IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JOE COMES, RILEY PAINT, INC., an Iowa corporation; SKEFFINGTON'S FORMAL WEAR OF IOWA, INC., an Iowa corporation; and PATRICIA ANNE LARSEN,	:	No. CL82311
Plaintiffs,	:	
vs.	:	
MICROSOFT CORPORATION, a Washington corporation,	:	
Defendant.	:	

MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR FINAL APPROVAL OF A SETTLEMENT OF THIS CLASS ACTION AND FOR ATTORNEYS' FEES AND EXPENSES OF IOWA CLASS COUNSEL

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INTRODUCTION

Roxanne B. Conlin of Roxanne Conlin & Associates PC and Richard M. Hagstrom of Zelle, Hofmann, Voelbel, Mason & Gette LLP, Lead Counsel for the Iowa Class, and with full authority from Iowa Class Counsel,[1] respectfully submit this Memorandum in Further Support of the Motion for Final Approval of a Settlement of this Class Action and for Attorneys' Fees and Expenses of Iowa Class Counsel (August 17, 2007) ("Motion"). The unopposed fee request seeks attorneys' fees of approximately $67.2 million and expenses of approximately $7.8 million. Microsoft agreed to pay the reasonable attorneys' fees and costs of Iowa Class Counsel. Microsoft also agreed that a total award of $75 million in attorneys' fees and expenses is fair, reasonable and adequate and will not object to an application for attorneys' fees and expenses in that amount. Each firm representing the Iowa Class that is seeking fees and/or costs has separately prepared an affidavit in support of this motion.[2] In addition, the Supplemental Affidavit of Roxanne B. Conlin describes in detail the significant challenges, tasks and risks facing Lead Counsel and Iowa Class Counsel in the prosecution of this action.

I. PRELIMINARY STATEMENT

For seven years, Iowa Class Counsel litigated against one of the most profitable and economically powerful corporations in the world in an effort to obtain compensation for Iowans who were damaged by Microsoft's unlawful conduct. Microsoft retained experienced and highly skilled counsel, who undertook a vigorous defense of the litigation. The law firms of Roxanne Conlin & Associates, Zelle Hofmann, Gergosian & Gralawski, and the Williams Law Firm collectively advanced more than $7.8 million in expenses and more than $46.9 million in

[1] Iowa Class Counsel means Roxanne Conlin & Associates PC, Zelle, Hofmann, Voelbel, Mason & Gette LLP, Gergosian & Gralawski LLP and the Williams Law Firm. Settlement § I.GG.

[2] *See* Supplemental Affidavit of Roxanne B. Conlin ("Conlin Supp. Aff."), Affidavit of Richard M. Hagstrom, Affidavit of Robert J. Gralewski and Affidavit of Kent M. Williams.

attorney and paralegal time on behalf of Iowa Class with no guarantee of receiving even a partial return on their investment. Microsoft contested every issue that could reasonably be contested. Out of the dozens of similar indirect lawsuits filed against Microsoft around the country, this litigation was only the second action to proceed to trial.

After three months of trial, the parties reached a settlement under which Microsoft will provide up to $179.95 million in cash or voucher compensation to Iowa Class Members. Unlike any other indirect purchaser class action settlement with Microsoft to date, this Settlement provides many Class Members with cash payments. In addition, unclaimed cash and vouchers and unredeemed vouchers will benefit Iowa's public schools. Specifically, if the total amount of cash payments and vouchers issued to class members is less than $179.95 million, one-half of the remaining amount will be given to eligible public schools in the form of "*cy pres*" vouchers. In addition, all of the vouchers issued to Class Members but not redeemed by them will be given to eligible public schools in the form of *cy pres* vouchers. Microsoft will also provide $1 million in cash to Iowa Legal Aid. On a per capita basis the results obtained by Iowa Class Counsel are significantly larger than the settlements in every indirect purchaser class action settlement with Microsoft to date.

Microsoft agreed that this matter was settled solely as a result of Iowa Class Counsel's efforts, under the direction of Lead Counsel. Settlement Agreement § VIII.C.1. Microsoft further agreed to pay the reasonable attorneys' fees and costs of Iowa Class Counsel on behalf of the Iowa Class. *Id.* § VIII.C.2. Microsoft also agreed that a total award of $75 million for attorneys' fees and expenses is fair, reasonable and adequate and will not object to an application for attorneys' fees and expenses in that amount. Lead Counsel, on behalf of Iowa Class Counsel, seek a total of $67.2 million in attorneys' fees, which is no more than 25.9 percent of the

common fund created by counsel for Iowa Class Counsel. Lead Counsel, on behalf of Iowa Class Counsel, also request reimbursement for their out-of-pocket costs and expenses in an amount of and expenses of $7.8 million.

The attorneys' fees sought in this case are manifestly reasonable under the circumstances. First and most important, Microsoft – the party responsible for paying these fees and expenses – has agreed to pay them without reducing the benefits to the Iowa Class.

Second, the requested fees are reasonable under the percentage of the recovery method used by the majority of courts when awarding attorneys' fees in class actions and a lodestar multiplier cross-check. In support of the Petition, Lead Counsel also submit the Supplemental Affidavit of Professor Geoffrey P. Miller ("Miller Supp. Aff."), a nationally renowned expert on class actions, attorneys' fees and settlements. As Professor Miller notes, 25.9 percent of the total estimated settlement benefit of $258.95 million obtained by the efforts of Iowa Class Counsel is in the average range for attorneys' fees in similar class actions, while the 1.43 multiplier over the $46.9 million lodestar is very low when judged against other similar cases.

Third, the complexity and risks of litigation, combined with the quality of Lead Counsel and co-counsels' services and the outstanding results obtained for the Iowa Class, support the reasonableness of the fees and expenses sought.

Fourth, the award of attorneys' fees and expenses will *not* reduce the number or value of the Consumer Cash Payments or Volume Licensee Vouchers distributed to Class Members, and an award of the requested fees and expenses is in the public interest. The Court should accordingly approve the unopposed request for attorneys' fees and expenses.

II. EFFORTS BY CLASS COUNSEL ON BEHALF OF THE IOWA CLASS

A. History of Litigation

Comes v. Microsoft Corp. was filed on February 18, 2000.[3] Plaintiffs alleged that Microsoft unlawfully monopolized the markets for Intel-compatible PC operating system software, word processing software, and spreadsheet software in violation of the Iowa Competition Law, Iowa Code § 553.1, *et seq.* Plaintiffs further alleged that, as a result of Microsoft's illegal monopolies, indirect purchasers of Microsoft's desktop operating systems (MS-DOS and Windows) and applications software (Word, Excel, and Office) paid higher prices for that software than they would have paid in markets unaffected by Microsoft's exclusionary conduct. On May 1, 2000, Microsoft filed a motion to dismiss Plaintiffs' action arguing that indirect purchasers do not have standing under the Iowa Competition Law. The Court dismissed the action on July 11, 2000. On appeal, the Iowa Supreme Court reversed, holding that a cause of action exists for all consumers, including indirect purchasers, who are harmed by illegal, anticompetitive conduct. *See Comes v. Microsoft Corp.*, 646 N.W.2d 440, 445-46 (Iowa 2002). Microsoft denied having engaged in any illegal conduct, and further asserted that it had offered quality software products at competitive prices.

