SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

CHARLES COX and OLD FACTORIES, INC., Individually and on Behalf of all Others Similarly Situated,

Plaintiffs,

- v -

Microsoft Corporation and Does 1-100, inclusive

Defendants.

INDEX NO 105193/2000

MOTION DATE

MOTION SEQ. NO. 006

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying **Findings of Fact, Conclusions of Law and Final Order and Judgment**

Dated: July 19, 2006

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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COUNTY OF NEW YORK: IAS Part 3

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Index No. 105193/2000

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER AND JUDGMENT

KARLA MOSKOWITZ, J:

Plaintiffs Charles Cox and Old Factories Inc. on behalf of themselves and all others similarly situated and defendant Microsoft Corporation ("Microsoft") seek judicial approval of a proposed settlement set forth in an agreement "made and entered into, subject to court approval, as of December 16, 2005." ("Settlement"). On June 13, 2006, I held a fairness hearing during which the court heard from the parties as well as from people objecting to the Settlement.

To determine whether to approve the Settlement, the court considered:

- Microsoft's Memorandum in Support of Plaintiffs' Motion for Final Approval of the Settlement dated June 6, 2006

- Plaintiffs' Memorandum of Law in Support of Application for an Award of Attorneys' Fees and Reimbursement of Expenses dated May 5, 2006

- Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Settlement dated May 5, 2006

- Affidavit of Ryan C. Williams, sworn to June 5, 2006

- Affidavit of Katherine Kinsella, sworn to May 8, 2006

- Affidavit of Daniel Hume in Support of Motion for an Award of Attorneys' Fees and Reimbursement of Expenses, sworn to May 5, 2006

- Affidavit of David S. Stellings in Support of Motion for an Award of Attorneys' Fees

and Reimbursement of Expenses, sworn to May 4, 2006

- Affidavit of J. Douglas Richards in Support of Motion for an Award of Attorneys' Fees and Reimbursement of Expenses, sworn to May 4, 2006

- Affidavit of Professor Geoffrey P. Miller, sworn to May 4, 2006

- Declaration of Richard H. Redfern, sworn to May 3, 2006

- Affidavit of Robert J.Gralewski, Jr. in Support of Motion for an Award of Attorneys' Fees and Reimbursement of Expenses, sworn to May 3, 2006

- Affidavit of Ryan C. Williams, sworn to February 1, 2006

- Declaration of Katherine Kinsella, sworn to January 31, 2006

- Affidavit of Mark Bogen in Support of Motion for an Award of Attorney's Fees and Reimbursement of Expenses (undated)

- Affirmation of Daniel P. Chiplock, Esq. dated May 4, 2006

- Joint Affirmation of Plaintiffs' Lead Counsel Daniel Hume, J. Douglas Richards and David S. Stellings (undated)

The court also considered objections from various class members and Plaintiffs' Reply to Objections to Proposed Settlement dated June 6, 2006.

On the basis of the fairness hearings and the submissions from the parties and objectors, the court makes the following findings of fact and conclusions of law and issues its final order and judgment approving the Settlement and dismissing the complaint with prejudice. The court reserves its decision on the reasonableness of attorneys' fees and will render a later decision on that issue.

I. BACKGROUND

Plaintiffs filed the original complaint in this action in March 2000 claiming violations of the Donnelly Act. On April 26, 2000, Microsoft moved to strike the class allegations in

Plaintiffs' initial complaint. On November 29, 2000, the Court (Cozier J.) granted Microsoft's motion and struck the complaint's class actions allegations in their entirety. Justice Cozier held that a class action was not proper under the Donnelly Act. In January 2002, the Appellate Division, First Department, affirmed the decision of the trial court. Although plaintiffs sought leave to appeal further, the Court of Appeals declined to hear the question of whether a class action was proper under the Donnelly Act.

Undeterred, on October 30, 2002, plaintiffs filed an amended class action complaint alleging that Microsoft violated New York General Business Law ("GBL") § 349 and was unjustly enriched through the use of anti-competitive practices in the design of its operating system ("Complaint"). The class included "all persons and entities who, from and including May 18, 1994, through December 31, 2004 (the "Class Period"), indirectly acquired a license for Microsoft Operating System and/or Microsoft Applications software for use in New York and who did not acquire it for the purpose of resale." (The "New York Class" or "Class"). (Settlement at 2).

