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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,	))
Plaintiff,	))
v.	) Civil Action No.) C 91 3666 MHP
BORLAND INTERNATIONAL, INC., and ASHTON-TATE CORPORATION,	)) COMPETITIVE IMPACT) STATEMENT)
Defendants.	) ANTITRUST)

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COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust

Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h),

files this Competitive Impact Statement relating to the proposed

Final Judgment submitted for entry in this civil antitrust

proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On October 17, 1991, the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, alleging that the acquisition of Ashton-Tate Corporation ("Ashton-Tate") by Borland International, Inc. ("Borland"), would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The complaint alleges that the effect of the acquisition may be substantially to lessen competition in the sale of relational database management system ("RDBMS") software for IBM and IBM-compatible personal computers ("PCs") running the MS-DOS/PC-DOS operating system ("DOS") in the United States.[1]

Borland and Ashton-Tate, both major software vendors, are the two largest firms, in terms of market share, currently selling RDBMS software in the United States. Borland's RDBMS

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[1]   The term "RDBMS software" shall hereinafter refer to relational database management system software for IBM and IBM-compatible personal computers running the DOS operating system. The term "software" refers to computer programs, which are series of instructions that direct the operation of a computer. Computer software falls into two basic categories: applications software and systems software. RDBMS software is one type of applications software. Applications software is used to perform a particular task such as word processing, communications, or statistical analysis; examples include dBASE, Paradox, WordPerfect, and Lotus 1-2-3. Operating systems, which are a type of systems software, provide basic functions on the computer, control the operation of the hardware, and manage the execution of applications software. The operating system that is most important in analyzing this merger is the Disk Operating System ("DOS") developed by Microsoft for IBM for use on IBM's PC. This operating system is sold by IBM under the name PC-DOS and (with minor variations that are not relevant here) by Microsoft and various other companies under the name MS-DOS. The term "DOS" is used herein to refer to both PC-DOS and MS-DOS.

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software is sold under the trade name "Paradox," and Ashton-Tate's RDBMS software is sold under the trade name "dBASE." After the acquisition, Borland will control approximately 60 percent, measured by dollar sales and units shipped, of the United States RDBMS software market. The acquisition thus results in a substantial increase in concentration in a market that is already concentrated and in which entry by new firms is difficult. The complaint seeks, among other relief, to have the acquisition adjudged in violation of Section 7 of the Clayton Act.

On October 17, 1991, the United States and Borland and Ashton-Tate filed a Stipulation by which they consented to the entry of a proposed Final Judgment. Under the proposed Final Judgment, as explained more fully below, Borland is enjoined from initiating any claim that asserts copyright infringement in the command names, menu items, menu command hierarchies, command languages, programming languages, and file structures used in Ashton-Tate's dBASE family of products. The proposed Final Judgment further directs Borland, at any time, to dismiss Ashton-Tate's pending copyright suit against Fox Software, Inc. ("Fox"), with prejudice within fifteen days following the dismissal with prejudice of Fox's counterclaims against Ashton-Tate. Additional details regarding Borland's obligations with respect to the Fox suit are described more fully under Section III.

The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the government withdraws its consent. Entry of

1 the proposed Final Judgment would terminate this action, except

2 that the Court would retain jurisdiction to construe, modify, and

3 enforce the proposed Final Judgment and to punish violations of

4 the Judgment.

5

6   **II.**

7   **EVENTS GIVING RISE TO THE ALLEGED VIOLATION**

8   On July 9, 1991, Borland agreed to purchase Ashton-Tate by

9 acquiring 100 percent of Ashton-Tate's stock in exchange for

10 Borland stock valued at approximately $440 million. Under the

11 Agreement and Plan of Merger, Ashton-Tate has become a wholly-

12 owned subsidiary of Borland.

13   Borland is engaged in the business of designing and

14 marketing personal computer software for businesses and software

15 developers. Borland distributes its products domestically and

16 internationally primarily through distributors, dealers, and

17 original equipment manufacturers and also sells directly to

18 corporate, governmental, educational, and individual customers.

19 Borland products are available in 13 languages for distribution

20 in 41 different countries. The company's three principal

21 products are RDBMS software, spreadsheet software and programming

22 languages.

23   Ashton-Tate was also engaged in the business of the design

24 and marketing of personal computer software for businesses and

25 software developers. Ashton-Tate also distributed its products

26 domestically and internationally, with products available in 20

27 languages in more than 50 countries. The company's major

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1 products included RDBMS, word processing, integrated decision

2 support, spreadsheet, graphics, and utility software. The

3 company offered a comprehensive line of consulting, training and

4 support services for individuals, corporations and government.

5 Ashton-Tate's current RDBMS software, dBASE III Plus and

6 dBASE IV, were enhancements of its first product, dBASE II.