Plaintiffs moved for certification of operating system and applications software classes on March 4, 2003. Microsoft opposed Plaintiffs' motion. The matter was fully briefed and argued and the Court granted certification of both classes on September 16, 2003. Microsoft unsuccessfully challenged the Court's certification order, which was affirmed on appeal. *See Comes v. Microsoft Corp.*, 696 N.W.2d 318 (Iowa 2005). Microsoft subsequently filed a motion on August 2, 2006, attempting to decertify the Classes. The parties submitted extensive briefing

[3] Plaintiffs also filed a First Amended Petition on March 8, 2000, a Second Amended Petition on October 7, 2002, a Third Amended Petition on February 14, 2003, and a Fourth Amended Petition on September 16, 2005 (which was slightly modified when Microsoft improperly removed this action to federal court).

and supporting evidence, and a two-day hearing was held on October 11-12, 2006. The Court denied Microsoft's decertification motion in its entirety.

On July 12, 2004, Plaintiffs moved for the offensive application of non-mutual collateral estoppel against Microsoft based on the findings and legal conclusions from the Government Action: *United States v. Microsoft Corp.*, 98-1232 (D.D.C.) and *State of New York, et al. v. Microsoft Corp.*, 98-1233 (D.D.C.). The Court granted Plaintiffs' motion and Microsoft appealed. The Iowa Supreme Court reversed and remanded with instructions regarding the standard to be applied. *See Comes v. Microsoft Corp.*, 709 N.W.2d 114, 122 (Iowa 2006). Plaintiffs renewed their motion for the application of collateral estoppel against Microsoft on March 17, 2006. After extensive briefing and a two-day hearing, the Court granted Plaintiffs' motion and collaterally estopped Microsoft from disputing over 140 Findings of Fact and the legal determination from the government action. Microsoft again applied to the Iowa Supreme Court for interlocutory appeal; however, Microsoft's application was denied.[4]

During the course of this litigation, Plaintiffs aggressively pursued discovery, propounding 286 discovery requests on Microsoft and bringing ten motions to compel discovery.[5] As a result of these efforts, Microsoft produced more than 25 million pages of

[4] Even after that interlocutory appeal was denied, Microsoft spent significant time and energy in an unrelenting effort to limit the effective scope of that ruling, continuing into trial. *See, e.g.*, Microsoft's Memorandum in Support of It's Motion in Limine To Preclude Plaintiffs From Introducing Evidence About Facts Subject to Collateral Estoppel (Sept. 15, 2006); Plaintiffs' Request that Microsoft's "Collateral Estoppel" Objections to the Deposition of Bill Gates and Related Exhibits be Overruled (Nov. 28, 2006); Microsoft's Memorandum concerning the Impact of Collateral Estoppel on Evidentiary Issues (Dec. 6, 2006); Plaintiffs' Motion to Prevent Microsoft from Relitigating Certain Issues Decided in the Government Action, or Otherwise Challenging this Court's Collateral Estoppel Ruling (Dec. 12, 2006).

[5] Plaintiffs' efforts to obtain discovery from Microsoft on their two causes of action involved struggles of epic proportion. Microsoft insisted *repeatedly* that Plaintiffs were not entitled to discovery unless their Petition alleged, with particularity, that the specific exclusionary conduct at issue violated the Iowa Competition Law. Plaintiffs amended their Petition to include the very kinds of evidentiary allegations upon which Microsoft had insisted. Microsoft then used those evidentiary allegations as the basis for removing this case to the United States District Court for the Southern District of Iowa. On November 22, 2005, almost six weeks after Microsoft removed the case, the Southern District of Iowa found Microsoft's removal to be improper and remanded the case to this Court.

documents. Plaintiffs also obtained copies of the source code for Microsoft's products which enabled their technical experts to evaluate Microsoft's actions in light of Microsoft's obligations under the 2002 Final Judgment entered in the government's Action against Microsoft.

Plaintiffs engaged in extensive pre-trial preparation. Plaintiffs retained twelve experts for trial on issues such as software code, the economics of the software industry, injury to competition, causation, and damages. Plaintiffs also obtained expert and other evidentiary support establishing injury resulting from increased security vulnerabilities caused by Microsoft's alleged anticompetitive conduct. Additional pre-trial preparations included, but were not limited to, the review of hundreds of prior testimony transcripts, the selection and designation of more than 300,000 lines of testimony for use at trial, the review of thousands of new documents, the designation of more than 4,000 *new* trial exhibits (over 9,000 in all for Plaintiffs), a meet and confer process regarding the parties' objections to various prior testimony and trial exhibit designations, briefing and argument of the same to the Special Master, and securing fact witnesses who were willing to testify at trial even though residing outside of the state of Iowa and in some cases outside of the United States.

Both parties moved for partial summary judgment on August 4, 2006. Plaintiffs filed one motion for partial summary judgment while Microsoft filed no less than eight such motions. On November 1, 2006, the Court denied Plaintiffs' motion for partial summary judgment and denied all but one of Microsoft's eight motions. On September 15, 2006, the parties filed sixteen motions *in limine*. Plaintiffs filed five and Microsoft filed eleven. On November 13, 2006, the Court ruled on these motions. *See* Ruling and Order on Plaintiffs' and Defendant's Motions in Limine (Nov. 9, 2006). The parties also each submitted proposed preliminary jury instructions

and supportive briefs on October 20, 2006. The jury instructions were briefed and argued up until the jury was empanelled.

On November 13, 2006, trial began. A twelve-member jury was empanelled on November 30, 2006. Opening statements lasted more than two weeks. The Court admitted more than 3,300 of Plaintiffs' trial exhibits as evidence against Microsoft. Plaintiffs also presented live testimony from four witnesses (Ronald Alepin, David Bradford, Theo Lieven, and John Edwards) and prior deposition and/or trial testimony from fourteen additional witnesses.[6] After approximately three months of trial, on February 14, 2007, Plaintiffs reached a settlement agreement with Microsoft on behalf of Iowa consumers, businesses and state and local governmental entities.

There can be no doubt that the parties and their counsel litigated this case ferociously. *See* Affidavit of Professor Geoffrey P. Miller in Support of Final Approval (August 13, 2007) ("Miller August 13 Aff.") ¶ 16. Microsoft contested every issue in this matter that could be contested and no legitimate effort was spared by either side to gain advantage. This Settlement, then, clearly is the result of hard fought litigation and arms-length negotiation between zealous adversaries.

B. The Settlement

The Settlement is truly unique in that, unlike any other consumer class action settlement with Microsoft to date, it provides many Class Members with cash payments. Under the terms of the Settlement, Microsoft will provide the Iowa Class up to $179.95 million in cash or voucher compensation. Consumers and businesses (who are not volume licensees and/or Iowa state or

[6] Plaintiffs presented the testimony of William Gates, Richard Williams, Anthony Speakman, Mark Chestnut, Richard Apple, Richard Freedman, Phillip Barrett, Stefanie Reichel, Andrew Hill, Richard Dixon, Glenn Stephens, Adam Harris, Brad Silverberg, and Sergio Pineda.

local governmental entities) will receive cash payments upon presentation of a satisfactory proof of claim which, for claims under $200, does not require any supporting documents or proof of purchase other than a completed claim form submitted by mail. *See* Settlement § IV.A.[7] Consumers and businesses (who are not volume licensees and/or Iowa state or local governmental entities) may also submit claims for less than $200 on-line at www.IowaSoftwareCase.com. The cash payments to such Class Members will be in the amount of $16 for every Microsoft operating system license, $29 for every Microsoft Office license, $25 for every Microsoft Excel license, and $10 for every Microsoft Word, Works, or Home Essentials license purchased between May 18, 1994 through June 30, 2006 for use in Iowa. *Id.* § II.B.1-4.

