive to consumers but, rather, by discouraging OEMs from distributing rival products. Because Microsoft's conduct, through something other than competition on the merits, has the effect of significantly reducing usage of rivals' products and hence protecting its own operating systems monopoly, it is anticompetitive. *Id.* at 65.

Microsoft's decision to bind IE to Windows 98 by placing code specific to Web browsing in the same files as code that provided operating system functions has an anticompetitive effect. The commingling deters OEMs from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the API set exposed by Microsoft's operating system. *Id.* at 65-66.

Plaintiffs plainly made out a *prima facie* case of harm to competition in the operating systems market by demonstrating that Microsoft's actions in excluding IE from the "Add/Remove Programs" utility and commingling code increased its browser usage share and thus protected its operating systems monopoly from a middleware threat and, for its part, Microsoft failed to meet its burden of showing that its conduct serves a purpose other than protecting its own operating systems monopoly. *Id.* at 67.

The internet access providers ("IAPs") constitute one of the two major channels by which browsers can be distributed. Microsoft has exclusive deals with fourteen of the top fifteen access providers in North America, which account for a large majority of all internet access subscriptions in this part of the world. By ensuring that the majority of all IAP subscribers are offered IE either as the default browser or as the only browser, Microsoft's deals with IAPs clearly have a significant effect in preserving its monopoly; they help keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly. *Id.* at 70-71.

Although independent software vendors ("ISVs") are a relatively small channel for browser distribution, they take on greater significance because Microsoft had largely foreclosed the two primary channels to its rivals. In that light, one can tell from the record that by affecting the applications used by millions of consumers, Microsoft's exclusive deals with ISVs had a substantial effect in further foreclosing rival browsers from the market. Because, by keeping rival browsers from gaining widespread distribution (and potentially attracting the attention of developers away from the APIs in Windows), the deals have a substantial effect in preserving Microsoft's monopoly (and Microsoft having offered no procompetitive justification), the deals violate Section 2 of the Sherman Act. *Id.* at 72.

Microsoft's exclusive contract with Apple had a substantial effect in restricting distribution of rival browsers, which serves to protect Microsoft's monopoly, and Microsoft offered no procompetitive justification for the exclusive contract. Accordingly, the exclusive deal is exclusionary, in violation of Section 2 of the Sherman Act. *Id.* at 72-74.

Microsoft's First Wave agreements foreclose a substantial portion of the field for Java Virtual Machine ("JVM") distribution and because, in so doing they protected Microsoft's monopoly from a middleware threat, they are anticompetitive. Because the cumulative effect of the deals is anticompetitive and because Microsoft has no procompetitive justification for them, the provisions in the First Wave Agreements requiring use of Microsoft's JVM as the default are exclusionary, in violation of Section 2 of the Sherman Act. *Id.* at 74-76.

The ultimate objective of Microsoft's conduct related to its Java developer tools was to thwart Java's threat to Microsoft's monopoly in the market for operating systems and served to protect its monopoly of the operating systems market in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive. Microsoft offered no procompetitive explanation for its campaign to deceive developers. Accordingly, this conduct is exclusionary, in violation of Section 2 of the Sherman Act. *Id.* at 76-77.

Microsoft's threats to Intel to stop aiding cross-platform Java were exclusionary in violation of Section 2 of the Sherman Act. *Id.* at 77-78.