7   As explained more fully below, the United States filed its

8 complaint because the acquisition would likely reduce competition

9 in the development and sale of RDBMS software in the United

10 States. The market for RDBMS software is concentrated, and entry

11 is difficult. Prior to the acquisition, Borland and Ashton-Tate

12 were the two leading firms offering RDBMS software. Some of the

13 other competitors offer products ("xBASE clones") that are based

14 on the dBASE programming language, which has become an industry

15 standard, and that are alternatives to dBASE and Paradox.

16 Paradox, on one hand, and dBASE and the xBASE clones, on the

17 other hand, were in significant competition with one another.[2/]

18 Prior to the acquisition, an increase in the price of either

19 Paradox or dBASE would cause so many customers to switch to other

20 RDBMS products that the price increase would be unprofitable.

21 After the acquisition, however, the price increase would be

22 profitable because Borland could capture a significant portion of

23 that diversion -- those customers who would switch to other RDBMS

24 products that are close substitutes now owned by Borland.

25 Finally, other firms in the industry could not reposition their

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27   [2]   After the acquisition, a price increase could take the
form of elimination or reduction of competitive price discounts
as well as increases in the list price.

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1 product lines so as to prevent the acquisition from having this

2 effect.

3 RDBMS software has multi-table, relational, and programming

4 capabilities, in addition to other functional differences, that

5 distinguish it from other types of software. Products such as

6 flat-file, spreadsheet, and word processing software and even

7 general programming languages and tools contain some of the same

8 functions and can, in some instances, be used to perform certain

9 applications accomplished with RDBMS software. The United States

10 found, however, that given the functional differences and

11 limitations of these other software products, customers would

12 find it more difficult or costly to use those products to perform

13 the same applications. Accordingly, the United States concluded

14 that customers would not likely substitute other software

15 products for RDBMS software in the face of a "small but

16 significant and non-transitory increase in price."[3]

17 The United States further concluded that, for the develop-

18 ment and sale of RDBMS software, the relevant geographic market

19 is the United States. The United States market for RDBMS

20 software is concentrated. In 1990, total United States sales of

21 RDBMS software were approximately $200 million. In 1990, Ashton-

22 Tate and Borland were the two largest sellers of RDBMS software,

23 together accounting for nearly 60 percent of dollar sales and

24 over 60 percent of units shipped. Concentration as measured by

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27 [3] Department of Justice Merger Guidelines § 2.11 (June
14, 1984), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,102, at
20,533 (hereinafter cited as "DOJ Merger Guidelines at ___").

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the Herfindahl-Hirschman Index ("HHI")[4] for the United States

RDBMS software market will increase significantly as a result of

the acquisition. Based on 1990 dollar sales, the HHI for RDBMS

software in the United States was 1726. The acquisition would

increase the HHI by 1403 points to 3129 and the relevant market

would become significantly more concentrated. Approximately

twelve other firms account for the remainder of RDBMS market

share, with no one firm holding a significant portion of market

share as compared to the combined Borland/Ashton-Tate. Such an

increase in concentration in an already concentrated market

raises significant concerns, in combination with other factors,

that the transaction may result in the exercise of market power.

In addition, the United States determined that entry into

the RDBMS software market is difficult and time consuming. It

generally takes over two years to conceptualize, design, develop,

test, and bring to market a full RDBMS software product.

Moreover, new entrants also face difficulty in achieving market

acceptance due to the preference of many customers for companies

with well-established reputations and proven products and the

comparatively high cost of effectively marketing a new high-end

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[4] The HHI is a measure of market concentration calculated
by squaring the market share of each firm in the market and then
summing the resulting numbers. For example, for a market
supplied by four firms with shares of 30, 30, 20, and 20 percent,
the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 900 + 900 + 400 + 400 = 2600$). The HHI takes into account the relative sizes and
distribution of firms in a market. It approaches zero when a
market is supplied by a large number of firms of relatively equal
size and reaches its maximum of 10,000 when a market is supplied
by a single firm. The HHI increases both as the number of firms
in the market decreases and as the disparities in size among
these firms increases.

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software product. Finally, existing RDBMS software customers find it difficult to switch to another RDBMS software product because there are considerable costs associated with switching, including (1) rewriting end user applications written for the particular RDBMS software; (2) retraining both end users and applications developers on the new RDBMS software; and (3) reconfiguring data file structures (where necessary).