For volume license purchases between May 18, 1994, through June 30, 2006, for use in Iowa, the purchaser will be compensated with the same per license compensation but in the form of vouchers. *Id.* § V.A-B. Iowa state or local governmental entities who acquired qualifying Microsoft software from July 1, 2002, through June 30, 2006, for use in Iowa, will also receive this same per license compensation in the form of vouchers. *Id.* The vouchers may be used (i) for the purchase of any desktop, laptop, or tablet computers using any operating system platform;[8] (ii) for any of several peripheral devices (i.e., printers, scanners, monitors, keyboards, or pointing devices); and (iii) for any software that is designed for use on any of the foregoing hardware products. *Id.* § V.F. The "Qualifying Hardware" and/or "Qualifying Software" does

[7] Claims over the initial $200 must be supported by additional documentation.

[8] The settlement excludes use of the vouchers for the purchase of servers, personal digital assistants ("PDAs"), and other hand-held devices.

not have to be a Microsoft product.[9] A Class Member whose claim is less than $950 may use the vouchers to purchase peripheral devices with or without the purchase of a computer. *Id.* § V.F.1. Each Class Member can transfer up to $650 in vouchers to another person, business, or organization. *Id.* § V.E.

Vouchers can be redeemed for Qualifying Hardware and/or Qualifying Software by submitting proof of a post-April 25, 2007 purchase with a completed claim form or voucher to the Claims Administrator, who will issue a check payable to the claimant for the amount redeemed and a new voucher for the portion, if any, not redeemed. *Id.* § VI. Once the vouchers are issued, they can be used for up to four years after the effective date of the settlement which is sixty days after the Court grants "final approval." *Id.* §§ I.EE; V.F.

The Settlement includes a *cy pres* remedy in the event that the voucher and cash payments issued to the Iowa Class are less than $179.95 million. In the "first *cy pres* distribution" Microsoft will distribute vouchers worth one-half of the remaining amount to public schools in Iowa. *Id.* §§ I.S; VII.C. Therefore, even if no claims are filed, Microsoft must provide $89,975,000 in vouchers to Iowa public schools. Moreover, in the "second cy pres distribution," 100 percent of the vouchers issued to Class Members but not redeemed will be distributed to Iowa public schools. *Id.* §§ I.BB.; VII.D. This *cy pres* remedy guarantees that this Settlement will have remarkable value regardless of the claims rates by Class Members. *See* Miller August 13 Aff. ¶ 57.

Both *cy pres* distributions will provide "General Purpose Vouchers" (50 percent) and "Software Vouchers" (50 percent) to Iowa public schools that are most in need of the vouchers

[9] In the usual voucher settlement, class members are required to purchase the defendant's products, or to purchase products at the defendant's stores. Miller August 13 Aff. ¶ 40. Because neither is true in this Settlement, one of the basic objections to a voucher-based settlement that has been made in many cases is eliminated. *See id.*

pursuant to a plan being developed by Plaintiffs, Microsoft, and the Iowa Department of Education. Settlement § I.P.; VII. C-D.[10] The advantages of this *cy pres* relief extend beyond the immediate recipients. *See* Miller August 13 Aff. ¶ 55. Indeed, as a result of the improved learning environment that these *cy pres* vouchers will facilitate, students in Iowa public schools will have access to educational opportunities that will better equip them to become well-functioning, productive adults. *Id.* All citizens of Iowa stand to benefit from such an outcome. *Id.* The Iowa Department of Education may also use up to $1,000,000 in cash to pay for administrative support, including staff and operating expenses, incurred in connection with the *cy pres* program. *See id.* § VII.E. These administrative costs shall be paid by Microsoft from the funds allocated to the *cy pres* program. *See id.*

"General purpose vouchers" can be used by eligible schools for purchasing: (1) any eligible hardware, (2) any non-custom software that could be used with eligible hardware, (3) Professional Development Services and/or IT Support Services used in connection with the hardware or software acquired with vouchers, (4) equipment needed for networking and infrastructure (e.g., routers, servers, wireless network cards, or wireless access points), (5) hardware for accessing the internet through television sets (e.g., MSNTV units or comparable technologies in the market) and internet access for such hardware for students' homes, (6) certification training for software and networking, (7) tablet computers or comparable technology that may become available, (8) non-custom assistive technology devices and

[10] As explained by Iowa Department of Education Director Judy Jeffrey, this Settlement "comes at an opportune time, since state and federal funding for technology has declined significantly in recent years." *See* April 10, 2007 Letter from Judy Jeffrey to Roxanne Conlin (attached as Exhibit D to the Affidavit of Roxanne B. Conlin in Support of Plaintiffs' Motion for Preliminary Approval of a Settlement of this Class Action (April 13, 2007) ("Conlin Preliminary Approval Aff.")). In Iowa, "[t]here is a statewide need for technology dollars if we are to prepare students with 21st century skills to be competitive in the global economy in which they will work and live." *Id.* The *cy pres* component of the Settlement will help address these issues. *See* August 17, 2007 Letter from Judy Jeffrey to Roxanne Conlin (attached as Exhibit D to the Affidavit of Roxanne B. Conlin in Support of Plaintiffs' Motion for Final Approval (August 17, 2007) ("Conlin Final Approval Aff.").

non-custom software designed for use by students with special needs, and (9) evaluation tools to assist the Iowa Department of Education in gathering evaluation data on the *cy pres* program. *Id.* §§ VII.C.4; VII.D.4.

"Software vouchers" can be used by eligible schools for acquiring any of the following: current or future operating system software (e.g., Mac OS X, Microsoft Windows, Linux or comparable non-custom products with similar functionality), word processing software (e.g., Apple Pages, WordPerfect, Final Draft, Microsoft Word or comparable non-custom products with similar functionality), spreadsheet software (e.g., Microsoft Excel, Datawatch Monarch or comparable non-custom products with similar functionality), presentation software (e.g., Apple KeyNote, Microsoft PowerPoint or comparable non-custom products with similar functionality), desktop relational database software oriented toward single users and typically residing on a standard personal computer (e.g., Microsoft Access or comparable non-custom products with similar functionality), web-authoring software (e.g., MS Front Page or comparable non-custom products with similar functionality), productivity suites software (e.g., Apple iWork, AppleWorks, Microsoft Office, Microsoft Works Suite, WordPerfect Office or comparable non-custom products with similar functionality), and encyclopedia software (e.g., Microsoft Encarta Premium Suite, Britannica Ultimate Reference Suite or comparable non-custom products with similar functionality) for either personal computers or Macintosh computers, and server software including client access licenses. *Id.* §§ VII.C.5; VII.D.5. Software vouchers may also be used to cover the cost of the software referenced above even when bundled with a computer purchased with the "general purpose vouchers."

All the benefits of the *cy pres* program are to be distributed and none shall revert to Microsoft. *Id.* § VII.K. In the event there remain available software vouchers and/or general

purpose vouchers at the end of either the first or the *second cy pres* periods, such vouchers will be distributed to other eligible schools or other needy organizations in Iowa. *Id.* § VII.L. As part of the *cy pres*, Microsoft will also provide $1 million in cash to Iowa Legal Aid for its charter purposes. *Id.* § VII.O.[11]

In order to ensure against dilution of any of the benefits that Microsoft has agreed to provide under this Settlement, Microsoft has further agreed to separately pay the costs of publishing and disseminating notice, the costs of claims administration, and to pay Lead Counsel up to $250,000 in fees and costs in connection with administering the settlement and claims process. *Id.* at §§ II.E.2; VI.E; VIII.C.3. Microsoft also agreed to pay each Class Representative a $10,000 incentive award for their time and effort. *Id.* at § VIII.D. Finally, Microsoft agreed to separately pay Plaintiffs' reasonable attorneys' fees and expenses. *Id.* at § VIII.C.2. Class Counsel are requesting $75 million in attorneys' fees and expenses. Again, the amount paid to Class Counsel and Class Representatives will *not* reduce the number or value of the Consumer Cash Payments or Volume Licensee Vouchers distributed to Class Members. Furthermore, Microsoft agreed that a total award of $75 million in attorneys' fees and expenses is fair, reasonable and adequate and will not object to an application for attorneys' fees and expenses in that amount.

