***** NOT FOR PUBLICATION *****

NO. 23775

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

JACK HINDMAN and FRANCIS FLETCHER, on behalf of themselves and all others similarly situated in Hawai'i, Plaintiffs-Appellants,

vs.

MICROSOFT CORPORATION, a Washington corporation, Defendant-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 00-1-0945)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., and Nakayama, J.; Circuit Judge Ibarra, in place of Levinson, J., recused; Circuit Judge Nakea, in place of Acoba, J., recused; and Circuit Judge Nakamura, in place of Duffy, J., recused)

Plaintiffs-appellants Jack Hindman and Francis Fletcher [hereinafter, collectively the plaintiffs] appeal from the first circuit court's[1] (1) August 29, 2000 order granting defendant-appellee Microsoft Corporation's [hereinafter, Microsoft] motion to dismiss the complaint and (2) September 21, 2000 final judgment. On appeal, the plaintiffs contend that "[t]he circuit court erred in ruling as a matter of law that Plaintiffs[ ] . . . were indirect purchasers who lacked standing to bring a private class action . . . ."

[1] The Honorable Karen N. Blondin presided over the matter at issue on appeal.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve the plaintiffs' contention as follows.

Initially, we note that, in their memorandum in opposition to Microsoft's motion to dismiss, the plaintiffs presented matters outside of the pleadings for the circuit court's consideration, including, inter alia, two purported end-user license agreements (EULAs) for Windows 98. Inasmuch as the record evinces that the circuit court did not exclude any of the exhibits presented by the plaintiffs in ruling on the motion to dismiss, we treat Microsoft's motion to dismiss as a motion for summary judgment pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 56 (2000) and apply the standard of review relating to summary judgment. HRCP Rule 12(b) (2000); see also Foytik v. Chandler, 88 Hawai'i 307, 313-14, 966 P.2d 619, 625-26 (1998); Hawai'i Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000).

In asserting that they have standing to bring a private class action suit as direct purchasers under Hawai'i Revised Statutes (HRS) chapter 480, the plaintiffs claim that, inasmuch as (1) "licensees are considered 'purchasers' under HRS Chapter 480" and (2) the EULA was made "directly between each Plaintiff and Microsoft, Plaintiffs cannot reasonably be considered to be 'indirect' purchasers." HRS chapter 480 does

not, however, define the terms "direct purchaser" or "indirect purchaser." (Emphases added.) Given the uncertainty of the meaning of the terms "direct purchaser" and "indirect purchaser," we examine relevant legislative history. Konno v. County of Hawai'i, 85 Hawai'i 61, 71, 937 P.2d 397, 407 (1997).

We point out that statutory references to direct and indirect purchasers were introduced in a 1980 amendment to HRS chapter 480, without definition. Compare 1980 Haw. Sess. Laws Act 69, §§ 2-3 at 91-93 (adding references to direct and indirect purchasers in an 1980 amendment to HRS §§ 480-13, 480-14) with 1961 Haw. Sess. Laws Act 190, §§ 11-12 at 317 (containing no references to direct or indirect purchasers in provisions that became HRS §§ 480-13, 480-14) and 1969 Haw. Sess. Laws Act 109, § 1 at 89 (containing no references to direct or indirect purchasers in a 1969 amendment to HRS § 480-13) and 1974 Haw. Sess. Laws Act 33, § 1 at 55-56 (containing no references to direct or indirect purchasers in a 1974 amendment to HRS § 480-13). The 1980 legislative history evinces that the legislature sought to afford consumers occupying the position of indirect purchasers, as described in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), a remedy that they would otherwise be denied in light of that decision. See Hse. Stand. Com. Rep. No. 508-80, in 1980 House Journal, at 1501; Sen. Stand. Com. Rep. No. 971-80, in 1980 Senate Journal, at 1493-94. However, notwithstanding that indirect purchasers were extended the right to recover for

antitrust violations by virtue of the 1980 amendment, the right to bring a class action suit was to be exercised exclusively through the attorney general. Sen. Stand. Com. Rep. No. 971-80, in 1980 Senate Journal, at 1494.

In the instant case, the plaintiffs acquired Windows 98, the product with the alleged overcharge, not from Microsoft but from third-party vendors. Under Illinois Brick, the plaintiffs are considered indirect purchasers inasmuch as the product with the alleged overcharge "pass[ed] through . . . separate levels in the chain of distribution before reaching [the plaintiffs]." 431 U.S. at 726. The EULAs between the plaintiffs and Microsoft do not alter this assessment insofar as the fact remains that there is no economic relationship between the plaintiffs and Microsoft.[2] See In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 709 (D. Md. 2001) ("Although the EULA may establish a direct relationship between Microsoft and the consumer, that relationship is not sufficient to make the consumer a 'direct purchaser' within the meaning of Illinois

[2] Indeed, it is now apparent that the legislature has always subscribed to this view. Cf. Mollena v. Fireman's Fund Ins. Co. of Hawai'i, Inc., 72 Haw. 314, 324-25, 816 P.2d 968, 973 (1991) (subsequent legislative amendment construed to clarify original intent regarding statute's meaning). In connection with the 2002 amendment modifying HRS chapter 480 to permit private indirect purchaser antitrust class actions, the legislature stated that "[i]ndirect purchasers are persons who bought from intermediaries, who in turn, bought from the parties engaged in the price fixing." Hse. Stand. Com. Rep. No. 1118-02, in 2002 House Journal, at 1666 (emphases added).

Brick. . . . Whether the consumer buys software or the EULA, the immediate economic transaction constituting the purchase occurs between the consumer and an [original computer equipment manufacturer] or retail seller."); Pomerantz v. Microsoft Corp., 50 P.3d 929, 934 (Colo. Ct. App. 2002) ("[T]he relationship established through the EULA between Microsoft and the end user is insufficient to make the end user a direct purchaser under Illinois Brick. . . . The EULA, and whatever contractual relationship it establishes, has no bearing on whether the consumer is a direct purchaser under Illinois Brick."); accord Vacco v. Microsoft Corp., 793 A.2d 1048, 1062-63 (Conn. 2002); Minuteman, LLC v. Microsoft Corp., 795 A.2d 833, 839 (N.H. 2002); Major v. Microsoft Corp., 60 P.3d 511, 515 (Okla. Ct. App. 2002); Sienna v. Microsoft Corp., 796 A.2d 461 (R.I. 2002).

Consequently, under the provisions of HRS § 480-14(c) (1993) applicable at the time the plaintiffs filed suit against Microsoft, the plaintiffs as indirect purchasers could only bring a class action through a suit instituted by the attorney general. Accordingly, the circuit court correctly ruled that the plaintiffs did not have standing to file a private class action suit. Therefore, inasmuch as Microsoft was entitled to summary judgment as a matter of law with respect to the plaintiffs' class action claims,

IT IS HEREBY ORDERED that the circuit court's (1) August 29, 2000 order granting Microsoft's motion to dismiss the complaint and (2) September 21, 2000 final judgment are affirmed.

DATED: Honolulu, Hawai'i, April 30, 2004.

Thomas R. Grande, Mark S. Davis, and Stanley E. Levin (of Davis Levin Livington Grande), for plaintiffs-appellants

Diane D. Hastert, Anna H. Oshiro, and Gregory W. Kugle (of Damon Key Leong Kupchak Hastert), for defendant-appellee