The United States also took into account the fact that the personal computer software industry continues to be affected by a number of technological changes. In particular, a new operating environment developed by Microsoft, called "Windows," offers opportunities for the introduction of new application software, including RDBMS software. Indeed, Microsoft, which heretofore has not offered a RDBMS product, recently announced that it is developing a new RDBMS product for Windows that it expects to introduce next year. These facts suggest that the current market shares of Ashton-Tate and Borland may not fully describe their competitive significance for the future. On the other hand, the United States determined that market changes resulting from these technological advances are likely to be evolutionary rather than revolutionary and are not sufficient in themselves to dispel the competitive concerns raised by this combination of the two leading sellers in the market.

In evaluating the competitive effects likely to result from the acquisition, it was particularly relevant that several of the smaller competitors in the RDBMS software market offer compatibility with the dBASE standard by using some of the

command names, menu command hierarchies, command languages and other features of the dBASE programming language. As a result, dBASE customers can switch to those products (known as "xBASE clones") at lower cost than to other products. Ashton-Tate has, however, asserted copyright claims to dBASE language which have impaired the ability of the xBASE firms to sell to certain customers, and which could limit the ability of the xBASE clones to inhibit possible anticompetitive effects of Borland's acquisition of Ashton-Tate. The largest of the xBASE firms, Fox, is a defendant in a suit ("Los Angeles action") seeking to enjoin its use of the dBASE programming language in Fox's RDBMS products.[5] Ashton-Tate has enjoyed competitive advantages as a result of its adoption as a "standard" by corporate customers.[6] The continued assertion of copyright claims to the dBASE language

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[5]   On November 18, 1988, Ashton-Tate filed a complaint in the United States District Court for the Central District of California against Fox and SCO alleging copyright infringement of its dBASE programs. Ashton-Tate Corporation v. Fox Software, Inc. and The Santa Cruz Operation, Inc., Civ. No. CV 88-6837 TJH (C.D. Cal., filed Nov. 18, 1988). The complaint alleges that "the organization, structure, and sequence of the dBASE programs embody and reflect forms of expression original to Ashton-Tate, including the novel application development and data management environments they present to the computer program user." Complaint at 3. Among other things, Ashton-Tate seeks an injunction restraining Fox "from copying, selling, marketing or distributing" its products; other equitable relief; and unspecified damages and attorneys' fees. Id. at 8. On December 8, 1988, Fox filed a counterclaim alleging that, among other things, Ashton-Tate "has monopolized and is attempting to monopolize the U.S. market for microcomputer database management systems." Answer and Counterclaims at 15. The lawsuit is still pending.

[6]   Widespread use of a RDBMS software product results in a large pool of trained users, applications developers and compatible tools that in turn promotes the further use of that product. "Clone" or compatible products also benefit from and promote such standardization.

1   thus would enable the merged firm unilaterally to raise the price

2   of its RDBMS products.

3   In sum, for all the above reasons, the United States found

4   that Borland's acquisition of Ashton-Tate, without the relief

5   provided for in the proposed Final Judgment, posed a substantial

6   likelihood that Borland could profitably exercise its market

7   power by raising prices to the detriment of RDBMS software

8   customers.

9

10   **III.**

11   **EXPLANATION OF THE PROPOSED FINAL JUDGMENT**

12   The proposed Final Judgment, which requires Borland to

13   refrain from exercising certain copyright claims related to the

14   dBASE RDBMS software products, provides relief that will assure

15   the continuation of a competitive marketplace. As discussed

16   above in Section II, the acquisition raised the likelihood that

17   Borland could raise the price of Paradox or dBASE without fear of

18   losing a significant amount of sales to other products that are

19   close substitutes. Borland's ability to exercise market power in

20   that way could be constrained to an extent by the ability of

21   customers to switch to the xBASE clones. The pendency or future

22   threat of copyright claims relating to the dBASE language,

23   however, has inhibited competition and would likely diminish the

24   effectiveness of that constraint on Borland's market power. As a

25   result, the United States sought to assure the continued

26   availability of competitive alternatives by requiring Borland to

27   relinquish certain copyright claims acquired through its

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acquisition of Ashton-Tate. In requiring this relief, the United

States expresses no view on the validity or invalidity of any

claims to copyright protection by any party to this Final

Judgment or any third party or on the appropriateness of

asserting any such claims.

Section IV.A. of the proposed Final Judgment enjoins

Borland, after the acquisition of Ashton-Tate, from initiating or

making any claim or counterclaim that asserts claims of copyright

infringement in the command names, menu items, menu command

hierarchies, command languages, programming languages and file

structures used in and recognized by Ashton-Tate's dBASE family

of products, standing alone and apart from other aspects of those

computer programs. In addition, Section IV.C. of the proposed

Final Judgment requires that Borland shall, at any time, dismiss

with prejudice its claims in the Los Angeles action within

fifteen days following the dismissal with prejudice of Fox's

counterclaims in the Los Angeles action.

