

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

IN RE MICROSOFT CORP. ANTITRUST)
LITIGATION)
) MDL Docket No. 1332
)
This document relates to:) Hon. J. Frederick Motz
)
)
Daisy Mountain Fire District)
v. Microsoft Corp.,)
Civil Action No. JFM-07-2851)
_____)

**PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL
OF PROPOSED SETTLEMENT, CERTIFICATION OF
THE PROPOSED SETTLEMENT CLASS AND
APPROVAL OF FORM AND MANNER OF NOTICE**

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiff Daisy Mountain Fire District, by and through counsel, move this Court for an Order granting preliminary approval to the proposed settlement of this action, certifying the proposed settlement class and approving the form and manner of notice. This motion is based upon the Settlement Agreement, a copy of which is attached as Exhibit A to the Declaration of Mark A. Griffin In Support Of Plaintiff's Motion For Preliminary Approval Of Proposed Settlement, Certification Of The Proposed Settlement Class And Approval Of Form And Manner Of Notice, the accompanying memorandum of law, and the record in this action. A proposed form of Order granting this Motion is attached hereto.

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RESPECTFULLY SUBMITTED this 2nd day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing document, which was electronically filed in this case, to be served on June 2, 2009 in the manner indicated below:

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of the putative class (the "Settlement Class"). The payment, which is to be spent on Qualifying Hardware and Software, will be in cash and quickly and easily distributed to the governmental entities, an important factor in the atmosphere of crisis surrounding public budgets today.

The Settlement will provide those significant benefits to the Class while removing the risk and delay associated with further litigation. It is an excellent result, and the Fire District and its counsel are pleased to present it to the Court for preliminary approval. As set forth in the Settlement Agreement and Appendix B thereto, the parties seek entry of an order:

- (1) Preliminarily approving the settlement and finding that the proposed settlement is sufficiently fair, reasonable and adequate to allow dissemination of notice of the settlement to the proposed Settlement Class;
- (2) Certifying the Settlement Class, as defined below;
- (3) Appointing Keller Rohrback as Class Counsel for the Settlement Class, and Daisy Mountain Fire District as Class Representative;
- (4) Approving the form of the Notice Of Class Action Settlement Hearing (the "Notice") attached as Appendix A to the Settlement Agreement, and the form of Publication Notice attached as Exhibit B to the Griffin Declaration;
- (5) Approving the notice plan and directing that notice be mailed and published;
- (6) Establishing a deadline for filing papers in support of final approval of the proposed settlement and a request for reimbursement of costs and expenses;
- (7) Establishing a deadline for the filing of objections by Settlement Class members;
- (8) Establishing a deadline for Settlement Class members to exclude themselves from the proposed Settlement Class;

- (9) Setting a date for a hearing on final approval of the proposed settlement; and
- (10) Staying all discovery and other proceedings in this litigation.

II. BACKGROUND

A. The Litigation

On July 24, 2007, Plaintiff Fire District filed a class-action complaint, on behalf of itself and others similarly situated, against Defendant Microsoft for violation of the Arizona Antitrust Act.¹ An Amended Complaint (hereafter, the “Complaint,” Docket No. 26), was filed November 5, 2007, alleging that Microsoft illegally monopolized markets for personal computer operating systems and certain software applications, and that its actions caused Plaintiff and the putative class of Arizona governmental entities to suffer damage by being overcharged for these products.

B. The Settlement

Keller Rohrback is quite familiar with the underlying factual background of the monopolization claims following its representation of other clients against Microsoft.² It came as no surprise, therefore, that Microsoft opened the litigation by trying to eliminate parts of the Plaintiff’s claims by filing a motion to dismiss on several grounds. After hard-fought briefing and argument, the Court granted the motion, but found one issue – the proper effect on the statute of limitations of the Plaintiff having been dropped from an earlier Arizona class action

¹ Ariz. Rev. Stat. Ann. § 44-1401 *et seq.*

² For example, Keller Rohrback L.L.P. was appointed a member of the Executive Committee of plaintiffs’ counsel on June 26, 2000 by this Court’s Pretrial Order No. 1 (Griffin Decl., Ex. C) and was actively involved in the litigation, incurring \$2,114,686 in fees. Decl. of William P. Butterfield In Support Of National Plaintiffs’ Counsel’s Motion For Attorneys’ Fees, ¶ 12 (Griffin Decl., Ex. D).

against Microsoft – worthy of certification for interlocutory appeal. The Fourth Circuit Court of Appeals declined to hear the issue on an interlocutory basis, so the ruling awaits appeal.