Specifically, plaintiffs accused Microsoft of engaging in anti-competitive conduct that two federal courts already found Microsoft perpetrated in two actions that the federal government brought against Microsoft. (*See United States v Microsoft*, 56 F 3d 1448 (D.C. Cir.) (Microsoft I), and *United States v Microsoft*, 84 F Supp 2d 9 (D.D.C.) (Findings of Fact), and 87 F Supp 2d 30 (D.D.C.) (Conclusions of Law), *aff'd in part, rev'd in part, and remanded* 253 F 3d 34 (D.C. Cir.) [Microsoft II]).

The federal court decisions found an "applications barrier to entry," by which consumers' interest in an operating system derives primarily from the ability of that system to run software

applications. (*See Microsoft II*, 253 F 3d at 55-56). Windows 95 and Windows 98 are operating systems. Plaintiffs allege that from 1988 to 1998 several products, known as middleware products, threatened to weaken, or circumvent the applications barrier to entry that had insulated Microsoft from competition. (Complaint, ¶ 92). Middleware products include Netscape Navigator ("Navigator"), a web browser that is a complement to, not a substitute for, Windows. Plaintiffs allege that, when Navigator became popular, shortly after its introduction in December 1994, Microsoft misled Netscape and the public by conditioning the availability of essential technical information that Netscape needed on Netscape's willingness to agree to certain secret proposals that would have limited Netscape's development of platform-level browsing technologies for Windows 95. (Complaint, ¶ 127 [a]).

Plaintiffs further allege that, to steer consumers away from using Navigator, Microsoft secretly engineered the computer code for Microsoft's Internet Explorer ("IE") to cause a malfunction when a consumer used any browser, such as Navigator, other than IE. (*Id.*, ¶ 127 [h]). Plaintiffs allege that Microsoft engineered this defect to deceive consumers into believing that browsers other than IE, such as Navigator, caused the malfunction. (*Id.*). Plaintiffs allege that Microsoft continued this strategy on Windows 98. (*Id.*, ¶ 127 [i]). In the federal action, the District Court found that Microsoft designed Windows 98 so "that [in some circumstances] using Navigator on Windows 98 would have unpleasant consequences for users," overriding the user's choice of a browser other than IE as his or her default browser. (Microsoft II, Findings of Fact, ¶ 172).

After plaintiffs filed the Complaint in October 2002 containing their amended causes of action for violation of GBL § 349, unjust enrichment and breach of implied warranty, Microsoft

moved to dismiss. I denied that part of Microsoft's motion to dismiss the GBL § 349 claim, but granted that part of the motion seeking dismissal of the unjust enrichment and breach of implied warranty claims. Both sides appealed.

By Order dated June 8, 2004, the Appellate Division reinstated plaintiffs' claim for unjust enrichment and otherwise affirmed the ruling. The Appellate Division found it did not matter that, as indirect purchasers of Microsoft's software products, plaintiffs only indirectly bestowed a benefit upon Microsoft and stated that "plaintiffs' allegations that Microsoft's deceptive practices caused them to pay artificially inflated prices for its products state a cause of action for unjust enrichment." (*Cox v Microsoft Corp.*, 8 AD3d 39, 40 [1st Dept 2004]). Microsoft moved for leave to appeal this decision to the Court of Appeals but was not successful. On July 29, 2005, I certified that this case could proceed as a class action. On December 16, 2005, the parties executed the Settlement. On February 3, 2006, I preliminarily approved the Settlement and set a fairness hearing for June 13, 2006.

II. THE PROPOSED SETTLEMENT

The Settlement calls for Microsoft to make available to Class members up to $350 million in vouchers that Class members can use to purchase computer equipment, not necessarily Microsoft's. The Class members may redeem the vouchers for cash in limited circumstances. (Settlement at 21).

The Settlement provides for those Class members who have filed a claim to obtain consumer vouchers with a face value of $12.00 for each license of certain Microsoft operating systems, $5.00 for each license of certain Word, Excel or Office software titles and $5.00 for each license of certain MS-DOS or Windows operating systems (including Windows XP). (Settlement

at 18). The time period for filing a claim expires on October 18, 2006.

Class members can aggregate vouchers and can transfer up to $650 worth of vouchers. However, a single transferee cannot receive more than $10,000 worth of vouchers. The vouchers are transferrable to Class members and non-Class members. (Settlement at 19-20).

