

INTRODUCTION

Microsoft Corporation, defendant in the cases of *Gordon v. Microsoft Corp.* (Hennepin County District Court No. 00-5994) and *Mednick v. Microsoft Court* (Ramsey County District Court No. 00-1276), respectfully requests this Court to transfer and consolidate these cases (and any related cases raising similar claims that may later be filed or remanded to Minnesota state district court) before a single district court judge. For a number of reasons—including (1) the respective scope of the proposed classes in the above cases, (2) the schedules for class certification motions that have been established in those actions, and (3) the fact that all other similar, related cases that were initially filed in Minnesota state district court (which were subsequently removed to federal court and later consolidated with approximately 55 other related cases) were brought in Hennepin County District Court—Microsoft respectfully suggests that the Court consolidate the above actions through assignment to the Honorable Bruce A. Peterson of the Hennepin County District Court, the judge assigned to the *Gordon* case.

BACKGROUND

Since November 1999, more than 150 similar private, putative class actions have been filed against Microsoft nationwide. These cases have been brought, in whole or in part, by plaintiffs on behalf of end-users of Microsoft software who allege that Microsoft violated federal or state antitrust laws. To date, six such actions have been brought in Minnesota state district courts.¹ Five of these were filed in Hennepin County District Court: *The Rubbright Group v. Microsoft Corp.*; *Nielsen v. Microsoft Corp.*; *Klein v. Microsoft Corp.*; *Jaffe v. Microsoft Corp.*; and *Gordon v.*

¹ Copies of the Complaints filed in these cases are attached at Exhibits A-F of the Affidavit of David R. Crosby in Support of Motion to Transfer and Consolidate Related Cases (“Crosby Aff.”).

Microsoft Corp. The sixth—*Mednick v. Microsoft Corp.*—was filed in Ramsey County District Court.

Microsoft removed four of the Minnesota state-court cases (*Rubbright, Nielsen, Klein and Jaffe*) to federal court. These cases, along with approximately 55 other cases pending in federal district courts across the country, have since been consolidated for pretrial proceedings by the United States Judicial Panel on Multidistrict Litigation (“MDL Panel”). This consolidated action, captioned *In re Microsoft Corp. Antitrust Litigation*, MDL Docket No. 1332 (“MDL Proceeding”), has been assigned to The Honorable J. Frederick Motz, Chief Judge of the United States District Court for the District of Maryland. In its Transfer Order, the MDL Panel detailed why consolidation of these related actions was warranted:

[T]he Panel finds that the actions in this litigation involve common questions of fact, and that centralization under Section 1407 in the District of Maryland before Chief Judge J. Frederick Motz will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. All actions arise out of the same nucleus of operative facts pertaining to Microsoft’s alleged anticompetitive conduct in a purported market for personal computer operating systems. Accordingly, each action raises similar questions of market definition, the existence of monopoly power, the fact and significance of Microsoft’s alleged anti-competitive conduct, and the existence and scope of any antitrust injury suffered by plaintiffs. Relevant discovery, including expert discovery, will overlap substantially in each action. Centralization under Section 1407 is thus necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (particularly with respect to overlapping class certification requests), and conserve the resources of the parties, their counsel and the judiciary. [Transfer Order dated April 25, 2000 at 2 (attached at Crosby Affidavit Ex. G).]

Prior to the MDL Panel’s Order consolidating the related federal putative class actions, plaintiffs’ counsel in *Rubbright, Nielsen, Klein and Jaffe* separately moved in United States District Court for the District of Minnesota to have their respective cases remanded to state court. Judge Michael C. Davis (to whom all of those cases were assigned) declined to rule on these motions pending the determination by the MDL Panel whether to transfer and consolidate the

cases. Plaintiffs in the MDL Proceeding have filed a “global” motion to remand, which will be heard by Judge Motz in October 2000.

