

ZELLE, HOFMANN, VOELBEL & GETTE

A LIMITED LIABILITY PARTNERSHIP

BOSTON
DALLAS
LOS ANGELES
MINNEAPOLIS
SAN FRANCISCO

33 SOUTH SIXTH STREET
CITY CENTER - SUITE 4400
MINNEAPOLIS, MINNESOTA 55402
612-339-2020 TELEPHONE
612-336-9100 FACSIMILE

John C. Goodnow
612-336-9160

August 22, 2000

OFFICE OF
APPELLATE COURTS
AUG 22 2000

VIA MESSENGER

Supreme Court
Attn.: Frederick K. Grittner
Supreme Court Administrator
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

FILED

Re: Motion to Consolidate
Daniel Gordon v. Microsoft Corporation
Civil No. 00-5994
and *Philip A. Mednick v. Microsoft Corporation*
Civil No. CO-00-1276

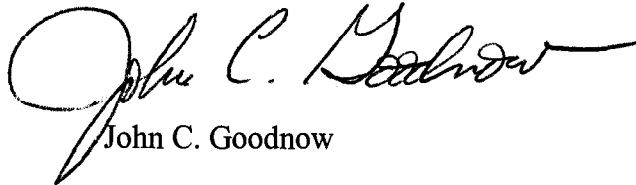
Dear Mr. Grittner:

Enclosed for filing with the Minnesota Supreme Court in the above-referenced matter please find:

Joinder in Microsoft Corporation's Motion to Transfer and Consolidate Related Cases.

Very truly yours,

ZELLE, HOFMANN, VOELBEL & GETTE LLP



John C. Goodnow

:er
Enclosure

cc: David E. Krause (via messenger)
George F. McGunnigle (via messenger)
David R. Crosby (via messenger)
Daniel E. Gustafson (via U. S. Mail)
Alice McNerney (via U. S. Mail)
Leonard B. Simon (via U. S. Mail)
David J. Bershad (via U. S. Mail)
Kenneth J. Vianale (via U. S. Mail)

STATE OF MINNESOTA

IN SUPREME COURT

CASE TITLE:)	
)	
DANIEL GORDON, Individually and)	Hennepin County District Court
On Behalf of All Others Similarly)	Fourth Judicial District
Situated,)	
)	
Plaintiff,)	Civil No. 00-5994
)	The Honorable Bruce A. Peterson
v.)	
)	
MICROSOFT CORPORATION and)	
DOES 1 through 100, inclusive,)	
)	
Defendants.)	
)	
)	
)	

)	
PHILIP A. MEDNICK, an individual,)	Ramsey County District Court
on behalf of himself and all others)	Second Judicial District
similarly situated,)	
)	
Plaintiff,)	Civil No. CO-00-1276
)	The Honorable Dale B. Lindman
v.)	
)	
MICROSOFT CORPORATION,)	
a Washington corporation,)	
)	
Defendant.)	

**JOINDER IN MICROSOFT CORPORATION'S
MOTION TO TRANSFER AND CONSOLIDATE RELATED CASES**

INTRODUCTION

Movants¹ hereby join Microsoft Corporation's ("Microsoft") Motion to Transfer and Consolidate Related Cases, filed on August 10, 2000. While Movants do not necessarily agree with all statements made by Microsoft in its motion, Movants concur with Microsoft that all six class actions involve identical or substantially overlapping plaintiff classes, are based upon the same alleged actions by Microsoft, raise the same or similar factual and legal questions, will require the same or overlapping discovery, and seek recovery under the same provisions of the Minnesota Antitrust Act. Accordingly, it is appropriate for this Court to exercise its supervisory jurisdiction and order the transfer and/or consolidation of these six pending Microsoft antitrust cases. Doing so will promote judicial economy, conserve the resources of the litigants, and avoid the potential for inconsistent factual and/or legal determinations arising out of the same conduct by the same defendant.

Movants further concur that these cases should be consolidated in Hennepin County District Court because five of the six actions filed to date -- including *Rubbright Group*, the first-filed action -- were brought in Hennepin County.

Finally, Movants join in Microsoft's request for an order providing that any such future actions filed against Microsoft also be transferred and consolidated in Hennepin County District

¹Movants are plaintiffs in the action entitled *Daniel Gordon, individually and on behalf of all others similarly situated v. Microsoft Corporation*, File No. 005994, venued in the Fourth Judicial District, Hennepin County District Court, before the Honorable Bruce A. Peterson. In addition, the undersigned are counsel for the class plaintiffs in *Rubbright Group et al. v. Microsoft Corporation*, File No. MC 99-017351, which was the first-filed Microsoft antitrust class action in Minnesota. *Rubbright Group* was removed to federal court, transferred by order of the Judicial Panel on Multidistrict Litigation to the District of Maryland, and is currently subject to a pending motion for remand scheduled to be heard on October 13, 2000.