The Class member seeking vouchers for five licenses or less need only provide a declaration setting forth that Class member's name, contact information, certain identifying information (such as the last four digits of a social security number), the number of licenses of each type of product at issue in this litigation that the Class member purchased, the year of purchase and the identity of the seller(s). Those seeking vouchers for more than five licenses must, in addition to the declaration, provide some proof for their purchases such as a product identification number. (Settlement at 24). Class members have a four-year period after the claims period ends to redeem their vouchers. As of April 30, 2006, the Settlement Administrator had received and logged approximately 70,013 standard and World Wide Marketing Database ("WWMDB") Claims forms and 933 Volume License Claims Forms. (Declaration of Richard H. Redfern, sworn to May 3, 2006 at ¶ 61) ("Redfern Aff.").

In consideration for the vouchers, the Settlement provides for the Class members to release certain claims against Microsoft and for dismissal of the action with prejudice. The released claims relate to: (1) antitrust, (2) deceptive practices, (3) unfair competition, (4) unfair practices, (5) price discrimination, (6) trade regulation, (7) trade practices and (8) other law similar or analogous to any of the above as long as the claims relate to Microsoft's conduct on or before December 31, 2004. (Settlement at 16-17).

Finally, the Settlement Agreement requires Microsoft to bear the costs of Settlement

administration including sending notice of the proposed Settlement to all Class members.

There will inevitably be some Class members who do not make a claim or who do not redeem their vouchers. Accordingly, the parties fashioned a *cy pres* remedy to distribute some portion of the settlement that Class members do not utilize. The Settlement provides for a *cy pres* remedy in the form of vouchers that certain needy schools may use to purchase platform-neutral computer hardware, software, training and support. The eligible schools ("Eligible Schools") are those public schools in New York in which at least 50% of the attending students are eligible to receive free or reduced-price meals through the National School Lunch Program. (Settlement at 5-6).

The amount of *cy pres* distribution is half the difference between $225 million and the amount of consumer vouchers that Rust Consulting Inc. (the "Settlement Administrator") issues. (Settlement at 32). Fifty percent of the *cy pres* distribution will be in the form of "General Purpose Vouchers" and the other 50% will be in the form of "Software Vouchers." (*Id.*).

The General Purpose vouchers are redeemable for: (1) Qualifying Hardware[1]; (2) any non-custom software used with the hardware acquired through the use of the General Purpose Vouchers; (3) services that, in the Settlement Administrator's view, primarily involve the maintenance or installation of hardware or software acquired through the use of the General Purpose or Software Vouchers; and (4) professional development services and training that, in the Settlement Administrator's view, are for use of the hardware or software acquired through the use of the General Purpose or Software Vouchers. (Settlement at 33). Eligible Schools may also

[1] "Qualifying Hardware" is "any new desktop, laptop or tablet computer for any operating system platform" purchased after the date of preliminary approval of the Settlement. (Settlement at 20). "Qualifying Hardware also includes peripheral devices that are: printers, scanners, monitors, keyboards and pointing devices (e.g., mouse, trackball etc). (*Id.*).

redeem General Purpose Vouchers for equipment needed for networking and infrastructure, hardware for accessing the Internet through television and access for student's homes, certification training for software and networking, tablet computers or comparable technology that may become available, non-custom assistive technology devices and non-custom software for students with special needs to use and evaluation tools to assist in monitoring the program and the use of the vouchers. (Settlement at 33-34). Thus, the Eligible Schools may redeem the General Purpose Vouchers for certain costs incident to owning computers, such as installation, maintenance and support.

Eligible Schools may redeem the Software Vouchers for Microsoft operating system software, word processing software, spreadsheet software, presentation software, desktop relational database software oriented towards single users and typically residing on a standard personal computer, web-authoring software, productivity suite software, encyclopedia software and server software. (Settlement at 34). They may also redeem Software Vouchers for any non-custom software bundled with hardware acquired through the General Purpose Vouchers. (Settlement at 35). However, the software vendors supplying the software pursuant to the vouchers must certify that the software it is selling to Eligible Schools is at a price no greater than the standard academic price, or, if an academic price is not available, the standard price. (Settlement at 38).

The time line for the distribution of the *cy pres* vouchers is as follows: within 60 days after the effective date of the Settlement, the Settlement Administrator shall calculate the *cy pres* amount. Within three months of the close of the Claims Period, the Settlement Administrator shall identify which school districts in New York have Eligible Schools. (Settlement at 33). The

Settlement Administrator will then estimate the number of students attending those Eligible Schools and will distribute the *cy pres* general purpose and software vouchers on a *pro rata* basis to the schools no later than 180 days after the close of the claim period.