Section IV.C. also requires that within a period of ninety

days from the entry of the proposed Final Judgment, Borland shall

use its best efforts to resolve the Los Angeles action in a

manner consistent with the intent of Section IV.A. Finally,

section IV.C. requires that should the district court presiding

over an unrelated copyright infringement action filed against

Borland by Lotus Development Corporation (the "Boston action")[7]

dismiss Lotus' claims for copyright protection in its menu

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[7] Lotus Development Corp. v. Borland International, Inc.,
Civ. No. 90-11662-K, filed in the United States District Court
for the District of Massachusetts.

command hierarchy, Borland shall seek prompt resolution of the

Los Angeles action in a manner consistent with the Boston court's

disposition and Section IV.A.

Section IV.B. permits Borland, after the acquisition, to

assert in any litigation its legal right to use the command

names, menu items, menu command hierarchies, command languages,

programming languages and file structures as well as the

copyright protection in and copyright infringement of the

computer program code (including its structure, sequence and

organization) and other aspects of the user interface of Ashton-

Tate's dBASE family of products. This paragraph makes clear that

the proprietary dBASE software itself and its underlying code are

not being placed in the public domain. In sum, the proposed

Final Judgment effectively prohibits Borland from using its

control of the dBASE standard as a means of inhibiting

competition from other vendors of dBASE products on the basis of

use of the dBASE language.[8]

The United States, Borland and Ashton-Tate have stipulated

that the proposed Final Judgment may be entered by the Court at

any time after compliance with the APPA. The proposed Final

Judgment constitutes no admission by any party as to any issue of

fact or law. Under the provisions of Section 2(e) of the APPA,

entry of the proposed Final Judgment is conditioned upon a

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[8] Section II.D. of the proposed Final Judgment defines the "dBASE family of products" to which the prohibition applies as including "the computer programs bearing the dBASE trademark for the management of computer databases of which Ashton-Tate is the rightful owner and publisher, the exclusive rights and privileges in and to the copyrights of which Ashton-Tate owns, including revisions or updates to such programs."

determination by the Court that the proposed Final Judgment is in the public interest.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust actions under the Clayton Act. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no _prima facie_ effect in any private lawsuit that may be brought against the defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION
OF THE PROPOSED FINAL JUDGMENT

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the _Federal Register_. The United States will evaluate the comments, determine whether it should withdraw its consent, and respond to the comments. The

1 comments and response(s) of the United States will be filed with

2 the Court and published in the _Federal Register_.

3   Written comments should be submitted to Constance K.

4 Robinson, Chief, Communications and Finance Section, Antitrust

5 Division, U.S. Department of Justice, 555 Fourth Street, N.W.,

6 Room 8104, Washington, D.C. 20001.

7   The proposed Final Judgment provides that the Court retains

8 jurisdiction over this action and any party may apply to the

9 Court for any order necessary or appropriate for its

10 modification, interpretation or enforcement.

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12   VI.

13   **ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT**
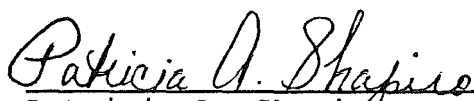
14   The United States considered, as an alternative to the

15 proposed Final Judgment filed with this Court, litigation to seek

16 an injunction to block Borland's acquisition of Ashton-Tate. The

17 United States rejected that alternative because the relief in the

18 proposed Final Judgment should prevent the acquisition from

19 having significant anticompetitive effects in the RDBMS software

20 market, while allowing any procompetitive effects the acquisition

21 may produce.

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VII.

DETERMINATIVE DOCUMENTS

No documents were determinative in the formulation of the proposed Final Judgment. Consequently, the United States has not attached any such documents to the proposed Final Judgment.
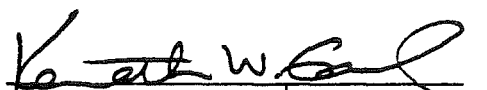
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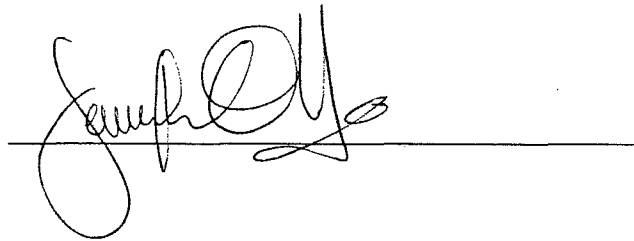_Jennifer L. Otto_
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Dated: October 22, 1991

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Competitive Impact Statement was hand delivered this 22nd day of October, 1991 to all counsel of record, at the addresses listed below:

William C. Pelster
Scot B. Hutchins
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, NY 10022

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Competitive Impact Statement was overnight express mailed this 22nd day of October, 1991 to all counsel of record, at the addresses listed below:

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