Because counsel on both sides had deep familiarity with the underlying antitrust claims and their historical outcomes,³ it made sense to see whether there was a way to resolve the case before embarking on the factual and expert discovery that was the next step in the litigation. Accordingly, counsel engaged in extensive negotiations stretching over roughly six months. During that time, the merits of each side's positions were thoroughly discussed, evaluated, and explored. In April, a proposed settlement with Microsoft was reached. On May 18, the Fire District's board approved that proposal.

The settlement negotiations and the agreement that they led to were founded on a full understanding of the strengths and weaknesses of the case, based on information from both this case and related prior litigation prosecuted by Class Counsel. The basic terms of the Settlement Agreement include:

1. The Settlement Class

The Settlement Agreement defines the Settlement Class as follows:

All government entities located in Arizona (excluding the federal government, foreign governments and government entities from states other than Arizona) that indirectly licensed Microsoft Operating System software and/or Microsoft Application software between May 18, 1994 and December 31, 2008 and did not obtain such software for purposes of resale.

³ A copy of the Settlement Agreement in *Kloth v. Microsoft Corp.*, No. 00-2117 (D. Md. 2004) on behalf of direct purchasers is attached as Exhibit E to the Griffin Declaration, the settlement agreement in *Friedman v. Microsoft Corp.*, No. CV 2000-00722 (Maricopa County, Ariz. Super. Ct. 2004), a class case that once included the Arizona government entities at issue in this case is attached as Exhibit F, and the Settlement Agreement in *City & County of San Francisco v. Microsoft Corp.*, No. 04-3705 (D. Md. 2006) on behalf of California government entities that this Court approved is attached as Exhibit G.

Settlement Agreement, p. 8. The final composition of the Settlement Class will be determined after all members have an opportunity to opt out.

2. The Settlement Amount

The proposed Settlement Agreement provides that Microsoft will pay Settlement Benefits of \$4,415,258 in cash to the Settlement Class. The money must be used to purchase qualifying computer hardware or software, which can be of any brand. The Settlement Benefits available for distribution to eligible members of the Settlement Class will be allocated among the government entities included on the Eligible Class Member List based upon each such government entity's proportionate share of the total number of full time equivalent employees ("FTE's") employed by all government entities in Arizona in the calendar year 2007. The FTE calculations are based on data provided by the United States Census, supplemented by data supplied by the Attorney General of the State of Arizona. *Id.* at 19. The calculation of each share of the settlement to be distributed to the government entities on the Eligible Class Member List has been prepared by Class Counsel. *See* Plan of Distribution, Appendix E to the Settlement Agreement (Griffin Decl., Ex. A).

3. The Release

In change for the above consideration from Microsoft, Plaintiff has agreed for itself and on behalf of the putative Settlement Class to release Microsoft from all claims relating to the purchase of Microsoft operating system or applications software arising from conduct of Microsoft before December 31, 2008. Settlement Agreement, pp. 17-18.

C. The Proposed Timeline for Final Approval

Pursuant to Fed. R. Civ. P. 23(e), a hearing on the final approval of the settlement should take place after class members have received notice and have had the opportunity to evaluate the settlement. Plaintiff proposes the following schedule:

1. Notice to be mailed no later than 30 days following the date on which the preliminary approval order is entered by the Court (“Notice Date”);
2. Plaintiff’s motion for final approval of the settlement to be filed no later than 45 days following the Notice Date;
3. Requests for exclusion from the proposed Settlement Class must be postmarked no later than 30 days following the Notice Date;
4. Any objections to the settlement must be filed with the Court and served on Class Counsel, postmarked no later than 20 days prior to the date the Court sets for a hearing on final approval;
5. Class counsel may respond to any objections no later than 10 days prior to the date the Court sets for a hearing on final approval;
6. Affidavits or declarations showing that notice to the Class was made in accordance with the preliminary approval order to be filed no later than 10 days prior to the date the Court sets for a hearing on final approval;
7. A hearing before the Court on final approval of the settlement to be scheduled subject to the Court’s convenience, at least 80 days following the Notice Date.