III. NOTICE AND JURISDICTION

This court has subject matter jurisdiction over this action pursuant to CPLR Article 9 and the grant of general, original jurisdiction in law and equity provided in the Constitution of New York State.

Between March 13, 2006 and March 31, 2006, the Settlement Administrator had a printing and mailing service, Vertis, mail 1,150,587 Standard Notice Packages and 1,306,866 WWMDB Notice packages. (Redfern Aff. at ¶¶ 11 and 29). Between March 13, 2006 and April 20, 2006, the Settlement Administrator used local print and mail vendors to mail 155,092 Volume License Notice Packages. (Redfern Aff. at ¶ 30). Between April 11, 2006 and April 15, 2006, Vertis e-mailed notices to 1,850,157 e-mail addresses. Each of the e-mailed notices included a link to a case-specific website that allows potential Class members to obtain detailed information about the settlement and permits Class members to download claims forms. (Settlement at 12-13; Redfern Aff. ¶¶ 34). The Settlement Administrator established that website on January 27, 2006 at www.microsoftNYsettlement.com. The website has logged tens of thousands of visitors and over 13,000 have printed out claims forms or asked for a mailed version. (Redfern Aff. at ¶¶ 55-56). During the notice period, the Class members received mailed written notice of the Settlement, e-mail notice of the Settlement and on-line notice of the Settlement. (Settlement at 12-13). With the help of class counsel, the Settlement Administrator also hired and trained 43 telephone representatives and supervisors to staff a telephone center to receive calls from Class members.

(Redfern Aff. at ¶ 43).

In addition, notice appeared in 40 weekly papers and 31 Sunday edition papers. (Affidavit of Kathryn Kinsella, sworn to May 8, 2006 at ¶¶ 11-12) ("Kinsella Aff."). Notice appeared in newspaper supplements, consumer magazines and internet access providers (banner ads). (Kinsella Aff. ¶¶ at 13-15).

If Microsoft had a record that a specific Class member had purchased one of its products, that information was included with the notice to that particular Class member. (Redfern Aff. at ¶¶ 8 and Exhibit B).

To opt-out, Class members must have individually signed and submitted timely written notices to Post Office Boxes that the Settlement Administrator designated before the expiration of the opt-out period on May 18, 2006. The Settlement also provided procedures for objecting to it.

The notice included (i) a description of the litigation; (ii) identification of the New York Class; (iii) names and addresses of both parties' counsel and the address of the Clerk of the Court; (iv) a summary of the proposed Settlement terms; (v) instructions and deadlines for filing objections; (vi) instructions and deadlines for requesting exclusion from the Class; (vii) the hearing date and presiding Judge; (viii) consequences of remaining in the Class and opting out of the Class; (ix) that Class counsel seek attorneys' fees of $23.5 million plus reasonable costs and request $7,500 for each of the Class representatives and (x) how to receive additional information, including the website address. (*See e.g.* Redfern Aff., Exhibit A). In addition, the notice apprizes Class members of the consequences of participating in the Settlement and includes the language of the release that Class members need to execute to obtain the benefits of the Settlement. (*Id.*).

The court finds that the combination of individual mailing, e-mail, website and publication

notice in this action is the most effective and best notice practicable under all the circumstances, constitutes due, adequate and reasonable notice to all Class members and otherwise satisfies the requirements of CPLR 904, 908 and other applicable rules. The Settlement meets the due process requirement for class actions by providing Class members an opportunity either to be heard and participate in the litigation or to remove themselves from the Class. (*See Philips Petroleum Co., v. Shutts*, 472 US 797, 812).

Neither the CPLR nor due process requires that each Class member actually receive individual notice. (*See In re Colt Indus. Shareholder Litig.*, 155 AD2d 154, 157 and 160, *aff'd as modified*, 77 NY2d 185 [approving the sufficiency of notice where the proposed settlement was published in two New York newspapers on one day]). The parties have provided the best practicable notice to all Class members and an opportunity to opt-out of the Class. Class counsel have adequately represented the interests of the Class throughout these proceedings. Accordingly, this court has personal jurisdiction over this Class consistent with the requirements of CPLR Article 9 and due process.