Court. Such an order would promote the same goals of judicial economy, conservation of the parties' resources, and avoidance of inconsistent factual and/or legal determinations arising out of the same conduct.

DISCUSSION

Movants are aware that Philip A. Mednick, the plaintiff in *Mednick v. Microsoft Corporation*, brought in the Second Judicial District, has filed an opposition to Microsoft's motion. The following discussion addresses Mednick's two basic arguments: 1) that this Court allegedly lacks jurisdiction over *Mednick* and has no authority to grant the relief sought by Microsoft's motion; and 2) that even if this Court possesses such authority, *Mednick* should not be transferred to Hennepin County.

I. This Court Has Jurisdiction To Transfer and Consolidate.

This Court clearly has jurisdiction to transfer and consolidate the Microsoft antitrust lawsuits. Under Section 2 of Article VI of the Minnesota state constitution, the Supreme Court has supervisory jurisdiction over all courts of the state. This jurisdiction confers upon the Court the power and authority to regulate procedural, evidentiary and other matters in the lower courts. In addition, the Chief Justice has express supervisory power over the district courts under Minn. Stat. §§ 2.724, 480.16 and 542.11.

As discussed in Microsoft's moving memorandum, Minn. R. Civ. P. 42.01 provides for consolidation of actions "involving a common question of law or fact."² While Rule 42.01 does not

²When faced with multiple actions involving common questions of law and fact, both Minnesota and federal courts (applying Fed. R. Civ. P. 42(a)) have found consolidation proper. *See, e.g., Minnesota Personal Injury Cases v. Keene Corp.*, 481 N.W.2d 24, 26 (Minn. 1992) (where each case required same or similar findings of fact and conclusions of law, consolidation

expressly provide for the transfer and consolidation of actions pending in different districts, the Minnesota Supreme Court has indicated that litigants should ask the Court to intervene directly to transfer and consolidate related litigation from different districts. *See Herr & Kindel Minnesota Practice: General Annotated*, § 113.4 (1999 ed.).

In fact, this Court has taken action on several occasions in litigation pending in multiple judicial districts in order to avoid duplication of discovery and inconsistent adjudications, and to preserve the parties' and courts' resources. *See, e.g., Minnesota Personal Injury Asbestos Cases v. Keene*, 481 N.W.2d 24 (Minn. 1992); *In Re Minnesota Silicone Breast Implant Litigation*, 503 N.W.2d 472 (Minn. 1993); *In Re Vitamin Antitrust Litigation*, 606 N.W.2d 446 (Minn. 2000).

In *Keene*, this Court placed all asbestos litigation filed in Minnesota under the control of a single judge. The actions subsequently were transferred to and consolidated in Hennepin County. 481 N.W.2d at 27. The Court's order in the asbestos litigation noted that intervention was necessary because there were a number of asbestos-related actions involving essentially the same defendants and "these actions will involve, in numerous instances, similar questions of law and fact, problems in discovery, theories of recovery and defense . . ." *Id.* Moreover, the *Keene* Court specifically found that transfers of venue resulting from consolidation would result in no prejudice to any party and stated that consolidation was a "proper exercise of the trial court's discretion." *Id.*

The Court again exercised its control over the docket of the lower courts in the silicone breast

was within the discretion of trial court); *see also, State of Ohio v. Louis Trauth Dairy, Inc., et al.*, 163 F.R.D. 500, 503 (S.D. Ohio 1995) (consolidation of multiple antitrust price fixing actions was proper because of numerous common questions of law); *Sherleigh Associates v. Windmere-Durable Holdings*, 184 F.R.D. 688, 691 (S.D. Fla. 1999) (seven class actions involving common issues of law and fact were properly consolidated).

implant litigation. See *In Re Minnesota Silicone Breast Implant Litigation*, 503 N.W.2d 472. As in the asbestos litigation, the Court transferred all actions to the control of a single judge for reasons of judicial economy and interests of the parties.