ARGUMENT

I. IOWA LAW ALLOWS THE RECOVERY OF ATTORNEYS' FEES IN THIS LITIGATION.

Microsoft agreed to pay the reasonable attorneys' fees and costs of Iowa Class Counsel and has also agreed that an award of $75 million in attorneys' fees and expenses is fair,

[11] *See* April 10, 2007 Letter from Dennis Groenenboom to Judge Rosenberg (attached as Exhibit C to the Conlin Preliminary Approval Aff.); July 31, 2007 Letter from Dennis Groenenboom to Judge Rosenberg (attached as Exhibit C to the Conlin Final Approval Aff.),

reasonable and adequate and will not object to an application for attorneys' fees and expenses in that amount. Even without this agreement, however, Iowa Class Counsel would be entitled to recover attorneys' fees and expenses for their efforts in this litigation for at least two reasons.

First, the Iowa Competition Law, on which Plaintiffs based their claims, provides that any person injured or threatened with injury by conduct prohibited under that law may "[r]ecover the necessary costs of bringing suit, including a reasonable attorney fee." Iowa Code § 553.12(4). The Iowa Competition Law thus provides statutory authority for a fee award.

Second, it is well-settled law that attorneys who obtain a benefit for class members are entitled to reasonable compensation for their services. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[L]awyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee."); Iowa R. Civ. P. 1.275 ("If a prevailing class recovers a judgment for money or other award that can be divided for the purpose, the court may order reasonable attorney's fees and litigation expenses of the class to be paid from the recovery."). Microsoft agreed that this matter was settled solely as a result of Iowa Class Counsel's efforts, under the direction of Lead Counsel. Settlement Agreement § VIII.C.1. Thus, even without this agreement, Iowa Class Counsel would be entitled to recover attorneys' fees and expenses for their efforts in this litigation from the total amount of the Settlement.[12]

A. Standard

It is undisputed that Iowa Class Counsel are entitled to recover reasonable attorneys' fees for their efforts in this litigation. The determination of whether attorneys' fees are "reasonable" is within the sound discretion of the trial court, and that determination will not be disturbed

[12] Iowa Class Counsel are entitled to recover their attorneys' fees directly from Microsoft, pursuant to the agreement of the parties, rather than the from the settlement fund.

absent a clear abuse of discretion. *See, e.g., King v. Armstrong*, 518 N.W.2d 336, 337 (Iowa 1994).

When a class action settlement creates a common fund or confers some other substantial benefit on a class, the costs of litigation, including an award of reasonable attorneys' fees, are recoverable from the fund as a whole. *Boeing*, 444 U.S. at 478. This common fund doctrine was designed to prevent unjust enrichment of class members who benefit from a lawsuit without contributing to its costs. *See id.* It also serves the important purpose of encouraging attorneys to pursue claims on behalf of a class of consumers who could not afford to litigate their individual claims. *See Steiner v. Williams*, 2001 WL 604035, *1 (S.D.N.Y. May 31, 2001).

Courts generally use either the percentage of recovery method or the lodestar/multiplier method to calculate attorneys' fees in class action cases. Miller Supp. Aff. ¶ 39. Under the percentage-of-the-fund method, the court calculates the attorneys' fee award based on a reasonable percentage of the fund created by class counsel's work in the litigation. *See Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); Miller Supp. Aff. ¶ 39. Under the lodestar/multiplier method, the court calculates the fee award by multiplying the attorneys' hours by an appropriate rate of compensation to produce a "lodestar" fee amount. *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999); Miller Supp. Aff. ¶ 39. The lodestar amount can then be enhanced (or reduced) using a multiplier based upon various factors. *See, e.g., id.*

B. The Percentage Of The Fund Approach Is The Most Appropriate Method For Evaluating The Fee Request Of Iowa Class Counsel.

Courts typically use a "percentage-of-the-fund" approach to setting attorney fees when a common fund has been established as the source of class benefits.[13] Conversely, the lodestar approach has been rejected by the vast majority of courts in the country, or is used only as a "cross-check" on the percentage of the fund approach. *See generally* Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 Texas L. Rev. 865, 868 nn.13-14 (1992) (citing authorities); John C. Coffee, Jr., *Understanding the Plaintiffs' Attorney: The Implications of Economic Theory for Private Enforcement of the Law through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 724-25 (1986); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. of Chi. L. Rev. 1, 4, 59-61 (1991). The Manual for Complex Litigation Fourth (2004) criticizes the lodestar method, stating that "[i]n practice, the lodestar method is difficult to apply, time consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result." Manual for Complex Litigation, § 14.121. That is because the lodestar approach "creates inherent incentives to prolong the litigation until sufficient hours have been expended." *Id.*

The percentage of recovery approach is appropriate to determine attorneys' fees when a settling defendant does not pay into a single fund that is "common" between class members and their attorneys, but instead agrees to pay attorneys' fees in addition to, and separately from, the fund for direct benefits for class members. *See, e.g., Johnston*, 83 F.3d at 246 (approving use of percentage-of-the-benefit approach when attorneys' fees were paid directly by defendants separately from settlement fund); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod.*

[13] The efforts of Iowa Class Counsel have yielded identifiable, quantifiable benefits for member of the Iowa Class. Significantly, the efforts of the Iowa Class Counsel led directly to the creation of a *cy pres* fund, which would pay Iowa public schools almost $90 million even if no claims are made by a single Class Member.

Liab. Litig., 55 F.3d 768, 821 (3d Cir. 1995) ("The rationale behind the percentage of recovery method also applies in situations where, although the parties claim that the fee and settlement are independent, they actually come from the same source."); *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 33, 97 Cal. Reptr. 2d 797 (1st Dist. 2000) (reasoning that "even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect to the class recovery. *Accordingly, the direct payment of attorney's fees by defendants should not be a barrier to the use of the percentage of the benefit analysis in the cases.*") (italics in original) (quoting *Johnston*, 83 F.3d at 246).

Although Iowa courts have had little opportunity to use the percentage of recovery method, the increasing trend in federal courts is to use the percentage-of-the-recovery method to set attorneys' fees. *See, e.g., In re Monosodium Glutamate Antitrust Litig.*, 2003 WL 297276, at *2 (D. Minn. 2003) (applying percentage-of-recovery method to determine fee award in an antitrust settlement). The Eighth Circuit also endorses the percentage of recovery approach, which rewards the plaintiffs' attorney for the result obtained, over the lodestar method. *See, e.g., Johnston*, 83 F.3d at 246 (approving use of percentage-of-the-benefit approach when attorneys' fees were paid directly by defendants separately from settlement fund). When the percentage of recovery method is used, some courts use a lodestar analysis to cross-check on the reasonableness of a percentage award. *See id.* (cross-checking award against lodestar); *In re Microstrategy, Inc. Sec. Litig.*, 72 F. Supp. 2d 778. Conversely, some courts have used the percentage approach to confirm the reasonableness of a lodestar multiplier. *See, e.g., Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 718 (E.D.N.Y. 1989) (cross-checking lodestar fee against percentage of recovery).