Microsoft did not remove *Gordon* and *Mednick* to federal court. To date, the only activity in these cases has been that Microsoft has answered, and scheduling conferences among counsel for the parties and the assigned judges have taken place. Consistent with Judge Motz’s desire to coordinate pretrial proceedings in the related state court putative class actions with the MDL Proceeding, the parties and the judges in *Gordon* and *Mednick* (the Honorable Bruce A. Peterson and the Honorable Dale B. Lindman, respectively) have agreed to generally abide by the pretrial schedules established in the MDL Proceeding, with the exception of class-certification scheduling.²

Judge Peterson in *Gordon* and Judge Lindman in *Mednick* have established the following schedules concerning class certification:

Action	<i>Gordon</i> Deadline	<i>Mednick</i> Deadline
Plaintiff’s deadline to file and serve a class certification motion (including all supporting papers, affidavits, and expert reports).	September 15, 2000	September 30, 2000
Defendant’s deadline to file and serve its response to Plaintiff’s class certification motion (including all supporting papers, affidavits, and expert reports).	December 4, 2000	December 31, 2000
Plaintiff’s deadline to file and serve a reply brief.	December 29, 2000	N/A
Oral argument.	January 9, 2001	January 23, 2001

² Apart from a requirement that Microsoft make certain documents available for review, discovery in the MDL Proceeding is effectively stayed through October 31, 2000.

The definition of the putative class in *Gordon* is significantly broader than and envelops the class definition proposed in *Mednick*:

Gordon: All persons or entities in the State of Minnesota who purchased for purposes other than re-sale or distribution on or after May 18, 1994 (the “Class Period”), Intel-compatible personal computer operating systems licensed by Microsoft. (*Gordon* Complaint at ¶ 8.)

Mednick: All end user licensees of Windows 98 residing in the State of Minnesota as to whom Microsoft has an electronic mail address that is computer-accessible by Microsoft. (*Mednick* Complaint at ¶ 16.)

ARGUMENT

I. The Court Should Transfer and Consolidate All Present and Future Related Cases Before a Single District Court Judge.

Both the *Gordon* and *Mednick* cases involve substantially similar questions of law and fact relating to Microsoft’s alleged anticompetitive conduct in a purported market for personal computer operating systems. As this Court recently held, in cases where related actions involve similar questions of law and fact, where putative classes are identical or overlap, and where the potential for duplicative discovery and other common issues or problems exists, it is appropriate for the Court to transfer and consolidate the cases before a single district court judge. *In re: Minnesota Vitamin Antitrust Litigation*, 2000 WL 210213 at **1 (Minn. Feb. 17, 2000) (attached at Crosby Aff. Ex. H); *see also* Minn. Stat. § 480.16 (chief justice has discretionary authority to assign cases in a manner that the courts function with maximum efficiency). A consolidation will further the interests of the parties and the judiciary “by a uniform and coordinated system of litigation management to eliminate duplicative discovery, prevent inconsistent pretrial rulings and conserve the resources of the parties, their counsel and the judiciary.” *In re: Minnesota Vitamin Antitrust Litigation*, 2000 WL 210213 at **1.

Nearly identical language to that quoted above was used by the MDL Panel in its Transfer Order (at 2), the only difference being the MDL Panel's explicit reference to its efforts to avoid inconsistent pretrial rulings with respect to overlapping class certification requests (a concern obviously relevant to the present motion). Because the same concerns that prompted consolidation by the MDL Panel of the federal cases are present in the Minnesota state court cases, this Court should transfer and consolidate the *Gordon* and *Mednick* actions, in addition to any case that may be remanded to Minnesota state court from the MDL Proceeding and any future actions filed in Minnesota state district court raising similar claims and factual allegations as those alleged within the *Gordon* and *Mednick* Complaints.

II. THE CONSOLIDATED CASE SHOULD BE ASSIGNED TO THE HONORABLE BRUCE A. PETERSON.

The assignment of a judge to a consolidated case is at the discretion of the chief justice, who is directed by statute to make assignments so that the state courts shall function with "maximum efficiency." Minn. Stat. § 480.16. Microsoft respectfully suggests that a number of efficiency factors exists that favor assigning the consolidated action to the Honorable Bruce A. Peterson of Hennepin County District Court.