III. THE COURT SHOULD GRANT PRELIMINARY APPROVAL.

Rule 23(e) of the Federal Rules of Civil Procedure directs that any settlement of a class action be approved by the Court following notice to members of the class. Fed. R. Civ. P. 23(e). The approval of a class action settlement generally follows a two-step process; at the preliminary approval stage, the Court determines whether the settlement appears to fall within the range of possible approval. MANUAL FOR COMPLEX LITIGATION (FOURTH) §21.632 (2009); *see also In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1383 (D. Md. 1983). If the Court is satisfied that the settlement proposals meets this standard, then it should schedule a formal fairness

hearing and order appropriate notice to class members so that they have an opportunity to object to the settlement if they wish to do so. *Id.*

A. Standard for Granting Preliminary Approval

In reviewing a proposed class settlement, the court does “not decide the merits of the case or resolve unsettled legal questions.” *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). “While the Court might have insisted on certain different provisions had it been a participant in the negotiations, the Court should not substitute its business judgment for the business judgment of the parties....” *Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. at 1385. Rather, the essential inquiry for the Court is whether the proposed settlement, taken as a whole, is fair, adequate, and reasonable. *Id.* at 1383. Thus, preliminary approval requires consideration of the factors that determine the reasonableness of the settlement, recognizing that the analysis is preliminary and that further findings will be made after the fairness hearing. *See Henley v. FMC Corp.*, 207 F. Supp. 2d 489, 492-93 (S.D.W. Va. 2002); *see also In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 526 (D. Md. 2002) (“Assessment of the adequacy of a proposed settlement requires evaluation both of the value of the settlement and the value of the claims being settled”).

Courts have wide discretion to determine what information to consider at the preliminary stage; this initial assessment can be made on the basis of information already known to the court. MANUAL FOR COMPLEX LITIGATION (FOURTH), at §21.632 (2009). Courts in this circuit have identified a variety of relevant factors to consider, including whether the settlement was reached through arm’s-length bargaining without collusion, as well as “(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel....” *In re Jiffy*

Lube Sec. Litig., 927 F.2d 155, 159 (4th Cir. 1991); *see also Flinn v. FMC Corp.*, 528 F.2d 1169, 1173-74 (4th Cir. 1975); *In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. 305, 315 (D. Md. 1979).

Consideration of the proposed settlement here in light of these factors demonstrates that it falls well within the range warranting preliminary approval. Based on the facts of the case, there is no basis to doubt the fairness of the proposed settlement. The parties engaged in arms-length negotiations over an extended period of time. The Settlement Agreement ensures substantial and prompt payment to the Settlement Class. This substantial relief is far preferable to the risk of a smaller recovery or none at all. In short, the proposed Settlement is an excellent result and merits preliminary approval.

B. The Proposed Settlement Plainly Merits Preliminary Approval.

The end result of the negotiations is a settlement in which every member of the Settlement Class will receive a cash recovery apportioned on the basis of the percentage that its number of full-time equivalent employees bears to the total number of full time equivalent employees in all Arizona state and local governmental entities.⁴ Despite Plaintiff's confidence in prevailing on its claims, the general wisdom of settling antitrust claims is well-settled: "Antitrust litigation in general, and class action litigation in particular, is unpredictable." *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998). *See, e.g., Berkey Photo, Inc.*

⁴ The FTE equivalent was originally conceived by expert economists for the California governmental entities' settlement with Microsoft. *See Griffin Decl., Ex. H.* The economists identified it as a fair, accurate, yet inexpensive way of estimating how the purchase of Microsoft products would have been spread across the governmental entities so that the recovery could "follow" the purchases without requiring thousands of governmental employee-hours trying to find years-old purchase records. The parties adopted it here for the same reasons.

v. Eastman Kodak Co., 603 F.2d 263, 268 (2d Cir. 1979) (vacating \$87 million judgment for antitrust plaintiff and remanding for new trial); *United States Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) (“the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only \$1.00 in damages”), *aff'd*, 842 F.2d 1335, 1377 (2d Cir. 1988).

Beyond the general wisdom supporting settlements, courts look to make sure that proposed settlements are not the result of collusion. The past relationship of the counsel involved in these negotiations (as zealous advocates of opposite sides of the issues going back over several years and several cases) is strong evidence that this settlement is not the result of collusion. The length of time that the negotiations continued provides additional proof, as does the arms-length nature of the negotiation, and the fact that lead counsel for the class are seasoned antitrust litigators with substantial experience in these matters and well-developed knowledge of the facts underlying the case. *See Keller Rohrback Complex Litigation Group resume (Griffin Decl., Ex. I)*

Furthermore, a recovery of \$4,415,258 for a Settlement Class of approximately 600 Class members is an excellent result when balanced against the expense and risk that plaintiff and the Settlement Class would face in litigating this case through trial and possible appeal against Microsoft. When the low claim and redemption rates for the *Friedman v. Microsoft* settlement (settling similar claims for non-governmental Arizona indirect purchasers) are compared to the cash that will be paid here, this settlement is a better result for the state and local government entities than the relief provided by *Friedman*. “So long as the record before [the Court] is adequate to reach ‘an intelligent and objective opinion of the probabilities of ultimate success