Regardless of the method used to award attorneys' fees, the fees must be reasonable. *See, e.g., King*, 518 N.W.2d at 337; Miller Supp. Aff. ¶ 39. In determining the amount of attorney's fees for a prevailing class, Iowa courts shall consider all of the following factors:

> a. The time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered.
>
> b. Results achieved and benefits conferred upon the class.
>
> c. The magnitude, complexity, and uniqueness of the litigation.
>
> d. The contingent nature of success.
>
> e. In cases awarding attorney's fees and litigation expenses under rule 1.275(4) because of the vindication of an important public interest, the economic impact on the party against whom the award is made.
>
> f. Appropriate criteria in the Iowa Rules of Professional Conduct.

Iowa Rule 1.275(5). In conjunction with Rule 1.275(5), Iowa Rule of Professional Conduct 2-106(B) provides that in determining the reasonableness of a fee, the following factors should be considered:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5)The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Iowa Rule of Professional Conduct 2-106(B).

Under the percentage of recovery method, and when cross-checked with the lodestar multiplier, the attorneys' fees sought by Iowa Class Counsel are very reasonable. Microsoft's agreement that the requested fees and expenses are reasonable provides compelling evidence of that fact. A fee that is 25.9 percent of the total estimated settlement benefit of $258.95 million obtained by the efforts of Iowa Class Counsel is in the average range for attorneys' fees in similar class actions, while the 1.43 multiplier over the $46.9 million lodestar is very low when judged against other similar cases. *See* Miller Supp. Aff. ¶ 34. Because the fees sought are reasonable, and Microsoft does not oppose the fee request, the Court should grant Iowa Class Counsel's fee request.

C. The Requested Fee Award Is Fair And Reasonable When Viewed In Light Of The Iowa Rule 1.275(5) and Iowa Rule of Professional Conduct 2-106(B) Factors.

1. The Time And Labor Expended By Iowa Class Counsel, Who Possessed Substantial Skill, Standing, And Experience, Was A Massive Effort.

As set forth above, and described in more detail in the Affidavit of Roxanne Conlin, the time and labor expended by Iowa Class Counsel in this case was phenomenal:

- Three months of trial, following almost seven years of hard-fought litigation;
- More than 286 discovery requests on Microsoft;
- More than ten motions to compel discovery;
- Twenty-five million pages of documents produced in discovery;
- More than 24 expert reports;

- Sixteen motions *in limine*;
- Nine motions for partial summary judgment;
- Three rounds of collateral estoppel briefing (and additional related motion practice); and
- Three trips to the Iowa Supreme Court.

This massive effort required more than 117,000 hours of Iowa Class Counsel's uncompensated time. The affidavits filed in support of this motion set forth in detail the backgrounds and substantial qualifications of Iowa Class Counsel. *See generally* Conlin Aff.; Hagstrom Aff.; Williams Aff.; and Gralewski Aff. Furthermore, and as discussed above, Iowa Class Counsel were uniquely situated to push the case forward with the strategy and full intention of bringing the case to trial, and brought all their skill and experience to bear in doing so. The experience, reputation and ability of Iowa Class Counsel was a significant factor in Microsoft's ultimate decision to settle the Iowa case on terms more akin to the settlements in California and Minnesota, rather than the less favorable settlements in South Dakota, Kansas, and elsewhere. *See* Hagstrom Aff. ¶¶ 12-13.

Finally, "[t]he ability of Class Counsel to obtain record-breaking settlements in the face of [such] a stubborn and well executed defense further evidences the excellent quality of petitioners' work." *In re Nasdaq*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998); *Maley v. Del Global Tech Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002) ("The ability of plaintiffs' counsel to recover a settlement valued at more than $11.5 million for the Class in the face of such formidable legal opposition provides further evidence of the quality of their work."). Similarly, "[t]he quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsel's work." *In re Warner Commun. Sec. Litig.*, 618 F. Supp. at 749. The quality of Iowa Class Counsel's work, and indeed Microsoft's work, was recognized by this Court:

> As a parting note, I've been involved in trials -- in a lot of trials for a long time in this state, both as a trial lawyer and a Judge, and this is the highest caliber and quality of attorneys I've ever been associated with. And I am truly impressed and in awe by both sides, and the professionalism, the courtesy displayed, the knowledge. It's just unbelievable.

February 14, 2007 Transcript 13593:14-:22.

2. Iowa Class Counsel's Efforts Resulted In An Exceptional Outcome For The Class.

The result obtained in litigation is among the most important factors in determining an appropriate percentage-of-recovery fee award. *See* Newberg on Class Actions § 14.6 (4th ed. 2002); Annotated Manual for Complex Litigation § 14.121.

As discussed above, unlike any other indirect purchaser class action settlement with Microsoft to date, this Settlement provides many Class Members with cash payments. The Settlement guarantees that Iowa consumers will receive substantial benefits as a result of this litigation. Indeed, the $179.95 million face value of the Settlement represents fully 54.6 percent of Plaintiffs' median damages calculation of $329.33 million. These numbers greatly exceed the heavily discounted settlements approved in other complex cases as being fair, reasonable and adequate outcomes.

The results obtained are outstanding when compared against settlements of other indirect purchaser actions against Microsoft.[14] The Iowa Settlement is superior to all other similar settlements with Microsoft to date. In all but Arizona, California, Minnesota, Wisconsin, and New Mexico, consumers received $5 for each license of Office, Excel, Word, MS-DOS and Windows 3.x, and either $10 or $12 for each license of Windows 9x. *See* Affidavit of Professor Jeffrey K. MacKie-Mason in Support of the Proposed Settlement at Table 1. Had the Iowa

[14] It is also critical to note that similar indirect purchaser actions against Microsoft had class certification denied in two states.

Plaintiffs reached a similar settlement, the benefits to the Iowa Class would be 65-68% lower; that is, Iowa Class Members would receive between $117.6 million and $121.8 million *less* than they will receive the current Settlement. *See id.* ¶ 8.[15]

In the present Settlement, in contrast, Iowa consumers will receive $29 for each license of Office, $25 for Excel, $10 for Word, Works, or Home Essentials, and $16 for each license of MS-DOS and Windows. With these numbers, the Iowa Settlement is valued at up to $179.95 million – a face value exceeded only by New York, California, Florida, and Wisconsin, which each have much larger populations. *See* Conlin Aff. Exhibit B. When compared on a per-resident basis, the results obtained in Iowa represent the best recovery of the 20 states listed, at $61.49 per resident.

Microsoft Indirect Purchaser Class Action Settlements[16]

	State	Settlement	Amount per Resident
1.	Iowa	$179.95 million	$61.49
2.	Wisconsin	$223.896 million	$41.74
3.	Minnesota	$174.5 million	$35.47
4.	California	$1.1 billion	$32.48
5.	Arizona	$104.6 million	$20.39
6.	New Mexico	$31.5 million	$17.32
7.	Vermont	$9.7 million	$15.93

[15] Further, as explained by Professor MacKie-Mason, "[i]f the Iowa Plaintiffs reached a settlement similar to that reached in Minnesota, the benefits to class members would represent 88% of the benefits obtained by the Iowa Plaintiffs. If the Iowa Plaintiffs reached a settlement similar to that reached in California, the benefits to class members would represent 98% of the benefits obtained by the Iowa Plaintiffs. If the Iowa Plaintiffs reached a settlement similar to that reached in Wisconsin, the benefits to class members would represent 88% of the benefits obtained by the Iowa Plaintiffs. If the Iowa Plaintiffs reached a settlement similar to that reached in Arizona or New Mexico, the benefits to class members would represent only 70% or 59%, respectively, of the benefits obtained by the Iowa Plaintiffs." *See* Mackie-Mason Final Approval Aff. at ¶ 8.

[16] Based on reported Microsoft settlements and the 2000 U.S. Census population figures.