Most recently, as discussed by Microsoft in its moving memorandum, the Court in *In Re: Minnesota Vitamin Antitrust Litigation*, 606 N.W.2d 446 (Minn. 2000), ordered consolidation of all class action lawsuits currently pending in Minnesota alleging violation of the state antitrust law in the sale and distribution of vitamins and vitamin products. The basis of the Court's intervention in the Vitamins Antitrust Litigation was a set of facts and procedural posture similar to this one:

- plaintiffs had filed multiple separate antitrust class actions in different districts;
- the same or virtually the same defendants were named;
- “[t]he actions involve[d] similar questions of law and fact”;
- there was an obvious potential for “duplicative discovery and other common issues or problems”;
- the class of plaintiffs in each of the actions was “either identical or overlapping in large degree”;
- one district court judge had consented to preside over the consolidated actions.

Id.

Each of these situations presented this Court with essentially the same situation as is present here: multiple actions filed in more than one district involving common questions of law and fact, and the existence of a core group of defendants (in this case, one defendant) named in each suit. Management of these actions by a single Minnesota district court will conserve judicial resources, avoid inconsistent judicial rulings and lead to a more efficient discovery process and trial. Movants therefore request that the Court once again exercise its supervisory jurisdiction to manage the

Minnesota Microsoft antitrust litigation.

II. *Mednick* Should Be Joined With The Other Five Minnesota Microsoft Antitrust Actions In Hennepin County District Court.

In his opposition, Mednick asserts that differences exist between his action and the five other Microsoft antitrust class actions which preclude transfer and consolidation of *Mednick* with the other actions in Hennepin County. This is not the case, for several reasons.

First, notwithstanding that the class in *Mednick* is defined more narrowly than the classes in the other five pending actions, it cannot be disputed (indeed, Mednick admits) that the class in *Mednick* is subsumed within those of the other five class actions. The class action complaints, attached as exhibits to the Affidavit of David Crosby (“Crosby Aff.”) submitted in support of Microsoft’s motion, define the respective classes as follows:

Rubbright v. Microsoft:

“[A]ll individuals and entities who purchased Windows from entities or persons other than Microsoft in Minnesota. Excluded from the class are defendants, their employees, parents, subsidiaries and affiliates.” Ex. A, p. 11, ¶ 18.

Gordon v. Microsoft:

“[A]ll 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. The Class excludes defendants and their co-conspirators, their subsidiaries, affiliates, officers, and employees, and governmental entities.” Ex. E, p. 4, ¶ 8.

Nielsen v. Microsoft:

“All persons or entities who indirectly purchased, leased or licensed Microsoft Windows or Microsoft Internet Explorer, in Minnesota, for their own use and not for resale (the “Class”).

Excluded from the Class are Microsoft; officers, directors or employees of Microsoft; any entity in which Microsoft has a controlling interest; the affiliates, legal

representatives, attorneys, heirs, or assigns of Microsoft; and any federal, state or local governmental entity, and any judge, justice or judicial officer presiding over this matter and the members of their immediate families and judicial staffs.” Ex. B, pp. 4-5, ¶ 11.

Mednick v. Microsoft:

“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.” Ex. F, p. 5, ¶ 16.

Klein v. Microsoft:

“Class #1 -- All residents and citizens of Minnesota who, as of the date of the filing of this Complaint or for four years prior, purchased any version of Windows operating system software.”

“Class #2 -- All residents and citizens of Minnesota who, as of the date of the filing of this Complaint or for four years prior, purchased a computer with Windows pre-installed, and who do not use Microsoft Internet Explorer.” Ex. C, pp. 3-4, ¶ 9.

Jaffe v. Microsoft:

“[A]ll 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 PC operating systems licensed by Microsoft. The Class excludes defendants and their co-conspirators, their subsidiaries, affiliates, officers, and employees, and governmental entities.” Ex. D, p. 4, ¶ 8.

Second, all six class actions name the same defendant -- Microsoft.

Third, it is not disputed that all six actions arise from the same or an overlapping set of facts.

Fourth, all six actions present the same or substantially similar legal claims:

Rubbright:

- monopolization under Minn. Stat. § 325D.49 *et seq.* Ex. A, pp. 12-13, ¶¶ 25-29.

- unreasonable restraint of trade under Minn. Stat. § 325D.51 and 53. *Id.*, p. 13, ¶¶ 30-32.

Gordon:

- illegal combination in restraint of trade under Minn. Stat. §§ 325D.51, *et seq.* Ex. E, p. 20, ¶¶ 56-58.
- illegal monopolization under Minn. Stat. §§ 325D.52 *Id.*, p. 21, ¶¶ 59-61.

Nielsen:

- violation of the Minnesota Antitrust Law. Ex. B, pp. 13-15, ¶¶ 43-50.

Mednick:

- monopolization under Minn. Stat. § 325D.51. Ex. F, pp. 21-22, ¶¶ 61-71.