IV. THE FAIRNESS, REASONABLENESS AND ADEQUACY OF THE PROPOSED SETTLEMENT

In order to approve the settlement of a class action, a court must find that the settlement is fair, reasonable and in the best interests of the class. *(Rosenfeld v. Bear Stearns & Co., Inc.*, 237 AD2d 199; *Weinberger v. Kendrick*, 698 F2d 61, 73 [2d Cir. 1982]). The following factors are relevant to the court's determination: (1) the likelihood that plaintiff would succeed on the merits or an assessment of the litigation risks; (2) the extent of support from the parties; (3) the judgment of counsel; (4) the presence of good faith bargaining and (5) the complexity and nature of the legal and factual issues. *(See Colt. Indus. Shareholder Litig.*, 155 AD2d at 160; *State v. Philip Morris*,

179 Misc2d 435, 440).

The Settlement provides significant benefits to the Class. Even if only a small percentage of the Class members cash in their vouchers, the Settlement still retains value through the *cy pres* provisions. For example, even if no Class members utilize their vouchers (this is not likely to occur because about 70,000 Class members have already submitted claims), the Settlement would still be worth $150 million. This is because Microsoft has agreed to give that amount in vouchers to New York public schools in the event none redeem their vouchers. In addition, Microsoft has agreed to pay the costs of notice, Settlement administration and Class attorney fees. It is appropriate to consider these costs part of the value of the Settlement. (*See Michels v Phoenix Home Life Mut. Ins. Co.*, 1997 NY Misc. Lexis 171, at * 78 [Albany Cty. Jan. 3, 1997]).

Items available for purchase include many products that sell for $100 or less. (*See* Miller Aff. at ¶ 37). Thus, vouchers with face amounts of $5.00 to $12.00 represent a reasonably high percentage of the value of those products. Because it is possible to aggregate vouchers, Class members may be able to pay for the full amount of an item. In addition, because of the ever-evolving nature of computer technology, Class members are likely have a frequent need to purchase new products. (*See* Miller Aff. at ¶ 14). The range of redeemable hardware and software is broad and goes beyond Microsoft's products. The time period for redemption is four years from the date of issue, a more than adequate time period given how quickly computer products become outdated. The vouchers are transferrable up to $10,000 to any one transferee. The Settlement Administrator will set aside half the difference in value between $225 million and the total amount of vouchers issued and distribute vouchers to public schools serving underprivileged communities. Thus, it is clear that the Settlement affords a substantial benefit to the Class, particularly in light of

the likely small amount of individual damage.

Other factors militate in favor of approving this Settlement.

(1) Likelihood of Plaintiff's Success

Were this case to proceed, plaintiffs faced heavy obstacles both on the legal front and because the presentation of the evidence involved would have been difficult. There is now a split between the Appellate Division, First Department and the Appellate Division, Second Department regarding whether privity is necessary to support a claim for unjust enrichment. (*Compare* the Appellate Division First Department's reversal of this court in *Cox v. Microsoft*, 8 AD3d 39, with the recent opinion of the Appellate Division, Second Department in *Sperry v. Crompton Corp.*, 26 AD2d 488, 810 NYS2d 498). Plaintiff indicates on page 7 of its Memorandum in Support of Approval of Settlement ("Pl. Mem.") that the *Sperry* plaintiffs have made a motion for leave to Appeal to the Court of Appeals on the issue of the privity requirement. Plaintiffs face a risk that the New York Court of Appeals will affirm the decision of the Appellate Division, Second Department thereby eliminating plaintiffs' strongest claim. In addition, to prevail on its GBL § 349 claim, plaintiffs would have to show that Microsoft deceived consumers and that its conduct was directed at consumers. (*See Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA, Inc.*, 3 NY 3d 200, 206 [2004]).

Plaintiffs also face a serious risk that this court would allow Microsoft to relitigate facts and law that the District Court and the D.C. Court of Appeals found in *United States v. Microsoft* as there may be insufficient similarity between the issues in both cases to apply collateral estoppel. For example, plaintiffs' claims here allege deceptive conduct involving numerous products over a period of 15 years. The government's case involved only Windows 98. Also, the government's

antitrust action required different levels of proof as to causation. Plaintiffs here would have to establish that Microsoft deceived the consuming public to establish their GBL claim.

To demonstrate damages, plaintiffs would have to show that any overcharge Microsoft created passed through to indirect purchasers. The proof to establish this "pass through" overcharge is complicated because: (1) dozens of software products are at issue; (2) the distribution of the products occurred over many years; (3) Class members acquired these products through thousands of third parties who made their own pricing decisions; (4) many of these third parties were down on the distribution chain from Microsoft and its alleged overcharging; and (5) many of the Class members acquired the software at issue as a component of a personal computer in which the software accounted for only a small portion of the total price.