8.	Arkansas	$37.8 million	$14.14
9.	North Dakota	$9 million	$14.01
10.	Montana	$12.3 million	$13.63
11.	Nebraska	$22.6 million	$13.21
12.	Florida	$202.845 million	$12.69
13.	South Dakota	$9.33 million	$12.36
14.	Kansas	$32 million	$11.90
15.	New York	$225 million cap	$11.86
16.	West Virginia	$21 million	$11.61
17.	Tennessee	$64 million	$11.25
18.	North Carolina	$89.194 million	$11.08
19.	District of Columbia	$6.2 million	$10.84
20.	Massachusetts	$34 million	$5.36

See Conlin Final Approval Aff. Exhibit B.

Finally, even if no claims were filed, Microsoft would be required to provide $89,975,000 in vouchers to Iowa public schools pursuant to the Settlement's *cy pres* provisions. This *cy pres* remedy guarantees that this Settlement will have remarkable value regardless of the claims rates by Class Members. *See* Miller August 13 Aff. ¶ 57.

It is doubtful that Microsoft ever would have agreed to such terms absent counsel who had demonstrated the ability and willingness to proceed to trial. In sum, the result obtained by Iowa Class Counsel in particular is exceptional and warrants an enhancement to the fee award to reflect the outstanding success.

3. Iowa Class Counsel Were Well Experienced To Deal With The Many Complex, Novel, And Difficult Issues Presented By This Case.

As courts routinely acknowledge, antitrust class actions are by their very nature complex and difficult to litigate. *See Weseley*, 711 F. Supp. at 719 (distinguishing antitrust class actions from securities class actions on basis that antitrust claims are "notoriously complex, protracted and bitterly fought"); *In re Art Materials Antitrust Litig.*, 100 F.R.D. 367, 372 (N.D. Ohio 1983) (noting "recognized difficulties of proof and requirements of a costly trial on the merits" in antitrust class actions).

Iowa Class Counsel were vigorously opposed by lawyers from some of the best corporate defense firms in the United States, representing one of the world's largest and most powerful corporations. Sullivan & Cromwell, for instance, has been representing Microsoft since the early days of federal investigations into Microsoft's conduct dating back to the early 1990's. The firm continued its representation of Microsoft throughout *United States v. Microsoft* and various competitor actions, including *Caldera v. Microsoft*, and numerous consumer actions. Accordingly, the firm has many attorneys versed in the complex economic and technical issues involved in this case.

As noted above and in the affidavits of Roxanne Conlin and Richard Hagstrom, Iowa Class Counsel were unique in their ability *and* willingness to prosecute this action. In California and Minnesota, class counsel demonstrated that they were willing to proceed to trial if necessary to secure a fair result for class members, even if that meant counsel were required to endure years of litigation, millions of dollars in out of pocket expenses, many millions of dollars in attorney time, and numerous and repeated attempts by Microsoft to derail the entire case or significant portions of it. In the process, Iowa Class Counsel mastered the factual, legal, economic and technical complexities involved in this case that uniquely positioned them to pursue Microsoft in Iowa. Few other firms in the nation possessed this institutional knowledge.

4. Iowa Class Counsel Worked On A Contingency Basis Subject To Substantial Risk.

"[T]he contingent nature of counsel's fee, with the built-in risk of litigation, is a highly relevant factor in determining the fee to be awarded." *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *27 (S.D.N.Y. Nov. 26, 2002); *see also* Newberg on Class Actions § 14.6 (4th ed. 2002); Annotated Manual for Complex Litigation § 14.121; *In re Warner Commun. Sec. Litig.*, 618 F. Supp. 735, 747 (S.D.N.Y. 1985) ("Numerous cases have recognized that the attorneys' contingent fee risk is an important factor in determining the fee award.").

Iowa Class Counsel undertook this litigation on behalf of Iowa consumers at a very substantial personal and professional risk. Iowa Class Counsel devoted more than 117,000 hours to this case without any assurance that they would ever be paid for their labors. The sheer number of hours devoted to this case, although high, does not fully reflect the extraordinary contingency risk Iowa Class Counsel undertook. For example the lodestar summary of the Conlin Law Firm makes clear that this case was a "bet-the-firm" proposition. What is more, this litigation lasted for seven years, and required a substantial time commitment from lead counsel (and co-counsel) that precluded work for other clients. Iowa Class Counsel had opportunities that were foreclosed as a result of this litigation. Conlin Aff. ¶ 82; Hagstrom Aff. ¶ 7; Gralewski Aff. ¶ 15; Williams Aff. ¶ 15. The court in *In re Sumitomo* noted how this kind of dedication of firm resources greatly magnified the already high risk of a contingency case:

> Petitioners were required to expend substantial amounts of professional time and money away from other professional business in order to prosecute the action, with no certainty of recovery thereof from any source. Thereby, the already high risks of this litigation were greatly multiplied.

In re Sumitomo Copper Litig., 74 F. Supp. 2d 393, 399 (S.D.N.Y. 1999) (affirming attorney fee award of more than $32 million was appropriate, calculated as 27.5% of the $116.6 million common fund settlement).

Lead Counsel also collectively invested thousands of hours and substantial amounts in a database and other costs associated with investigating and prosecuting this case with no guarantee that their efforts would ever be repaid, and with no way to mitigate or insure against nonpayment or non-reimbursement. Finally, the risk faced by Iowa Class Counsel was heightened due to the strength and skill of their opposition. Microsoft retained some of the best defense firms in the country. Sullivan & Cromwell has extensive experience defending Microsoft in matters such as the Iowa Microsoft litigation and had a history of contesting virtually every issue on behalf of their client. *See* Miller Supp. Aff. ¶ 44.

5. Iowa Class Counsel's Requested Fees Are Reasonable Because They Promote The Public's Interest In The Vigorous Enforcement Of Iowa Antitrust Laws.

As a matter of public policy, private antitrust litigation generally, and class actions specifically, are a vital tool to ensure enforcement of the antitrust laws. *See, e.g., Hawaii v. Standard Oil Co. of California*, 405 U. S. 251, 275 (1972) (holding that private antitrust actions are an effective supplement to government enforcement of the antitrust laws and contribute to the maintenance of a competitive economy). Appropriate fee awards in cases such as this one preserve the incentive to bring meritorious class actions:

> [F]ew would dispute the basic proposition that one whose labors produce a favorable result deserves adequate recompense. Such a notion is particularly applicable in the area of the antitrust class action, which depends heavily on the notion of the private attorney general as the vindicator of the public policy. In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation.

Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045, 1050 (2nd Cir. 1973) (citation omitted).

In short, all of the factors set forth above establish the reasonableness of the fee request by counsel for the Iowa Class.

6. Iowa Class Counsel's Fees Are Representative Of The Fees Customarily Charged For Similar Legal Services.

Iowa Class Counsel's requested fee award is reasonable based on customary fees for similar legal services. *See, e.g., In re Workers' Comp. Ins. Antitrust Litig.*, 771 F. Supp. 284, 287 (D. Minn. 1991) (holding that a 22.5% award from a common fund of approximately $50 million was appropriate and reasonable, considering the actual amount of time devoted to the case, the complexity and duration of the litigation, the experience and ability of the attorneys involved, and awards in similar cases); *In re Vitamins Antitrust Litig.*, No. 99-197, MDL 1285, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (approving a nearly 34% award in a case involving a $360 million fund); *In re Lease Oil Antitrust Litigation (No. II)*, 186 F.R.D. 403, 443 (S.D. Tex. 1999) (holding that 25% of $190 million common fund, from eight combined settlements, was reasonable in six out of the eight cases given the large initial investment by Class Counsel and size of the class as well as the outstanding results achieved); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 399-400 (S.D.N.Y. 1999) (affirming attorney fee award of more than $32 million was appropriate, calculated as 27.5% of the $116.6 million common fund settlement).