Klein:

- monopolization under Minn. Stat. § 325D.52. Ex. C, pp. 16-17, ¶¶ 45-48.
- restitution. *Id.*, pp. 17-18, ¶¶ 49-52.
- violation of the Consumer Protection Act under Minn. Stat. § 325F.69. *Id.*, p. 18, ¶¶ 53-57.

Jaffe:

- deceptive acts or practices in violation of the Minnesota Uniform Deceptive Trade Practices Act, §§ 325D.44 *et seq.* Ex. D, pp. 20-21, ¶¶ 56-60.
- illegal combination in restraint of trade in violation of the Minnesota Antitrust Law. *Id.*, p. 21, ¶¶ 61-63.
- illegal monopolization in violation of the Minnesota Antitrust Law. *Id.*, p. 22, ¶¶ 64-66.

Fifth, as described by Microsoft in its moving memorandum, there were four class action antitrust lawsuits brought against Microsoft in Hennepin County District Court in addition to the

pending *Gordon* action, including the first-filed *Rubbright Group* action. Those four actions were removed to federal court by Microsoft, transferred by order of the Judicial Panel on Multidistrict Litigation, and now are pending in the federal district court for the District of Maryland. All four actions are subject to a pending motion for remand which will be heard on October 13, 2000. If those actions are remanded, there is no question that the Hennepin County District Court will consolidate all five actions initially brought in Hennepin County.

Finally, no prejudice would result to Microsoft or to any other party, including the *Mednick* plaintiffs, if the Court transfers and consolidates these cases in Hennepin County. All of the named plaintiffs in each action are likely to be members of the same overlapping plaintiff class. Moreover, each action is at an early stage such that transfer and consolidation of this litigation in Hennepin County would create no issue of prejudice associated with attempts to consolidate cases at a later stage of the proceedings.³

CONCLUSION

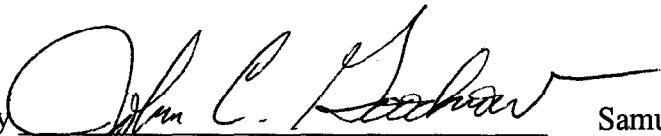
For these reasons, Movants join in Microsoft's motion and respectfully request that this Court issue an order transferring and consolidating in Hennepin County District Court all actions currently pending, and all actions (if any) subsequently brought in Minnesota District Court, alleging violations by Microsoft of the Minnesota Antitrust Act arising from a set of facts and law common

³Movants are aware that Judge Peterson has already expressed his willingness to hear a consolidated action and have no objection to his doing so. However, while Movants agree with Microsoft that these actions should be consolidated in Hennepin County District Court, Movants also note that the *Rubbright Group* action was assigned to Judge Robert H. Lynn and that Judge Lynn, by virtue of having presided over the first-filed action, could therefore also be an appropriate choice. Movants would have no objection to having the action consolidated before Judge Lynn, Judge Peterson, or any other judge of Hennepin County District Court selected by this Court and/or the court administrator.

to those alleged in the six actions discussed herein.

Dated: August 22, 2000

**ZELLE, HOFMANN, VOELBEL &
GETTE LLP**

By 
Richard M. Hagstrom (#39445)
Michelle K. Enright (#193069)
John C. Goodnow (#158732)
City Center, Suite 4400
33 South Sixth Street
Minneapolis, MN 55402
Telephone: (612) 339-2020

Samuel D. Heins
Daniel E. Gustafson
Vincent J. Esades
HEINS MILLS & OLSON, P.L.C.
700 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
Telephone: (612) 338-4605

Alice McInerney
KIRBY, McINERNEY & SQUIRE LLP
830 Third Avenue
New York, NY 10022
Telephone: (212) 371-6606

Leonard B. Simon
Dennis Stewart
Alan M. Mansfield
Michael J. Flannery
**MILBERG WEISS BERSHAD
HYNES & LERACH LLP**
600 West Broadway, Suite 1800
San Diego, CA 92101
Telephone: (619) 231-1058

Kenneth J. Vianale
**MILBERG WEISS BERSHAD
HYNES & LERACH LLP**
The Plaza, Suite 900
5355 Town Center Road
Boca Raton, FL 33486
Telephone: (561) 361-5000

David J. Bershad
Robert A. Wallner
Joseph Opper
**MILBERG WEISS BERSHAD
HYNES & LERACH LLP**
One Pennsylvania Plaza
New York, NY 10119-0165
Telephone: (212) 594-5300

ATTORNEYS FOR MOVANTS