Plaintiffs also expect that, to reduce damages, Microsoft would argue that plaintiffs have actually benefitted from Microsoft's conduct because its products are better than its competitors and that prices for the products at issue have really declined on a "quality adjusted" basis. (Pl. Mem. at 34). Finally, should this case not have settled, Microsoft was prepared to finalize an appeal of this court's decision to certify the Class. Thus, a trial of this case would be risky for plaintiffs and there is a significant chance that they would not recover anything.

(2) Extent of Support from the Parties

The Class appears to support the Settlement. Between March 13, 2006 and March 31, 2006, Vertis mailed 1,150,587 Standard Notice packages and 1,308,866 WWMDB Notice packages. Between March 13, 2006 and April 20, 2006, the Settlement Administrator arranged for the mailing of 155,092 Volume License Notice packages. As of April 28, 2006, the Settlement Administrator had mailed approximately 4,791 notice packages as a result of inquiries. (Redfern

Aff. at ¶ 33). In addition, Vertis e-mailed 1,850,157 notices between April 11, 2006 and April 20, 2006. (Redfern Aff. at ¶ 36). The Settlement Administrator has e-mailed an additional 1,935 notices pursuant to requests. (Redfern Aff. at ¶ 37).

As of April 30, 2006, the Settlement Administrator had received and logged approximately 70,013 Standard and WWMDB Claims Forms and 933 Volume License Claim Forms. (Redfern Aff. ¶ 61). The Settlement Administrator is reviewing these claims forms for validity. Even though there were millions of Class members who received notice and even though the Settlement Administrator has received 70,013 Standard and WWMDB Claims Forms and 933 Volume License Claim Forms, the Settlement Administrator has received only 468 pieces of correspondence from Class members. (Redfern Aff. at ¶ 60). The small number of opt-outs and objections from Class members compared to the size of the Class supports approval of the Settlement. *(In re Lorazepan and Clorezepate Antitrust Litig.*, 205 FRD 369, 378 (D.D.C. 2002); *Sutton v. Medical Services Assoc.*, 1994 WL 246166 at * 9 [E.D. Pa. June 8, 1994]).

(3) Judgment of Counsel

In determining whether to approve a class action settlement, "[t]he court should be able to rely upon the judgment of experienced counsel in determining whether or not the settlement is fair." (*Peterson v. Arvida/JMB Partners*, L.P. II, 1994 U.S. Dist. Lexis 2109 at *38 (N.D. Ill. Feb. 25, 1994); *In re Nasdaq Market-Makers Antitrust Litig.*, 187 FRD 465, 473-74 [SDNY 1998]). The Court approved several law firms to act as lead Class counsel: (1) Kirby McInerney & Squire LLP; (2) Milberg Weiss Bershad & Shulman, LLP; (3) Lieff Caraser Heimann & Bernstein LLP; along with (4) Mark Bogen PA; and (5) Gergosian and Gralewski, LLP. These counsel have many years experience in plaintiffs' class action litigation (*See* Joint Affirmation of Plaintiffs' lead

counsel, sworn to [undated] at ¶ 3), including prosecuting consumer class actions against Microsoft in other states. (*Id.* at ¶ 5). Thus, the Class received representation from not one, but several highly qualified law firms to act on behalf of the Class. The support of qualified counsel is significant to approval of the Settlement. (*Michels* v. *Phoenix Home Life Mut. Ins. Co.*, 1997 N.Y. Misc. Lexis 171 [Albany Cty. Jan 3, 1997; *see also Smith v. Vista Org. Ltd.*, 1991 WL 152612 at *5 [SDNY July 30, 1991]).

In addition, counsel for both sides submitted this Settlement after using their best efforts to negotiate. The submissions to this court and the statements counsel made at oral argument indicate that they carefully evaluated the risks of litigation and balanced their decision to accept the Settlement in light of those risks and what they had achieved in settling this case.

(4) The Presence of Good Faith Bargaining

The negotiations leading up to the Settlement were lengthy. Settlement discussions with Microsoft began after the court's July 31, 2005 decision certifying the Class. Negotiations took place over several months from August 2005 until December 2005. The parties did not reach a settlement until December 16, 2005. That the negotiations took as long as they did reflects an arduous negotiation process. That the parties bitterly contested this lawsuit over so many years and were able to reach this compromise also indicates good faith bargaining.

(5) Complexity and Nature of the Factual and Legal Issues

As addressed earlier, this litigation is complicated because of the difficulty in determining causation and damages. The danger that future decisions could go against plaintiffs made it particularly risky to proceed with this case. Accordingly, the nature of the factual and legal issues in this case weighs in favor of approval.