D. The Fees Requested By Iowa Class Counsel Represent A Reasonable Percentage Of The Common Fund Attributable To Them, As Compared To Fee Awards In Other Large Class Action Settlements.

A common fund consists of two parts: (1) the portion reserved for payments to class members, and (2) the fees the class must pay for the services of class counsel on their behalf,

plus costs. Miller Supp. Aff. ¶ 50. It is appropriate to view both of these parts together as a single common fund. *Id.*

In this case the Settlement Agreement Face Value is $179,950,000. Courts recognize that the "percentage of the fund" approach should be based on the entire fund created, even if the fund is not fully claimed. *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436-38 (2d Cir. 2007) (and cases cited therein). Class counsel's fee request is $67.2 million, or 25.9 percent, of the fund created.[17] Miller Supp. Aff. ¶¶ 50-56. Professor Miller opines that class counsel's request for a fee of $67.2 million which is approximately 25.9% of the overall common fund of $258,950,000,[18] is reasonable. Miller Supp. Aff. ¶¶ 41; 58-64. Indeed, Professor Miller believes that a fee award in the range of 25 percent under the circumstances of this case is reasonable in light of the exceptional result achieved, the quality of the work performed, and other factors. *Id.* ¶ 41. That figure comports with the 25 percent *benchmark* fee award utilized by several of the federal circuit courts of appeal.

As established below, a fee award of 25.9 percent of the total benefit is well within the range of percentage fee awards in similar cases, and is amply supported by the circumstances of this case. A fee award of 25.9 percent of the $258.95 million fund created by the efforts of class

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[17] $67.2 million ÷ ($67.2 million + $7.8 million + $4 million + $179,950,000) = 25.9%.

[18] The common fund also includes the awarded fee, the awarded expenses and the cost of publishing and disseminating notice and the cost of claims administration. Therefore, it is appropriate to add class counsel's fee request of $67.2 million, class counsel's expense request of $7.8 million, and the projected $4 million in costs associated with publishing and disseminating notice and with claims administration to the total value of the Settlement caused by class counsel when calculating the common fund. Miller Supp. Aff. ¶ 51-54.

Common Fund

$ 179,950,000	(face value of settlement)
+ 67,200,000	(class counsel's requested fee)
+ 7,800,000	(class counsel's expenses)
+ 4,000,000	(costs of publishing and disseminating notice & the costs of claims administration)
$258,950,000	

Conlin Aff. ¶ 5.

counsel is within the range of percentage fee awards in large settlements around the country. At least three federal circuits – the Ninth, Eleventh, and D.C. Circuits – have established at least 25 percent of the recovery as a "benchmark" for attorneys' fees calculations under the percentage-of-recovery approach. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991) (noting with approval that "district courts are beginning to view the median of this 20% to 30% range, i.e., 25%, as a benchmark percentage fee award which may be adjusted in accordance with the individual circumstances of each case...."); *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1033 (N.D. Ill. 2000) (recognizing "the established 30% benchmark for an award of fees in class actions.").

Professor Miller cites his 2004 study of fee awards in common fund cases and concludes that the median fee award for all 630 class action awards examined in non-fee shifting statute cases was 30 percent. Miller Supp. Aff. ¶ 57. Professor Miller also notes that the median percentage fee for antitrust cases in this same sample was approximately 28.4 percent. *Id.* Professor Miller concludes from his review of antitrust class action cases between 1996 and 2006 which resulted in the creation of common funds in excess of $100, that the court computed the attorneys' fees using the percentage method and that the average percentage fee was approximately 25.04 percent. *Id.* at ¶ 58. If the two cases with recoveries of over one billion dollars are excluded, Professor Miller notes that the average percentage fee is 17.7 percent. *Id.* He concludes from another 1996 study of attorneys' fees in securities actions that the average fee award is around 30 percent of the common fund. *Id.* at ¶ 59. Other studies cited by Professer Miller confirm that attorneys' fees awarded in large class action settlements generally constitute *at least* 25 percent of the class fund. *See* Miller Supp. Aff. ¶¶ 57-61 (citations omitted). As

Professor Miller concludes, the 25.9 percent fee sought by Iowa Class Counsel is reasonable by comparison. *Id.* at ¶ 58.

E. The Fees Sought By Class Counsel Are Reasonable When Cross-Checked Against A Lodestar/Multiplier Analysis.

As noted *supra*, in common fund cases, the lodestar/multiplier approach is sometimes used as a "cross-check" on the percentage of the fund approach. *See generally* Miller Supp. Aff. ¶¶ 65-68; *see also In re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778 (E.D. Va. 2001) (cross-checking award based on percentage of recovery against lodestar measure). In this case, the requested $67.2 million fee for class counsel represents a multiplier of 1.43 on a lodestar of $46.9 million. This is well below the range of lodestar multipliers conferred in other cases. *See, e.g., In re Rite Aid Corporation Securities Litigation*, 146 F. Supp. 2d at 735-36 (awarding fees reflecting a multiplier of 4.5 – 8.5); *Conley v. Sears, Roebuck and Co.*, 222 B.R. 181, 188-89 (D. Mass. 1998) (awarding a multiplier of 8.9); *Muchnick v. First Federal Sav. & Loan Ass'n of Philadelphia*, No. 86-1104, 1986 WL 10791, at *2 (E.D. Pa. Sept. 30, 1986) (awarding a multiplier of 8.33).

An analysis of the lodestar and the factors to be considered in awarding a multiplier confirms the reasonableness of the requested fee using the lodestar/multiplier cross-check approach.

1. The Lodestar Is Reasonable.

Under the lodestar/multiplier cross-check approach, the starting point for determining the reasonableness of a fee request is to multiply the number of hours reasonably expended on the case by an appropriate hourly rate. This amount is commonly referred to as the "lodestar."

The total lodestar amount claimed by Class Counsel is in excess of $46.9 million. This figure represents more than 117,000 attorney and paralegal hours expended on this case for a

seven-year period. As discussed in detail in the supporting affidavits of counsel, all of the hours claimed were actually expended on behalf of the Iowa Class and were necessary for the proper representation of the Iowa Class in this litigation. *See* Conlin Aff. ¶ 96; Hagstrom Aff. ¶ 8; Williams Aff. ¶ 9; Gralewski Aff. ¶ 9.

The hourly rates charged by Class Counsel represent the current standard hourly rates for complex litigation for the attorneys and paralegals who performed the work. *See* Conlin Aff. ¶ 96; Hagstrom Aff. ¶ 8; Williams Aff. ¶ 9; Gralewski Aff. ¶ 9. These rates are reasonable, when viewed in the context of the appropriate market for the legal services rendered. The nationwide pool of potential antitrust counsel with the knowledge, skill, experience, and resources to litigate complex antitrust class action cases is small, and the pool of such attorneys who are willing to prosecute these cases on a purely contingent basis is even smaller. Given the ever-present possibility of jeopardizing the entire case with the loss of a single motion on any of countless substantive or procedural issues, the stakes involved in these cases are typically quite high and require a corresponding level of skill and resources to vigorously litigate them. Therefore, the billable rates that these firms can command are substantial. The billing rates for such services are similar to the rates for top partners in major metropolitan areas, and are usually much higher than the local rates for legal services in a given venue. Therefore, the rates submitted by class counsel, which range from $125 to $750 per hour, are within the range for sophisticated legal services of the type required in this case.