1. Comparison of Proposed Classes.

As detailed above, the putative class in the *Gordon* case (to which Judge Peterson is assigned) is significantly broader than the proposed class in the *Mednick* action. Indeed, all putative class members in *Mednick*—Minnesota end-user licensees of Windows 98 who "registered" with Microsoft and, in so doing, provided an e-mail address—are included within the class definition proposed in the *Gordon* Complaint. That pleading seeks to certify a class on behalf of all Minnesota end-user licensees of any Microsoft computer operating system (*i.e.*,

Windows 98 and Windows 95) who acquired their software after May 1994. Thus, a determination concerning the issue of class certification in *Gordon* is much more likely to be dispositive as to *Mednick* than the other way around. For this reason, judicial economy suggests that the issue of class certification best be resolved in the forum of the *Gordon* action.

2. Class Certification Scheduling.

Rule 23.03(a) of the Minnesota Rules of Civil Procedure mandates that the issue of class certification be determined “as soon as practicable” after commencement of an action. While there is not a significant difference in the schedules for bringing and hearing class certification motions in *Gordon* and *Mednick*, the fact that the hearing on the motion in *Gordon* is scheduled prior to that in *Mednick* again favors the *Gordon* case as the appropriate forum.

3. Appropriateness and Convenience of Hennepin County.

Hennepin County is the more convenient venue for the parties. Not only are local co-counsel for plaintiff and defendant in *Gordon* located in downtown Minneapolis in Hennepin County, the same is true for *Mednick*, too. And in the event that any of the other related class actions that have been consolidated as part of the MDL Proceeding are remanded to Minnesota state district court, any such case would be remanded to Hennepin County, where each such case was initially filed.³

4. Familiarity With the Parties and the Issues.

If the Court agrees Hennepin County is the most appropriate venue for a consolidated action, logic dictates that the case be assigned to Judge Peterson (the Judge assigned to the

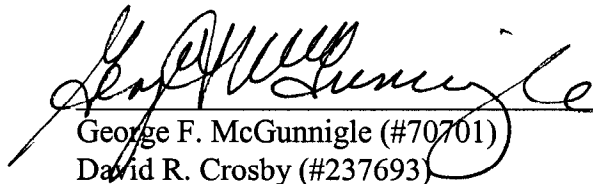
³ The Complaint in *Mednick*, though filed prior to the Complaint in *Gordon*, was filed several weeks after the filing of complaints in two of the related cases initially brought in Hennepin County District Court (the *Rubbright Group* and *Nielsen* actions). Plaintiff in *Rubbright Group*

Gordon case), as opposed to a Hennepin County District Court Judge unfamiliar with the litigations against Microsoft. Judge Peterson has met with the parties to generally discuss the issues involved, reviewed relevant correspondence, and received and read Orders from the MDL Panel and Judge Motz.

CONCLUSION

For the foregoing reasons, Microsoft respectfully requests that the Court transfer and consolidate the *Gordon* and *Mednick* actions, in addition to any case that may be remanded to Minnesota state district court from the MDL Proceeding and any future actions filed in Minnesota state district court raising similar claims and factual allegations as those alleged within the *Gordon* and *Mednick* Complaints. Further, Microsoft respectfully suggests that the Court assign the consolidated case to the Honorable Bruce A. Peterson, Hennepin County District Court Judge.

Dated: August 10, 2000


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and

has filed a motion in the *Mednick* case to intervene, and seeks a stay or dismissal of the *Mednick* action in order to protect what it claims to be broader interests of a larger putative class.

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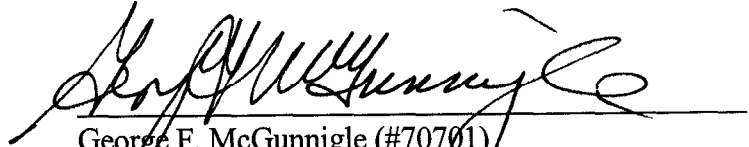
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ACKNOWLEDGMENT

Defendant Microsoft Corporation, by its attorney, George F. McGunnigle of Leonard, Street and Deinard, hereby acknowledges that, under certain circumstances, costs, disbursements and reasonable attorneys' and witness' fees may be awarded in this action pursuant to Section 549.211 of the Minnesota Statutes.



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