V. OBJECTIONS

Class members expressed several types of objections to the terms of the Settlement. However, none of them warrant denying approval of the Settlement.

(1) Objections to the Terms of the Settlement.

The bulk of the objections relate to the amount of attorneys' fees that the law firms representing the plaintiff class have requested. The court will address these objections in a later decision and order relating to attorneys' fees.

The second largest category of objections concern general dislike of the lawsuit. Objections in this category expressed admiration for Microsoft, a belief that the claims against Microsoft are spurious or a general disapproval of class actions. However, Class members who do not wish to participate in the Settlement are free to opt-out and Microsoft's other contributions to the world have little bearing on the conduct plaintiffs have complained of in this case.

Several Class members objected to the Settlement on the grounds that it provides insufficient benefits to Class members. For example, a few objectors commented that some or all of the Class members will not use their vouchers. However, this is not a reason to reject the Settlement. (*See e.g. Schwab v. Philip Morris USA, Inc.*, 2005 WL 3032556 AT 62 [EDNY Nov. 14, 2005]; *In re Mexico Money*, 267 F3d 743, 748 [7th Cir. 2001]). Indeed, courts routinely approve coupon settlements with the understanding that not all class members will actually use the coupons. (*See e.g. In re Compact Disc Minimum Advertised Price Antitrust Litigation,* 292 F Supp 2d 184, 186-187 [D. Maine 2003]; *In re Excess Value Ins. Coverage Litigation,* 2004 WL 1724980 at *13 [SDNY July 30, 2004]; *In re Mexico Money*, 267 F.3d 743; *In re Domestic Air Transp. Antitrust Litig.*, 148 FRD 297, 3081.1 [ND Ga. 1993]. In addition, here, the parties have provided

that unused vouchers would go to needy New York schools, making Class members' failure to use the vouchers an insufficient reason to reject the Settlement.

Some objectors argue that the court should eliminate or reduce the requested incentive awards to the Class representatives. However, the Class representatives in this case consulted periodically with counsel throughout the long life of this case, as well as appeared for depositions. Apparently, Mr. Cox even had to make a trip to New York from his current residence in Florida for his deposition. Therefore, the requested incentive awards are fair compensation for the efforts the Class representatives made on behalf of the Class. Also, Microsoft will pay the fees of the Class representatives separately and therefore the fees do not reduce the overall benefit to the Class.

One objector complained that the notice provided inadequate substantive information to permit Class members to understand what the case is about. However, the notice is written in plain language that is easy to understand. It would be much more difficult for consumers to follow had it contained details concerning the complex antitrust and technological issues this case involved. Further, the notice provides a toll-free number that Class members can call with questions about the Settlement. If a Class member wishes to request a copy of the complaint in this case, the notice form provides the names of counsel from whom to make a request. Thus, there is no reason to object based on the information the notice contains.

Some objectors suggested that the *cy pres* program might replace some other charitable program that Microsoft would have funded (*See e.g.* Objection of Gayle Gordon). However, in the Settlement Agreement, Microsoft explicitly agrees that the *cy pres* program will not reduce its other charitable giving. (*See* Settlement Agreement § VI.I).

One objector, Louis Burke ("Burke"), objected to the Settlement because he believes the

Class Period is too long because it extends for two more years after the entry of Final Judgment on November 12, 2002 in *U.S. v. Microsoft*, Civil Action No., 98-1232 (CKK). Burke elaborates that, since November 12, 2002 (the date of the final judgment in *U.S. v Microsoft*, Civ. Action No. 98-1232 [CKK]), Microsoft has been operating in the United States with significant restrictions on its business that limit its ability to abuse its monopoly power in the market for personal computer operating systems and software. (Burke Aff. at pg. 2). Burke argues that the release in this case will "effectively immunize Microsoft against claims arising out of conduct in violation of New York and federal antitrust laws and New York consumer protection laws during the period ending December 21, 2004." (*Id.* at pg. 3).

To the extent the court understands the argument Burke is trying to make, it is a non-sequitur. It is unclear to this court how the existence of the final judgment in *U.S. v. Microsoft* and its date of November 12, 2002 make the claims in this case that arise after December 31, 2002 stronger. In fact, one can presume that Microsoft is complying with that Final Judgement and therefore claims arising after the date of that judgment actually are weaker than the ones arising prior to that date. Nor does Burke identify any private damage claims that have arisen for the additional two years after December 31, 2002.