2. The Fee Requested By Class Counsel Represents A Reasonable Multiplier For The Work Performed And The Benefits Conferred.

The analysis under the lodestar/multiplier approach does not end with a calculation of the lodestar. In awarding the fee, a court may increase the lodestar amount based on a number of factors, including the difficulty of the case, results obtained, contingent risk, and quality of

representation. *See* Miller Aff. ¶ 39. Other factors that may justify an upward adjustment to the lodestar include public policy, the time commitment required, and the delay in recovery. *See* Newberg on Class Actions § 14.5; Annotated Manual for Complex Litigation at § 14.122.

Decisions in several federal cases confirm that a 1.43 multiplier is reasonable for a case of this kind.[19] For example, in *In re Rite Aid Corporation Securities Litigation*, 146 F. Supp. 2d 706, 735-36 (E.D. Pa. 2001), the parties settled a securities class action for $193 million. In awarding an overall fee of 25 percent of the recovery, the court approved a lodestar multiplier in the range of 4.5 to 8.5 to multiple groups of plaintiffs' counsel. *See id.* at 736 n.44. The *Rite Aid* court further found that, while the award was "a certainly handsome recovery," it was "unquestionably reasonable" in light of the complex issues in the case, the skill and efficiency of the attorneys, and the risk of nonpayment had they not been successful. *See id.* at 736. *See also In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 589-90 (E.D. Pa. 2005) (holding that a $32 million fee award, which represented a 6.96 multiplier on lodestar, was reasonable because the case involved the largest class recovery on record against an auditor in a securities fraud action, the case was complex, and counsel exhibited considerable skill, among other factors).

Likewise, in *Conley v. Sears, Roebuck and Co.*, 222 B.R. 181, 188-89 (D. Mass. 1998), the Court found that an attorneys' fee award of $7.5 million, which represented a multiplier of 8.9 on lodestar, was reasonable in a class action that successfully challenged a creditor's practice of obtaining and collecting upon reaffirmation agreements which were not filed in bankruptcy court. In finding the requested fee to be "within the range of reason," the court considered the fact that the attorneys' efforts had added $32 million to the settlement fund and the fact that the attorneys' fees were to be awarded in addition to the direct benefits to class members. *See id.* at

[19]No reported Iowa decisions on attorneys' fees involve a recovery of this size or a case of this complexity.

188-89; *In re R.J.R. Nabisco, Inc. Sec. Litig.*, M.D.L. No. 818 (MBM), 1992 WL 210138, at *7-8 (S.D.N.Y. Aug. 24, 1992) (approving request for fees that yielded a lodestar multiplier of 6 where counsel "negotiate[d] a settlement with skill and in such a way as to minimize the burden on the court"); *Cosgrove v. Sullivan*, 759 F. Supp. 166, 169 (S.D.N.Y. 1991) (approving $1 million fee, which represented a multiplier of 8.75 of lodestar where small law firm "successfully battle[d] a huge bureaucracy"); *Muchnick,* No. 86-1104, 1986 WL 10791, at *2 (awarding a multiplier of 8.33 due to "novel and complex arguments" and "expeditious resolution").

In this case, the 1.43 multiplier on class counsel's lodestar that is in excess of $46.9 million is supported by the fact that, Class Counsel had to forego other potentially lucrative opportunities to commit the necessary resources into pursuing the class claims against Microsoft, without any guarantee of being paid anything in return. Conlin Aff. ¶ 82; Hagstrom Aff. ¶ 7; Gralewski Aff. ¶ 15; Williams Aff. ¶ 15. Indeed, investing millions of dollars not just in time but in out-of-pocket costs necessarily precludes other opportunities. Additional factors, such as the complexity and difficulty of the case, the significant risks faced by Class Counsel, the quality of representation, the substantial threat posed by Class Counsel to Microsoft, and other factors discussed above under the percentage of the fund approach, all support the lodestar multiplier represented by the requested fee.[20]

3. A Multiplier Is Necessary When Continued Post-Settlement Work Is To Be Done Without Additional Compensation.

It is also worth noting that Class Counsel will continue to be involved in the settlement process for years to come. *See, e.g.,* Settlement Agreement ¶ I.EE (defining "Settlement Period" as "four years from the Effective Date of the Settlement"). In Minnesota, class counsel incurred

[20] As Professor Miller notes, the reason the multiplier is so low is due to the amount of lodestar that was required to litigate this case for seven years. Miller Supp. Aff. ¶ 68. Even if Iowa Class Counsel's lodestar was cut in half to $23.45 million, the requested attorneys' fee of $67.2 million represents a multiplier of only 2.87 over that lodestar amount. *See id.* A 2.87 multiplier is also substantially lower than one would expect in this case. *See id.*

over $1.2 million in fees and $270,000 in costs in administering the settlement. Hagstrom Aff. 17. The *effective* multiplier here, therefore, will clearly be much less than 1.43 by the time this litigation and the claims administration period ends. The limitation on fees (and lack of multiplier) for post-settlement work related to the claims administration and any appeals further justifies the requested multiplier.

In sum, the requested percentage fee is unquestionably reasonable, whether cross-checked against various factors that justify upward adjustments to the lodestar or compared to other cases in which multipliers have been applied.

II. CLASS COUNSEL ARE ENTITLED TO $7.8 MILLION IN EXPENSES.

In the prosecution of this litigation, Class Counsel have incurred expenses in excess of $7.8 million in order to prepare this case for trial. *See* Conlin Aff., Exhibit B. These expenses represent just 4.3% of the $179,950,000 face value of settlement and 10.4% of the total requested award of $75 million. These expenses represent out-of-pocket payments by the various Class Counsel with no markup. *See* Conlin Aff. ¶ 10. The expenses sought in this case by Class Counsel are eminently reasonable and indeed represent something of a bargain to Microsoft in light of the length of the litigation and the ultimate result. Courts regularly award reimbursement of those expenses that are reasonable and were necessarily incurred. *See, e.g., Synthroid I*, 264 F.2d at 722; *Great Neck*, 212 F.R.D. at 412.

Iowa Class Counsel retained twelve nationally renowned experts to address the issues raised in this case. Plaintiffs' experts were retained to address issues including class certification, the economics of the software industry, injury to competition, causation, and damages, which involved development and application of complex economic modeling. Iowa Class Counsel also developed an extensive proprietary database of more than 25 million pages of documents and hundreds of thousands of pages of prior testimony. The development and

maintenance of that multi-million dollar database, and storage of the data was crucial for preparing the case for trial. Finally, unlike every other Microsoft indirect purchase case (save one), this case went to trial. The trial lasted three months before settling and during that time, substantial expenses were incurred. Class Counsel respectfully submit that given the length, and economic and technical complexity of this litigation, the costs and expenses were reasonable and necessary to obtain the substantial settlement on behalf of the Iowa Class. *See* Conlin Aff. ¶ 86.

CONCLUSION

Because of Microsoft's agreement to pay reasonable attorneys' fees and expenses and in light of the complexity and difficulty of this case, the significant risks faced by Iowa Class Counsel, the quality of representation, the excellent result obtained, and significantly, the fact that the award of attorneys' fees and expenses will not reduce the benefits available to the Iowa Class, Class Counsel's request for attorneys' fees and expenses is fair, reasonable and adequate. Accordingly, the Court should approve the Petition for Attorneys' Fees and Expenses of Class Counsel.

DATED: August 24, 2007

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause and to each of the attorneys of records herein at their respective addresses disclosed on the pleadings on August 24, 2007.

By:

U.S. Mail	FAX
Hand delivery ✓	Overnight Courier
Certified Mail	Other: email ✓

Signature: Peggy Durfee