Several objectors complained that they did not retain documentation of their purchases and therefore were unfairly cut off from receiving their vouchers. However, a member of a Class other than a Volume Licensee (a member of the New York Class who licensed a Microsoft Operating System or Microsoft Application through Microsoft's volume licensing program) may submit up to five license claims with only a sworn declaration under the penalty of perjury. (Settlement at 23). The Settlement Administrator shall approve these claims without requiring further documentation

unless there is reasonable cause to suspect that the claim is fraudulent or otherwise improper. (*Id.*). Thus, in most cases, the Settlement does not require documentation beyond a sworn statement.

The Class member can also submit materials online, including the sworn statement and the Product Identification ("PID") number for each license. (*Id.*). In addition, for those Class members who have more than five license claims, the Settlement allows for the sworn statement previously described and either: (1) the PID number; (2) the Product Key number that can be obtained from a variety of sources; (3) the original COA; (4) printed information obtained from Microsoft's End User Data; or (5) receipts reflecting the purchase of Microsoft products that are eligible for Settlement benefits. (*Id.* at 24-25). If the Class member lacks these proofs of qualification, class members are free to support their claim with other proof as the parties and the Settlement Administrator agree to take. (*Id.* at 25). The additional written evidence must be clear and convincing. Finally, a Class member who is unable to locate any documentation can request Microsoft to search its records for license information. (*Id.* at 26).

Those Volume Licensees seeking vouchers can support their claims by submitting a sworn declaration and proof of licensing such as the claimant's license agreement, interim true-up orders, receipts and other proof endemic to the volume licenses. (*Id.* at 25).

Some Class members complained at being included in the Class and one suggested that the parties should have resorted to an opt-in class. However "[t]here is no legal or constitutional principle that mandates the use of the opt-in method," *(Hibbs v. Marvel Enterprises, Inc.*, 19 AD3d 232, 233 [1st Dept 2005]) and courts regularly approve class action settlements incorporating an opt-out method. Here, there is no basis to believe that the opt-out method somehow prevented Class members "from exercising an informed choice as to whether to

participate in the settlement." (*Id.*). Thus, there is no reason to reject the Settlement because it did not utilize an opt-in method to determine the Class participants.

In sum, although some objectors may have wanted different terms or even a more valuable benefit, these objections do not make the settlement unfair or unreasonable.

CONCLUSION

Based upon the submissions of the parties referenced above and upon the court's findings of fact and conclusions of law as set forth above,

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. This Final Order and Judgment incorporates herein and makes a part hereof the Settlement Agreement made and entered into as of December 16, 2005.

2. The court finds that the various forms of notice of the Proposed Settlement distributed to the members of the Class fully and accurately represented all material elements of the proposed Settlement, constituted the best notice practicable under the circumstances, was valid, was sufficient notice to all Class members and complied fully with the requirements of all applicable laws.

3. All Class members who have not opted out or been otherwise excluded from the Class that this court previously certified are forever enjoined and barred from commencing, prosecuting or participating in any actions or proceedings that arise from or relate to the purchase, use or acquisition of a license for a Microsoft Operating System or Microsoft Application where the claim concerns or relates to: (1) antitrust; (2) deceptive practices; (3) unfair competition, (4) unfair practices; (5) trade regulation; (6) trade practices or (7) other federal or state law, regulation or common law similar or analogous to any of the

foregoing.

4. The terms and provisions of the Settlement Agreement are hereby fully and finally approved as fair, reasonable and adequate as to, and in the best interests of, each of the settling parties and the Class members. In approving the Settlement, the Court specifically considered all objections filed with the Court or served upon counsel, but determined that, under the circumstances, the objections were not grounds for denying approval of the Settlement.

5. This action is dismissed: (1) with prejudice and without costs as to the Class members who have not opted out or been otherwise excluded from the Class and (2) otherwise without prejudice and without costs; provided that this court shall, without affecting the finality of this judgment, reserve exclusive and continuing jurisdiction over this action, for the purpose of, among other things, supervising the implementation, interpretation and enforcement of the Settlement Agreement and this Judgement.

6. The parties shall carry out the Settlement in accordance with the terms of the Agreement. The foregoing is the Final Order and Judgment of the Court. The clerk is directed to enter the judgment accordingly. The parties are directed to publish this order and judgment appropriately.

7. The issues of approval, appropriateness and amount of attorneys fees are severed and shall be decided in a separate decision, order and judgment.

Dated: July 4, 2006

J.S.C